



THE CITY OF
COLUMBUS
ANDREW J. GINTHER, MAYOR

CITY OF COLUMBUS DISPARITY STUDY

FINAL REPORT |
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CHAPTER 1: Legal Analysis

I. Introduction

This Legal Analysis summarizes the constitutional standards that the federal and state courts have applied to review local governments' affirmative action contracting programs. The United States Supreme Court decision of *City of Richmond v. J.A. Croson Co. (Croson)*¹ raised the standard by which lower courts shall review both local and state affirmative action contracting programs, including minority business enterprise programs.

The City of Columbus Disparity Study was commissioned to conduct statistical analyses of data measuring the availability and utilization of Minority and Woman Business Enterprises (MWBES) in contracts awarded by the City of Columbus (City). This Study will ensure that the City's Affirmative Action Code of 2016, including race or gender-conscious remedial measures, is narrowly tailored in compliance with *Croson* and its progeny.

The United States Supreme Court decision in *Croson* sets forth the strict scrutiny constitutional analysis applicable to race-based remedies for public contracting affirmative action programs. Race or gender-conscious remedies implemented by the City are governed under the United States Court of Appeals for the Sixth Circuit. Therefore, Sixth Circuit cases constitute legal precedent and are discussed herein. Since 1989, courts in several circuits, including the Sixth Circuit, have decided cases involving challenges to affirmative action programs. Case law pertaining to M/WBE programs adjudicated outside of the Sixth Circuit are discussed because they are instructive, albeit not binding authority, when implementing race or gender-based public contracting programs.

A. Overview of Legal Challenges to City of Columbus Affirmative Action Programs

The City promulgated its initial affirmative action program on January 23, 1989 under Ordinance 29-89. The Ordinance established the Equal Business Opportunity (EBO) Code of 1989, authorizing minority and female-owned business preferences in the award of construction subcontracts. The City approved subcontracting goals at 21 percent for minority-owned businesses and 10 percent for female-owned businesses. However, the subcontracting goals were set without evidence of past discrimination on the part of the City.

The City's affirmative action contracting program was first challenged in 1989 in *Associated General Contractors of America v. City of Columbus (AGC)*. The challenge led to a litigation history that spanned over a decade. The initial lawsuit, filed by the Central Ohio Division of Associated General Contractors of America (AGC), challenged the constitutionality of the City's Ordinance and the EBO Code of 1989.² In response, the City Council amended Ordinance 29-89



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

² *Associated General Contractors of America v. City of Columbus*, No. 89CV936 (S.D. Ohio) (Jan. 25, 1991).

and removed the numerical quotas. The remaining components of the EBO Program were unchanged.

In 1991, both AGC and the City agreed to a consent order acknowledging that the EBO Code of 1989, in both its original form and as amended, was unconstitutional pursuant to the standards set forth in *City of Richmond v. J.A. Croson Co.*³ The consent decree enjoined the City from legislatively or administratively enacting any further preference programs without first complying with the *Croson* requirements. The 1989 EBO Code was therefore declared unconstitutional and the City ended its set-aside program in 1991.⁴

In December 1993, the City enacted a new Equal Business Opportunity Code after completing a disparity study. The EBO Code of 1993 authorized race and gender-based preferences in the City's contracting practices. The City then petitioned the Court to dissolve the consent order and permit the implementation of the EBO Code of 1993. Three years later, in August 1996, a trial was held to determine whether the new legislation and the evidence in the disparity study met the requirements of *Croson*.⁵

The Court concluded that the factual predicate relied upon to enact the EBO Code of 1993 did not establish that the City had been an active or passive participant in discrimination against minority or female-owned construction businesses within the City's geographic market area. In its 1996 decision, the Court found that the City's EBO Code of 1993 was unconstitutional.⁶

The Court identified several flaws in the disparity study that were used to support the City's EBO Code of 1993. The Court found that the evidence did not validate any institutional practices that affected discrimination against minority or female-owned construction businesses, nor did it demonstrate that the City's spending practices exacerbated a pattern of prior discrimination. Thus, the Court found that the City had not implemented narrowly tailored goals to remedy past discrimination.⁷

The City appealed the decision to the Sixth Circuit Court on March 26, 1999. The Court found that the district court lacked jurisdiction because no case or controversy existed that precipitated the filing of the complaint.⁸ Specifically, AGC alleged that the racial and gender requirements of the EBO Code of 1993 could have the effect of preventing AGC's members, who regularly bid on public works contracts and subcontracts, from competing on an equal basis.⁹ The district court

³ *Croson*, 488 U.S. at 109.

⁴ *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 413 (6th Cir. 1999).

