

NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENTS

# Joint Availability and Disparity

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VOLUME

LEGAL,  
ANECDOTAL,  
PRIVATE SECTOR,  
& CAPACITY ANALYSES

FINAL REPORT | AUGUST 2010

Submitted by: Mason Tillman Associates, Ltd.



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## ***ACKNOWLEDGMENT***

In 2008, North Central Texas Council of Governments (NCTCOG) commissioned a Joint Availability and Disparity Study (Study) on behalf of six agencies that formed a Consortium. The six Consortium Agencies that participated in the Study are the City of Arlington, the City of Fort Worth, Dallas/Fort Worth International Airport Board, Fort Worth Independent School District, Fort Worth Transportation Authority, and the North Texas Tollway Authority. Mason Tillman Associates, Ltd., of Oakland, California was selected by NCTCOG to perform the Study.

The purpose of the Joint Availability and Disparity Study was to evaluate the procurement and contracting practices of each agency, particularly their use of minority, woman-owned, and disadvantaged businesses and how well each Consortium Agency's current program promotes equal opportunity for bidding, diversification of its vendor base, and equitable distribution of purchases. The Consortium's Joint Availability and Disparity Study focused on construction, architecture and engineering, professional services, non-professional services, and goods and services and it reviewed the award of prime contracts and subcontracts during the study periods.

The Burrell Group, Adrian Information Systems, Consumer and Market Insights, Trovada Davis Agency, and Ms. Sherry Crum Tupper assisted Mason Tillman in the performance of the Study. The subcontractor team performed legal analysis, data collection activities, anecdotal interviews, design services, and outreach to the business community.

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Monte Mercer, Deputy Executive Director and Donna Steward, Procurement and Facilities Coordinator of NCTCOG provided overall leadership and guidance for the Consortium's Joint Availability and Disparity Study. Mason Tillman's effort to secure the needed resources to complete the Joint Availability and Disparity Study was facilitated by Fiona Allen, Deputy City Manager and Debra Carrejo, Purchasing Manager of the City of Arlington; William Johnson, Assistant Director, Business Development Division, Housing

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# 1

## **LEGAL ANALYSIS**

### **I. INTRODUCTION**

This chapter discusses the current state of the law applicable to affirmative action programs in the area of public contracting. Two U. S. Supreme Court decisions, *City of Richmond v. J.A. Croson Co.*<sup>1</sup> (*Croson*) and *Adarand Construction, Inc. v. Peña*<sup>2</sup> (*Adarand*), articulated the standard by which federal courts will review such programs. In those decisions, the Court announced that the constitutionality of affirmative action programs that employ racial classifications would be subject to “strict scrutiny.” Broad notions of equity or general allegations of historical and societal discrimination against minorities are insufficient to meet the requirements of the Equal Protection Clause of the U.S. Constitution. Instead, governments may adopt race-conscious programs only as a remedy for identified discrimination found in a disparity study, and this remedy must impose a minimal burden upon unprotected classes.

*Adarand*, which followed *Croson* in 1995, applied the strict scrutiny standard to federal programs. The U.S. Department of Transportation (USDOT) amended its regulations to focus on outreach to Disadvantaged Business Enterprises (DBEs). Although the U.S. Supreme Court heard argument in *Adarand* during the October 2001 term, it subsequently decided that it had improvidently granted *certiorari*. Thus, the amended USDOT regulations continue to be in effect and control the federally funded DBE programs of the six consortium agencies forming the North Central Texas Council of Governments; the City of Arlington, the City of Fort Worth, Dallas / Fort Worth International Airport Board, Fort Worth Transportation Authority, the Fort Worth Independent School District, and the North Texas Tollway Authority (*hereinafter referred to collectively as Consortium Agencies*).

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<sup>1</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>2</sup> *Adarand Constructors, Inc. v. Peña*, 2097 (1995).



A caveat is appropriate here. The review under strict scrutiny is fact-specific. In addition to the U.S. Supreme Court cases, there are five post-*Croson* Federal Court of Appeals opinions which provide guidelines for the evidence a disparity study has to adduce if race-conscious remedies are put in place. The Third, Eleventh, Tenth, and Fourth Federal Circuits assessed the disparity studies in question on their merits instead of disposing of the cases on procedural issues.<sup>3</sup> The Fifth Circuit, which also includes Texas, also has applied the *Croson* evidentiary standard in cases involving race. Thus a review of the relevant cases in the Fifth Circuit is also discussed below in Section VI.

## **II. STANDARDS OF REVIEW**

The standard of review represents the measure by which a court evaluates a particular legal issue. This section discusses the standard of review that the U. S. Supreme Court set for race-conscious state and local programs in *Croson*, women-owned businesses, and federal programs in *Adarand*. It also discusses lower courts' interpretations of these two U. S. Supreme Court cases and evaluates the implications for program designs that arise from these decisions. It concludes with the standard of review for local business programs that are not race or gender-conscious.

### **A. Race-Conscious Programs**

An understanding of *Croson*, which applies to state and local governments, is necessary in developing sound state and locally funded Minority-Owned Business Enterprise (MBE) and Woman-Owned Business Enterprise (WBE) programs. In *Croson*, the U. S. Supreme Court affirmed that, pursuant to the Fourteenth Amendment, the proper standard of review for state and local MBE programs which are necessarily race-based programs is strict scrutiny.<sup>4</sup> Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.<sup>5</sup> The Court recognized that a state or local entity may take action, in the form of an MBE program, to rectify the effects of *identified, systemic racial*

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<sup>3</sup> *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990 (3d Cir. 1993), *on remand*, 893 F. Supp. 419 (E.D. Pa. 1995), *aff'd*, 91 F.3d 586 (3d Cir. 1996); *Eng'g Contractors of S. Fla. v. Metro. Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996), *aff'd*, 122 F. 3d 895 (11th Cir. 1997); *Concrete Works of Colo. v. City & County of Denver*, 823 F. Supp 821 (D. Colo 1993), *rev'd* 36 F.3d 1513 (10th Cir. 1994) ("*Concrete Works F*"), *on remand*, 86 F. Supp 2d 1042 (D. Colo. 2000), *rev'd* 321 F.3d 950 (10th Cir. 2003) ("*Concrete Works II*"); *Rothe Development Corp. v. Dep't of Defense*, 545 F. 3d 1023 (Fed. Cir. 2008); *H.H. Rowe Co., Inc. v Tippett* (4<sup>th</sup> Cir. 7/22/10). In the federal court system, there are primarily three levels of courts: the U.S. Supreme Court, appellate courts, and district courts. The U. S. Supreme Court is the highest ranking federal court, and its rulings are binding on all other federal courts. Appellate court rulings are binding on all district courts in their geographical area and are used for guidance in other circuits. District court rulings, while providing insight into an appropriate legal analysis, are not binding on other courts at the district, appellate, or U.S. Supreme Court levels.

<sup>4</sup> *Croson*, 488 U.S. at 493-95.

<sup>5</sup> *Id.* at 493.



*discrimination* within its jurisdiction.<sup>6</sup> Justice O'Connor, speaking for the majority, articulated various methods of demonstrating discrimination and set forth guidelines for crafting MBE programs so that they are “narrowly tailored” to address systemic racial discrimination.<sup>7</sup> The specific evidentiary requirements are detailed in Section IV.

## **B. Woman-Owned Business Enterprise**

Since *Croson*, the U. S. Supreme Court has remained silent with respect to the appropriate standard of review for women-owned business enterprise (WBE) programs and local business enterprise (LBE) programs which are geographically based. *Croson* was limited to the review of a race-conscious plan. In other contexts, however, the U. S. Supreme Court has ruled that gender classifications are not subject to the rigorous strict scrutiny standard applied to racial classifications. Instead, gender classifications are subject only to an “intermediate” level of review, regardless of which gender is favored.

Notwithstanding the U. S. Supreme Court’s failure thus far to rule on a WBE program, the consensus among the Circuit Courts of Appeals is that WBE programs are subject only to intermediate scrutiny, rather than the more exacting strict scrutiny to which race-conscious programs are subject.<sup>8</sup> Intermediate review requires the governmental entity to demonstrate an “important governmental objective” and a method for achieving this objective that bears a fair and substantial relation to the goal.<sup>9</sup> The Court has also expressed the test as requiring an “exceedingly persuasive justification” for classifications based on gender.<sup>10</sup>

The U. S. Supreme Court acknowledged that in limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists the members of that sex which are disproportionately burdened.<sup>11</sup>

The Third Circuit in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)* ruled in 1993 that the standard of review that governs WBE

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<sup>6</sup> *Croson*, 488 U.S. at 509.

<sup>7</sup> *Id.* at 501-02. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting: compelling interest and narrowly tailored remedies. The U. S. Supreme Court in *Croson* and subsequent cases provides fairly detailed guidance on how those concepts are to be treated in contracting. In education and employment, the concepts are not explicated to nearly the same extent. Therefore, references in those cases to “compelling governmental interest” and “narrow tailoring” for purposes of contracting are essentially generic and of little value in determining the appropriate methodology for disparity studies.

<sup>8</sup> See e.g., *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *Phila.*, 91 F.3d 586; *Dade County*, 122 F.3d 895; *accord Concrete Works II*, 321 F.3d at 959; *H.H. Rowe Co., Inc. v Tippet* (4<sup>th</sup> Cir. 7/22/10).

<sup>9</sup> *Craig v. Boren*, 429 U.S. 190, 198-99 (1976).

<sup>10</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); see also *Michigan Road Builders Ass’n., Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987).

<sup>11</sup> *Id.* at 728.



programs is different from the standard imposed upon MBE programs.<sup>12</sup> The Third Circuit held that whereas MBE programs must be “narrowly tailored” to a “compelling state interest,” WBE programs must be “substantially related” to “important governmental objectives.”<sup>13</sup> An MBE program would survive constitutional scrutiny only by demonstrating a pattern and practice of systemic racial exclusion or discrimination in which a state or local government was an active or passive participant.<sup>14</sup>

The Ninth Circuit in *Associated General Contractors of California v. City and County of San Francisco (AGCC I)* held that classifications based on gender require an “exceedingly persuasive justification.”<sup>15</sup> The justification is valid only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification, and the classification does not reflect or reinforce archaic and stereotyped notions of the roles and abilities of women.<sup>16</sup>

The Eleventh Circuit also applies intermediate scrutiny.<sup>17</sup> The district court in *Engineering Contractors Association of South Florida v. Metropolitan Dade County (Dade County)*, which was affirmed by the Eleventh Circuit U.S. Court of Appeals, cited the Third Circuit’s 1993 formulation in *Philadelphia*: “[T]his standard requires the [county] to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.”<sup>18</sup> Although the *Dade County* district court applied the intermediate scrutiny standard, it queried whether the U. S. Supreme Court decision in *United States v. Virginia*,<sup>19</sup> finding the all-male program at Virginia Military Institute unconstitutional, signaled a heightened level of scrutiny. The U. S. Supreme Court held that parties who seek to defend gender-based government action must demonstrate an “exceedingly persuasive justification” for that action.<sup>20</sup> While the *Dade County* appellate court echoed that speculation, it concluded that “[u]nless and until the U. S. Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard

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<sup>12</sup> *Phila.*, 6 F.3d at 1000-01.

<sup>13</sup> *Id.* at 1009.

<sup>14</sup> *Id.* at 1002.

<sup>15</sup> *Associated Gen. Contractors of Cal. v. City & County of S. F.*, 813 F.2d 922, 940 (9th Cir. 1987).

<sup>16</sup> *Id.* at 940.

<sup>17</sup> *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1579-1580 (11th Cir. 1994).

<sup>18</sup> *Dade County*, 122 F.3rd at 909, (citing *Phila.*, 6 F.3d at 1010 (3d Cir. 1993)).

<sup>19</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>20</sup> *Dade County*, 943 F.Supp. at 1556.



in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective.”<sup>21</sup>

The *Dade County* appellate court noted that at the time, by articulating the “probative evidence” standard, the Third Circuit in *Philadelphia* was the only federal appellate court that explicitly attempted to clarify the evidentiary requirement applicable to gender-conscious programs.<sup>22</sup> Dade County went on to interpret that standard to mean that “evidence offered in support of a gender preference must not only be ‘probative’ [but] must also be ‘sufficient.’”<sup>23</sup> It also reiterated two principal guidelines of intermediate scrutiny evidentiary analysis: (1) under this test a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself;<sup>24</sup> and (2) the intermediate scrutiny evidentiary review is not to be directed toward mandating that gender-conscious affirmative action is used only as a “last resort”<sup>25</sup> but instead ensuring that the affirmative action is “a product of analysis rather than a stereotyped reaction based on habit.”<sup>26</sup> This determination turns on whether there is evidence of past discrimination in the economic sphere at which the affirmative action program is directed.<sup>27</sup> The court also stated that “a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”<sup>28</sup>

### **C. United States Department of Transportation - Disadvantaged Business Enterprise Programs**

#### **1. Legislative and Regulatory History**

The US Department of Transportation (USDOT) promulgated in 1982 its initial DBE regulations, 49 CFR Part 26 in 1982, to enact the contracting affirmative action requirements of the 1982 Surface Transportation Assistance Act. This Act required that a minimum of ten percent of funds be expended with small businesses owned and controlled by socially and

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<sup>21</sup> *Id* at 908.

<sup>22</sup> *Id.* at 909.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 910 (citing *Ensley Branch*, 31 F.3d at 1580).

<sup>25</sup> *Id.* (citing *Hayes v. N. State Law Enforcement Officers Ass’n.*, 10 F.3d 207, 217 (4th Cir. 1993) (racial discrimination case).

<sup>26</sup> *Id.* (citing *Phila.*, 6 F3d at 1010) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 582-583 (1990)).

<sup>27</sup> *Id.* (citing *Ensley Branch*, 31 F.3d at 1581).

<sup>28</sup> *Dade County*, 122 F.3d at 929. However, Judge Posner, in *Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642 (7th Cir. 2001), questioned why there should be a lesser standard where the discrimination was against women rather than minorities.



economically disadvantaged individuals. The Department's DBE regulations have been amended several times since 1982. Women business enterprises (WBEs) were added to the DBE Program in the 1987 Surface Transportation and Uniform Relocation Assistance Act. The U.S. Congress reauthorized the DBE Program again in 1991 and 1998 respectively. Both the 1991 Intermodal Surface Transportation Efficiency Act and the 1998 Transportation Equity Act for the 21st Century (TEA-21) continued the ten percent DBE set-aside provision.

In response to the U. S. Supreme Court's decision in *Adarand*, which applied the strict scrutiny standard to federal programs, the USDOT revised provisions of the DBE rules effective, March 1999. The goal of promulgating the new rule was to modify the DBE program consistent with the "narrow tailoring" requirement of *Adarand*. The new provisions apply only to the airport, transit, and highway financial assistance programs of the USDOT. See Appendix A and B for the main components of the rules.

Although the U. S. Supreme Court heard argument in *Adarand* in the October 2001 term, it subsequently decided that it had improvidently granted *certiorari*. Thus, the amended USDOT regulations continue to be in effect and control IDOT's federally-funded programs.

There have been challenges to the amended DBE regulations. Two circuit courts, the Seventh and Eighth, approved them. One, the Ninth, did not. Therefore, the Consortium Agencies, being in the Fifth Circuit, is free to follow the amended regulations as written. We turn first to the Seventh Circuit position in *Northern Contracting*; then to the position of the Eighth Circuit; and after that, to the Ninth Circuit's *Western States*.<sup>29</sup> We conclude with *Rothe*<sup>30</sup> where the Federal Circuit dealt with the issue of capacity.

## 2. The Case Law

### a. The Seventh Circuit Analysis

In 2007, the Seventh Circuit Court of Appeals entered a ruling on whether the Illinois Department of Transportation (IDOT) violated the U.S. Constitution in administering a Disadvantaged Business Enterprise Program designed to increase the participation of socially and economically disadvantaged individuals in Illinois highway construction subcontracts.<sup>31</sup>

As a USDOT recipient, IDOT is required to comply with federal law pertaining to its DBE program. Pursuant to federal requirements, IDOT had to determine the figure that would constitute an appropriate DBE involvement goal, based on the relative availability of DBEs

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<sup>29</sup> *Western States Paving Co. Inc., v. Washington State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005).

<sup>30</sup> *Rothe Dev. Corp., Inc. v. United States Dep't. of Def.*, 324 F.Supp.2d. 840 (Fed. Cir., 2005).

<sup>31</sup> *N. Contracting, Inc. v. Ill. Dep't of Transp.*, 473 F.3d 715 (7th Cir. 2007).



pursuant to 49 C.F.R. Section 26.45(b). To calculate DBE availability, USDOT recipients must calculate a "base figure" for the relative availability of DBEs, and then examine evidence in its local area to determine whether any adjustments to the base figure is needed.<sup>32</sup> Additionally, recipients are required to maximize the portion of its goal through race-neutral means.<sup>33</sup>

*NCI* filed suit in the district court alleging that: (1) TEA-21 and USDOT's regulations were outside the scope of Congressional power; (2) that the federal provisions violated the Fifth Amendment's guarantee of equal protection; and (3) that the Illinois statute implementing the federal DBE requirement violated 42 U.S.C. Sections 1981, 1983, 2000(d) and the Fourteenth Amendment's Equal Protection Clause.

The district court summarily sided with IDOT concluding that the federal government had demonstrated a compelling interest, i.e., ending the effects of current and past discrimination in highway contracting, and that TEA-21 and its implementing regulations were sufficiently narrowly tailored. The district court reserved only one issue for trial—whether IDOT's DBE program was narrowly tailored.

At trial, the District Court ruled that IDOT's Fiscal Year 2005 DBE Program was narrowly tailored to the compelling interest identified by the federal government to remedy the effects of racial and gender discrimination in the highway construction market. *NCI* appealed the district court decision to the Seventh Circuit Court of Appeals.

The Seventh Circuit was charged with the responsibility of determining whether IDOT's DBE program passed constitutional muster because the program encompassed racial classifications. IDOT, a state entity implementing a congressionally mandated program, relied on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market. *NCI* relied on *Builders Association of Greater Chicago v. County of Cook*<sup>34</sup> as a basis for its argument on narrow tailoring but the Seventh Circuit surmised that this reliance was misplaced. The Court of Appeals observed that in *Builders Association* the State was required to demonstrate that its program was narrowly tailored to remedy the specific past discrimination perpetrated by the State. But in the case at issue, IDOT was acting as an instrument of federal policy therefore, “*NCI* cannot collaterally attack the federal regulations through a challenge to IDOT's program.”

Next, the court considered *NCI*'s final three arguments—(1) that IDOT violated 49 C.F.R. Section 26.45(c) by improperly calculating the relative availability of DBEs in Illinois; (2) that IDOT failed to properly adjust its base figure based on local market conditions; and (3)

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<sup>32</sup> 49 C.F.R. §26.45(c)-(d).

<sup>33</sup> 49 C.F.R. § 26.51(a).

<sup>34</sup> *Builders Ass'n*, 256 F.3d at 646.



that IDOT violated 49 C.F.R. Section 26.51 by failing to meet the maximum feasible portion of its overall goal through race-neutral means. The Seventh Circuit ruled against NCI on each of the proffered arguments.

As to *NCI's* first contention, the Court of Appeals stated that according to 49 CFR Section 25.45(b) "relative availability" means "the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on IDOT-assisted contracts."<sup>35</sup> The Seventh Circuit reasoned that IDOT did not miscalculate the number of DBEs that were "ready, willing, and able" by utilizing the "custom census." *NCI* argued that a simple count of the number of IDOT's registered and prequalified DBEs under Illinois law would have been the correct approach. But the Court of Appeals agreed with the lower court which ruled that *NCI* failed to establish its position based on the requisite federal regulations. And the Seventh Circuit held that the "custom census" utilized by IDOT reflected an attempt by the agency to arrive at more accurate numbers than would be possible through use of just the list of IDOT's registered and prequalified DBEs.

*NCI's* second contention that IDOT failed to properly adjust its goal based on local market conditions was determined to be unfounded. IDOT argued that "49 C.F.R. Section 26.45(d) did not require any adjustments to the base figure after the initial calculation, but simply provides recipients with authority to make such adjustments if necessary." *NCI* suggested that IDOT abused its discretion under this regulation by failing to separate the prime contractor availability from the subcontractor availability. However, the court reasoned that "it would make little sense to separate prime contractor and subcontractor availability as suggested by *NCI* when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal."

Finally, the court dismissed *NCI's* argument that IDOT violated 49 C.F.R. Section 26.51 by failing to meet the maximum feasible portion of its overall goal through race-neutral means for DBE participation. IDOT demonstrated that all of the methods described in Section 26.51(b) to maximize the portion of the goal that could be achieved through race-neutral means were utilized by the agency. Additionally, the Court of Appeals noted that IDOT sponsored different types of informational sessions, provided technical and financial training to DBEs and other small businesses, as well as initiating a bond and financial assistance program. Due to these efforts by IDOT, *NCI* failed to demonstrate that IDOT did not maximize the portion of its goal through race-neutral means.



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<sup>35</sup> Emphasis added.

## **b. The Eighth Circuit Analysis**

*Sherbrooke Turf Inc. v. Minnesota Department of Transportation and Gross Seed Co. v. Nebraska Dep't of Roads*<sup>36</sup>, is a 2003 joint decision. (In both cases, the district courts found that the revised DBE Program, as amended in 1999, met the strict scrutiny standard prescribed in *Adarand*.<sup>3</sup>) On appeal, the Circuit Court held that Congress had a “compelling interest” to enact the legislation because it “had a sufficient evidentiary basis on which to conclude that the persistent racism and discrimination in highway subcontracting warranted a race-conscious procurement program.”

The court’s “narrow tailoring” examination looked at the DBE regulations themselves. The court held that five factors demonstrated the DBE program was narrowly tailored on its face. Those factors were: (1) the emphasis on the use of race-neutral measures to meet the goals; (2) the substantial flexibility allowed; (3) goals were tied to the local market; (4) participation was open to all small businesses who could show they were socially and economically disadvantaged; and (5) the presumption the minority business qualification was limited to those with \$750,000 or less in net worth.

The Circuit Court then examined whether the program was narrowly tailored *as applied* by Minnesota and Nebraska in their local labor markets. Each state retained a consultant to examine local conditions. In Minnesota, the consultant followed the regulations’ two-step goal setting, reducing the availability in DBE participation when the program was suspended. In Nebraska, the consultant determined the DBE availability in the four years before the program was amended in 1999 to make clear the ten percent goal was not mandatory. After determining what decisions had been reached on a race neutral basis, the consultant predicted the amount of the availability that would require race and gender conscious subcontracting. Therefore, the Eighth Circuit rejected the plaintiffs’ appeal.<sup>37</sup>

## **c. The Ninth Circuit Analysis**

*Western States Paving Co. Inc., v. Washington State Department of Transportation*, filed in the U.S. District Court in 2000, subjected the State of Washington’s Department of Transportation DBE Program to a two-pronged analysis. One aspect of the analysis determined whether the USDOT DBE legislation was facially constitutional and the other assessed whether the State of Washington’s application of the DBE regulations was valid.