⁵ *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996), vacated and remanded, 172 F.3d 411 (6th Cir. 1999).

⁶ *Id.*

⁷ *Id.*

⁸ *Associated Gen. Contractors of America*, 172 F.3d at 421.

⁹ *Id.* at 421-2.



decision was therefore vacated by the Sixth Circuit Court, with instructions to dismiss the case because AGC had no injured party.

In 2001, AGC filed its last complaint challenging the EBO Code of 1993, and the United States District Court for the Southern District of Ohio, Eastern Division, ruled that AGC proffered the same allegations as in its previous complaint without providing any additional evidence.¹⁰ Again, AGC's complaint focused on actions that could discriminate against its members, but failed to name an injured party. The Court held that the complaint was not ripe for review.¹¹ Furthermore, the City argued that the EBO Code of 1993 had not been effectuated or enforced. The City reported that it had not awarded any contracts nor intended to award any contracts subject to the provisions of the EBO Code of 1993.¹² The Court reasoned that since the issues were not ripe, the district court could only render an advisory opinion and not a binding legal ruling. Thus, AGC's appeal was denied and the case was dismissed in its entirety.¹³ The City did not promulgate another EBO ordinance until 2016.

Ordinance 3025-2016, adopted on December 15, 2016, established the City's Affirmative Action Code of 2016. This Code, which is race and gender-neutral, is limited to developing and implementing procedures and practices that encourage the use of minority and female-owned businesses and other small businesses on the City's contracts. It established the Office of Diversity and Inclusion (ODI) and the ODI Advisory Council to replace the EBO Commission Office. The ODI is authorized to implement the objectives of the Affirmative Action Code of 2016.

The Affirmative Action Code of 2016 provides provisions for MWBE outreach and a small business program. The provisions include solicitation procedures for small contracts, bid specification review, prompt payment policies, finance and bonding assistance programs, a mentor/protégé program, sheltered market opportunities, good faith effort requirements, and M/WBE certification services.

B. Other Relevant Sixth Circuit Cases

The Sixth Circuit is the only circuit court with judicial authority governing the City. Its decisions are binding for the City. Since 1989, the Sixth Circuit has decided several cases involving entities other than the City. The cases have reviewed capacity as a component of availability, a plaintiff's standing to challenge MBE programs, and the sufficiency of post-enactment evidence to prove discrimination. The Sixth Circuit decisions, other than *AGC v. City of Columbus*, that are binding on the City are summarized below in Table 1.1. The holdings from these relevant cases are discussed in detail within this chapter.

¹⁰ *Associated Gen. Contractors of Am. v. City of Columbus* 147 F. Supp. 2d 864 (S.D. Ohio 2001).

¹¹ *Associated Gen. Contractors of America*, 147 F. Supp. 2d.

¹² *Id.*

¹³ *Id.*



Table 1.1: Sixth Circuit Precedent

Sixth Circuit Affirmative Action Public Contracting Programs Ohio, Michigan, Kentucky, and Tennessee	
Case Name	Holding
<i>Associated General Contractors of Ohio, Inc. v. Drabik</i> , 214 F.3d 730 (6th Cir. 2000).	The AGC challenged the Ohio's Minority Business Enterprise Act as unconstitutional because it included racial and ethnic preferences for the State's construction contracts. The Sixth Circuit ruled the MBE Act unconstitutional, holding that (1) the State could not rely on mere speculation or legislative pronouncements of past discrimination to demonstrate a compelling governmental interest, (2) narrow tailoring implies that affirmative action programs include an expiration date and the State's program had remained in effect for 20 years, and (3) there was no evidence that the State used race-neutral means to increase minority participation before resorting to race-based quotas.
<i>Michigan Road Builders Association v. Blanchard</i> , 761 F. Supp. 1303 (W.D. Mich. 1991).	<i>Citing Hunt v. Washington State Apple Advertising Comm'n</i> , 432 U.S. 333 (1977), the District Court for the Western District of Michigan held that the Michigan Road Builders lacked standing to challenge the State's set-aside program. Michigan Road Builders' claim that the set-asides for disadvantaged business enterprises adversely affected or would adversely affect the future ability of contractors to bid, compete, and be awarded public contracts is insufficient to create standing to challenge the program.
<i>West Tennessee Chap. of Assoc. Builders and Contractors, Inc. v. Board of Educ. of Memphis City Schools</i> , 64 F.Supp.2d 714 (W.D. Tenn. 1999).	The Builders' Association challenged the City of Memphis and the Board of Education's racial preference program for construction contracts. The City of Memphis and the Board of Education attempted to use post-enactment evidence to support the program. The district court, citing <i>Croson</i> , ruled that the post-enactment evidence could not be used to demonstrate that their interest in remedying prior discrimination was compelling. The district court disagreed with the federal circuit courts, which allowed post-enactment evidence of discrimination. Cases include: <i>Coral Construction Co. v. King County</i> , 941 F.2d 910 (9 th Cir. 1991); <i>Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo</i> , 981 F.2d 50 (2d Cir. 1992); <i>Contractors Ass'n of Eastern Pa. v. Philadelphia</i> , 6 F.3d 990 (3d Cir. 1993); <i>Concrete Works of Colorado, Inc. v. Denver</i> , 36 F.3d 1513 (10 th Cir. 1994); <i>Engineering Contractors Ass'n of S. Fla. v. Metropolitan Dade Co.</i> , 122 F.3d 895 (11 th Cir. 1997).