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<sup>36</sup> 345 F.3d 964 (8th Cir. 2003).

<sup>37</sup> Accord. *N. Contracting Inc.*, 473 F.3d 715 (2007). (Consultant’s methodology were consistent with the flexible nature of the DBE regulations: (1) use of its ‘custom census’ was acceptable method to determine Step 1 availability; (2) was not required to separate prime and subcontracting availability; and (3) reasonably determined amount of goal that would use race neutral means).



- **Facial Constitutional Challenge**

In *Western States*, the plaintiff sought a declaratory judgment arguing that TEA-21's preference program violated the equal protection provision under the Fifth and Fourteenth Amendments of the U.S. Constitution. The TEA-21 DBE Program on its face and as applied by the State of Washington were claimed to be unconstitutional. In addressing *Western States*' facial challenge, the court interpreted the issue as to whether Washington State met its burden of demonstrating that the federal statute and regulations satisfied the strict scrutiny's exacting requirements.

The federal government, according to *Croson*, has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.<sup>38</sup> Thus, the court evaluated the evidence that Congress considered in enacting the DBE statute to ensure it had a "strong basis in evidence for its conclusion that remedial action was necessary."<sup>39</sup> The court concluded that a substantial body of statistical and anecdotal evidence was considered by Congress at the time the law was enacted. Therefore, the court found Congress had a strong basis in evidence for concluding that, at least in some parts of the country, there was discrimination within the transportation contracting industry which hindered minorities' ability to compete for federally funded contracts.<sup>40</sup>

Next, the court considered whether the DBE regulation's racial classification was narrowly tailored as represented in the State of Washington's DBE goals. Citing *Croson*, *Western States* decided that a minority preference program must establish utilization goals that bear a close relationship to minority firms' availability in a particular market in order to be narrowly tailored.<sup>41</sup> The court referenced *Sherbrooke*, noting the Eighth Circuit's holding that the DBE programs of the Minnesota and Nebraska Departments of Transportation independently satisfied the strict scrutiny's narrow tailoring requirement, by relying upon two disparity studies.

The court notes that the DBE regulations did not establish a mandatory nationwide minority utilization goal in transportation contracting. The court found the ten percent DBE utilization goal in the regulation was only "aspirational," and the regulation provides that each state must establish a DBE utilization goal that is based upon the proportion of ready, willing, and able DBEs in its transportation contracting industry.<sup>42</sup> Because the regulations

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<sup>38</sup> *Croson*, 488 U.S. at 492 (1982).

<sup>39</sup> *Id* at 493.

<sup>40</sup> *W. States Paving*, 407 F.3d at 983.

<sup>41</sup> *Id* at PINCITE

<sup>42</sup> *Id* at PINCITE



require each state to set minority utilization goals that reflect the contractor availability in its own labor market, the court found the DBE regulations to be narrowly tailored to remedy the effects of race and sex-based discrimination within the transportation contracting industry. The court ultimately held that they were satisfied TEA-21's DBE program was narrowly tailored to remedy the effects of race and sex-based discrimination within the transportation contracting industry, and, thus, *Western States'* facial challenge failed.

- **Washington State's Application of the Narrowly Tailored Standard**

The second prong of the Court's analysis considered whether the utilization goals established by the State of Washington were unconstitutional. The State contended its DBE program was constitutional because it comported with the federal statute and regulations. The State also proffered that since the proportion of DBEs in the state was 11.17 percent, and the percentage of contracting funds awarded to them on race-neutral contracts was only 9 percent, discrimination was demonstrated.<sup>43</sup> The Court disagreed with this rationale. It opined that this oversimplified statistical evidence is entitled to little weight because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work. DBE firms may be smaller and less experienced than non-DBE firms or they may be concentrated in certain geographical areas of the State, rendering them unavailable for a disproportionate amount of work.

Citing *Croson*, the court opined that recipients of federal funds could not use race-conscious methods to meet their DBE goals without a finding of discrimination. The court held there is insufficient evidence in the record suggesting that minorities currently or previously suffered discrimination in the Washington transportation contracting industry. Further, the court found that the State of Washington failed to provide evidence of discrimination within its own contracting market and thus failed to meet its burden of demonstrating that its DBE program was narrowly tailored to further Congress's compelling remedial interest.<sup>44</sup>

The court concluded the lower court erred when it upheld the State's DBE program simply because the State complied with the federal program's requirement. Washington's DBE program was categorized as an "unconstitutional windfall to minority contractors solely on the basis of their race or sex."<sup>45</sup>

In summary, *Western States* found that Washington's DBE program met the first prong of the test (held facially constitutional), but it did not pass the second prong because the State's application of the DBE regulations was not narrowly tailored to remediate a finding of

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<sup>43</sup> *Id at PINCITE*

<sup>44</sup> *Id at PINCITE*

<sup>45</sup> *Id at 1004.*



statistically significant underutilization of the respective minority groups. Therefore, the State’s application of the DBE regulations was deemed unconstitutional.

In response to *Western States*, the USDOT issued a Guidance Memorandum titled, *FY 2006 DBE Goal Setting Approval Process and DBE Program Plans - December 21, 2005*. This Memorandum recommended a disparity study as an appropriate methodology for USDOT recipients in the Ninth Circuit to formulate narrowly tailored DBE goals. (We note that the prior USDOT regulations, as promulgated in 1992 recommends the use of a disparity study among other availability sources for setting the DBE goals.)

**d. Federal Circuit Court Analysis**

*Rothe Development Corp. v. U.S. Department of Defense* had been in litigation since 1998. Following two earlier appeals, the Federal Circuit Court of Appeals issued a decision in November 2008 holding that the Department of Defense’s (“DOD”) small disadvantaged business program was unconstitutional on its face.

During this last appeal, Rothe argued that, in granting summary judgment, the district court erroneously relied on six disparity studies because: (1) the studies analyzed data that was stale by the time of the 2006 reenactment; (2) the studies were not truly “before Congress”; (3) the studies were methodologically flawed and therefore unreliable; and (4) the studies failed to establish that the DOD itself played any role in the discriminatory exclusion of minority-owned contractors.<sup>46</sup>

The primary basis for the court’s holding was that Congress had no sufficient evidence before it to conclude that there was racial discrimination in defense contracting when it reauthorized the program in 2006:

[W]e are hesitant to conclude that the mere mention of a statistical study in a speech on the floor of the House of Representatives or the Senate is sufficient to put the study “before Congress” for purposes of Congress’ obligation to amass a “strong basis in evidence” for race-conscious action. We recognize that there is no dispute that these six studies were completed prior to the 2006 reenactment of Section 1207, and in that sense they were indeed “before” the acting legislature. But beyond their mere mention, there is no indication that these studies were debated or reviewed by members of Congress or by any witnesses.<sup>47</sup>

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<sup>46</sup> The court declined to adopt a *per se* rule on staleness—appellant’s first contention—noting that other studies had been accepted that were more than five years old. Additionally, the court emphatically rejected appellant’s fourth argument that the DOD had to make findings of its own discrimination. *Rothe v. Dep’t of Def.*, 545 F.3, 1039.

<sup>47</sup> *Id.* at 1039-40.



We note that this decision constrains no other federal programs, such as those that the Department of Transportation and the Small Business Administration have established,<sup>48</sup> which were not parties to the litigation. Neither is it binding in other federal circuits.<sup>49</sup> Only decisions of a circuit court are binding on district courts within that circuit. Otherwise, the decisions are merely persuasive, so long as there is no contrary opinion in the particular circuit.

The opinion requires further comment, however, because the court discussed the availability methodology of six disparity studies—four of which Mason Tillman Associates, Ltd. (Mason Tillman) performed (New York City, Alameda County, Cuyahoga County, and Dallas).

The court responded favorably to Mason Tillman’s determination of ‘willing and able’ businesses because “the bulk of the businesses considered in these studies were identified in ways that tend to establish their qualifications, such as their presence on city contract records and bidders’ lists.”<sup>50</sup> Therefore, the court rejected plaintiff’s criticism that Mason Tillman used lists compiled by local business associations and community outreach programs to identify minority-owned businesses.<sup>51</sup>

The court’s biggest concern involved the issue of a firm’s capacity. The court acknowledged that Mason Tillman attempted to deal with this issue. For example, in New York City, Mason Tillman limited prime contracts to those for \$1,000,000 and under. And likewise, in Dallas, Mason Tillman limited prime contracts to firms that had a “demonstrated capacity to win large competitively bid contracts.”<sup>52</sup> Therefore, the firms had the capacity to perform a contract. The sticking point was whether the firms could do *more than one at a time*,

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<sup>48</sup> *Dynalantic Corp. v. U.S. Dep’t of Def.*, 503 F. Supp.2d 262, was a 2007 D.C. District Court memorandum opinion. Plaintiff Dynalantic was raising essentially the same issue subsequently decided by the Federal Circuit in *Rothe* but after the District Court’s decision, which ruled for the DOD on whether Congress validly reauthorized Section 1207 in 2006. Essentially, the memorandum opinion put off a decision. In this case, plaintiff challenged the DOD’s policy of using the § 8(a) program, as called for in 10 U.S.C § 2323, and not the § 8(a) program as a whole. The § 8(a) program utilized race-conscious criteria in qualifying applicant firms, and therefore the policy, which employed the program to issue contracts, had to be reviewed using strict scrutiny. Such racial classifications were constitutional only if they were narrowly tailored measures that furthered compelling governmental interests. In order for the government to rely upon such interests, a court had to evaluate the evidence that Congress considered to ensure that it had a strong basis in evidence for its conclusion that remedial action was necessary. This evaluation specifically included reviewing the evidence before Congress prior to the enactment of the racial classification. Because Congress reauthorized the DOD program in 2006, the court had to consider the evidence before Congress at the time of the reauthorization. The court could resolve no fundamental issues that the parties raised in their motions without considering the evidence before Congress in 2006. Most of this evidence was not before the court.

<sup>49</sup> The Federal Circuit, unlike the other eleven circuits, has specific subject matter jurisdiction. This litigation was brought under the Tucker Act. Essentially, claims for money arising from federal contract disputes are appealed to the Federal Circuit.

<sup>50</sup> *Rothe*, 545 F.3d at 1042.

<sup>51</sup> The court, in its words, “was less confident in this aspect” of the other two studies. The firms either did business within the industry group from which purchases were made; the owner believed the firm was qualified and able; the owner’s actions demonstrated an interest in obtaining work; *all* firms in vendor data are ready, willing and able. *Id.* at 1042.

<sup>52</sup> *Id.* at 1044.



otherwise known as ‘relative capacity.’<sup>53</sup> As a solution, the court stated that future studies could resolve this problem by employing a regression analysis.<sup>54</sup>

In *Concrete Works III*, the Tenth Circuit Court of Appeals relied, in part, upon a regression analysis of survey results that controlled for various firm characteristics, including indicia of firm size such as level of revenues and numbers of employees to conclude that M/WBE firms experienced disparate treatment on the basis of race and gender that was unrelated to their capacity.

To place this issue of disparity measurements in proper context, *the* Rothe decision must be juxtaposed with the initial guidance on analysis of availability provided in *Croson*. The U.S. Supreme Court criticized a comparison of MBE utilization as prime contractors in city construction projects with the percentage of city residents that were minority. The Court contrasted this faulty analysis with the analysis in *Ohio Contractors Association v. Keip*<sup>55</sup> in which the State of Ohio produced evidence of disparities between the MBE utilization and the “percentage of minority businesses in the State.” Neither the U. S. Supreme Court in *Croson*, nor the Sixth Circuit in *Keip* imposed any requirement of regression analysis that controlled for some elusive definition of capacity.

#### ***D. Local Business Enterprise***

The Ninth Circuit Court of Appeals applied the rational basis standard when evaluating LBE programs, holding a local entity may give a preference to local businesses to address the economic disadvantages those businesses face in doing business within the city or county.<sup>56</sup> In *AGCC I*, a pre-*Croson* case, the City and County of San Francisco conducted a detailed study of the economic disadvantages faced by San Francisco-based businesses versus businesses located outside the City and County boundaries. The study showed a competitive disadvantage in public contracting for businesses located within the City versus businesses from other areas.

San Francisco-based businesses incurred higher administrative costs in doing business within the City. Such costs included higher taxes, rents, wages, insurance rates, and benefits for labor. In upholding the local LBE Ordinance, the Ninth Circuit held that “. . . the city may

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<sup>53</sup> *Id.*

<sup>54</sup> Capacity is a function of many subjective, variable factors. While one might assume that current size reflects capacity, it does not follow that smaller firms have less capacity. Most firms have the ability and desire to expand to meet demand. Moreover, a firm’s ability to divide a contract and subcontract its parts makes capacity virtually meaningless in the context of this study.

<sup>55</sup> 713 F.2d 167 (6th Cir. 1983).

<sup>56</sup> *AGCC I*, 813 F.2d at 943.



rationality allocate its own funds to ameliorate disadvantages suffered by local businesses, particularly where the city itself creates some of the disadvantages.”<sup>57</sup>

### **III. BURDEN OF PROOF**

The procedural protocol that *Croson* established imposes an initial burden of proof upon the government to demonstrate that the challenged MBE program is supported by a strong factual predicate, i.e., documented evidence of past discrimination. Notwithstanding this requirement, the plaintiff bears the ultimate burden of proof to persuade the court that the MBE program is unconstitutional. The plaintiff may challenge a government’s factual predicate on any of the following grounds:<sup>58</sup>

- the disparity exists due to race-neutral reasons
- the methodology is flawed
- the data is statistically insignificant
- controverting data exists

Thus, a disparity study must be analytically rigorous, at least to the extent that the data permits, if it is to withstand legal challenge.<sup>59</sup>

#### **A. Strong Basis in Evidence**

*Croson* requires defendant jurisdictions to produce a “strong basis in evidence” that the objective of the challenged MBE program is to rectify the effects of discrimination.<sup>60</sup> The issue of whether or not the government has produced a strong basis in evidence is a question of law.<sup>61</sup> Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.<sup>62</sup>

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<sup>57</sup> *Id.* at 943.

<sup>58</sup> These were the issues on which the district court in Philadelphia reviewed the disparity study before it.

<sup>59</sup> *Croson*, 488 U.S. 469.

<sup>60</sup> *Concrete Works I*, 36 F.3d 1513 at 1522 (citing *Wygant v. Jackson Bd. of Edu.*, 476 U.S. 267, 292 (1986)); *see also Croson* 488 U.S. at 509.

<sup>61</sup> *Id.* (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 944 (D.Conn 1992)).

<sup>62</sup> *Concrete Works I*, 36 F.3d at 1522.



The adequacy of the government’s evidence is “evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction].”<sup>63</sup> The onus is upon the jurisdiction to provide a factual predicate which is sufficient in scope and precision to demonstrate that contemporaneous discrimination necessitated the adoption of the MBE program. The various factors which must be considered in developing and demonstrating a strong factual predicate in support of MBE programs are discussed in Section IV.

## **B. Ultimate Burden of Proof**

The party challenging an MBE program will bear the ultimate burden of proof throughout the course of the litigation, despite the government’s obligation to produce a strong factual predicate to support its program.<sup>64</sup> The plaintiff must persuade the court that the program is constitutionally flawed by challenging the government’s factual predicate for the program or by demonstrating that the program is overly broad.

Justice O’Connor explained the nature of the plaintiff’s burden of proof in her concurring opinion in *Wygant v. Jackson Board of Education (Wygant)*.<sup>65</sup> She stated that following the production of the factual predicate supporting the program:

[I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently “narrowly tailored.”<sup>66</sup>

In *Philadelphia*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether the facts constitute a “strong basis” in evidence.<sup>67</sup> That court wrote the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered.<sup>68</sup> If the plaintiff’s theory is that an agency has adopted race-based preferences with a purpose other than remedying past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else.<sup>69</sup>

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<sup>63</sup> *Id.* (citing *Croson* 488 U.S. at 498).

<sup>64</sup> *Id.* (citing *Wygant*, 476 U.S. at 277-278).

<sup>65</sup> *Wygant*, 476 U.S. at 293.

<sup>66</sup> *Id.*

<sup>67</sup> *Phila.*, 91 F.3d at 597.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*



The situation differs if the plaintiff's theory is that an agency's conclusions as to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, once the agency comes forward with evidence of facts alleged to justify its conclusions, the plaintiff has the burden of persuading the court that those facts are inaccurate. However, the ultimate issue of whether a strong basis in evidence exists is an issue of law, and the burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue.<sup>70</sup>

*Concrete Works II* made clear that the plaintiff's burden is an evidentiary one; it cannot be discharged simply by argument. The court cited its opinion in *Adarand*: “[g]eneral criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity study is of little persuasive value.”<sup>71</sup>

*Concrete Works II* strongly supports the conclusion that the plaintiff has the burden of proof in the U. S. Supreme Court's disposition of the plaintiff's petition for *certiorari*. The U. S. Supreme Court review of appellate decisions is discretionary, in that four justices have to agree, so normally little can be inferred from its denial. However, *Concrete Works II* is not the typical instance. Justice Scalia concurred in *Croson* that strict scrutiny was required of race-conscious contracting programs. However, his criticism there and over the years to the use of race is clear. Justice Scalia's view is that governmental remedies should be limited to provable individual victims. That view is at the base of his written dissent, on which only Chief Justice Rehnquist joined, to the Court's November 17, 2003 decision not to grant *certiorari* in *Concrete Works II*.<sup>72</sup>

Justice Scalia would place the burden of proof squarely on the defendant jurisdiction when a plaintiff pleads unequal treatment. For him, the Tenth Circuit was simply wrong, because the defendant should have to *prove* that there was discrimination. He takes this position despite the case law in equal employment cases, from which *Croson* was derived, that the defendant has the burden of *production*. Once the defendant satisfies that, the burden of *proof* shifts to the plaintiff. Contrary to Justice Scalia, the Tenth Circuit in *Concrete Works II* held that the defendant must show “a strong basis” for concluding that MBEs are being discriminated against, and, the plaintiff has to put in evidence that negates its validity.

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<sup>70</sup> At first glance, the position of the Third Circuit does not square with what the Eleventh Circuit announced as its standard in reviewing whether a jurisdiction has established the “compelling interest” that strict scrutiny requires. That court said the inquiry was factual and would be reversed only if it was “clearly erroneous.” However, the difference in formulation may have had to do with the angle from which the question is approached: If one starts with the disparity study — whether a compelling interest has been shown factual issues are critical. If the focus is the remedy, because the constitutional issue of equal protection in the context of race comes into play, the review is necessarily a legal one.

<sup>71</sup> *Concrete Works II*, 321 F.3d at 979.

<sup>72</sup> *Id.*



## **IV. CROSON EVIDENTIARY FRAMEWORK**

Government entities must construct a strong evidentiary framework to stave off legal challenges, and ensure that the adopted MBE programs comport with the requirements of the Equal Protection clause of the U.S. Constitution. The framework must comply with the stringent requirements of the strict scrutiny standard. Accordingly, there must be a strong basis in evidence, and the race-conscious remedy must be “narrowly tailored,” as set forth in *Croson*. A summary of the appropriate types of evidence to satisfy the first element of the *Croson* standard follows.

### **A. Active or Passive Participation**

*Croson* requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program. However, the local entity need not be an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court’s strict scrutiny review.<sup>73</sup>

An entity will be considered an “active” participant if the evidence shows that it has created barriers that actively exclude MBEs from its contracting opportunities. In addition to examining the government’s contracting record and process, MBEs who have contracted or attempted to contract with that entity can be interviewed to relay their experiences in pursuing that entity’s contracting opportunities.<sup>74</sup>

An entity will be considered to be a “passive” participant in private sector discriminatory practices if it has infused tax dollars into that discriminatory industry.<sup>75</sup> The *Croson* Court emphasized a government’s ability to passively participate in private sector discrimination with monetary involvement, stating, “[I]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice.”<sup>76</sup>

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. In *Concrete Works I*, the Tenth Circuit considered a purely private sector definition of passive discrimination. Since no government funds were involved in the contracts analyzed in the case, the court questioned

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<sup>73</sup> *Croson*, 488 U.S. at 509.

<sup>74</sup> *Wygant*, 476 U.S. at 275.

<sup>75</sup> *Croson*, 488 U.S. at 492; *Coral Constr.*, 941 F.2d at 916.

<sup>76</sup> *Croson*, 488 U.S. at 492.



whether purely private sector discrimination is likely to be a fruitful line of inquiry.<sup>77</sup> On remand, the district court rejected the three disparity studies offered to support the continuation of Denver's M/WBE program because each focused on purely private sector discrimination. Indeed, Denver's focus on purely private sector discrimination may account for what seemed to be a shift by the court away from the standard *Croson* queries of: (1) whether there was a firm basis in the entity's contracting process to conclude that discrimination existed; (2) whether race-neutral remedies would resolve what was found; and (3) whether any race-conscious remedies had to be narrowly tailored. The court noted, that in the City of Denver's disparity studies, the chosen methodologies failed to address the following six questions:

1. Was there pervasive discrimination throughout the Denver Metropolitan Statistical Area (MSA)?
2. Were all designated groups equally affected?
3. Was discrimination intentional?
4. Would Denver's use of such firms constitute "passive participation?"
5. Would the proposed remedy change industry practices?
6. Was the burden of compliance—which was on white male prime contractors in an intensely competitive, low profit margin business—a fair one?

The court concluded that the City of Denver had not documented a firm basis of identified discrimination derived from the statistics submitted.<sup>78</sup>

However, the Tenth Circuit on the appeal of that decision completely rejected the district court's analysis. The district court's queries required Denver to prove the existence of discrimination. Moreover, the Tenth Circuit explicitly held that "passive" participation included private sector discrimination in the marketplace. The court, relying on *Shaw v. Hunt*,<sup>79</sup> a post-*Croson* U. S. Supreme Court decision, wrote as follows:

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<sup>77</sup> *Concrete Works I*, 36 F.3d at 1529. "What the Denver MSA data does not indicate, however, is whether there is any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. That is, we cannot tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that 'it had essentially become a "a passive participant" in a system of racial exclusion practiced by elements of the local construction industry' [citing *Croson*]. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. The record before us does not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and this may well be a fruitful issue to explore at trial."

<sup>78</sup> *Id.* at 61.

<sup>79</sup> 517 U.S. 899 (1996).