II. Legal Framework Governing Affirmative Action Public Contracting Programs

The legal standard *Croson* and its progeny required to implement a race-based contracting program are presented in this chapter. *Croson* established the legal framework for the analysis that must be performed for a local government to implement a race-specific contracting program to meet the strict scrutiny standard. The minority business utilization had to be compared to the available minority businesses in the market area. Additionally, the Court determined that anecdotal evidence could be used to supplement statistical findings of discrimination, but could not be used as a proxy for a statistical finding of disparity. Therefore, anecdotal evidence alone is insufficient to establish the requisite predicate for a race-conscious program. However, a pattern of individual discriminatory acts could not be used to buttress findings of statistically significant



underutilization of MWBEs on public contracts.¹⁴ Finally, the Court determined that discrimination had to be defined as a statistically significant underutilization of available MBEs.

However, the Court was not specific in the definition of an available business. According to *Croson*, availability is the number of qualified businesses in the jurisdiction's market area that are willing and able to provide goods or services.¹⁵ Although *Croson* references availability, it does not give a definition of what constitutes "willing and able," and therefore leaves the appellate courts open to define "availability." Nevertheless, the accuracy and reliability of the statistical analysis largely depends on the definition and analysis of "availability."

The most significant development in the case law since *Croson* is the interpretation of the concept of availability and the methods of measuring business capacity sanctioned by the appellate courts. Twenty-eight years after the *Croson* decision, the appellate courts are still reviewing challenges to the MWBE programs in cases that center on the definition of availability. The preponderance of the cases reviewed since *Croson* have challenged the availability methodology used in disparity studies. An overview of these cases is warranted as an introduction to the case law that has determined the standard of review for a constitutionally sound disparity study. This overview of availability focuses on cases from several circuits, including the Sixth Circuit, which is binding on the City of Columbus. The other relevant cases decided in federal appellate courts are persuasive authority.

In 2000, the Sixth Circuit in *Associated Gen. Contractors of Ohio, Inc. v. Drabik (Drabik)*, addressed the issue of capacity. The Sixth Circuit concluded that for statistical evidence to meet the legal standard of *Croson*, the Court must consider the issue of capacity of the businesses defined as ready, willing, and able to contract with the State.¹⁶ The Court reviewed the Ohio Minority Business Enterprise Act (Act) resulting from a legal challenge by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio (AGC).¹⁷ The AGC argued that the Act violated the equal protection clause. The district court held that the Act violated the fourteenth amendment equal protection clause because discrimination was not sufficiently proven for all ethnic groups included in the Program. The Sixth Circuit ruled that the State could not rely on mere speculation or legislative pronouncements of past discrimination to demonstrate the compelling governmental interest.¹⁸

The earliest case to consider "ready, willing, and able" was *Engineering Contractors Association of South Florida Inc. v. Metropolitan Dade County* in the Eleventh Circuit.¹⁹ Dade County had relied on census data that compared the proportion of African American-owned construction firms

¹⁴ *Croson*, 488 U.S. at 509; see *Teamsters v. United States*, 431 U.S. 324 (1977).

¹⁵ *Croson*, 488 U.S.

¹⁶ *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734-38 (6th Cir. 2000) ("*Drabik*"). The Court reviewed Ohio's 1980, pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 176 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

¹⁷ *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000).

¹⁸ *Associated General Contractors of Ohio*, 214 F.3d at 730.