The *Shaw* Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” The City can satisfy this condition by identifying the discrimination “public or private, with some specificity.” The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.”<sup>80</sup>

The Tenth Circuit, therefore, held that the City was correct in its attempt to show it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against M/WBE subcontractors in other private portions of their business.”<sup>81</sup> The court emphasized that its reading of *Croson*,<sup>82</sup> and its own precedents, supported that conclusion. Also, the court pointed out that the plaintiff, which had the burden of proof, failed to introduce controverting evidence, merely *arguing* that the private sector was out of bounds and that Denver’s data was flawed.<sup>83</sup>

The courts found that the disparities in MBE private sector participation, demonstrated with the rate of business formation and lack of access to credit which affected MBEs’ ability to expand in order to perform larger contracts, gave Denver a firm basis to conclude that there was actionable private sector discrimination. For procedural legal reasons,<sup>84</sup> however, the court did not examine whether the consequent public sector remedy — one involving a goal requirement on the City of Denver’s contracts — was “narrowly tailored.” The court took this position despite the plaintiff’s contention that the remedy was inseparable from the findings and that the court should have addressed the issue of whether the program was narrowly tailored.

Ten months later, in *Builders Association of Greater Chicago v. City of Chicago*,<sup>85</sup> the question of whether a public sector remedy is “narrowly tailored” when it is based on purely private sector discrimination was at issue. The district court reviewed the remedies derived from private sector practices with stringent scrutiny. It found that there was discrimination against minorities in the Chicago construction industry. However, it did not find the City of

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<sup>80</sup> *Concrete Works II*, 321 F.3d at 975-76.

<sup>81</sup> *Concrete Works II*, at 1530.

<sup>82</sup> See also *Shaw*, 517 U.S. 899.

<sup>83</sup> Whether Denver had the requisite strong basis to conclude that there was discrimination was a question of law; it was for the Tenth Circuit to decide. The standard by which the factual record before it was reviewed was “clearly erroneous.”

<sup>84</sup> Plaintiff had not preserved the issue on appeal; therefore, it was no longer part of the case.

<sup>85</sup> 298 F.Supp2d 725 (N.D.Ill. 2003).



Chicago’s MBE subcontracting goal an appropriate remedy. It was not “narrowly tailored” to address the lack of access to credit for MBEs which was the documented private discrimination. The court also criticized the remedy because it was a “rigid numerical quota,” and there was no individualized review of MBE beneficiaries, citing Justice O’Connor’s opinion in *Gratz v. Bollinger*.<sup>86</sup>

The question of whether evidence of private sector practices may be used to support governmental MBE programs also arose in *Builders Ass’n of Greater Chicago v. County of Cook*.<sup>87</sup> In this case the Seventh Circuit cited *Associated General Contractors of Ohio v. Drabik*<sup>88</sup> in throwing out a 1988 County ordinance under which at least 30 percent of the value of prime contracts were to go to minority subcontractors and at least 10 percent to women owned businesses. The Associated General Contractors of Ohio argued that evidence of purely private sector discrimination justified a public sector program. However, the court pointed out that a program remedying discrimination in the private-sector would necessarily address only private-sector participation. In order to justify the public-sector remedy, the County would have had to demonstrate that it had been at least a passive participant in the discrimination by showing it had infused tax dollars into the discriminatory private industry through its procurement programs.

The issue of private sector participation was also discussed in the Fourth Circuit’s recent opinion in *Rowe*.<sup>89</sup> The court rejected its use as a justification for including women-owned businesses, who had been overutilized in public contracts, in North Carolina’s remedial program. There was no evidence of the extent to which women sought private sector business, or that such businesses who discriminate against women win public sector contracts.

## **B. Systemic Discriminatory Exclusion**

*Croson* clearly established that an entity enacting a business affirmative action program must demonstrate identified, systemic discriminatory exclusion on the basis of race or any other

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<sup>86</sup> 539 U.S. 244, 299-300 (2003). *Croson* requires a showing that there was a strong basis for concluding that there was *discrimination* before a race-conscious remedy can be used in government contracting. In the University of Michigan cases that considered race-conscious admissions programs, a key element in the decisions is the Court acceptance of *diversity* as a constitutionally sufficient ground; it did not require a showing of past *discrimination* against minority applicants. If it had, the basis for a program would have disappeared. Discrimination is the historic concern of the 14th Amendment, while promoting diversity is of recent origin. The Court may have been disposed therefore to apply a more rigorous review of legislation based on diversity. The 14th Amendment’s prohibitions are directed against “state action.” The private sector behavior of businesses that contract with state and local governments is a conceptual step away from what it does in its public sector transactions. That distinction may lead courts to apply the *Gratz* approach of more searching scrutiny to remedial plans based on private sector contracting.

<sup>87</sup> 256 F.3d 642 (7th Cir. 2001).

<sup>88</sup> 214 F.3d 730 (6th Cir. 2000).

<sup>89</sup> *Rowe*, supra, 7/22/10.



illegitimate criteria (arguably gender).<sup>90</sup> Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.<sup>91</sup> Using appropriate evidence of the entity's active or passive participation in the discrimination, as discussed above, the showing of discriminatory exclusion must cover each racial group to whom a remedy would apply.<sup>92</sup> Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

*Croson* enumerates several ways an entity may establish the requisite factual predicate. First, a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by an entity or by the entity's prime contractors, may support an inference of discriminatory exclusion.<sup>93</sup> In other words, when the relevant statistical pool is used, a showing of gross statistical disparity alone "may constitute prima facie proof of a pattern or practice of discrimination."<sup>94</sup>

The *Croson* Court made clear that both prime contract and subcontracting data were relevant. The Court observed that "[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures."<sup>95</sup> Subcontracting data is also an important means by which to assess suggested future remedial actions. Since the decision makers are different for the

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<sup>90</sup> *Croson*, 488 U.S. 469. See also *Monterey Mech.I v. Wilson*, 125 F.3d 702 (9th Cir. 1997). The Fifth Circuit Court in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (1999) found that the City's MBE program was unconstitutional for construction contracts because minority participation goals were arbitrarily set and not based on any objective data. Moreover, the Court noted that had the City implemented the recommendations from the disparity study it commissioned, the MBE program may have withstood judicial scrutiny (the City was not satisfied with the study and chose not to adopt its conclusions). "Had the City adopted particularized findings of discrimination within its various agencies and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City's construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support the Department's 15% DBE-participation goal."

In 1996, Houston Metro had adopted a study done for the City of Houston whose statistics were limited to aggregate figures that showed *income* disparity between groups, without making any connection between those statistics and the City's contracting policies. The disadvantages cited that M/WBEs faced in contracting with the City also applied to small businesses. Under *Croson*, that would have pointed to race-neutral remedies. The additional data on which Houston Metro relied was even less availing. Its own expert contended that the ratio of lawsuits involving private discrimination to total lawsuits and ratio of unskilled black wages to unskilled white wages established that the correlation between low rates of black self-employment was due to discrimination. Even assuming that nexus, there is nothing in *Croson* that accepts a low number of MBE business *formation* as a basis for a race-conscious remedy.

<sup>91</sup> *Id.* at 509.

<sup>92</sup> *Id.* at 506. As the Court said in *Croson*, "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination." See *North Shore Concrete and Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998), which rejected the inclusion of Native Americans and Alaskan Natives in the City's program, citing *Croson*.

<sup>93</sup> *Id.* at 509.

<sup>94</sup> *Id.* at 501 (citing *Hazelwood Sch.I Dist. v. United States*, 433 U.S. 299, 307-08 (1977)).

<sup>95</sup> *Croson*, 488 U.S. at 502-03.



awarding of prime contracts and subcontracts, the remedies for discrimination identified at a prime contractor versus subcontractor level might also be different.

Second, “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”<sup>96</sup> Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.<sup>97</sup> Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

In *Coral Construction*, the Ninth Circuit Court of Appeals further elaborated upon the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.<sup>98</sup> The court explained that statistical evidence, standing alone, often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.<sup>99</sup>

Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.<sup>100</sup> Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”<sup>101</sup>

## 1. Geographic Market

*Croson* did not speak directly to how the geographic market is to be determined. In *Coral Construction*, the Court of Appeals held that “an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction.”<sup>102</sup> Conversely, in *Concrete Works I*, the Tenth Circuit Court of Appeals specifically approved the Denver MSA as the appropriate market area since 80 percent of the construction contracts were let there.<sup>103</sup>

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<sup>96</sup> *Id.* at 509.

<sup>97</sup> *Id.*

<sup>98</sup> *Coral Constr.*, 941 F.2d at 919.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* (quoting *Intl Bhd of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

<sup>102</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>103</sup> *Concrete Works*, 823 F.Supp. 821, 835-836 (D.Colo. 1993); rev’d on other grounds, 36 F.3d 1513 (10th Cir. 1994).



Read together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. Because *Croson* and its progeny did not provide a bright line rule for a local market area, which determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.<sup>104</sup> Extra-jurisdictional evidence may be permitted, when it is reasonably related to where the jurisdiction contracts.<sup>105</sup>

## 2. Current Versus Historical Evidence

In assessing the existence of identified discrimination through demonstration of a disparity between MBE utilization and availability, it may be important to examine disparity data both prior to and after the entity's current MBE program was enacted. This will be referred to as "pre-program" versus "post-program" data.

On the one hand, *Croson* requires that an MBE program be "narrowly tailored" to remedy current evidence of discrimination.<sup>106</sup> Thus, goals must be set according to the evidence of disparity found. For example, if there is a current disparity between the percentage of an entity's utilization of Hispanic construction contractors and the availability of Hispanic construction contractors in that entity's marketplace, then that entity can set a goal to bridge that disparity.

It is not mandatory to examine a long history of an entity's utilization to assess current evidence of discrimination. In fact, *Croson* indicates that it may be legally fatal to justify an MBE program based upon outdated evidence.<sup>107</sup> Therefore, the most recent two or three years of an entity's utilization data would suffice to determine whether a statistical disparity exists between current M/WBE utilization and availability.<sup>108</sup>

Pre-program data regarding an entity's utilization of MBEs prior to enacting the MBE program may be relevant to assessing the need for the agency to keep such a program intact.

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<sup>104</sup> *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990); *Associated Gen. Contractors v. Coalition for Econ. Equity*, 950 F.2d 1401 (9th Cir. 1991).

<sup>105</sup> There is a related question of which firms can participate in a remedial program. In *Coral Construction*, the Court held that the definition of "minority business" used in King County's MBE program was over-inclusive. The Court reasoned that the definition was overbroad because it included businesses other than those who were discriminated against in the King County business community. The program would have allowed, for instance, participation by MBEs who had no prior contact with the County. Hence, location within the geographic area is not enough. An MBE had to have shown that it previously sought business, or is currently doing business, in the market area.

<sup>106</sup> *See Croson*, 488 U.S. at 509-10.

<sup>107</sup> *Id.* at 499 (stating that "[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination").

<sup>108</sup> *See AGCC II*, 950 F.2d 1401 at 1414 (consultant study looked at City's MBE utilization over a one year period). Also in *Kossmann Contracting Co v. The City of Houston*, No. Civ-H-96-3100 (S.D. Tex., filed 1996), the City of Houston's initial M/WBE program was challenged as unconstitutional and the study upon which the Program was based on was ruled to be invalid. A consultant was retained to conduct a new disparity study which became the factual predicate for the City's M/WBE program. The Judge approved the consultant's study and approved the reinstatement of the City's M/WBE program in January of 2007.



A 1992 opinion by Judge Henderson of the U.S. District Court for the Northern District of California, *RGW Construction v. San Francisco Bay Area Rapid Transit District (BART)*,<sup>109</sup> set forth the possible significance of statistical data during an entity’s “pre-program” years. Judge Henderson opined that statistics that provides data on a period when no M/WBE goals were operative is often the most relevant data in evaluating the need for remedial action by an entity. Indeed, “to the extent that the most recent data reflect the impact of operative DBE goals, then such data are not necessarily a reliable basis for concluding that remedial action is no longer warranted.”<sup>110</sup> Judge Henderson noted this is particularly so given the fact that M/WBEs report they are seldom or never used by a majority prime contractor without M/WBE goals. That this may be the case suggests a possibly fruitful line of inquiry: an examination of whether different programmatic approaches in the same market area led to different outcomes in M/WBE participation. The Tenth Circuit came to the same conclusion in *Concrete Works II*. It is permissible for a study to examine programs where there were no goals.

Similarly, the Eleventh Circuit in *Dade County* cautions that using post-enactment evidence (post-program data) may mask discrimination that might otherwise be occurring in the relevant market. However, the court agreed with the lower court that it was not enough to speculate on what MBE utilization would have been in the absence of the program.<sup>111</sup>

Thus, an entity should look both at pre-program and post-program data in assessing whether discrimination exists currently and analyze whether it would exist in the absence of an M/WBE program. Even though a government can take remedial action when they possess evidence of discrimination, they must identify that discrimination, public or private, with some specificity before they can use race-conscious relief.<sup>112</sup>

### 3. Statistical Evidence

To determine whether statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the “disparity index,” which consists of the percentage of minority or women contractor participation in local contracts divided by the percentage of minority or women contractor availability or composition in the population of available firms in the local market area.<sup>113</sup> Disparity indexes have been found highly probative evidence of

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<sup>109</sup> See Nov. 25, 1992, Order by Judge Thelton Henderson (on file with Mason Tillman Associates).

<sup>110</sup> *Id.*

<sup>111</sup> *Dade County*, 122 F.3d at 912.

<sup>112</sup> *Shaw*, 517 U.S. 899 (1996). (citing *Croson*, 488 U.S. 504).

<sup>113</sup> Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been taken into account. In addition to looking at Dade County’s contracting and subcontracting statistics, the district court also considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County’s Wainwright study (which compared construction business



discrimination where they ensure that the “relevant statistical pool” of minority or women contractors are being considered.

The Third Circuit Court of Appeals, in *Philadelphia*, ruled that the “relevant statistical pool” includes those businesses that not only exist in the marketplace, but those that are qualified and interested in performing the public agency’s work. In that case, the Third Circuit rejected a statistical disparity finding where the pool of minority businesses used in comparing utilization to availability were those that were merely licensed to operate in the City of Philadelphia. The Court concluded this particular statistical disparity did not satisfy *Croson*.<sup>114</sup> Merely being licensed to do business with the City does not indicate either a willingness or capability to do work for the City.

Statistical evidence demonstrating a disparity between the utilization and availability of M/WBEs can be shown in more than one way. First, the number of M/WBEs utilized by an entity can be compared to the number of available M/WBEs. This is a strict *Croson* “disparity” formula. A significant statistical disparity between the number of MBEs an entity utilizes in a given product/service category and the number of available MBEs in the relevant market area specializing in the specified product/service category could give rise to an inference of discriminatory exclusion.

Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between the award of contracts by an entity in the relevant locality/market area to available majority contractors and the award of contracts to M/WBEs. Thus, in *AGCC II*, an independent consultant’s study compared the number of available MBE prime contractors in the construction industry in San Francisco with the amount of contract dollars awarded to San Francisco-based MBEs over a one-year period. The study found the available MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-minority counterparts.<sup>115</sup>

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ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County’s Brimmer Study (which focused only on Black-owned construction firms and looked at whether disparities existed when the sales and receipts of Black-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms).

The court affirmed the judgment that declared appellant’s affirmative action plan for awarding county construction contracts unconstitutional and enjoined the plan’s operation because there was no statistical evidence of past discrimination and appellant failed to consider race and ethnic-neutral alternatives to the plan.

<sup>114</sup> *Philadelphia*, 91 F.3d 586. The courts have not spoken to the non-M/WBE component of the disparity index. However, if only as a matter of logic, the “availability” of non-M/WBEs requires that their willingness to be government contractors be established. The same measures used to establish the interest of M/WBEs should be applied to non-M/WBEs.

<sup>115</sup> *AGCC II*, 950 F.2d 1401 at 1414. Specifically, the study found that MBE availability was 49.5 percent for prime construction, but MBE dollar participation was only 11.1 percent; that MBE availability was 36 percent prime equipment and supplies, but MBE dollar participation was 17 percent; and that MBE availability for prime general services was 49 percent, but dollar participation was 6.2 percent.



Whether a disparity index supports an inference of discrimination in the market turns not only on what is being compared, but also on whether any disparity is statistically significant.<sup>116</sup> In *Croson*, Justice O'Connor opined, “[w]here the gross statistical disparities can be shown, they alone, in a proper case, may constitute a *prima facie* proof of a pattern or practice of discrimination.”<sup>117</sup> However, the Court has neither assessed nor attempted to cast bright lines for determining if a disparity index is sufficient to support an inference of discrimination. Rather, the analysis of the disparity index and its significance are judged on a case-by-case basis.<sup>118</sup>

Following the dictates of *Croson*, courts may carefully examine whether there is data showing that MBEs are ready, willing, and able to perform.<sup>119</sup> *Concrete Works I* made the same point: capacity—i.e., whether the firm is “able to perform”—is a ripe issue when a disparity study is examined on the merits:

[Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the marketplace overstates “the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than non-minority owned firms.” In other words, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs.<sup>120</sup>

Notwithstanding that appellate concern, the disparity studies before the district court on remand did not examine the issue of M/WBE capacity to perform Denver’s public sector contracts. As mentioned above, the Court focused on the private sector, using census-based data and Dun & Bradstreet statistical extrapolations.

The Sixth Circuit Court of Appeals, in *Associated General Contractors of Ohio v. Drabik*, concluded that for statistical evidence to meet the legal standard of *Croson*, it must consider the issue of capacity.<sup>121</sup> The State’s factual predicate study based its statistical evidence on

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<sup>116</sup> In *Rowe*, supra, the 4<sup>th</sup> Circuit required that disparity indexes be confirmed by a statistical test.

<sup>117</sup> *Croson*, 488 U.S. at 501 (quoting *Hazelwood Sch’l Dist., v. United States*, 433 U.S. at 307-08).

<sup>118</sup> *Concrete Works I*, 36 F.3d at 1522.

<sup>119</sup> The *Philadelphia* study was vulnerable on this issue.

<sup>120</sup> *Concrete Works I*, 36 F.3d at 1528.

<sup>121</sup> See 214 F.3d 730 (6th Cir. 2000). The Court reviewed Ohio’s 1980, pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass’n v. Keip*, No. 82-3822, 1983 U.S. App. LEXIS 24185 (6th Cir. September 7, 1983), finding the program unconstitutional under *Croson*. It should also be noted that in *Concrete Works I* and III the court stated that



the percentage of M/WBE businesses in the population. The statistical evidence did not take into account the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.<sup>122</sup> The court reasoned as follows:

Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. If MBEs comprise 10% of the total number of contracting firms in the State, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.<sup>123</sup>

Further, *Drabik* also pointed out that the State not only relied upon the wrong type of statistical data but that the data was more than twenty years old.

The appellate opinions in *Philadelphia*<sup>124</sup> and *Dade County*,<sup>125</sup> regarding disparity studies involving public sector contracting, are particularly instructive in defining availability.

First, in *Philadelphia*, the earlier of the two decisions, contractors' associations challenged a city ordinance that created set-asides for minority subcontractors on city public works contracts. Summary judgment was granted for the contractors.<sup>126</sup> The Third Circuit upheld the third appeal, affirming there was no firm basis in the evidence for finding the existence of race-based discrimination existed to justify a race-based program and that the program was not narrowly tailored to address past discrimination by the City.<sup>127</sup>

The Third Circuit reviewed the evidence of discrimination in prime contracting and stated that whether such evidence is strong enough to infer discrimination is a "close call" which the court "chose not to make."<sup>128</sup> It was unnecessary to make this determination because the

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smaller size and capacity of M/WBEs may itself be evidence of effects of discrimination. Also, due to the ability to subcontract construction tasks, the difference in capacity among prime contractors is largely of little consequence to obtaining contracts.

<sup>122</sup> *Drabik*, 214 F.3d 730.

<sup>123</sup> *Id.* at 736.

<sup>124</sup> *Phila.*, 6 F.3d 990 (3rd Cir. 1993), on remand, 893 F.Supp. 419 (E.D. Penn. 1995), aff'd, 91 F.3d 586 (3rd Cir. 1996).

<sup>125</sup> *Dade County*, 943 F.Supp. 1546.

<sup>126</sup> *Phila.*, 91 F.3d 586.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 605.



court found that even if there was a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.

When the court looked at subcontracting, it found that a firm basis in evidence did not exist. The only subcontracting evidence presented was a review of a random 25 to 30 percent of project engineer logs on projects more than \$30,000. The consultant determined no MBEs were used during the study period based upon recollections regarding whether the owners of the utilized firms were MBEs. The court found this evidence as insufficient basis for finding that prime contractors in the market were discriminating against subcontractors.<sup>129</sup>

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that “[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE”; and it was a “reasonable choice” under the circumstances to use a list of certified contractors as a source for available firms.<sup>130</sup> Although theoretically, it may have been possible to adopt a more refined approach, the court found that using the list of certified contractors was a rational approach to identifying qualified firms.

Furthermore, the court discussed whether bidding was required in prime construction contracts as the measure of “willingness” and stated, “[p]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work.”<sup>131</sup>

In addition, the court found that a program certifying MBEs for federal construction projects was a satisfactory measure of capability of MBE firms.<sup>132</sup> In order to qualify for certification, the federal certification program required firms to detail their bonding capacity, size of prior contracts, number of employees, financial integrity, and equipment owned. According to the court, “the process by which the firms were certified [suggests that] those firms were both qualified and willing to participate in public work projects.”<sup>133</sup> The court found certification to be an adequate process of identifying capable firms, recognizing that the process may even

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<sup>129</sup> Another problem with the program was that the 15 percent goal was not based on data indicating that minority businesses in the market area were available to perform 15 percent of the City’s contracts. The court noted, however, that “we do not suggest that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides.” The court also found the program flawed because it did not provide sufficient waivers and exemptions, as well as consideration of race-neutral alternatives.

<sup>130</sup> *Phila.*, 91 F.3d at 603.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*



understate the availability of MBE firms.<sup>134</sup> Therefore, the court was somewhat flexible in evaluating the appropriate method of determining the availability of MBE firms in the statistical analysis of a disparity.

In *Dade County*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program, because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs was taken into account.<sup>135</sup> The *Dade County* district court accepted the Disparity Study's limiting of "available" prime construction contractors to those that had bid at least once in the study period. However, it must be noted that relying solely on bidders to identify available firms may have limitations. If the solicitation of bidders is biased, the results of the bidding process will be biased.<sup>136</sup> In addition, a comprehensive count of bidders is dependent on the adequacy of the agency's record keeping.<sup>137</sup>

The appellate court in *Dade County* did not determine whether the County presented sufficient evidence to justify the M/WBE program. It merely ascertained that the lower court was not clearly erroneous in concluding that the County lacked a strong evidentiary basis to justify race-conscious affirmative action. The appellate court did not prescribe the district court's analysis or any other specific analysis for future cases.

### **C. Anecdotal Evidence**

As will be discussed below, anecdotal evidence will not suffice standing alone to establish the requisite predicate for a race-conscious program. Its great value lies in pointing to remedies that are "narrowly tailored," the second prong of a *Croson* study.

The following types of anecdotal evidence have been presented and relied upon by the Ninth Circuit, in both *Coral Construction* and *AGCC II*, to justify the existence of an M/WBE program:

- M/WBEs denied contracts despite being the low bidders —*Philadelphia*<sup>138</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Dade County*, 943 F. Supp. 1546

<sup>136</sup> Cf. *League of United Latin Am. Citizens v. Santa Ana*, 410 F.Supp. 873, 897 (C.D. Cal. 1976); *Reynolds v. Sheet Metal Workers, Local 102*, 498 F.Supp 952, 964 n. 12 (D. D.C. 1980), *aff'd*, 702 F.2d 221 (D.C. Cir. 1981) (involving the analysis of available applicants in the employment context).

<sup>137</sup> Cf. *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1981) (in the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).

<sup>138</sup> *Phila.*, 6 F.3d at 1002.



- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs — *Cone Corporation v. Hillsborough County*<sup>139</sup>
- M/WBEs’ inability to obtain contracts for private sector work — *Coral Construction*<sup>140</sup>
- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties — *AGCC*<sup>141</sup>
- Attempts to circumvent M/WBE project goals — *Concrete Works I*<sup>142</sup>
- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on an entity's contracts — *AGCC*<sup>143</sup>

Courts must assess the extent to which relief measures disrupt settled “rights and expectations” when determining the appropriate corrective measures.<sup>144</sup> Presumably, courts would look more favorably upon anecdotal evidence, which supports a less intrusive program than a more intrusive one. For example, if anecdotal accounts relate experiences of discrimination in obtaining bonds, they may be sufficient evidence to support a bonding program that assists M/WBEs. However, these accounts would not be evidence of a statistical availability that would justify a racially limited program such as a set-aside.

As noted above, in *Croson*, the U. S. Supreme Court found that the City of Richmond’s MBE program was unconstitutional, because the City lacked proof that race-conscious remedies were justified. However, the Court opined that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”<sup>145</sup>

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<sup>139</sup> *Cone Corp.*, 908 F.2d at 916.

<sup>140</sup> For instance, where a small percentage of an MBE or WBE’s business comes from private contracts and most of its business comes from race or gender-based set-asides, this would demonstrate exclusion in the private industry. *Coral Constr.*, 941 F.2d 910 at 933 (WBE’s affidavit indicated that less than 7 percent of the firm’s business came from private contracts and that most of its business resulted from gender-based set-asides).

<sup>141</sup> *AGCC II*, 950 F.2d at 1415.

<sup>142</sup> *Concrete Works I*, 36 F.3d at 1530.

<sup>143</sup> *AGCC II*, 950 F.2d at 1415.

<sup>144</sup> *Wygant*, 476 U.S. at 283.

<sup>145</sup> *Croson*, 488 U.S. at 509 (citing *Teamsters*, 431 U.S. at 338).



In part, it was the absence of such evidence that proved lethal to the program in the *Croson* case. The U. S. Supreme Court stated that “[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”<sup>146</sup>

This was not the situation confronting the Ninth Circuit in *Coral Construction*. There, the more than 700-plus pages of appellate records contain the affidavits of “at least 57 minorities or women contractors, each of whom complain in varying degrees of specificity about discrimination within the local construction industry. These affidavits certainly suggest that ongoing discrimination may be occurring in much of the King County business community.”<sup>147</sup>

Nonetheless, this anecdotal evidence standing alone was insufficient to justify King County’s MBE program since “[n]otably absent from the record, however, is *any* statistical data in support of the County’s MBE program.”<sup>148</sup> After noting the U. S. Supreme Court’s reliance on statistical data in Title VII employment discrimination cases and cautioning that statistical data must be carefully used, the Court elaborated on its mistrust of pure anecdotal evidence:

Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices.<sup>149</sup>

The Court concluded its discourse on the potency of anecdotal evidence in the absence of a statistical showing of disparity by observing that “rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”<sup>150</sup>

Two other circuit courts also suggested that anecdotal evidence might be dispositive, while rejecting it in the specific case before them. For example, in *Philadelphia*, the Third Circuit Court of Appeals noted that the Philadelphia City Council had “received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination,” which the district court had “discounted” because it deemed this evidence to

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<sup>146</sup> *Id.* at 480.

<sup>147</sup> *Coral Construction*, 941 F.2d at 917-18.

<sup>148</sup> *Id.* at 918 (emphasis added) (additional statistical evidence gathered after the program had been implemented was also considered by the court and the case was remanded to the lower court for an examination of the factual predicate).

<sup>149</sup> *Id.* at 919.

<sup>150</sup> *Id.*



be “impermissible” for consideration under *Croson*.<sup>151</sup> The circuit court disapproved of the district court’s actions because in its view the court’s rejection of this evidence was contrary to the court’s role in disposing of a motion for summary judgment.<sup>152</sup> “Yet,” the circuit court stated:

Given *Croson*’s emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, we do not believe this amount of anecdotal evidence is sufficient to satisfy strict scrutiny [quoting *Coral*, supra]. Although anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.<sup>153</sup>

The District of Columbia Circuit Court echoed the Ninth Circuit’s acknowledgment of the rare case in which anecdotal evidence is singularly potent in *O’Donnell Construction v. District of Columbia*.<sup>154</sup> The court found that in the face of conflicting statistical evidence, the anecdotal evidence there was insufficient:

It is true that in addition to statistical information, the Committee received testimony from several witnesses attesting to problems they faced as minority contractors. Much of the testimony related to bonding requirements and other structural impediments any firm would have to overcome, no matter what the race of its owners. The more specific testimony about discrimination by white firms could not in itself support an industry-wide remedy. Anecdotal evidence is most useful as a supplement to strong statistical evidence—which the Council did not produce in this case.<sup>155</sup>

The Eleventh Circuit is also in accord. In applying the “clearly erroneous” standard to its review of the district court’s decision in *Dade County*, it commented that “[t]he picture painted by the anecdotal evidence is not a good one.”<sup>156</sup> However, it held that this was not the “exceptional case” where, unreinforced by statistics, the anecdotal evidence was enough.<sup>157</sup>

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<sup>151</sup> *Phila.*, 6 F.3d at 1002.

<sup>152</sup> *Id.* at 1003.

<sup>153</sup> *Id.*

<sup>154</sup> 963 F.2d 420, 427 (D.C. Cir.1992).

<sup>155</sup> *Id.*

<sup>156</sup> *Dade County*, 943 F.Supp 1546.

<sup>157</sup> *Id.* at 926.



In *Concrete Works I*, the Tenth Circuit Court of Appeals described the type of anecdotal evidence that is most compelling: evidence within a statistical context. In approving of the anecdotal evidence marshaled by the City of Denver in the proceedings below, the court recognized that “[w]hile a fact finder should accord less weight to personal accounts of discrimination that reflects isolated incidents, anecdotal evidence of a municipality’s institutional practices carries more weight due to the systemic impact that such institutional practices have on market conditions.”<sup>158</sup> The court noted that the City had provided such systemic evidence.

The Ninth Circuit Court of Appeals has articulated what it deems to be permissible anecdotal evidence in *AGCC II*.<sup>159</sup> There, the court approved a “vast number of individual accounts of discrimination” which included numerous reports of MBEs denied contracts despite being the low bidder; MBEs told they were not qualified although they were later found qualified when evaluated by outside parties; MBEs refused work even after they were awarded the contracts as low bidder; and MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal, the City points to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the City’s procurement processes; an “old boy’s network” still exists; and racial discrimination is still prevalent within the San Francisco construction industry.<sup>160</sup> Based on *AGCC II*, it would appear that the Ninth Circuit’s standard for acceptable anecdotal evidence is more lenient than other Circuits that have considered the issue.

Taken together, these statements constitute a taxonomy of appropriate anecdotal evidence. The cases suggest that, to be optimally persuasive, anecdotal evidence must satisfy six particular requirements.<sup>161</sup> These requirements are that the accounts:

- are gathered from minority contractors, preferably those that are “qualified”<sup>162</sup>
- concern specific, verifiable instances of discrimination<sup>163</sup>
- involve the actions of governmental officials<sup>164</sup>

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<sup>158</sup> *Concrete Works I*, 36 F.3d at 1530.

<sup>159</sup> *AGCC II*, 950 F.2d 1401.

<sup>160</sup> *Id.* at 1415.

<sup>161</sup> *Phila.*, 6 F.3d at 1003. (anecdotal evidence must be “dominant or pervasive”).

<sup>162</sup> *Id.*

<sup>163</sup> *Coral Constr.*, 941 F.2d at 917-18; *but see Concrete Works II*, 321 F.3d at 989. (“There is no merit to [plaintiff’s] argument that the witnesses accounts must be verified to provide support for Denver’s burden.”).

<sup>164</sup> *Croson*, 488 U.S. at 509.



- involve events within the relevant jurisdiction’s market area<sup>165</sup>
- discuss the harm that the improper conduct has inflicted on the businesses in question<sup>166</sup> and
- collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.<sup>167</sup>

Given that neither *Croson* nor its progeny identifies the circumstances under which anecdotal evidence alone will carry the day, it is not surprising that none of these cases explicate bright line rules specifying the quantity of anecdotal evidence needed to support a race-conscious remedy. However, the foregoing cases, and others, provide some guidance by implication.

*Philadelphia* makes clear that 14 anecdotal accounts will not suffice.<sup>168</sup> While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type referenced above, were insufficient to justify the program in *Coral Construction*. The number of anecdotal accounts relied upon by the district court in approving Denver’s M/WBE program in *Concrete Works I* is unclear, but by one count the number might have exceeded 139.<sup>169</sup> It is, of course, a matter of speculation as to how many of these accounts was indispensable to the court’s approval of the Denver M/WBE program.

In addition, as noted above, the quantum of anecdotal evidence that a court would likely find acceptable may depend on the remedy in question. The remedies that are least burdensome to non-targeted groups would likely require a lesser degree of evidence. Those remedies that are more burdensome on the non-targeted groups would require a stronger factual basis likely extending to verification. However, the Fourth Circuit, in *Rowe* rejected the need for

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<sup>165</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>166</sup> *O’Donnell, Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

<sup>167</sup> *Coral Constr.*, 941 F.2d at 919.

<sup>168</sup> *Philadelphia*, 6 F.3d. at 1002-03.

<sup>169</sup> The Denver City Council enacted its M/WBE ordinance in 1990. The program was based on the results of public hearings held in 1983 and 1988 at which numerous people testified (approximately 21 people and at least 49 people, respectively), and on a disparity study performed in 1990. See *Concrete Works of Colo. v. Denver*, 823 F.Supp. 821, 833-34 (D. Colo. 1993). The disparity study consultant examined all of this preexisting data, presumably including the anecdotal accounts from the 1983 and 1988 public hearings, as well as the results of its own 69 interviews, in preparing its recommendations. *Id.* at 833-34. Thus, short of analyzing the record in the case, it is not possible to determine a minimum number of accounts because it is not possible to ascertain the number of consultant interviews and anecdotal accounts that are recycled statements or statements from the same people. Assuming no overlap in accounts, however, and also assuming that the disparity study relied on prior interviews in addition to its own, the number of M/WBEs interviewed in this case could be as high as 139, and, depending on the number of new people heard by the Denver Department of Public Works in March 1988 (*see id.* at 833), the number might have been even greater.



verification, pointing out that it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including a witness’ perceptions.”<sup>170</sup>

## **V. CONSIDERATION OF RACE-NEUTRAL OPTIONS**

A remedial program must address the source of the disadvantage faced by minority businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.<sup>171</sup>

On the other hand, an MBE program cannot stand if the sole barrier to minority or woman-owned business participation is a barrier which is faced by all new businesses, regardless of ownership.<sup>172</sup> If the evidence demonstrates that the sole barrier to M/WBE participation is that M/WBEs disproportionately lack capital or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.<sup>173</sup> In other words, if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

The requirement that race-neutral measures be considered does not mean that they must be exhausted before race-conscious remedies can be employed. The district court wrote in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*:

The U. S. Supreme Court has recently explained that although “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative” it “does require serious, good faith consideration of workable race-neutral alternatives that will achieve diversity[.]” The County has failed to show the necessity for the relief it has chosen, and the efficacy of alternative remedies has not been sufficiently explored.<sup>174</sup>

If the barriers appear race-related but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found. If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, MBEs also face

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<sup>170</sup> *Concrete Works*, 321 F. 3d at 989.

<sup>171</sup> *AGCC II*, 950 F.2d at 1404.

<sup>172</sup> *Croson*, 488 U.S. at 508.

<sup>173</sup> *Id.* at 507.

<sup>174</sup> *Hershell Gill*, 333 F.Supp. 2d 1305, 1330 (S.D.Fla. 2004).



race discrimination in the awarding of contracts, then a race-conscious program will stand, so long as it also includes race-neutral measures to address the capital and bonding barriers.<sup>175</sup>

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.<sup>176</sup> Instead, an entity must make a serious, good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing MBE utilization, it is imperative to examine barriers to MBE participation that go beyond “small business problems.” The impact on the distribution of contracts programs that have been implemented to improve MBE utilization should also be measured.<sup>177</sup>

## **VI. SUMMARY OF FIFTH CIRCUIT RELEVANT CASE LAW**

The District Court in *Bilbo Freight Lines, Inc. v. Dan Morales*,<sup>178</sup> entered judgment in favor of plaintiffs and invalidated Section 4 of Senate Bill 1313 as an unconstitutional violation of the Equal Protection Clause. The court found that Section 4 gave preferential treatment to minorities and women in the issuance of Certificates of Authority by the Texas Railroad Commission to participate in the intrastate trucking industry. In applying the *Croson* evidentiary standard, the court found that “the State must make specific findings of discrimination within a relevant market under its jurisdiction before engaging in race-conscious relief. A generalized assertion that there has been past discrimination in the intrastate trucking industry is insufficient because it provides no guidance in determining the precise scope of the perceived injury it seeks to remedy. The Texas legislature did not make the requisite findings of identifiable discrimination before enacting Section 4 of S.B. 1313; instead it relied on general assertions of past societal discrimination and economic deprivation.”

In *W.H. Scott Construction Company, Inc. v City of Jackson*,<sup>179</sup> the Fifth Circuit Court of Appeals affirmed the district court’s grant of summary judgment to plaintiff in its equal protection challenge to a policy encouraging minority participation in City construction contracts. The district court found that the City’s Policy created race-based preferences in the City’s construction contracting and therefore applied strict scrutiny to the racial classification.

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<sup>175</sup> *Id.* (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

<sup>176</sup> *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

<sup>177</sup> *Dade County*, 122 F.3d at 927. At the same time, the Eleventh Circuit’s caveat in *Dade County* should be kept in mind: “Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications that a government may use to treat race-based problems. Instead, it is the strongest of medicines, with many potentially harmful side-effects, and must be reserved to those severe cases that are highly resistant to conventional treatment.” For additional guidance, see *supra* the discussion of narrow tailoring in *Concrete Works, Adarand,, County of Cook, and City of Chicago*.

<sup>178</sup> C.A. No. H-93-3808. Dist Ct. S. Dist of Texas Houston District (Feb 3, 1994).

<sup>179</sup> 199 F3d. 206 (5<sup>th</sup> Cir. 2000).



The Court of Appeals held that “the City lack[ed] the factual predicates required under the Equal Protection Clause to support the City’s 15 percent DBE-participation goal” and therefore found the City’s Policy in violation of the Equal Protection Clause.

In *Kossman Contracting v. The City of Houston*,<sup>180</sup> the plaintiff contends that the City's revised ordinance does not accurately reflect the findings of its Disparity Study. Kossman is not disputing the Study findings, but interprets that no disparity exists for women or minorities other than African Americans. The City argued that the Court's jurisdiction to enforce the settlement on procedural grounds, does “not have inherent power to resolve disputed settlement agreements.” This case has not been decided. Also, please see the 5th Circuit decision in *Rothe Development Corporation, Inc. v. U.S. Department of Defense*,<sup>181</sup> which is discussed under the United States Department of Transportation’s Disadvantaged Business Enterprise Section of this Chapter.

## **VII. CONCLUSION**

The 1989 decision of the U.S. Supreme Court in the *Croson* changed the legal landscape for business affirmative action programs and altered the authority of local governments to institute remedial race-conscious public contracting programs. Justice O’Connor opined that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”<sup>182</sup> Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies, such as outreach to the M/WBE community, which are accessible to all segments of the business community regardless of race. They are not intrusive, and in fact, require no evidence of discrimination before implementation. Conversely, race-conscious measures, such as set-asides, fall at the other end of the spectrum and require a larger amount of evidence.<sup>183</sup>

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<sup>180</sup> No. Civ-H-96-3100 (S.D. Tex. 1996), (settled June 23, 2006, re-opened April 30, 2007 and is scheduled for a hearing November 14, 2008). (Non-published case, not yet decided).

<sup>181</sup> 324 F. Supp. 2d. 840 (W.D. Tex. 2004).

<sup>182</sup> *Croson*, 488 U.S. at 509 (*Teamsters*, 431 U.S. at 338).

<sup>183</sup> Cf. *AGCC II*, 950 F.2d at 1417-18 (in finding that an ordinance providing for bid preferences was narrowly tailored, the Ninth Circuit stated that the program encompassed the required flexibility and stated that “the burdens of the bid preferences on those not entitled to them appear relatively light and well distributed. . . . In addition, in contrast to remedial measures struck down in other cases, those bidding have no settled expectation of receiving a contract. [Citations omitted.]”).



## **VIII. LIST OF CASES**

- **Cases**

*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

*Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987).

*Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991).

*Associated General Contractors of Connecticut v. City of New Haven*, 791 F.Supp. 941 (D. Conn. 1992).

*Associated General Contractors of Ohio v. Drabik*, 50 F.Supp. 741 (S.D. Ohio 1999), 214 F.3d 730 (6th Cir. 2000).

*Bilbo Freight Lines, Inc. v. Dan Morales*, C.A. No. H-93-3808. Dist Ct. S. Dist of Texas Houston District (Feb 3, 1994).

*Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp 2d 725 (N.D.Ill. 2003).

*Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001).

*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

*Concrete Works of Colorado v. City and County of Denver*, 823 F.Supp. 821 (D. Colo. 1993).

*Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994). (“Concrete Works I”).

*Concrete Works of Colorado v. City and County of Denver*, 86 F.Supp.2d 1042 (D. Colo 2000).

*Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). (“Concrete Works II”).

*Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

*Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993), *on remand*, 893 F.Supp. 419 (E.D. Penn. 1995), *aff’d*, 91 F.3d 586 (3rd Cir. 1996).



*Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

*Coral Construction v. San Francisco*, 116 Cal. App. 4th 6. (Cal. 2004).

*Craig v. Boren*, 429 U.S. 190 (1976).

*EEOC v. American National Bank*, 652 F.2d 1176 (4th Cir. 1981).

*Engineering Contractors Association of South Florida v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997).

*Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

*Gratz v. Bollinger*, 539 U.S. 244 (2003).

*Gross Seed Co. v. Nebraska Department of Roads*, No. 4:00-CV-3073, 2002 U.S. Dist LEXIS 27125 (D. Neb. May 6, 2002).

*Hayes v. North State Law Enforcement Officers Association*, 10 F.3d 207 (4th Cir. 1993).

*Hazelwood School District v. United States*, 433 U.S. 299 (1977).

*Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F.Supp. 2d 1305 (S.D.Fla. 2004).

*H.H. Rowe Co., Inc. v Tippett* (4<sup>th</sup> Cir. 7/22/10).

*Hi-Voltage v. City of San Jose*, 24 Cal. 4th 537 (Cal. 2000).

*International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

*League of United Latin American Citizens v. Santa Ana*, 410 F.Supp. 873 (C.D. Cal. 1976).

*Michigan Road Builders Association v. Milliken*, 834 F.2d 583 (6th Cir. 1987).

*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

*Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997).

*North Shore Concrete and Associates v. City of New York*, No. 94-CV-4017, 1998 U.S. Dist. LEXIS 6785 (E.D.N.Y. April 12, 1998).



*Northern Contracting Inc. v. State of Illinois*, No. 00-C-4515, 2005 U.S. Dist. LEXIS 19868 (D. Ill. Sept. 8, 2005).

*O'Donnell Construction Company v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992).

*Ohio Contractors Association v. Keip*, No. 82-3822, 1983 U.S. App. LEXIS 24185 (6th Cir. Sept. 7, 1983).

*Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162 (9th Cir. 2004).

*Reynolds v. Sheet Metal Workers, Local 102*, 498 F.Supp 952 (D. D.C. 1980), aff'd, 702 F.2d 221 (D.C. Cir. 1981).

*RGW Construction v. San Francisco Bay Area Rapid Transit District*, No. C92-2938 THE (N.D. Cal. Sept. 18, 1992).

*Ritchey Produce Co. v. State of Ohio*. 707 N.E.2d 871 (Ohio1999).

*Rothe Development Corporation, Inc. v. Department of Defense*, 324 F.Supp.2d. 840 (Fed. Cir., 2005)

*Shaw v. Hunt*, 517 U.S. 899 (1996).

*Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, No. 00-CV-1026, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001).

*United States v. Virginia*, 518 U.S. 515 (1996).

*Ward Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (Cal. 2001).

*Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005).

*W.H. Scott Construction Company, Inc. v. City of Jackson*, 199 F3d. 206 (5th Cir. 2000).

*Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

- **Statutes**

42 U.S.C. § 14000e, *et seq.*



## Appendix A

The US Department of Transportation promulgated in 1982 its initial DBE regulations, 49 CFR Part 26, to enact the contracting affirmative action requirements of the 1982 Surface Transportation Assistance Act. This Act required that a minimum of ten percent of funds be expended with small businesses owned and controlled by socially and economically disadvantaged individuals. The Department's DBE regulations have been amended several times since 1982. Women business enterprises (WBEs) were added to the DBE Program in the 1987 Surface Transportation and Uniform Relocation Assistance Act. The U.S. Congress reauthorized the DBE Program again in 1991 and 1998 respectively. Both the 1991 Intermodal Surface Transportation Efficiency Act and the 1998 Transportation Equity Act for the 21st Century (TEA-21) continued the ten percent DBE set-aside provision.

The DBE regulations, 49 CFR Part 26, were last amended in 1999. The regulations were amended to conform with the issues raised in numerous court cases dealing with the DBE program, including the U. S. Supreme Court decision in *Adarand v. Peña*. The regulations set forth a personal net worth standard for DBE Program eligibility and the requirement for setting race-neutral goals in conjunction with race-specific goals.

Recipients of federal financial assistance from the Federal Aviation Administration are required to implement an Airport Concession Disadvantaged Business Enterprise Program (ACDBE). On March 22, 2005, the US Department of Transportation published a final rule revising 49 CFR Part 23, the regulation governing ACDBE programs. The rule became effective on April 21, 2005. The rule revised and updated the regulation to ensure that ACDBEs are afforded an equal opportunity to receive and participate in concession opportunities.