¹⁹ *Engineering Contractors Assoc. of South Florida Inc., v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997).



in the Standard Industrial Classification (SIC) codes to majority firms regarding the proportion of the overall revenues they received. The Court concluded that there was not a strong basis in evidence to justify the program because the census data did not account for firms that were qualified to perform the contract requirements nor the size of the firms, which would impact the dollar value of contracts. The same circuit weighed in on availability in *Webster v. Fulton County*.²⁰ It rejected the bidding data relied on, pointing out that it overstated availability because of the “unavailability of minority firms to bid on and obtain large construction contracts.”²¹

The Tenth Circuit in *Concrete Works of Colorado v. City & County of Denver* (“*Concrete Works IV*”), addressed the validity of availability methodology in previous studies conducted in 1990, 1995, and 1997.²² The 1990 disparity study determined availability using data from eight city bonding contracts, the overall utilization of W/MBEs in the Denver construction market, and interviews of representatives of the W/MBEs, majority-owned construction firms and government officials.²³ After the 1990 study, a second study was conducted in 1995, which used census bureau data, including information on employment and revenues for proprietorships to determine availability.²⁴ A third study commissioned in 1997 determined availability by using construction specialties and geographic location.²⁵ The Court indicated that disparity studies could determine availability by using construction specialties and geographic location.²⁶ While the Court noted that this approach was “a more sophisticated method to calculate availability,” it held that the city’s 1990 and 1995 disparity studies were not fatally flawed because they did not use the 1997 method.²⁷ The Court also noted that a disparity study is not required to control for firm specialization where there is no evidence to support the proposition that “M/WBEs are more likely to specialize in certain construction fields.”²⁸ Furthermore, in support of the various methods used in the city’s disparity studies, the Court stated, “[the government] is permitted to make assumptions about capacity and qualification of M/WBEs to perform construction services if it can support those assumptions.”²⁹

The Third Circuit held certification to be a valid method of defining availability.³⁰ In *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, the Court held that using a list of

²⁰ *Daniel Webster v. Fulton County*, 51 F.Supp.2d 1354 (N.D. Georgia, Atlanta Division 1999).

²¹ *Daniel Webster*, 51 F.Supp.2d.

²² *Concrete Works of Colo. v. City & County of Denver*, 321 F.3d 950, 963 (10th Cir. 2003) (“*Concrete Works IV*”).

²³ *Concrete Works IV*, 321 F.3d at 963.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *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).



certified contractors was a rational approach to identifying qualified and available firms.³¹ *Contractors Association as in Concrete Works IV* stated “[a]n analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach [of qualification].”³²

The Seventh Circuit’s definition of availability, in *Northern Contracting, Inc. v. Illinois*, held that a “custom census instead of a simple count of the number of registered and prequalified M/WBEs under Illinois Law” could be used to determine “the number of M/WBEs that were ‘ready, willing, and able’[.]”³³ The custom census, the Court opined, is not a miscalculation rendering that the methodology used in the disparity study is wrong.³⁴ The custom census involved “first identifying the relevant geographic market” and “the relevant product market.”³⁵ After the initial identification, the study surveyed a comprehensive database of M/WBEs and all firms not listed as an M/WBE.³⁶ The Court believed the use of the custom census reflected “an attempt by IDOT to arrive at more accurate numbers than would be possible through use of just the list.”³⁷

In the Federal Circuit, the Court in *Rothe Dev. Corp. v. U.S. DOD (Rothe VII)* opined that disparity studies should include a regression analysis to control for relative capacity in determining the available pool of MWBE contractors.³⁸ *Rothe VII* suggested disparity studies should “account for the relative capacities of businesses to bid for *more than one contract at a time* [.]”³⁹ In *DynaLantic Corp. v. U.S. DOD*, contrary to *Rothe VII*, the Court recognized that courts evaluate availability differently. *DynaLantic* referenced a Mason Tillman Associates disparity study that used the same method as the four disparity studies referenced in *Rothe VII*.

The *DynaLantic* court used the Mason Tillman Associates’ disparity study as an example of a study that did not use the methods prescribed by other courts, including *Rothe VII*. The Court found that the Mason Tillman disparity study used “relatively narrow measurements of availability and conducted relatively detailed capacity analyses.”⁴⁰ The *DynaLantic* court additionally concluded the Mason Tillman Associates’ study did not address firm size with significant government contracting experience, but the study sufficiently demonstrated qualified, eligible, minority-owned firms that were excluded from the contracting market, and “provide[d] *powerful evidence* from

³¹ *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).

³² *Id.*

³³ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 723 (7th Cir. 2007).

³⁴ *Northern Contracting, Inc.* 473 F.3d at 723.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008) (“*Rothe VII*”).

³⁹ *Rothe VII*, 545 F.3d at 1044.