The revisions to the ACDBE program paralleled in many important aspects, the DBE regulation for federally assisted contracts. The revisions addressed issues such as goal-setting, personal net worth, business size standards, and ACDBE participation by car rental companies. It should also be noted that ACDBE program goals must be established in two separate categories. One category for car rental activities and another category for all other airport concession activities not related to car rentals.

Their main components of the U.S. Department of Transportation (USDOT) regulations as set forth at 49 CFR Part 26 are as follows:

### 1. Goal Setting

Section 26.45 lays out a two-step process for setting goals. Step 1 is establishing a base figure for DBE availability. It specifies three examples: DBE Directories and Census Bureau Data; Bidders List; and Disparity Study Data (but see *Western States Paving*). Step 2 is an adjustment of that base figure if there is evidence available in the jurisdiction that supports one.



## **2. Meeting Overall Goals**

Section 26.51 requires that the “maximum feasible portion” of the overall DBE goal be met through the use of race/gender-neutral mechanisms. To the extent that these means are insufficient to meet overall goals, recipients may use race/gender-conscious mechanisms, such as contract goals. However, contract goals are not required on every USDOT-assisted contract, regardless of whether they were needed to meet overall goals.

If during the year it becomes apparent that the goals will be exceeded, the recipient is to reduce or eliminate the use of goals. Similarly, if it is determined that a goal will not be met, an agency should modify the use of race and gender-neutral and race and gender-conscious measures in order to meet its overall goals.

Set-asides may not be used for DBEs on USDOT contracts subject to Part 26 except, “in limited and extreme circumstances when no other method could be reasonably expected to address egregious instances of discrimination.”

## **3. Good Faith Efforts**

The new regulation emphasizes that when recipients use contract goals, they must award the contract to a bidder that makes good faith efforts to meet the goal. The contract award cannot be denied if the firm has not attained the goal, but has documented good faith efforts to do so. Recipients must provide administrative reconsideration to a bidder who is denied a contract on the basis of a failure to make good faith efforts.

## **4. DBE Diversification**

Section 26.33 is an effort to diversify the types of work in which DBEs participate, as well as to reduce perceived unfair competitive pressure on non-DBE firms attempting to work in certain fields. This provision requires that if agencies determine there is an over-concentration of DBEs in a certain type of work, they must take appropriate measures to address the issue. Remedies may include incentives, technical assistance, business development programs, and other appropriate measures.

## **5. Alternative Programs**

Section 26.15 allows recipients to obtain a waiver of the provisions of the DBE program requirements if they demonstrate that there are “special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rule making that establish this part.”



## Appendix B

### AIRPORT CONCESSIONS

49 CFR Part 23

Section 23.95 lays out the elements of the DBE concession plan:

#### 1. Goal Setting

Section 23.95(a) lays out two methods for determining the base percentage for the overall DBE goal. Program goals can be based on either a) estimated gross receipts and net payments or b) total number of concession agreements. The USDOT encourages sponsors to seek DBE participation on all types of concession activities and allows sponsors to set an overall goal exceeding 10 percent. The process used for determining overall DBE goal for concessions must be consistent with Section 26.45.

##### a. Goals Based on Estimated Gross Receipts and Net Payments

Goals can be determined using the estimated gross receipts earned by all concessions operating at the airport during the goal period, excluding gross receipts not generated by concession activity. When the terms of the concession agreement do not provide for disclosure of gross receipts, goals can be based on an estimate of that recipients net payment to the airport. Goals established using this method, must include the net payment made to the airport by banks and banking services.

##### b. Goals Based on the Total Number of Concession Agreements

Goals can also be determined using the total number of concession agreements operating at the airport during the goal period. Sponsors choosing to set their goals based on this methodology must submit a rationale to the Federal Aviation Administration (FAA) in accordance with Section 23.99. The rationale must demonstrate that the use of gross receipts to calculate goals would result in disproportionate percentage of opportunities for DBEs or other circumstances that make the use of gross receipts unfeasible.

#### 2. Goals Setting Methodology

Section 23.95 (b) requires DBE concession plans to include a description of the methodology that is used to establish the overall DBE goals. This methodology must contain information on concessions that will operate at the airport during the plan period and the potential for DBE participation in each concession. Each concession agreement must include, amongst other things, detailed information on the method solicitation that will be used by the sponsor, the



identification of the DBE certified concessionaires and indication of concessions that have the potential for DBE participation.

The plan must include a narrative description of the types of efforts the sponsor will make to achieve the overall annual goals. If none of the overall goals for DBE participation are 10 percent or more, the sponsor must submit information to the FAA, in accordance with Section 23.101, documenting 1) their efforts to recruit DBE participation or 2) why the participation of a DBE on the particular concession is not economically feasible.

### **3. Utilization of DBE Set Asides**

Section 23.95 (c) authorizes sponsors to create set asides for DBE concessionaires where not prohibited by law. If a state or local law prohibits the use of set asides, a citation to the law must be included in the DBE concession plan.

### **4. Documentation of Goal Achievement**

Section 23.95 (d - e) requires the sponsor to provide an analysis of the accomplishments made toward achieving the previous year's DBE goal. The analysis must show the effect of the previous year's results on the overall level of DBE participation. If the previous year's DBE goals are not met, the plan must demonstrate why the failure to meet the goal was beyond the sponsor's control. If the FAA finds that the justification given by the sponsor is insufficient, the FAA may require the sponsor to take remedial measures to increase participation.

### **5. Certification Procedures**

Section 23.95 (f) requires all DBEs that participate in the plan to be certified in accordance with Unified Certification Program. The Unified Certification Program procedures are set forth in Part 26, subpart E. Only those firms that have been certified in accordance with the Unified Certification Program can count toward the fulfillment of the overall goal.

### **6. Certification Standards**

Section 23.95 (g - h) require all DBEs that participate in the plan to use the same standards for ownership and control as contained in Part 26, subpart D. Limited partnerships under which a non-DBE is the general partner and other arrangements that do not provide for ownership and control by a socially disadvantaged owner are not eligible for certification under this standard.

### **7. Good Faith Efforts**

Section 23.95 (i) requires the contractor to make a good faith effort to achieve the overall goal of the approved plan. Good faith efforts include locating, identifying and notifying DBEs of



concession opportunities. Efforts also include providing information to concession competitors regarding the DBE requirements and the availability of DBEs to help them meet the requirements. When practical, sponsors should structure contracting activities to encourage participation of DBEs.



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# 2

## ***ANECDOTAL ANALYSIS***

### ***I. INTRODUCTION***

The U. S. Supreme Court, in its 1989 decision *City of Richmond v. J.A. Croson Co.*, specified the use of anecdotal testimony as a means to determine whether remedial race-conscious relief may be justified in a particular market area. In its *Croson* decision, the Court stated that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proofs, lend support to a [local entity’s] determination that broader remedial relief [be] justified.”<sup>1</sup>

Anecdotal testimony of individual discriminatory acts can, when paired with statistical data, document the routine practices by which minority and woman-owned business enterprises (M/WBEs) are excluded from business opportunities within a given market area. The statistical data can quantify the results of discriminatory practices, while anecdotal testimony provides the human context through which the numbers can be understood. Anecdotal testimony from business owners provides information on the kinds of barriers that the business owners believe exist within the market area, including the means by which those barriers occur, who perpetrates them, and their effect on the development of M/WBEs.

#### ***A. Anecdotal Evidence of Active or Passive Participation***

*Croson* authorizes anecdotal inquiries along two lines. The first approach investigates active government discrimination or formal acts of exclusion that are undertaken by representatives of the local government entity. The purpose of this examination is to determine whether the government has committed acts that bar minority and women business owners from government contracting opportunities.

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<sup>1</sup> *Croson*, 488 U.S. at 509.



The second line of inquiry examines the government’s “passive” support of exclusionary conditions that occur in the market area into which its funds are infused. “Passive” governmental exclusion results when government officials knowingly either use public monies to contract with companies that discriminate against M/WBEs, or fail to take positive steps to prevent discrimination by contractors who receive public funds.<sup>2</sup>

Anecdotal accounts of passive discrimination delve, to some extent, into the activities of purely private-sector entities. In a recent opinion, the Tenth Circuit Court of Appeals has cautioned that anecdotal accounts of discrimination are entitled to less evidentiary weight, to the extent that the accounts concern more private than government-sponsored activities.<sup>3</sup> Nonetheless, when paired with appropriate statistical data, anecdotal evidence that the entity has engaged in either active or passive forms of discrimination can support the imposition of a race or gender-conscious remedial program. Anecdotal evidence that is not sufficiently compelling, either alone or in combination with statistical data to support a race or gender-conscious program is not without utility in the *Croson* framework. As *Croson* points out, jurisdictions have at their disposal “a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”<sup>4</sup> Anecdotal accounts can paint a finely detailed portrait of the practices and procedures that generally govern the award of public contracts in the relevant market area. These narratives can thus identify specific generic practices that can be implemented, improved, or eliminated in order to increase contracting opportunities for businesses owned by all citizens.

This chapter presents anecdotal accounts excerpted from interviews with businesses domiciled in the Consortium Agencies’ market area. The anecdotes provide accounts of both active and passive discrimination encountered by the businesses attempting to do business with the Consortium and within the market area.

## ***B. Anecdotal Methodology***

Two methods were employed to collect anecdotal testimony. One was the interview technique and the other was a focus group. Oral history is defined by the *American Heritage Dictionary* as “historical information obtained in tape-recorded interviews with individuals having firsthand knowledge.” In-depth interviews have been determined by Mason Tillman Associates to be superior to the other forms of gathering anecdotal evidence—mail or telephone survey or public hearing testimony. It affords the researcher a greater opportunity to garner in-depth accounts of testimony to assess the effects of exclusionary practices on M/WBEs and the

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<sup>2</sup> *Croson*, 488 U.S. at 491-93, 509.

<sup>3</sup> *Concrete Works*, 36 F.3d at 1530 (“while a fact finder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality’s institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions.”)

<sup>4</sup> *Croson*, 488 U.S. at 509.



means by which these practices occur. The in-depth interviews are also structured in a manner that affords M/WBEs a process in which their anonymity can be preserved.

By allowing interviewees to describe in their own words the details of the barriers they have experienced in conducting business, information can be collected as to how barriers occur, who creates them, and how they affect the development of M/WBEs. Thus, the information obtained not only sheds light on the Consortium Agencies, but offers vital insights on future program needs and changes.

Potential interviewees were identified using contract and certification records, community meetings, and other sources. Once identified, interviewees were pre-screened to determine if they operated within the defined market area and were willing to commit to the interview process.

The interviews lasted on average one hour. A set of probes was designed to cover all aspects of business development, from start-up to growth issues, and both public and private sector experiences.

Once completed, the interviews were transcribed and analyzed for barriers M/W/DBEs encountered. From this analysis of the transcripts, the anecdotal report was completed. The anecdotal report describes general market conditions, prime contractor barriers, and the range of experiences encountered by interviewees attempting to do business in the market area generally and with the Consortium Agencies.

### ***C. Focus Group Meetings***

The Consortium also conducted focus groups to provide business owners the opportunity to their experiences working with members of the Consortium and seeking work from the Consortium. The focus groups solicited comments which are summarized at the end of this chapter.

Business surveys were sent to business owners located within the market area of the Consortium who indicated an interest in participating in a focus group. Two focus groups were held on November 6, 2008 at the Dallas Fort Worth International Airport and the Fort Worth Business Assistance Center. The third focus group was held on November 7, 2008 at the Arlington Chamber of Commerce Moritz Family Board Room. The focus groups lasted approximately two hours in duration.

The probes for each of the focus groups included an overview of the Disparity Study process and a question and answer format for businesses to share their contracting experiences. The discussions from the three focus groups were recorded and transcribed.



## **II. BUSINESS BARRIERS**

### **A. Racial Barriers**

The interviewees reported incidences of racial prejudice encountered when working for some Consortium Agencies and within the market area. Racial discrimination restricts the opportunities of minority contractors at various points in the bidding and contracting process. Minority contractors who managed to obtain the skills and financing necessary to start their own businesses report confronting discrimination in attempting to bid for, obtain, and perform construction contracts.<sup>5</sup> Race is identified as a significant factor in the decision to select a vendor.

A minority female owner of a professional services firm explained why she believes that her race has been both a positive and negative factor in the contractor selection process:

If you are in the public sector and they need to have minority participation on the job, it's positive. [But if] you go out in the private sector, people are quick to do business with their own race.

A minority male owner of a professional services firm explained that he believes that minority businesses are unfairly stereotyped:

These agencies, City of Fort Worth included, whenever they have a bad experience with one minority firm, they put every other minority in that same category. Once they have one bad experience, that's it. They always put everybody in the same category. If I was the other color, with what I could bring to the table, I'd probably be over in my big Cancun resort by now. It's tough being a minority business owner. All of the good projects never go to us unless our politics are strong.

A minority male owner of a professional services company reported on what he believes is the attitude of some prime contractors toward minority businesses:

When some general contractors are told that a project has a lot of [M/WBE] participation, a lot of them start whining, 'ah, I have to deal with one of those minority firms. Those guys can never finish a job and they are useless.'

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<sup>5</sup> *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Businesses in Federal Contracting*, Anthony W. Robinson, President of the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF). (September 24, 2008).



A Caucasian female owner of a services company with minority employees explained that she believes Hispanics are discriminated against in Texas:

I think there is prejudice against Mexican people in Texas. There is a lot of good old boys, and they run the business. We are in an area where there is a lot of government contracting offices here, so there is a lot of people that come here from all over the country. There is prejudice against Mexicans period. I've had people come here from Michigan and meet my workers and tenants and say 'I've never had to deal with Mexican people.' They're not just laborers, they are real hard workers and they are honest. I know there are bad apples in every ethnic group, but in general I'd have to say there is some prejudice here against Mexican people and I don't allow it in my company. We put them in business and make them successful.

## **B. Gender Barriers**

Unfair treatment toward woman-owned business owners was reported by several interviewees. Some female business owners believed that they have to overcome hurdles that their male counterparts are not subjected to because of their gender.

A Caucasian female owner of a services company reported that it has been a challenge working with DFW International Airport because of her gender:

I have issues right now with DFW Airport. They think that because I'm a woman that I don't know how to run a [service type withheld] company because they got their big union buddies that are their friends, and they want them to have the contract. Some people think that a woman can't run a blue collar company.

A minority female owner of a services company explained that she believes that physical appearance can be an obstacle for some female business owners:

[My gender has impacted me] negatively [as a business owner]. In a lot of aspects, the entertainment and photography industry is male dominated. What I found is if you have a pretty face and a build like a model, you are not necessarily taken as seriously and you have to be a little more aggressive.



A minority female owner of a professional services firm reported that she is also treated differently in her field because of her gender:

Because I run an operation and I work in the computer [industry], I am treated differently because I'm a female. Some meetings I [attend] are all male. It takes extra effort and extra time to build a relationship in the technology field.

A Caucasian female owner of a services company explained why she believes it is still a "man's world":

Because I'm a woman, I have learned the hard way being a widow and a woman that you do get taken advantage of. Sometimes I think if I'd been a man, things probably would have been a little easier. I know things have changed, but I still believe it's a man's world. I don't care how hard women scream; I think men have more clout. We may be capable of doing the same work as a man, but I think we get passed over because we are women. I have worked [as a business owner] hard as any man out there, working twenty-four hours a day. I have literally laid hoses all night long to build my company and get the work done to satisfy my customers.

This same business owner further elaborated on a situation where one of her male customers treated her in a disrespectful manner because of her gender:

And I have one male customer, and I'm being very frank and honest that I will not talk to [one of my customers] because he is a chauvinist. When he calls my company, I will not answer my phone. I let my son handle him. I won't talk with him on the phone at all. He has belittled, humiliated, and insulted me to a point that I will not do business with him. My son does, but I won't. He does not treat my son that way. And he even made the comment that if he wants a job done right, he should talk to a man.

A Caucasian female owner of a construction services company reported that it is difficult for women to break into the construction industry:

A lot of men in the field think that women [do not] know what they are talking about, because it is a man's field. You have to prove [yourself] more than if you were just a man, [because] building and fabrication, welding, and machine shop is their profession. There aren't very many women that can do this



[kind of work]. It's really hard to break in as a woman.

A minority male owner of an architecture and engineering firm explained that he believes that male business owners are treated more favorably in his industry than female business owners:

To be honest, in the Civil Engineering [industry] and [working on] roads and bridges, [businesses] like to dealing with males than they do with the females.

A minority female owner of a services company reported that she is judged negatively as a woman business owner:

I think the mentality [in the past was] that women are weaker in business. I still think that is the standard. When I work with vendors or buyers, the first thing they ask me, 'is your husband part of your company.' And I'm like, no he's not.

### **III. BARRIERS TO BREAKING INTO THE CONTRACTOR COMMUNITY**

#### **A. Difficulty Breaking into the Contracting Community**

Traditionally, large corporations and majority-owned businesses have dominated the public and private contracting sectors. Securing a contract even when having the lowest bid is one reported barrier affecting minority businesses. Repeated use of select contractors is a reported barrier verified by the analysis of some interviewees with agencies contracts. Exclusion from established networks makes it more costly for minorities to compete with non-minority-owned firms.<sup>6</sup>

A minority female owner of a professional services company reported that she has been unable to get work from several Texas agencies:

We have not been able to tap into Fort Worth, Dallas Independent School District (DISD), or the City of Fort Worth.

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<sup>6</sup> *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Businesses in Federal Contracting*, Anthony W. Robinson, President of the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF). (September 24, 2008).



A minority male owner of a construction company reported that he believes that most prime contractors have relationships with certain subcontractors with which they prefer to work therefore, most networking events sponsored by government agencies have not been beneficial:

Typically, most of the general contractors already have their subcontractor in tow if you will. So we didn't have very much luck with [networking events]. We were able to bid, but nothing resulted from it.

A minority male owner of an architectural and engineering firm reported that most of the networking events are not cost effective:

It's not a problem networking, the problem is how genuine is the networking. All of the agencies have gatherings for the big majority firms. This is something that the cities of Dallas and Fort Worth do very well. The problem is [that most agencies] are not genuine with the networking. It costs us more money to go to these meetings than actually what we get out of them. I'll give you an example, most of the time the big companies really have no intent in helping us get on a contract.

A minority female owner of a services firm reported that she believes that the Fort Worth Independent School District typically utilizes the same contractors:

The School District has a tendency to use [the same contractors] that they always use. This is a [disadvantage] for a small business not being as familiar as some of the businesses that have been around for much longer. Just trying to present ourselves as being capable can be a hindrance.

A minority female owner of a professional services company believes that the City of Arlington prefers to utilize the same contractor regardless of the cost:

The firms that the [City of Arlington] selected had nothing to do with cost because they used them all of the time. They charged way more than I did so it had nothing to do with having the lowest bid. In my opinion, it was all about relationship, which is discriminatory in itself. Because if you are African American, especially female and over fifty, the chances of you being able to establish a relationship with the mayor, city manager and council members, is almost impossible to do. When you are working with City government, it's all about the good old network. That is what it's all about in the



City of Arlington. It's who you know and the relationships you have; it has nothing to do with your ability to perform.

A minority male owner of a construction company reported that he has been denied contracts from several school districts even though he was the lowest bidder:

Two to three times I was told that I was the low bidder but not going to get the job because they didn't believe that I had the financial strength to perform the job. One was for Fort Worth Independent School District and the other was Mansfield. They probably just wanted to give it to somebody else. I don't think it had anything to do with my financial strength, because they really didn't have [any knowledge] of my financial strengths.

A minority male owner of a services company reported that he has received very little work from the City of Fort Worth or notifications of contracting opportunities:

It is fair to say that we have had very little, if any, work from the City of Fort Worth other than one part. We have not received any notifications from Fort Worth. And after a year and a half I have to say that we have not been awarded with a single order from the City of Dallas. One particular incident, the contract went to a company in Canada, and we were only five percent higher than the company in Canada. We are taxpayers in the City of Dallas and a certified DBE. I'm a little bit disenchanted because we've not learned how to do business [with either] City. We have spent lots of money buying lunches, attending seminars, and learning how to do business to the point where it is a drain on our time with no return on our investment with the City of Dallas.

A minority male owner of a services company reported that he believes that the Fort Worth Independent School District should do more business with local businesses:

A couple of years ago, my salesman went to Fort Worth Independent School District, and he submitted a comprehensive bid. Our prices were comparable to company [name withheld] located in New York City. The contract went to New York City, and Fort Worth ISD had to pay shipping charges.



A Caucasian female owner of a professional services company reported that she was unable to complete a project because she refused to provide favors to a staff member of the Consortium:

I don't take referral fees, and I don't give gifts to my clients because most of [my clients] are from the government and they should not take money. One of the reasons I did not complete a contract at the City of Fort Worth is because I would not give gifts or take a gentleman that I worked with there to dinner. The same thing happens in the City of Dallas. The IT manager was handcuffed and taken out because of receiving favors.

A Caucasian male owner of a construction company described his frustration in trying to obtain work from the City of Arlington:

I don't know how many people [live] in the City of Arlington. I'm going to guess about 1,000,000. One [service type withheld] gets all [the work]. [That contract] is approximately \$5,000,000 for the City. Trying to get to talk to someone [about getting work], you would have better luck trying to have lunch with the Pope. You are going to sit there and tell me there is not something shady or illegal going on. Why are you even having this Study, it is a waste of time? Everybody is complaining about it. But guess what? Nobody does s\*\*t about it.

A minority male owner of a services company explained why he no longer seeks work from public institutions:

In certain institutions it is just almost impossible to break into the contractor [community]. To the point that we don't spend any time trying to get business because we know that were not going to be successful at it.

A minority male owner of a construction company reported that small and minority businesses are excluded from bidding on projects because they packaged into very large contracts:

Some projects are large and a small or minority business may not have the financial backing to bid those jobs which puts unfair restraints on us. It limits us to bid on different projects.



## **B. Good Old Boys Network**

Many minorities and women find it challenging to crack the closed social and professional “good old boys” network, which they believe deliver a disproportionate number of contracts to a select few Caucasian male contractors. For example, much of the information about upcoming job opportunities is spread through such informal “old-boy networks” which are social networks that deliberately excluded minorities, placing minority-owned businesses at a distinct competitive disadvantage.<sup>7</sup>

A minority female owner of a construction company reported that the City repeatedly utilizes one particular contractor:

It is always the same contractor that wins City work. I’m not exactly sure how they do it, but we hear that there is one company that is always doing the City’s work.

A minority male owner of an architectural and engineering firm reported that he believes that the good old boy network controls the work in his industry:

The construction and the architecture and engineering business is a good ole boy system. We as minority firms always have to prove ourselves. It doesn’t matter whether we have degrees from the same schools. We automatically come in second place. They look at us to say, they really can’t do the job. We have to go in and always prove that we can do the project. It’s like starting ten yards behind everybody else in the race. I do work for the City of Fort Worth and the City of Dallas. I have met with a lot of the project managers who I’m pretty sure don’t want me there as a minority business. But I’m there performing as good as I can to stay there. But there are some circles that I’m not invited to. In the architectural and engineering business a lot of the [contractors] are selected months and months before the contract comes out.