⁴⁰ *DynaLantic Corp. v. U.S. DOD*, 885 F. Supp. 2d 237 (District of Columbia 2012).



which ‘an inference of discriminatory exclusion could arise.’”⁴¹ Most recently, in *Midwest Fence Corp. v. United States Department of Transportation*, the plaintiff challenged Illinois Department of Transportation’s (IDOT) United States Department of Transportation DBE Program as applied by IDOT. The IDOT DBE Program was based on an Availability Study.⁴² In 2013, Mason Tillman’s Post Enactment DBE Disparity Study was used as the factual predicate for the DBE Program and a summary judgement was entered on behalf of the Illinois Department of Transportation that reinstated IDOT’s challenged DBE Program.

Given the case history of the critical concept of availability, due diligence must be taken to ensure that availability methodology meets the defined legal standards. The Court found MTA disparity was sufficient and issued the disparity study. Availability, including capacity, is addressed in this Study to conform to the legal standards herein. Further discussion of the concept of capacity is set forth in this Chapter.

III. Standard of Review

The standard of review refers to the level of scrutiny a court applies during its analysis of whether or not a particular law is constitutional. This chapter discusses the relevant standard of review applied to remedial programs based on race or gender, including the heightened standard of review that the United States Supreme Court set forth in *Croson* for race-conscious programs, and the Sixth Circuit applied to gender-conscious programs.

A. Minority Business Enterprise Programs

MBE programs are designed to ensure that minority-owned businesses are afforded equal access to public contracting opportunities. MBE programs can contain both race-conscious and race-neutral policies and procedures to achieve the objectives of the program. In *Croson*, the United States Supreme Court affirmed that, pursuant to the Fourteenth Amendment, the proper standard of review for state and local race-based MBE programs is strict scrutiny.⁴³ Under a strict scrutiny analysis, the government must show that the race-conscious measures in a challenged program are narrowly tailored to achieve a compelling state interest.⁴⁴ In practice, strict scrutiny requires that a government entity prove both a “compelling interest” in remedying identified discrimination based upon “strong evidence,” and that the measures adopted to remedy the discrimination are “narrowly tailored” to that evidence. 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 discrimination* within its jurisdiction.⁴⁵

⁴¹ *DynaLantic Corp.*, 885 F. Supp. 2d at 267-68.

⁴² *Midwest Fence v. Illinois Department of Transportation*, No. 15-1827, 2016 WL 6543514, (7th Cir. November 4, 2016).

⁴³ *Croson*, 488 U.S. at 493-95.

⁴⁴ *Id.*

⁴⁵ *Id.* at 509.



In *Croson*, the plaintiff was a construction firm and sole bidder that was denied a contract because it failed to meet the 30 percent MBE goal under the City of Richmond’s MBE Plan. The plaintiff argued that the MBE Plan was unconstitutional under the Fourteenth Amendment’s Equal Protection Clause. The City’s MBE plan imposed a 30 percent MBE subcontracting goal on prime contractors that were awarded City construction contracts, but imposed no geographic limitation on the available pool of MBEs, and did not provide for the possibility of waiver in the application of the MBE goals. The Court affirmed that the City of Richmond’s MBE Plan violated both prongs of strict scrutiny—there was not a compelling governmental interest and the 30 percent set-aside was not narrowly tailored.

The City failed to demonstrate a compelling governmental interest because the evidence did not establish prior discrimination by the City in awarding contracts. The City presented generalized data of past discrimination within the construction industry as a whole, and included nonracial factors that would affect any group seeking to establish a new business enterprise, such as deficiencies in working capital and inability to meet bonding requirements. The Court held that evidence of general application is not sufficiently particularized, was not germane to the City’s local contracting market, and is insufficient to implement race-based relief under the Fourteenth Amendment’s Equal Protection Clause. Additionally, the Court rejected the statistical methodology used to determine disparity. The City of Richmond relied upon a statistical disparity analysis to identify the discrimination that the MBE Plan was seeking to remedy. The City’s disparity analysis was calculated based on the number of prime contracts awarded to MBEs compared to the City’s MBE population. According to the Court, the proper calculation should have been based on the percentage of MBEs in the relevant market area that are qualified, willing, and able to work on the City’s contracts compared to the percentage of total City construction dollars that were awarded to MBEs.

The City failed to demonstrate that the MBE Plan was narrowly tailored to remedy the effects of prior discrimination because it entitled MBEs located anywhere in the country to an absolute preference based solely on race and failed to establish discrimination within the City’s local contracting market. Furthermore, the 30 percent goal was not based on the availability of MBEs in the City’s local contracting market. The Court determined that the 30 percent goal was predicated upon an unrealistic assumption that MBEs will choose to work on the City’s contracts. Additionally, the Court determined that the City did not seriously consider race-neutral alternatives as a remedy to address the identified discrimination.

Justice O’Connor, speaking for the majority, articulated various methods of demonstrating discrimination and set forth guidelines for crafting MBE programs that are “narrowly tailored” to address systemic racial discrimination.⁴⁶ To demonstrate discrimination and survive strict scrutiny, the government must show that it had become a “passive participant” in a system of racial exclusion practiced by the local industry.⁴⁷ Methods available to demonstrate patterns of

⁴⁶ *Croson*, 488 U.S. at 501-2. 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 Supreme Court in *Croson* and subsequent cases provided a 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.

⁴⁷ See *Id.* at 492-93.



discrimination that appropriately satisfy the strict scrutiny analysis include evidence of the government entity's active and passive participation in the discrimination to be remedied by the proposed race and gender-conscious goals, systemic discriminatory exclusion, and supporting anecdotal evidence. These methods to construct a strong evidentiary framework are discussed in greater detail below, in *Section IV: Croson Evidentiary Framework*.

B. Women Business Enterprise Programs

WBE programs are designed to ensure that women-owned businesses are afforded equal access to public contracting opportunities. WBE programs may contain both gender-conscious and gender-neutral policies and procedures to achieve the objectives of the program. Since *Croson*, which dealt exclusively with the review of race-conscious plans, the United States Supreme Court has remained silent with respect to the appropriate standard of review for geographically-based Women Business Enterprise (WBE) programs and Local Business Enterprise (LBE) programs. In other contexts, however, the United States Supreme Court has ruled that gender classifications are not subject to the rigorous strict scrutiny standard applied to racial classifications. Instead, gender classifications have been subject only to an "intermediate" standard of review, regardless of the favored gender.

The Sixth Circuit applies both the strict scrutiny standard and the intermediate standard of review to WBE programs depending on the application of the program's policies. In *Brunet v. City of Columbus*, the Sixth Circuit held that the strict scrutiny standard of review is applied to an affirmative action plan based on gender classification when challenged under the Equal Protection Clause.⁴⁸ The Court made a distinction between "gender-conscious" plans and "gender-preference" plans. Pursuant to Sixth Circuit precedent, gender-conscious plans are subject to the intermediate standard of review, while gender-preference plans are subject to the strict scrutiny standard of review.⁴⁹ The Court classifies a program as "gender conscious" if its policies utilize gender as a factor but are gender neutral in their application and have no disparate impact on individuals based on gender when the policies are applied equally to both men and women.⁵⁰ The Court classifies a program as "gender preference" if its policies contain gender-based criteria that are applied directly as a preference.⁵¹

Notwithstanding the fact that the United States Supreme Court has not ruled on a WBE program, the consensus among the federal circuit courts of appeals is that WBE programs are subject to intermediate scrutiny, rather than the more exacting strict scrutiny standard to which race-conscious programs are subject.⁵² Intermediate scrutiny requires the governmental entity to demonstrate that the action taken furthers an "important governmental objective," employing a

⁴⁸ *Brunet v. City of Columbus*, 1 F.3d 390, 404 (6th Cir. 1993).

⁴⁹ *Brunet*, 1 F.3d at 404.

⁵⁰ See *Id.* (citing *Jacobsen v. Cincinnati Board of Education*, 961 F.2d 100, 102 (6th Cir. 1992)).

⁵¹ *Id.*

⁵² See *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 930-31 (9th Cir. 1991); *Eng'g Constr. Ass'n v. Metro. Dade Cnty.* ("Dade County II"), 122 F.3d 895, 907-08 (11th Cir. 1997); see also *Concrete Works of Colo. v. City & Cnty. of Denver*, 321 F.3d 950, 960 (10th Cir. 2003) ("Concrete Works IV"); and *H.B. Rowe Co. v. N.C. Dep't of Transp.*, 615 F.3d 233, 236 (4th Cir. 2010) ("Rowe").



method that bears a fair and substantial relation to the goal.⁵³ The courts have also described the test as requiring an “exceedingly persuasive justification” for classifications based on gender.⁵⁴ The United States 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 who are disproportionately burdened.”⁵⁵

Consistent with the United States Supreme Court’s finding with regard to gender classification, the Third Circuit in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia* (“*Philadelphia IV*”) ruled in 1993 that the standard of review governing WBE programs is different from the standard imposed upon MBE programs.⁵⁶ 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.”⁵⁷ In contrast, 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.⁵⁸

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.”⁵⁹ 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.⁶⁰

The Eleventh Circuit United States Court of Appeals (Eleventh Circuit) also applied intermediate scrutiny.⁶¹ In its review and affirmation of the district court’s holding, in *Engineering Contractors Association of South Florida v. Metropolitan Dade County* (“*Dade County II*”), the Eleventh Circuit cited the Third Circuit’s 1993 formulation in *Philadelphia IV*: “[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.”⁶² Although the *Dade County II* appellate court ultimately applied the intermediate scrutiny standard, it queried whether the United

⁵³ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982); see also *United States v. Virginia*, 518 U.S. 515, 524 (1996) (“*Virginia*”).