This same business owner provided what he believes is a benefit of belonging to the good old boys network:

Let me give you an example, say the City of Fort Worth is going to do a major project on Main Street. If you have the

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<sup>7</sup> *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Businesses in Federal Contracting*, Anthony W. Robinson, President of the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF). (September 24, 2008).



right relationship with the managers, they will tell you as a consultant in January that it's going to come out even though it may not be [publicly released] for eight months. When the minority company gets it eight months later, he has already lost the job because the [non-minority consultant] has already been doing the necessary things to make sure they get selected.

It's a good old boy system. Qualifications are based on opinion most of the time. Because most of the time when we put in for jobs, we have just as good experience as the next company. But it all comes down to relationships. If they don't know you if they don't have a personal relationship with you, most likely you are not going to get selected over them.

A Caucasian female owner of a services firm reported that she believes that the good old boys network is also entrenched in the private sector:

The private sector is extremely difficult to break into. That is why 90 percent of my business is from the government. There are no laws or guidelines for the private [sector], it's all the good old boys and how much can you wine and dine. Whoever wine and dines the most gets the contract.

This Caucasian male owner of an architectural and engineering firm explained why he believes he is part of the good old boys network:

I believe there are vendors that are more favored than others because of the experience they have with the Fort Worth Independent School District. They know what level of service they are going to get with those vendors, and I would 'not' call it the good old boys network. I consider myself one of the favored vendors.

A minority male owner of a professional services firm reported that he believes that the good old boys network is less prevalent now than it was in the past:

With North Texas Tollway Authority (NTTA) there was time when the same contractor was getting all the work. It would have been somewhere between 2001 and 2005. I wouldn't say it stopped, but it is not as prevalent as it was back in that time period. Different contractors are now being awarded work. I think that somebody started to notice.



A minority male owner of a services company reported that he believes that he is not afforded the same opportunities as other business owners:

I compete with everybody on the same level, and the services I offer are the same. But invariably, we are either shut out or not given the same opportunities as some of the others.

A minority male owner of a professional services company believes that some of the RFP requirements for the DFW International Airport are designed to exclude certain contractors:

On one DFW project, the requirements were so strict it was obvious that they were designed to weed out anyone else. They definitely had someone targeted for that particular project. It was a mystery shopping project at the airport.

## **IV. DIFFICULTIES IN THE CONTRACTING PROCESS**

### **A. Difficulty Obtaining Bid Information**

Several interviewees reported that there is a problem getting bid information from some of the Consortium Agencies. A minority female owner of a construction company reported that she believes that the City of Arlington does not publicly solicit all bids:

The City of Arlington had a good size job that required the same type of work that we do, but we never knew about it until we saw people working there. We know that our main supplier is the one who supplies them. They sent the main supplier the invitation. We are all supposed to get an invitation to bid on projects.

A minority male owner of a professional services firm believes that the City of Arlington as well as prime contractors only solicit bids from minority firms when there is a minority participation goal:

They are not going to contact you unless there is a goal to be filled. If it's not a goal to be filled, the City of Arlington or majority firms do not call. They only call for that specific reason. I have never known the City or anyone to call you if it's not based on some goal they need to meet.



A Caucasian female owner of a services company reported that she has experienced difficulties obtaining bid tabulations from the City of Fort Worth:

I have difficulty getting bid tabulations after a bid has occurred from the City of Fort Worth. If I do not attend a public bid opening, I still want to know the bid tabulation of every company that submitted a bid and their pricing.

A minority female owner of a services company reported that she believes that DFW International Airport could do a better job of rotating small businesses on their vendor list:

Unless you have a good relationship with the purchaser [it's hard to] get those inquiries. They are going to call the people they like not necessarily the people that have quality products or have good customer service. The airport is supposed to have a list of companies that [provides] janitorial supplies. They are supposed to rotate that list, and that's the way to do it. I don't think these agencies should call the same three people all the time. I think that occurs a lot. They should have a rotating schedule and someone there to oversee and make sure it is being rotated.

A minority female owner of a services company reported that she never receives bid notices from the City of Fort Worth even though she is on their bidder's list:

I am on Fort Worth's vendors' list, and I don't ever get bid notices. I don't know if there is a reason.

A minority female owner of a professional services firm reported that she also has never received a bid notice from DFW International Airport even though her business is on the vendor's list:

We went to DFW looking for new business and we were put on their [vendor] list. I went to Fort Worth several times, and after two years I stopped. We just never heard from them.

A Caucasian male owner of a construction company reported that he does not always receive bid notices from the City of Fort Worth:

Sometimes the City will mail out an invitation to bid and sometimes they don't, and I hear about it and I will call them up to get one.



This same business owner reported on his difficulties with DFW International Airport's bid specifications:

The reason we don't [bid with] the Airport is because of their two-inch bid specifications. It's just ridiculous. I mean someone needs to sit down and look at [their requirements]. They ask for stuff that don't have a d\*\*\* thing to do with [the service we are providing].

A minority male owner of a professional services company reported that he believes that North Texas Tollway's pre-bid meetings are intentionally non-informative:

In terms of NTTA, I think that one of the things that killed me about their solicitations was that for most projects there is a pre-bid. The pre-bid is intended to inform those that are interested in bidding projects and provide specific information relative to the project. It allows the bidder enough data so they can successfully assess risk, exposure, and cost in submitting a bid that they can live up to and perform. But at their pre-bid [meetings] they want to get out of there as quick as they can and say as little as possible. It just confuses me why such a successful government entity is so close-mouthed about details relative to the work that they are soliciting and then they wonder why people don't bid.

Historically, this particular entity is so tight-lipped and doesn't want to say anything. They will throw some documents at you, and people are afraid to ask any questions. They will immediately close the session and say, 'The pre-bid is completed for the day.' The only message that it sends is that we either have somebody selected for this or there are only a few people we think who are going to qualify.

This same business owner explained why he thought a bid specification issued by North Texas Tollway Authority was cost not efficient:

Recently there was a NTTA project that we actually were prepared to bid but then decided not to based on the scope of the work. There were requirements in the project that required the installing contractor to carry a cost for repairing damaged duct banks that were damaged by others and also to carry cost in the bid for existing underground pathways that were installed by others but may have become damaged after installation. But



they did not give an option to survey the underground [pathways] provided by others, and if they are broken, you got to fix them at your own cost. To fix these duct banks and underground raceways could be substantial, especially if some of these duct banks are concrete encased. The exposure that we would take by carrying a loss is so great that in this particular case we elected to no-bid the project.

A minority male owner of a construction company explained the burden on small business owners for purchasing costly plan specifications:

A lot of entities like DFW and Dallas Area Rapid Transit's (DART's) plans are \$300 to \$400 which is money that I don't want to spend on drawings when I'm competing for a project that 20 other contractors are bidding on. It's hard to get the drawings because most of the general contractors will say you can go to their facility to look at the drawings. But it's not the same as having the drawings at your own place. Trying to get everything done in two or three days and spend two to three days sitting in someone else's plan room trying to get the job [is not productive].

A Caucasian female owner of a professional services company reported that she often receives bid notices for services that she does not provide:

I never get bid notices. I got one recently from The T and the City of Dallas but not at all for my area of expertise. They will be for cementing or construction work, a waste. I don't get anything that I could bid on, and I don't know where those [bids] are going.

A minority male owner of a professional services company reported that some specifications that require specific brand names can be an obstacle for small business owners:

I think it's fairly common knowledge that some of these agencies' specification or technical requirements are written so precisely that it is deliberately tailored to a single company. An example I can think of is at the airport. They wrote technical specifications for only one item [from a] very specific manufacturer. We've seen on a couple of occasions where they do a specific requirement for a brand.

Such as when they specify [a certain] fiber, and there's only one



company in the whole area that is certified to do that. Also, when you put that in the bid up front, you know there's no competition. Nobody can do that, and we're all aware that there is only one company that can do that.

A minority male owner of a construction company reported that he had to pay a fee to obtain bid information from the City of Arlington:

The City of Arlington had a program where you had to buy into a membership in order to participate in the bid proposal process. It limited [our ability to bid] because of the cost of having to join the membership organization. It put us in an unfair position.

***B. Inadequate Lead Time to Respond to Bid Notices Limits a Business from Submitting a Comprehensive and Timely Bid***

The failure to provide adequate lead time to respond to a request for bid greatly diminishes the chance of minority and woman-owned businesses to successfully bid. Many of the interviewees reported that they receive inadequate time to respond to a request for bid.

A minority female owner of a construction company reported that some prime contractors only solicit bids from M/W/DBEs to fulfill good faith effort requirements with no real intent of utilizing their services:

I believe that 40 percent of the [prime] contractors who [solicit] bids are late with only a day or two [to respond]. They are not serious about doing business with minority or women-owned firms. However, in order to get opportunities with the City of Fort Worth they have to comply with the good faith effort policy so that's why we even get a notification.

A minority male owner of a services company reported that he has had inadequate lead time from Fort Worth Independent School District to respond to a bid:

I have gotten bid requests from Fort Worth Independent School District, and it would come in on a Monday and it would be due on a Thursday. I would have to rush to [submit a bid].



A Caucasian female owner of a services company reported that her company has received only a few days to respond to a bid request which she believes can put her at risk of miscalculating her quote:

Sometimes we will receive a bid packet, and you have four days to prepare it and that's not really adequate time. Sometimes they don't realize their contract has expired and so they have to hurry up and get the documents together because they're paying somebody month to month at a higher rate. We have to cancel other obligations to be able to prepare and quickly put together quickly [a bid]. You take a chance on [mis]calculating when you have to rush to get a bid out.

A minority female owner of a services company reported that she has received as little as a day to respond to a bid request:

I would like at least ten days to put a bid together. I'll get a request for quote that is due back that same day at five p.m.

A minority male owner of a construction company believes that some bid notices are purposely sent late so prime contractors can work with their preferred subcontractor:

You may want to bid on [a project], but [sometimes] we don't get it in time to [submit a bid]. Most of the general contractors have people they like to work with, so they are going to get them involved first before it gets to anybody else.

A Caucasian female owner of a services company reported that she needs at least eight to ten weeks lead time to prepare a bid because of the type of product she sells:

I would consider it unrealistic lead time [because] the type of items that I sell a distributor does not keep on the shelf. The lead time [I would prefer] is eight to ten weeks. The airport or the end user doesn't have a grasp on the understanding of the lead time that is [needed] as far as our industry is concerned.

## **V. CERTIFICATION PROCEDURES**

The North Central Texas Regional Certification Agency (NCTRCA) certifies DBEs, MBEs, and WBEs for 19 member entities including five Consortium Agencies. The City of Fort Worth, DFW International Airport Board, North Texas Tollway Authority, The T, and Fort Worth Independent School District are all member entities of NCTRCA. The interviewees



reported on their experiences certifying with NCTRCA.

A Caucasian female owner of a services company reported that she had difficulty obtaining information when she tried to get certified by NCTRCA:

I had a hard time getting through to anyone and I had to be pre-qualified before I could be certified. I needed to ask them some questions. I had difficulty getting through to the right people to get my documentation completed. It took a couple of months to get certified. And just to get certified is excessive.

A Caucasian female owner of a services company reported that she has been unable to get certified as a M/WBE because her husband is also Caucasian:

They have these regional certification agencies that do all the certification for all the government entities. They trust this agency to do the work for them. They won't certify me because I'm married to a White man. I've been turned down twice, and it took 40 hours to put the material together for the certification.

A Caucasian female owner of a professional services firm reported that the DBE re-certification process requires excessive paper work that has to be repeated each year:

To be DBE certified, you have to go through so much paper each year to get re-certified, and I think that's just a big pain.

A minority female owner of a professional services firm was frustrated that it took six months for her to receive her certification from the NCTRCA:

I think the NCTRCA is understaffed. It took me six months to get my certification. It wasn't until we reached out to them that they said that our application wasn't finished. And we got them all of the information and then it still took a long time after that and twice they lost our addendums to our application.

A Caucasian female owner of a services company explained that her firm was unfairly denied certification:

We were certified as a female-owned business. We reached the point in our growth cycle where we were told that we were too big to be certified. We were [certified by] the North Central Texas Regional Certification Agency. We were told that our



total gross revenues exceeded the limit, even though we were still considered a small business they could no longer certify us. I had a little bit of a problem with that because certification is based on ownership, not volume of business. The statement made to me was that because of our size, we no longer had difficulty obtaining financing for any project. Therefore, we didn't need to be certified.

A minority male owner of a professional services firm reported that NCTRCA's certification process is too time-consuming for a small business owner:

The process for getting the certification from the NCTRCA has always been one of those things where you start looking at the process and the paperwork that is requested, and you just want to throw it away. It always seemed like they try to increase certification of minority businesses, but yet we almost need a full-time position to go through all the procedures and paperwork to get certified. If you put the amount of hours together as a business owner, it doesn't seem like it's even worth it. It's not guaranteed that you are going to get any business out of it. So all you are basically trying to do is get a piece of paper that certifies you as being minority or women-owned.

## **VI. FINANCIAL BARRIERS**

### **A. Difficulty Obtaining Financing**

One of the most significant hurdles for minority and women business owners are obtaining business capital. Studies show that among firms with the same borrowing credentials, minority-owned firms are approximately 20 percent less likely to obtain venture-capital financing than comparable non-minority-owned firms and 15 percent less likely to receive business loans.<sup>8</sup> Additionally, a study that compared Caucasian-owned businesses with African American-owned businesses with the same amount of equity capital found that Caucasian-owned businesses typically received loan amounts three times larger than those received by their African American-owned counterparts.<sup>9</sup>

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<sup>8</sup> Grown & Bates, *Commercial Bank Lending Practices & the Dev. of Black-Owned Construction Co.*, Journal of Urban Affairs, Vol. 14, No. 1, 34, (1992).

<sup>9</sup> T. Bates, *Commercial Bank Fin. of White & Black Owned Small Business Start-ups*, Quarterly Review of Economics & Business, No. 1, 79, (1991).



A minority male owner of a construction firm reported that bonding requirements constitute a major obstacle for his business:

The City of Fort Worth has a fairly low [bonding] requirement, I think it's \$25,000 where several of the other entities have either \$50,000 or \$100,000 and for me that has been a barrier. [Lack of] financing always affects [small businesses] one way or another. It impacts [our opportunity] to bid for jobs and impacts [whether we] are able to bond in terms of meeting insurance requirements for jobs.

A minority female owner of a construction company reported various reasons she believes her company has not been able to obtain financing:

My personal credit score was not high enough. Another time, our business net profit wasn't high enough. And I was told our receivables didn't look good. They felt our receivables were not coming in fast enough. We do not have secondary or backup resources to handle our obligations, including payroll and purchasing of equipment and supplies. I think this is an industry wide [problem] because they are [excluding] a group of qualified contractors [from] the opportunity to participate in public and government sector opportunities due to their inability to [meet the] bonding [requirements].

A minority male owner of an architectural and engineering firm believes that the decision to qualify a business for financial assistance is mostly subjective:

I visited numerous banks about lines of credit that is needed to run this type of business. It is difficult. I have talked to some of my other counterparts that are non-minorities, and they appear to have had an easier time to get funding. Once you turn in your financials to the bank managers, it still comes down to them saying yea or nay. [However], it is subjective in part [when they] qualify [business owners]. It's not just a matter of one plus one equals two.

A minority male owner of a services firm reported that the financial institutions to which he applied for financing were not receptive to a small minority business:

Banks don't seem to be too receptive when you come to them with signed contracts. They are really not interested in giving loans to small businesses. Even though we have a contract in



place, I did not want to put up my own collateral. I wanted to try to use a bank line of credit as opposed to putting up my personal funds or securities as collateral. But unfortunately, I wasn't able to do so. Basically, I was forced to [use my personal funds]. I had a money market and a CD in that particular bank. I feel that particular bank does not embrace small businesses or minorities.

A minority female owner of a services firm described the negative impact that lack of financing has had on her company's growth:

We are not able to take on some of the projects that we had in mind. And we are not able to hire employees or grow the business.

A minority male owner of a construction firm reported that he has been unable to obtain financing for his company because of his inability to provide collateral that is at least equal to the amount of monies he is trying to secure:

Before it was hard [to get financing], and right now it's worse. I haven't been able to get lines of credits through the banks because either they don't loan to contractors or if I want \$100,000, I have to be able to put up \$100,000 worth of collateral. So it's not easy to get a line of credit with the bank. They do not loan money to subcontractors. If I could get financing, I could look for bigger jobs and try to obtain bonding. That is pretty much what is choking our business, and we are not able to grow because we don't have the working capital to approach bigger jobs.

A Caucasian female owner of professional services firm reported that she also did not want to put up her personal funds to secure a loan for her small business:

Things got pretty rough at one time, and I tried to seek out a small business loan but I had to put up my equipment as collateral and I did not want to do that. But I did not want to jeopardize my company in any way. So I took the money out of my own savings to keep my company going.

This same business owner reported on the impact that lack of financing has had on her personally and professionally:

It nearly gave me a heart attack. I lost some employees,



[because] it is very hard to keep permanent employees in this type of business unless you really get out there in the trenches [to get] some major contracts coming in to keep people busy.

A Caucasian female owner of a construction company believes that she did not receive a loan because of her gender:

They don't want to lend me money because I was the only owner, woman-owned, and it was my only income. That wasn't good enough, [it's] very difficult. I went into the bank that did SBA loans, and the guy was more interested in golf. So I went to the president of the bank because the way he treated me regarding his attitude about giving me a loan. The president said that she was [not] going to back him, but I didn't get a loan.

A Caucasian male owner of a construction company believes that one needs to have a substantial amount of money before most financing institutions will lend money to small business:

They make it awful . . . to get a loan. If you can prove you don't need it, [then] they will give you all you want.

A minority female owner of a construction firm reported that the major reason she has not been able to obtain financing is because of her personal credit history:

I haven't been able to establish a credit line. We [sometimes] get paid over 30 days [from submittal of invoice] from certain clients which puts us in a bind every now and then. And as far as a credit line, we haven't been able to establish it because my personal credit history is not the best, and that's why we have been denied in the past. I don't feel that should be a sole reason for us not getting a good credit line. One of our biggest issues is not having a credit line.

This same business owner explained that even though she has substantially increased her business revenue, she is still unable to obtain a small loan:

I have established a good relationship with all my clients, and I have got a good cash flow. And I've got a growing company where we were able to demonstrate that we went from \$64,000 to almost \$3,000,000 in revenues. And I'm not asking for a major line of credit, [just] \$10,000. I even offered to put up



collateral, and they still denied it to me. I don't think I was treated fairly. I'm very disappointed with banks right now.

A minority male owner of an architectural and engineering firm reported that he has to utilize his home equity line of credit and credit cards to keep his business solvent:

Initially, we had maybe three or four projects going and sometimes would need money for cash flow. So I killed my credit cards which I had ran up and my home equity line of credit. We were able to bring some of the projects to conclusion.

A minority male owner of a professional services firm reported that he and his business partners were devastated because they were unable to obtain financing during a rough time:

It affected me incredibly. It almost killed my partner. The emotional drain that went on for weeks and the emotion when I saw him every day was very difficult to see. My other friend, I don't know how he actually got over it but he's still kicking. I think that entrepreneurs have a survival instinct. We got through it, and I know it would have been a whole lot easier to go through that transition if the finance was available.

A minority male owner of a professional services firm reported that insufficient cash flow has had negative effects on his small business:

We did not qualify for any specific grants or any other kinds of loans. My personal credit and my partner's credit was really good. But they said we [the business] had not established any credit. It affected us very badly because we had no cash flow. Finally, we had to sell our property at a huge loss.

A minority male owner of a services company reported that performance bond requirements have been an obstacle for his small business:

Sometimes the conditions put in performance bonds is really difficult [to meet] for a small company under \$12,000,000. Performance bonds have been a serious issue to overcome.

A minority male owner of a services company also reported the hardship that obtaining bonds can cause on small business owners:

The City of Fort Worth in my opinion really caters to businesses



that have been in business for over ten years. For example on a \$300,000 [project] you [will] need a cashier's check or a surety bond through an insurance company at five percent of your bid. It's hard for a small business to have the City to hold their cashier's check for sixty days; that's \$17,000. And many small businesses usually are using all their revenue to generate more business.

## ***B. Late Payment by a Consortium Member***

Many interviewees reported that some of the Consortium Agencies failed to pay them in a timely manner. Late payments are particularly onerous for minority and woman-owned businesses and limited access to financing with cash flow problems.

A minority male owner of an architectural and engineering firm reported that receiving timely payment from State agencies has been the "most challenging part" of his business:

In the architectural and engineering [industry] I have had a very difficult times getting these agencies to pay within thirty days. That is the most challenging part of our business.

A minority female owner of a construction company reported that she and her colleagues have experienced late payments from DFW International Airport:

I have experienced [late payments] with DFW in addition to my colleagues. They just have a slow payment process.

A Caucasian male owner of an architecture and engineering company reported that the City of Fort Worth's bureaucracy is the major reason it is late paying its invoices:

The City of Fort Worth can sit on invoices forever. We know we are going to get the money some day, but it just never seems to come. There is two to three layers of people between me and the person [responsible for] writing the check. This is a very frustrating and time-consuming process.

A Caucasian male owner of a construction company also reported that the City of Fort Worth is typically late paying invoices:

The City of Fort Worth is late every month. We always complain.



A minority female owner of a construction company reported that some of her colleagues have been forced to close their businesses due to late payments:

DFW Airport and the City of Dallas are very hard to collect from. Their payments take 30 to 60 days. We don't have a very good cash flow because every time we do a job, we have to wait [for payments]. I have seen a lot of construction companies close their doors, because they can't grow or maintain [their business].

A minority male owner of a construction company reported that it took 60 to 90 days to receive payment from DFW International Airport:

We did work at the airport, and their [payment] system took almost 60 to 90 days to get paid. It was very inconvenient for us and a lot of other people.

A Caucasian male owner of a professional services company also reported on receiving late payments from DFW International Airport:

Large companies like DFW [Airport] are horrendous and make us not want to work for them because it takes sometimes 120 to 150 days for the initial payment. The invoicing process is terrifically ornate. It takes moving bankers boxes of invoices to get anything paid; sometimes it's cheaper not to do business with them.

This same business owner reported that as a prime contractor he has witnessed the hardships those small businesses have endured due to late payments from DFW International Airport:

A large firm with cash reserves can get through it. But for a small firm, especially a small subcontractor on a pay type of arrangement does not have the cash reserve and didn't sign up to be the first bank of DFW to help finance the job, I think it's painful. I [know of] many supplier subcontractors [that went] to the airport and complained that they weren't being paid. This was in fact true but we as a prime [contractor] hadn't been paid, therefore they hadn't been paid. It's very onerous and difficult for small firms because of that.



### **C. Late Payments by Prime Contractors**

Subcontractors' experience delayed payments when the governmental agency pays its prime contractors late. Many interviewees reported negative impacts late payments had on their small businesses.

A minority male owner of an architectural and engineering firm reported that his late payment from a prime contractor was due to the City of Fort Worth:

I had a couple of occasions where the wait on my payment was pretty long, [because] the prime contractor was waiting to get paid from the City of Fort Worth. This is why we have to go to banks for [financing] to get cash flow.

A minority female owner of a construction company explained that she is typically paid late by most State agencies:

My experience with several of these entities is they have a very long pay cycle. And I don't have the resources to expand my business, continue with other projects, or show a positive return on investments.

A Caucasian female owner of a professional services company reported that recently she has waited ninety days to receive payment from prime contractors:

Usually [payment is received ] on a thirty-day net basis. But in the last couple of years a lot of companies paid [late]. And sometimes I waited ninety days to get paid. I can't keep a small company going if I don't have a tremendous amount of small contracts.

A minority male owner of a professional services company reported that he has waited 120 days to receive payment from some prime contractors:

I have received late payments from [prime] contractors. These guys were exceeding 120 [days]. This affects cash flow, and it puts a tax on the profit margin that you are [supposed to receive] on the project. I mean we are not a bank and the cost to carry [the debt] past 120 days becomes a real expense at some point. We were affected in terms of our ability to continue staying in operation.



A Caucasian female owner of a professional services company reported that some prime contractors wait four to five months to respond to her payment invoice:

After we submit our invoices to contractors, it takes four or five months [for them] to pay us.

A Caucasian female owner of a professional services company also reported that prime contractors are typically untimely when paying their subcontractors:

It takes a long time to get paid. Prime contractors probably would not consider their [payments] late. Once they get the invoice, it typically takes 90 to up to 120 days [to receive payment]. I think that is the joy about being a subcontractor!

## **VII. COMMENTS ABOUT THE GOVERNMENT UNIT'S M/W/D/BE PROGRAMS**

Each of the Consortium Agencies has implemented a business enterprise program or enacted policies aimed at increasing the participation of disadvantaged, small, minority, and woman-owned businesses. The interviewees expressed their opinions regarding the Consortium Agencies' business enterprise programs. Most business owners felt that the programs were valuable but in need of enhancements.

A minority male owner of a construction firm explained that the intent of the M/WBE program is not being fulfilled:

Race does play a part in business. There is a serious game being played with the whole minority women- owned business issue. When 85 to 90 percent of M/WBE [participation] goes to White female-owned business, I think the spirit of the law and effort of the M/WBE [program] has gotten lost in the process. If my race wasn't an issue, then African American and Hispanics would receive more of the business. I think the spirit of the law is being lost when ethnic minorities get ten percent of M/WBE participation, and that's not a made up number, that is a specific number we got from the City of Fort Worth. They did their study and reported a break down for what minority businesses was getting. It was ten percent to minorities and 90 percent to White families.



This same business owner believes that the City of Fort Worth's M/WBE program is valuable for minority and women business owners:

The [City of Fort Worth's] program is absolutely valuable. It typically provides some assistance to minorities and women to get jobs and business opportunities. And without a watch dog agency I don't know what would happen.

A minority male owner of an architectural and engineering firm also believes that the City of Fort Worth's M/WBE program is valuable:

The City of Fort Worth's program is very valuable. I think it's an outstanding program.

A Caucasian female owner of a construction company reported that the Fort Worth Transportation Authority's (The T) DBE program reaches out to qualified DBEs to work on the projects:

The T's DBE Program is valuable. I think that they actively try to engage all the DBE contractors that are qualified to do the work that they need to have done. They give us an opportunity to bid on work as long [as] we're capable to do the work. It's a win-win for everybody.

A Caucasian female owner of a services company believes that some M/WBE program managers do not want to assist her because she is not a minority:

I'm sure that most people aren't really interested in [working with] M/WBEs. But they work on the buddy system, and there are entities that are ran by minorities and they don't want anything to do with me because I'm a White woman. I've even been told that, 'you're not Hispanic, you're not Black so you are not a minority to us.' I am certified as a woman-owned disadvantaged business, and I'm having difficulty with that right now.

This same business owner also reported that the City of Fort Worth's M/WBE program is valuable for new business owners:

But I would say that the City of Fort Worth's M/WBE program is valuable. I think they are improving, but there are areas that need improvement. The City offers help in preparing bids which is [for] owners just starting their business.



A minority female owner of a services company credits The T with reaching out to DBEs about including them in their contracting opportunities:

The T is [proactive] in reaching out to DBEs about [contracting] opportunities. I sense eagerness from them to make sure we are included and to make sure that we get a piece of [the work].

A minority male owner of a services company reported that the City of Fort Worth's M/WBE program lacks enforcement capabilities to penalize non-compliant prime contractors:

I have seen a trend where particular companies send out mass emails, make mass phone calls to meet the [City of Fort Worth's good faith effort] criteria. But with conversations with colleagues nobody ever gets any business, we just get phone calls and emails. I think their program is valuable but it is lacking in enforcement capabilities. I don't think they have the capability to stop a contract or penalize a company.

A minority male owner of a construction company explained why he believes that M/WBE participation goals are needed to sustain minority businesses:

It is very important for us to have M/WBE participation goals. Because as it is, it's really hard for us to get work just relying on the general contractors. M/WBE programs are one of the ways we can get our feet in the door with some of these contractors to provide them with quality work so they can keep offering us work.

A Caucasian male owner of a services company explained why he supports M/WBE programs in general:

I don't have any trouble with the goals and ambition of M/WBE programs. At some point I would hope that they would be deemed unnecessary. I know people that have done extremely well because of these programs.

A minority male owner of a construction company believes that the City of Fort Worth's M/WBE program should be used as a model for other government entities:

I wish everyone followed the same [M/WBE program] model as the City of Fort Worth and was as proactive as Fort Worth. We might get a little more attention being a minority. I think



they adopted a policy to help the disadvantaged business owner, and they have done it very well and organized. Their program is very valuable because they are proactive. I think all other municipalities just give lip service and don't really push [their program] forward. When you're dealing with Fort Worth, you are pretty much assured they're giving you what they mean, and that's what your going to get. It's been a very positive relationship performing as a minority [business owner] with them.

A minority female owner of a construction company reported that as a prime contractor for the City of Fort Worth, she was required to adhere to strict subcontracting reporting requirements:

The City of Fort Worth's program is very strict on making sure that [prime contractors] follow up as far as [program requirements]. I've worked as a subcontractor and a general contractor and in both occasions I've had to submit proof of paperwork that we did use a subcontractor. We had to verify that the subcontractors were used and were paid before we could proceed with the next month's billing time period.

A minority male owner of a professional services company explained what he believes are the pros and cons of minority and women business enterprise programs:

I believe any [entities] minority participation programs can be valuable to minority firms in that they solicit minority firms that have the capacity to perform. I don't believe in entities that have goals that only do nothing more than drive minority participation for nonperforming vendors.

A Caucasian male owner of a construction company reported that as a prime contractor, he believes that NTTA's program is instrumental in assisting minority businesses with building their capacity to perform heavy civil construction work:

I think NTTA's program is valuable. It's important to create opportunities and more importantly [increase] capacity in the M/WBE contracting community. As a prime contractor, we self-perform a majority of the work, and we find there's not a large pool of M/WBE subcontractors that do heavy civil construction self-performing.



A minority male owner of a professional services firm reported that he has been offered monetary compensation for his minority participation without providing any services:

I am aware of [agencies] that have stated that if you run your bid through me, I can turn it into minority dollars for you and get your participation for a fee.

A minority male owner of a construction company explained that his bid is shopped by some prime contractors:

There is a lot of [bid] shopping in this business. A lot of times we give a price to a general contractor, and they turn it around and say, 'Well these contractors bid this price, do it for this price.

A minority male owner of a construction company believes that most networking events do not result in tangible benefits:

Some of the people at the networking meetings are general contractors, and you can meet 10 or 100 people. They will screen you and pre-qualify you based on how much money you have in the bank or if you are bondable. It's just a way to meet people, and there really is not access to work.

And this minority male owner of a services company also believes that the public sector is more amenable in working with minority contractors:

The public sector is much more inclusive on giving small minority contractors larger contracts. The private sector seems to be less likely to give you opportunities. Where in the public sector if you have a track record and you have met all the basic criteria, they will you a [bigger] opportunity where the private sector is more reluctant to do so.

## **VIII. POSITIVE STATEMENTS**

Many interviewees reported on positive experiences they encountered with the staff of the Consortium Agencies.



A minority female owner of a construction company explained that a City of Fort Worth employee was helpful when she was seeking plans to prepare a bid:

I had problems getting plans for a bid with the City of Fort Worth. [Name withheld] was very helpful. Someone in her office originally told me about the project, but I could not find the plans and specifications. I went there and she helped me find the department, the project manager, who then in turn helped me get the plans. Up to that point I had not been able to determine where to get plans or specifications.

[Name withheld] at the Fort Worth Office took the initiative to actually call different departments when I was looking for a bid opportunity. So, rather than just telling me that she's not aware and good luck, she actually made the effort to help find the information. And there is a lot of training available at the Fort Worth Business Assistance Center.

A minority male owner of an architectural and engineering firm reported that the City of Fort Worth pays its contractors on a timely basis:

I will say that the City of Fort Worth is one of the best paying agencies. I always get paid within my thirty days. I love to have a contract with them, because they pay quickly. The City of Fort Worth will even fight with the prime consultant to pay the subconsultant, so I think that is a strong point about Fort Worth. Also, there was a manager with the City of Fort Worth that was very helpful. He brought me in, and he said this is what we expect and this is how we like it to be done.

A minority female owner of a services company reported that she personally receives calls informing her of upcoming bid opportunities at The T:

[Name withheld] at The T specifically calls us for bid projects. I always get personal phone calls when somebody wants me to bid on something.

A minority female owner of a services company believes that DFW International Airport does a great job increasing minority participation on their contracts:

The international airport does a fantastic job of [increasing] minority participation, better than any [other] agency that I've dealt with.



A minority female owner of a professional services company reported on two agencies that she believes does a good job in providing contracting opportunities for minority businesses:

DFW and NTTA are [both] very helpful. They [provide] opportunities to minority companies and I think that is a good thing.

A Caucasian female owner of a services company reported that she has benefitted from a positive business relationship with DFW International Airport:

DFW is an awesome company, especially with the personnel we work with. They are very timely with their payments.

A minority male owner of a construction company spoke highly of the City of Fort Worth. He reported that it disseminated comprehensive bidders' lists as well as provided him with contracting opportunities:

Fort Worth is the most proactive municipality as far as putting out comprehensive bidder's list. It's much more pleasurable doing business with City of Fort Worth than the City of Dallas and other small municipalities, because they have their act together. They are constantly in contact with us and give us plenty of opportunities to do business with them.

Most of the correspondence we receive from Fort Worth, whether it's email, there is a contact person that's well informed when we call with questions. At other municipalities you don't always get the right person. Even though their name may be attached to a project when you call them, they are either unavailable or not handling that project anymore. You get switched around.

A minority female owner of a professional services company also reported on the services the City of Fort Worth offers to new and small business owners:

The City of Fort Worth provides specialized counseling, classes, and programs designed to help people start a business and write a business plan. [They also provided information on] where to look for creative resources getting traditional financing. [Through our participation] at the entrepreneur expo at the City of Fort Worth we obtained very promising leads.



A minority male owner of a professional services company reported that a manager at NTTA was helpful when he sought work from the agency:

[Name withheld] at NTTA was helpful in that he invited us to solicit and bid on his projects. [He also told me] that you are a qualified contractor, and you have done good work for us in the past. What is it going to take for you to bid [with] us again?

A minority male owner of an architectural and engineering firm also spoke about the services the City of Fort Worth provides for small business owners:

The City of Fort Worth pays relatively on time compared to other cities. Maybe every two weeks unlike most others [that] go thirty days and beyond. I think that is a very positive thing for the City of Fort Worth. The benefit is [that we can] pay our suppliers and subcontractors on time, so that they don't keep calling and knocking [on our doors]. [We have had] a whole bunch of positive experiences with the City of Fort Worth. Their M/WBE office is constantly contacting us for workshops.

A Caucasian male owner of a construction firm explained why he is satisfied with NTTA's procurement process:

I've been very satisfied with how NTTA shares information regarding opportunities. I think it's easy to track their opportunities, and we certainly are notified in enough advance when they have meetings for upcoming procurement opportunities.

A minority male owner of a services company credited the City of Fort Worth as the one agency that has been instrumental in helping grow his business:

One thing positive is that a small business can take advantage of all the educational classes that are offered by the City of Fort Worth, the Small Business Development Corporation, and the SBA. This has been one of the biggest reasons for my company's growth.

This minority male owner of a construction company also spoke highly of the City of Fort Worth:

As far as the municipalities in the metroplex, the City of Fort Worth, even as large as they are, stands out to be one of the



better agencies as far as timeliness and getting information out to us.

A minority female owner of a professional services company spoke positively about her professional relationship with NTTA:

I was contacted for a subcontracting opportunity with NTTA, and I'd worked with them in the past on other projects. I found that NTTA is very open and understands the importance of M/WBE companies and what the expertise they can lend to the process. I think the NTTA does a very good job. Recently, they had a bid coming up for marketing services, and they did a really good job of communicating.

This same business owner also spoke about her experience with DFW International Airport:

Presently, they have done a good job of outreach to notify as many people as possible. I think DFW Airport also does a fairly good job of it. I see their postings quite often in public places. I have seen them in mass email distributions at various chambers of commerce, and you don't necessarily have to be a member to see their postings.

A minority male owner of a construction company reported that he liked working with DFW International Airport, because it was helpful when he sought assistance:

You can work with the DFW; they help you figure the problem out instead of throwing the problem back at you.

A Caucasian female owner of a professional services company reported that a director at The T was very helpful on a project on which she worked:

There are a lot of managers at The T that were helpful. I think [name withheld] was extremely helpful in getting the project done, and [name withheld] HR Director was extremely helpful.

A minority male owner of a professional services company reported that he is unaware of the Fort Worth Independent School District's M/WBE program:

I have never [heard] from [anyone] at Fort Worth Independent School District of their [M/WBE program], and I wouldn't know where they are or who they are. I'm sure that they have [a program], I'm just not aware of it. As opposed to the Dallas



school district. They call us and we are on a first [name] basis. I have never had any interaction with the Fort Worth School District MBE guys.

A Caucasian female owner of a construction company reported that her relationship with DFW International Airport has been very beneficial for her small business:

DFW's program has been fabulous for my business! It's been great. I have been in business twenty-five years. They have been much more welcoming and helpful. I won't ever go back to the highway industry.

A Caucasian female owner of a services company believes that DFW International Airport is committed to increasing the participation of M/WBEs on their contracts:

DFW shows a really strong respect for M/WBE local businesses. They set high standard and high percentage goals that their contractors have to meet. They really have created opportunities for me. This is based on the 19 years that we have been dealing with DFW.

## **IX. RECOMMENDATIONS**

The interviewees suggested ways for increasing the participation of minority and woman-owned business enterprises on contracts with the Consortium Agencies. They ranged from increasing the capacity for minority business owners and website enhancements for prospective bidders to a more diverse selection committee and opening all bids publicly.

A Caucasian male owner of a construction company suggests that NTTA create opportunities for M/WBEs to increase their capacity to work on heavy civil construction projects:

NTTA should create more capacity in the M/WBE contracting community. They need to help [develop] M/WBE capacity to self-perform in the construction industry. I think that it has a good program, and I have noticed with NTTA in the last year or so is there commitment to increase M/WBE participation at all levels which I applaud. However, on the construction side of the fence, which is where most of the dollars are spent, there is still a capacity gap in sufficient number of qualified [minorities] that have the ability to self-perform heavy civil construction.



A Caucasian male owner of a services company recommended a website enhancement to help prospective bidders:

It would be beneficial if some public entities' purchasing departments would include on their website a link that list archives for all RFPs that have been released over the last year with bid tabulations. It would be extremely useful to go to a prospect client's website to see [that information] to prepare [a bid response].

A minority male owner of a professional services business recommends that NTTA line item each bid item as well as host a seminar for prospective bidders:

NTTA should line item each individual [bid] item rather than just the total of the bid. The total of the bid is not always the best way to go. And maybe [host] a seminar on how to do business with NTTA.

A Caucasian female owner of a services company suggests the Fort Worth Independent School District notify business owners of its upcoming contracting opportunities by email and snail mail:

I would like the Fort Worth Independent School District to notifying me more by mail or email so that I'm aware of what I can bid on to provide services for them. Just be fair and let me be competitive. I do not want anything special, except to let me know [what is available for bidding] and to evaluate me by the same standards as everyone else.

A minority male owner of an architectural and engineering firm recommends that public contracting agencies have a more diverse selection committee:

We have to make sure that from an engineering point of view that the Selection Committee is fair and not consumed with the good old boy system, [to stop] hiring the same people over and over again. I think that in every selection committee there should be somebody from the Small Disadvantaged Business Office. I think that's very important. I think if you let these managers of these departments always be the only ones on the selection team, they are going to always pick the same good old boys. But if you just make the selection committee more diverse, then it can bring a more equal and fair opportunity for everyone.



A Caucasian female owner of a services company reported that she believes that all bids should be opened publicly:

I don't like when there is not a public bid opening. I don't understand how they can do that. I really don't understand those situations at all when they say your bid has to be in by 5 p.m. on Wednesday, and we'll let you know on Monday who [won the bid]. That can be totally subjective. It should always be open publicly.

A minority female owner of a services company recommends more vendor fairs where business owners can meet purchasing agents:

A vendor fair [with all the agencies] would be good to find out who makes the purchases. And open houses with different schools [would be helpful]. It could be done by industry or who's in charge of construction or apparel. Just something to establish some kind of relationship. It would be nice to learn the way to get business from the Fort Worth ISD. More face-to-face [meetings] with purchasing agents.

A minority female owner of a services company reported that she believes that more training is needed for new business owners to effectively operate their businesses:

If they had more programs that taught people the [operational] side of business rather than the other stuff, they would probably be a little bit more successful, especially in the construction industry. People know how to do the work. They just don't know how to run a business.

A minority female owner of a services company recommends a workshop for new business owners so they can be informed of the agencies' expectations concerning the bid process:

A workshop for people new to doing business with [government entities] should be held to help them understand what the expectations are for those entities. [Such as] who is the right person to contact in those [entities] and networking to be able to connect with the right people.

A minority female owner of a professional services firm would like more information made available to understand the public bidding process:

I [would like] a better understanding of the bid and evaluation



process. A better understanding of the annual spending in certain categories and how to become engaged with the agency. We have not understood how to engage ourselves other than to wait for a bid to come in the email.

A minority male owner of a services company suggested that the City of Fort Worth increase its utilization of small minority firms:

I think they can communicate a lot better. We're not asking for the whole pie just a piece of the pie. I mean spread it out some, this all-or-nothing is ridiculous. We have nearly eighteen at a reasonable cost and can save the taxpayer money. It's like they have a tunnel vision [and will only work with company names withheld]. I think Fort Worth should give small companies like mine a chance.

A minority female owner of a construction firm suggests that large contracts be broken down into smaller projects to afford more opportunities for small businesses:

There are certain projects that are small that we go after, but there are other projects that are awarded in bigger packages that could be broken down and that could help us maintain and grow. Instead of a five-year contract, they can do it annually which can give us the opportunity to bid on projects like that and more than once.

A minority male owner of a professional services company would like more access to public purchasing agents:

I would [like] more direct access to the decision makers. A company that provides a service could be matched with [someone who needs that service].

A Caucasian female owner of a professional services firm suggested that DFW International Airport implement a vendor registration program for upcoming bidding opportunities:

[I recommend] DFW [implement] a vendor registration [program] where we could register using a [product or service category] code. Then they could send out bid notices to all within a certain category, sort of like a master vendor list.



A Caucasian female owner of a professional services firm recommends that the DFW International Airport reorganize its website to make it more efficient for business owners seeking upcoming bidding opportunities:

DFW's website has opportunities that are two and three years old that have never been taken off. It's not organized and [difficult] to find [opportunities] that were just released yesterday.

## **X. FOCUS GROUP SUMMARY**

Three focus groups were held in the City of Fort Worth and the City of Arlington. Two meetings were held on Thursday, November 6, 2008, at the Dallas Fort Worth Airport's Rental Car Center Multi-Purpose Room and the Fort Worth Business Assistance Center. The third focus group was held on November 7, 2008, at the Arlington Chamber of Commerce, Moritz Family Board Room. The purpose of the focus groups was to solicit information from the attendees about their experience working with or seeking work with any of the Consortium Agency.

Most of the attendees reported that they aren't given enough time to sufficiently respond to bids. Some stated that they have a week, or as little as a weekend, to pull together bids. Additionally, after pre-bid conferences contractors receive written responses to questions which they must take into consideration in their bid preparations, but the deadline for submitting RFPs is not extended to provide more time for responses. There also appeared to be a need for more centralized access to information regarding bids. It was reported that such access to bid information could help M/WBEs manage short lead times.

Most attendees felt strongly that to accomplish transparency within the bid process, the awarded bidder and subcontractors' names should be published, without including specificity regarding line item pricing.

Most of the attendees expressed that the "good old boys" network is status quo—a "given"—particularly in the construction and trades industry. However, they expressed that more prevalent than the "good old boys" network, might be simple favoritism. For example, prime contractors, who have worked with individuals on various jobs over the years, prefer to continue to work with these people, and use them from job to job.

The business owners reported that one major obstacle to breaking through the good old boys network is the difficulty of creating business relationships. The attendees suggested ways to break through this barrier, such as networking sessions which would enable prime contractors to informally meet with subcontractors and get to know them.



There was a sense that bonding requirements are sometimes used to eliminate or diminish M/WBE participation. Because working with smaller companies is sometimes risky, subcontractors are required to incur costs for bonding and large insurance umbrellas that are determined to be unattainable.

It was also suggested by some that even though prime contractors list M/WBEs on their bids, once contracts are awarded they are not being used, and subcontractors are never notified. The T and DFW Airport were mentioned as two agencies that have systems in place to minimize this tactic. It was reported that these two agencies require prime contractors to submit minority participation forms after the contract is awarded, ensuring that minority subcontractors are used and not substituted.

As subcontractors, the business owners reported that they find themselves being paid late because even though government entities typically pay within 30 days, they have to wait for the general contractors to cut checks. One recommendation was that agencies could model their pay schedule after Fort Worth or Arlington, which pays every 15 days, shortening the lag time before subcontractors get paid.