⁵⁴ *Hogan*, 458 U.S. at 751; see also *Mich. Rd. Builders Ass’n, Inc. v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987).

⁵⁵ See *Id.* at 728; see also *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (“*Ballard*”).

⁵⁶ *Philadelphia IV*, 6 F. 3d at 1001.

⁵⁷ *Id.* at 1009-10.

⁵⁸ *Id.* at 1002.

⁵⁹ *Associated Gen. Contractors of Cal. v. City & Cnty. of San Francisco*, 813 F.2d 922, 940 (9th Cir. 1987) (“*AGCC I*”).

⁶⁰ *Ballard*, 419 U.S. at 508.

⁶¹ *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F. 3d 1548, 1579-80 (11th Cir. 1994).

⁶² *Dade County II*, 122 F.3d at 909 (citing *Philadelphia IV*, 6 F.3d at 1010; see also *Saunders v. White*, 191 F. Supp. 2d 95, 134 (D.D.C. 2002) (stating “[g]iven the gender classifications explained above, the initial evaluation procedure must satisfy intermediate scrutiny to be constitutional.”).



States Supreme Court decision in *United States v. Virginia*,⁶³ finding the all-male program at Virginia Military Institute unconstitutional, signaled a heightened level of scrutiny.⁶⁴ In the case of *United States v. Virginia*, 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.⁶⁵ While the Eleventh Circuit United States Court of Appeals 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 in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective.”⁶⁶

In *Dade County II*, the Eleventh Circuit court noted that the Third Circuit in *Philadelphia IV* was the only federal appellate court that explicitly attempted to clarify the evidentiary requirement applicable to WBE programs.⁶⁷ *Dade County II* interpreted that standard to mean that “evidence offered in support of a gender preference must not only be ‘probative’ [but] must also be ‘sufficient.’”⁶⁸

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;⁶⁹ 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,”⁷⁰ but instead ensuring that the affirmative action is “a product of analysis rather than a stereotyped reaction based on habit.”⁷¹

This determination requires “evidence of past discrimination in the economic sphere at which the affirmative action program is directed.”⁷² 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.”⁷³

⁶³ *Virginia*, 518 U.S. at 534.

⁶⁴ *Dade County II*, 122 F.3d at 907-08.

⁶⁵ *Virginia*, 518 U.S. at 534.

⁶⁶ *Dade County II*, 122 F.3d at 908.

⁶⁷ *Id.* at 909.

⁶⁸ *Id.* at 910.

⁶⁹ *Id.* (quoting *Ensley Branch*, 31 F.3d at 1580).

⁷⁰ *Id.* (quoting *Hayes v. N. State Law Enforcement Officers Ass’n.*, 10 F.3d 207, 217 (4th Cir. 1993) (racial discrimination case)).

⁷¹ *Id.* (quoting *Philadelphia IV*, 6 F.3d at 1010).

⁷² *Id.* (quoting *Ensley Branch*, 31 F.3d at 1581).

⁷³ *Id.* at 929; cf. *Builders Ass’n of Greater Chi. v. Cnty. of Cook*, 256 F. 3d 642, 644 (7th Cir. 2001) (questioned why there should be a lesser standard where the discrimination was against women rather than minorities.).



C. Local Business Enterprise Programs

LBE programs are designed to stimulate the local economy by utilizing businesses on public contracts that are located within a specified geographic boundary. In *AGCC I*, a pre-*Croson* case, the Ninth Circuit Court of Appeals applied the rational basis standard when evaluating the City and County of San Francisco's Local Business Enterprise (LBE) program, holding that a local government may give a preference to local businesses to address the economic disadvantages those businesses face in doing business within the City and County of San Francisco.⁷⁴

To survive a constitutional challenge under a rational basis review, the government entity need only demonstrate that the governmental action or program is rationally related to a legitimate government interest.⁷⁵ The Supreme Court cautioned government agencies seeking to meet the rational basis standard by advising that, if a race and gender-neutral program is subjected to a constitutional attack, the facts upon which the program is predicated will be subject to judicial review.⁷⁶ The rational basis standard of review does not have to be the government's actual interest. Rather, if the Court can merely hypothesize a legitimate interest served by the challenged action, it will withstand the rational basis review.⁷⁷ The term rational must convince an impartial lawmaker that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.⁷⁸

San Francisco conducted a detailed study of the economic disadvantages faced by San Francisco-based businesses compared to businesses located in other jurisdictions. The study showed a competitive disadvantage in public contracting for businesses located within the City compared to businesses from other jurisdictions.