The issue of retainage was also discussed. An attendee commented that they are due payment for retainage with the City of Fort Worth after two years and even though the job is finished, they are still waiting on their money. In these instances, the business owners explained that they are not sure the exact reason for this problem, because the general contractors are working with the government agencies directly. Some businesses reported that they are reluctant to be aggressive trying to obtain late payments, because they don't want to "rock the boat" or get blacklisted by prime contractors.

However, payment for work in the private sector appears to be more expedient among these business owners. These owners reported that other advantages of working with the private sector included the absence of bureaucracy. Such as dealing with inspections and projects are approached with more urgency and are completed quicker.

The business owners reported that they would like better communication between M/WBE's and the Consortium Agencies in terms of providing information on whether they are meeting M/WBE participation goals and which prime contractors have been awarded bids. For example, this information could be published in newspapers, on websites, and/or made available through M/WBE office. Some M/WBE participants are unaware if goals are being met and do not always know the status of bids (i.e., when they are being used as subcontractors). Public notice of this information would serve a twofold purpose: general contractors who use M/WBEs to submit bids would be more inclined to give work to subcontractors, and general contractors who fail to meet promised M/WBE participation goals could be held more accountable.

There was also some concern expressed about majority-owned companies becoming minority-



owned by simply turning the majority interest over to a spouse to qualify as a M/WBE. Additionally, there was a prevalent feeling expressed that some of the “watch” agencies have either no authority to enforce minority participation goals or no backbone to ensure minority participation goals are being met.

Several of the business owners believe the disparity study results will serve as the catalyst to get the message to the Consortium Agencies about changes that need to be made to increase minority participation and stricter monitoring procedures.

## ***XI. SUMMARY FOR ONE-ON-ONE ANECDOTAL INTERVIEWS***

Many of the interviewees explained why business enterprise programs are valuable for small, women, and minority businesses. Many of the interviewers credited these programs with maintaining their businesses.

It was also reported that problems with some of the Consortium Agencies’ bid processes were a significant factor in preventing the interviewees from participating in contracting opportunities. And the interviewees explained that the impact of inadequate lead time frequently resulted in lost business opportunities.

The interviewees reported that they were unable to be competitive for public contract work, because they were denied financing and bonding from local financing institutions. Additionally, many interviewees expressed other concerns about being barred from contracting with several of the Consortium Agencies. They complained that some agencies preferred to work with the same contractors who also belonged to the good old boys network. The business owners lamented that this practice made it impossible to compete. Racial barriers were also reported by the interviewees. Several women interviewees believed there are still obstacles that women business owners have to overcome.

The majority of the recommendations centered on strategies to increase the participation of minority and woman-owned businesses. They ranged from a more diverse selection committee to increasing the capacity of minority business owners in heavy civil construction projects.

Finally, many of the managers at the Consortium Agencies were given accolades by the business owners for their hard work and dedication in supporting and sustaining small, minority, and women businesses.



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# 3

## ***PRIVATE SECTOR ANALYSIS***

### ***I. INTRODUCTION***

This chapter examined whether private sector discrimination was evident in the geographic market area. The question was addressed by analyzing the utilization of minority and woman-owned business enterprise (M/WBE) subcontractors on Consortium agency contracts.

The analysis compared the M/WBE subcontractor utilization level achieved on Consortium agency contracts with an M/WBE or DBE subcontracting goal, to the level achieved on contracts without subcontracting goals. Subcontracting decisions made by prime contractors on no-goal contracts are not subject to government-imposed contracting requirements. Therefore, these subcontracting decisions presented a relevant context for assessing market conditions affecting M/WBE utilization.

The evidence demonstrated that M/WBE subcontractor utilization on contracts without an M/WBE or DBE goal was lower than on the contracts with subcontracting goals.

### ***II. METHODOLOGY***

The data analyzed in this chapter were the construction and architecture and engineering subcontracts awarded by the Consortium agencies' prime contractors between October 2002 and December 2007. These subcontracts are described in *Chapter 3: Subcontractor Utilization Analysis* in volumes two through seven.

The Consortium agencies awarded a total of 11,109 construction and architecture and engineering subcontracts in the five year study period. The 11,109 subcontracts were separated into contracts with goal and no-goal contracts. Subcontracts awarded on prime contracts with goals totaled 10,304. Subcontracts awarded on no-goal prime contracts totaled 805. The M/WBE subcontractor utilization level achieved on contracts without an M/WBE or DBE goal was compared to the level of utilization achieved on prime contracts with subcontracting goals.



### **III. FINDINGS**

This section reports the findings for the comparison of construction and architecture and engineering contracts with and without goals. Utilization of M/WBE subcontractors on both construction and architecture and engineering contracts without an M/WBE or DBE goal was lower than the utilization on contracts with subcontracting goals. M/WBE utilization on construction contracts with an M/WBE or DBE goal was 43.71 percent of the total subcontract dollars while it was 21.28 percent on contracts without subcontracting goals. On architecture and engineering contracts, M/WBE utilization on contracts with an M/WBE or DBE goal was 74.53 percent of the total subcontract dollars while only 49.09 percent on contracts without subcontracting goals. Table 3.01 below illustrates the utilization of M/WBE subcontractors on Consortium agency contracts with and without an M/WBE or DBE goal.

**Table 3.01 M/WBE Subcontractor Utilization On Contracts With And Without Goals**

<b>Type of Contract</b>	<b>Total Subcontract Amount</b>	<b>M/WBE Subcontractor Utilization Amount</b>	<b>M/WBE Subcontractor Utilization Percentage</b>
<b>Construction</b>			
With Goals	\$640,231,166	\$279,864,647	43.71%
Without Goals	\$32,037,459	\$6,816,094	21.28%
<b>Architecture and Engineering</b>			
With Goals	\$78,623,020	\$58,598,562	74.53%
Without Goals	\$12,878,095	\$3,122,168	24.24%

### **IV. CONCLUSION**

The subcontracting decisions made by prime contractors on Consortium agency contracts unfettered by M/WBE or DBE goals evinced the presence of private sector discrimination in the geographic market area. The analysis found that the utilization of M/WBE subcontractors was lower in the absence of M/WBE or DBE subcontracting goals.



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# 4

## ***CAPACITY ANALYSIS***

### ***I. INTRODUCTION***

This chapter examined the capacity of available minority and woman-owned business enterprise (M/WBE) subcontractors in the market area, as compared to that of available non-M/WBE subcontractors. The purpose of the analysis was to assess the sufficiency of available M/WBE subcontractors to perform Consortium agency contracts.

Two methods were used to perform the capacity analysis. One was a survey of the available businesses to quantify the capacity of M/WBE and non-M/WBE businesses willing to perform Consortium agency contracts. The other method was a size analysis, which measured the relative capacity of M/WBEs and non-M/WBEs by size of subcontracts.

The analysis demonstrated that the M/WBE subcontracts and non-M/WBE subcontracts were similar in size.

### ***II. METHODOLOGY***

#### ***A. The Capacity Survey***

The survey was based on a sample of 840 businesses stratified by ethnicity, gender, and industry.<sup>1</sup> The sample was drawn from the availability database, which is discussed in the Availability Analysis Chapter of volumes two through seven. To draw the sample, all businesses in the availability database were separated into the five industries: architecture and engineering, construction, goods, professional services, and non-professional services. The list of businesses in each of the five industries was further separated into six ethnic and gender

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<sup>1</sup> In this random sampling technique, the whole population is first divided into mutually exclusive subgroups, or strata, based on some predetermined criteria, such as ethnic and gender group as well as industry. Then, samples are selected randomly from each group. When the sample data is analyzed, numeric coefficients (weights) are applied to each sub-sample to reestablish the proportions.



groups: Asian American, African American, Hispanic American, Native American, Caucasian Female, and Caucasian Male. A random sample was drawn from each of the 30 groups. Table 4.01 below illustrates the composition of the sample by ethnicity, gender, and industry.

**Table 4.01 Profile of Survey Sample**

<b>Ethnicity</b>	<b>Architecture and Engineering</b>	<b>Construction</b>	<b>Goods</b>	<b>Professional Services</b>	<b>Non Professional Services</b>	<b>Total</b>
Asian American	42	28	24	27	18	<b>139</b>
African American	31	35	25	30	24	<b>145</b>
Hispanic American	34	39	21	28	19	<b>141</b>
Native American	21	35	19	27	22	<b>124</b>
Caucasian Female	31	37	22	29	26	<b>145</b>
Caucasian Male	32	32	24	28	30	<b>146</b>
<b>Total</b>	<b>191</b>	<b>206</b>	<b>135</b>	<b>169</b>	<b>139</b>	<b>840</b>

The survey questionnaire consisted of 30 questions, 14 of which were multiple-choice and 16 open-ended questions. Multiple-choice questions helped to increase the response rate for sensitive subjects related to a company’s history and finances and made coding of the responses easier. For example, instead of asking for a gross receipts figure, the survey asked to choose from a set of dollar ranges before administering the survey. A copy of the survey is included in the Appendix of this chapter.

All 840 businesses in the sample were contacted by telephone to complete the survey. In an effort to maximize the return rate, two rounds of follow-up telephone calls were made to each business that did not respond to the initial attempt to complete the survey. The survey was e-mailed to those who did not complete the survey by telephone. Bilingual staff assisted in the follow-up calls to ensure the maximum response rate. A relational database was designed to enter the survey responses and track the follow-up calls.

**B. Size Analysis**

The subcontract payment data compiled in the subcontractor utilization analysis for each member of the Consortium was used as the data source for the size analysis. The subcontracts were grouped into eight different dollar ranges.<sup>2</sup> Each subcontract was classified within one of the eight categories based on the subcontract amount. The size analysis compared the size of M/WBE subcontracts and non-M/WBE subcontracts on Consortium agency construction and architecture and engineering contracts. A Chi-Square test was performed to determine whether there was a statistically significant difference in the size of M/WBE subcontracts and



<sup>2</sup> The eight different dollar ranges are \$1 to \$24,999, \$25,000 to \$49,999, \$50,000 to \$99,999, \$100,000 to \$249,999, \$250,000 to \$499,999, \$500,000 to \$999,999, \$1,000,000 to \$2,999,999, and \$3,000,000 and greater.

non-M/WBE subcontracts.<sup>3</sup>

### III. FINDINGS

#### A. Capacity Survey

A completed survey was received from 223 businesses, or 26.55 percent of the sample. A disproportionate number of Caucasian Males responded to the survey. Caucasian Males represented 29.15 percentage of the respondents while only 17.38 percent of the sample group were Caucasian Males. The sample was 65.36 percent minority-owned businesses, however this group represented only 46.18 percent of the survey respondents. The difference in the response rate between Caucasian Males and minority-owned businesses was statistically significant.<sup>4</sup> Although the response rate was low, multiple attempts were made to solicit a response from the sample, especially the minority-owned businesses, in order to eliminate the non-response bias. Despite the multiple attempts, using various methods to encourage businesses to complete the survey, the response rate was disproportionately low for minority-owned businesses. Table 4.02 presents the number and percentage of respondents by ethnic and gender group.

**Table 4.02 Profile of Survey Respondents**

Ethnicity	Architecture and Engineering	Construction	Goods	Professional Services	Non Professional Services	Total
Asian American	5	1	3	9	0	18
African American	6	9	9	17	0	41
Hispanic American	7	15	5	10	0	37
Native American	2	3	0	1	1	7
Caucasian Female	12	15	11	17	0	55
Caucasian Male	19	13	11	21	1	65
<b>Total</b>	<b>51</b>	<b>56</b>	<b>39</b>	<b>75</b>	<b>2</b>	<b>223</b>

Sampling requires that the profile of survey respondents accurately represent the overall population. The utility of the findings relies heavily on proportionate response rates of the groups in the stratified sample. No meaningful inferences could be drawn from the findings because the overall non-response rate was high and the differential response rate of the ethnic and gender groups was significant.

<sup>3</sup> A Chi-Square Test determines whether two variables, this case ethnic and gender group and the size of subcontracts, are independent. In other words, it tests whether knowing the ethnic and gender categorization has a statistically significant effect on the size of subcontracts.

<sup>4</sup> To evaluate the statistical significance of the differential response rate, a Chi-Square Test was performed. P Value < 0.05.



## **B. Size Analysis**

M/WBE subcontracts and non-M/WBE subcontracts were essentially the same size. The similarity in the size of the subcontracts was the same in each of the two industries analyzed, construction and architecture and engineering. Findings for construction and architecture and engineering subcontracts are presented below.

### **1. Construction**

Table 4.03 depicts the construction M/WBE and non-M/WBE subcontract within the eight dollar categories. M/WBE subcontracts more than \$50,000 were 31.27 percent; those more than \$100,000 were 19.39 percent; and those over \$500,000 were 4.03 percent. Non-M/WBE subcontracts more than \$50,000 were 18.02 percent; those more than \$100,000 were 11.84 percent; and those more than \$500,000 were 2.91 percent.

A Chi-Square test was performed to determine the probability that the findings comprise a pattern or chance occurrence. The P-Value<sup>5</sup> of <0.001 denotes a statistically significant difference in the size of construction M/WBE subcontracts, when compared to non-M/WBEs.

### **2. Architecture and Engineering**

Table 4.04 depicts the architecture and engineering subcontract M/WBE and non-M/WBE subcontract within the eight dollar categories. M/WBE subcontracts more than \$50,000 were 26.18 percent; those more than \$100,000 were 15.64 percent; and those more than \$500,000 were 2.45 percent. Non-M/WBE subcontracts more than \$50,000 were 37.69 percent; those more than \$100,000 were 25.63 percent; and those more than \$500,000 were 5.53 percent.

The P-Value<sup>6</sup> of <0.001 denotes a statistically significant difference in the size of construction contract dollars across ethnic/gender groups.

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<sup>5</sup> P-value is the probability that a given statistical finding is due to chance. When a P-value is very small, the finding is very unlikely to be a chance occurrence and is very likely to represent an existing pattern. The industry standard is that if a P-value is less than 0.05, or in other words, the probability that a given finding is due to chance is less than 5 percent, the finding is considered statistically significant. "P-value<0.001" indicates a very strong statistical significance.

For construction subcontract, P-Value = 8.427E-88.

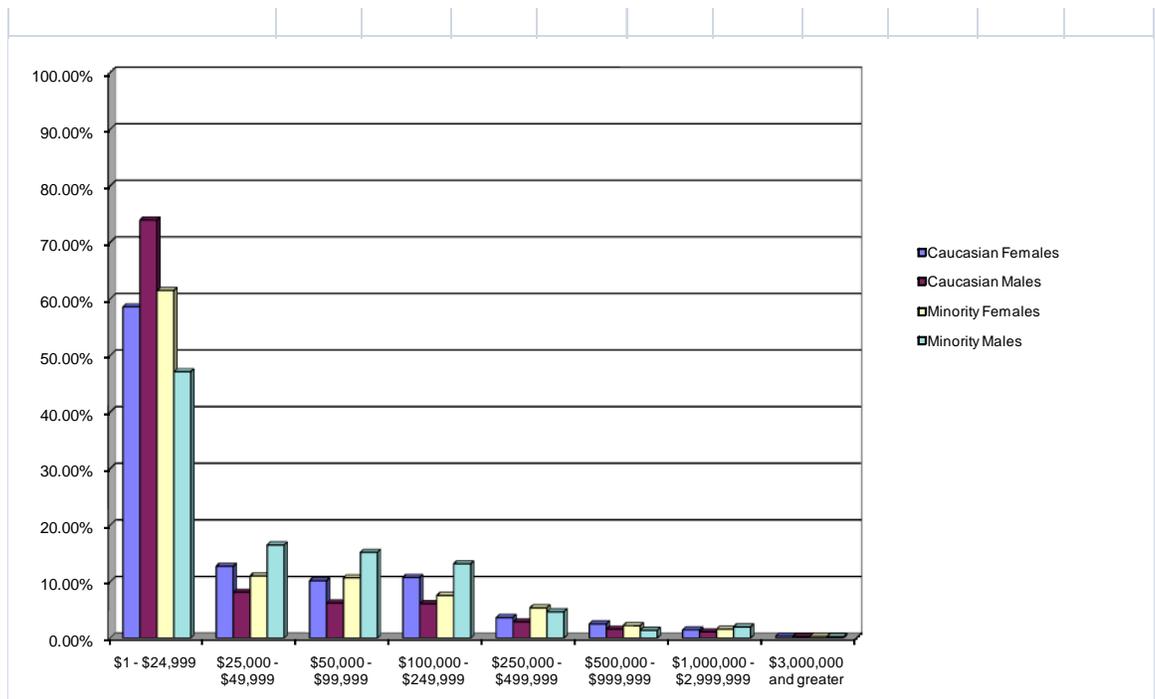
<sup>6</sup> For architecture and engineering subcontracts, P-Value = 0.0001123.



**Table 4.03 Construction Subcontract Awards By Size**

Contract Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Number	Percent
	Number	Percent	Number	Percent	Number	Percent	Number	Percent		
\$1 - \$24,999	1214	58.56%	4,651	73.90%	196	61.44%	578	47.07%	6,639	66.97%
\$25,000 - \$49,999	263	12.69%	509	8.09%	35	10.97%	202	16.45%	1,009	10.18%
\$50,000 - \$99,999	210	10.13%	389	6.18%	34	10.66%	186	15.15%	819	8.26%
\$100,000 - \$249,999	222	10.71%	383	6.09%	24	7.52%	161	13.11%	790	7.97%
\$250,000 - \$499,999	75	3.62%	179	2.84%	17	5.33%	57	4.64%	328	3.31%
\$500,000 - \$999,999	52	2.51%	99	1.57%	7	2.19%	17	1.38%	175	1.77%
\$1,000,000 - \$2,999,999	30	1.45%	68	1.08%	5	1.57%	24	1.95%	127	1.28%
\$3,000,000 and greater	7	0.34%	16	0.25%	1	0.31%	3	0.24%	27	0.27%
<b>Total</b>	<b>2073</b>	<b>100.00%</b>	<b>6294</b>	<b>100.00%</b>	<b>319</b>	<b>100.00%</b>	<b>1228</b>	<b>100.00%</b>	<b>9914</b>	<b>100.00%</b>

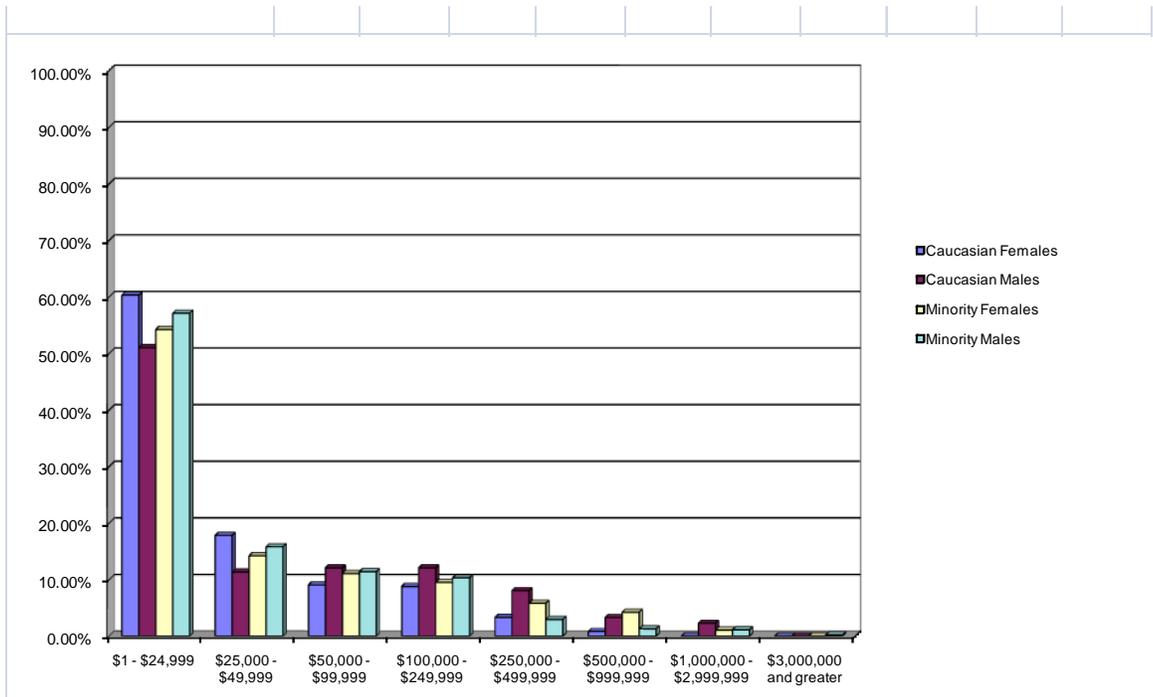
P-Value < 0.001



**Table 4.04 Architecture and Engineering Subcontract Awards**

Contract Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Number	Percent
	Number	Percent	Number	Percent	Number	Percent	Number	Percent		
\$1 - \$24,999	220	60.27%	203	51.01%	103	54.21%	311	57.06%	837	55.87%
\$25,000 - \$49,999	65	17.81%	45	11.31%	27	14.21%	86	15.78%	223	14.89%
\$50,000 - \$99,999	33	9.04%	48	12.06%	21	11.05%	62	11.38%	164	10.95%
\$100,000 - \$249,999	32	8.77%	48	12.06%	18	9.47%	56	10.28%	154	10.28%
\$250,000 - \$499,999	12	3.29%	32	8.04%	11	5.79%	16	2.94%	71	4.74%
\$500,000 - \$999,999	3	0.82%	13	3.27%	8	4.21%	7	1.28%	31	2.07%
\$1,000,000 - \$2,999,999	0	0.00%	9	2.26%	2	1.05%	6	1.10%	17	1.13%
\$3,000,000 and greater	0	0.00%	0	0.00%	0	0.00%	1	0.18%	1	0.07%
<b>Total</b>	<b>365</b>	<b>100.00%</b>	<b>398</b>	<b>100.00%</b>	<b>190</b>	<b>100.00%</b>	<b>545</b>	<b>100.00%</b>	<b>1498</b>	<b>100.00%</b>

P-Value < 0.001



## **IV. CONCLUSION**

The analysis documented that M/WBEs received a higher percentage of the larger contracts than non-M/WBEs. M/WBEs received significantly more contracts with a value greater than \$50,000 than non-M/WBEs. In fact, 19.39 percent of the construction subcontracts awarded to M/WBEs were valued over \$100,000. Only 11.84 percent of subcontracts awarded to non-M/WBEs were valued over \$100,000. Subcontracts valued at over \$500,000 accounted for 4.03 percent of all construction subcontracts awarded to M/WBEs. Only 2.91 percent of construction subcontracts awarded to non-M/WBEs were over \$500,000.

Therefore, when capacity is measured by the size of the contracts awarded, the data indicates that the capacity of M/WBEs is comparable, if not superior, to non-M/WBEs. This finding is an indication that M/WBEs could perform Consortium agency subcontracts at the same levels as non-M/WBEs. The relative capacity of M/WBEs is especially important when considering the significance of the disparity finding of statistically significant underutilization of available M/WBEs.





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