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 LBE Ordinance, the Ninth Circuit held "... the city may rationally allocate its own funds to ameliorate disadvantages suffered by local businesses, particularly where the city itself creates some of the disadvantages."⁷⁹

⁷⁴ *AGCC I*, 813 F.2d at 943; *Lakeside Roofing Company v. State of Missouri, et al.*, 2012 WL 709276, 39-41 (E.D.Mo. Mar. 5, 2012) (Note that federal judges will generally rule the way that a previous court ruled on the same issue following the doctrine of stare decisis – the policy of courts to abide by or adhere to principles established by decisions in earlier cases; however, a decision reached by a different circuit is not legally binding on another circuit court, it is merely persuasive and instructional on the issue).

⁷⁵ *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319–320 (1993)).

⁷⁶ See *Armour*, 132 S. Ct. 2073 at 2080.

⁷⁷ *Lakeside Roofing*, 2012 WL 709276, 38; see KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW FOUNDATION PRESS Chapter 9 (16th ed. 2007).

⁷⁸ *Croson*, 488 U.S. at 515.

⁷⁹ *AGCC I*, 813 F.2d at 943.



D. Small Business Enterprise Programs

SBE programs are designed to foster business development for small businesses by maximizing their participation on government contracts. The size standards of the program vary depending on the government agency's eligibility requirements. A government entity may implement a Small Business Enterprise (SBE) program predicated upon a rational basis to ensure adequate small business participation in government contracting. Rational basis is the lowest level of scrutiny and the standard the courts apply to race and gender-neutral public contracting programs.⁸⁰

IV. Burden of Proof

The procedural protocol established by *Croson* 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:⁸¹

- Disparity exists due to race-neutral reasons
- Methodology is flawed
- Data are not statistically significant
- Controverting data exist

A. Initial Burden of Proof

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 past identified discrimination.⁸² Whether or not the government has produced a strong basis in evidence is a question of law.⁸³ The defendant in a constitutional claim against a disparity study has the initial burden of proof to show that there was past discrimination.⁸⁴

Once the defendant meets this initial burden, the burden shifts to the plaintiff to prove that the program is unconstitutional. “[W]hen the proponent of an affirmative action plan produces sufficient evidence to support an inference of discrimination, the plaintiff must rebut that inference in order to prevail.”⁸⁵ Because the sufficiency of the factual predicate supporting the MBE program

⁸⁰ *Doe I v. Lower Merion Sch. Dist.*, 689 F. Supp. 2d 742, 748 (E.D. Pa. 2010).

⁸¹ *Contractors Ass'n v. City of Philadelphia*, 893 F. Supp. 419, 430, 431, 433, 437 (E.D. Pa.1995) (“*Philadelphia V*”) (These were the issues on which the district court in Philadelphia reviewed the disparity study before it).

⁸² See *Croson*, 488 U.S. at 510; *Philadelphia VI*, 91 F.3d at 597 (citing *Concrete Works of Colo. v. Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994)(“*Concrete Works II*”).

⁸³ *Id.* (citing *Associated Gen. Contractors v. New Haven*, 791 F. Supp. 941, 944 (D. Conn. 1992)).

⁸⁴ *Concrete Works II*, 36 F.3d at 1521-22 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292 (1986)).

⁸⁵ *Engineering Contractors Ass'n of S. Fla. v. Metropolitan Dade Co.*, 122 F.3d 895, 916 (11th Cir. 1997).



is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.⁸⁶

The adequacy of the government's evidence is "evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction]."⁸⁷ The onus is on the jurisdiction to provide a factual predicate that is sufficient in scope and precision to demonstrate that contemporaneous discrimination necessitated the adoption of the MBE program.⁸⁸ When the jurisdiction supplies sufficient statistical information to support the inference of discrimination, the plaintiff must prove that the statistical analysis that was utilized to support the challenged program is flawed.⁸⁹ Therefore, the ultimate burden of proof is on the plaintiff.

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.⁹⁰ The plaintiff must persuade the Court that the program is constitutionally flawed, either by challenging the government's factual predicate for the program or by demonstrating that the program is overly broad. A plaintiff "cannot meet its burden of proof through conjecture and unsupported criticism of the evidence."⁹¹

Joining the majority in stating that the ultimate burden rests with the plaintiff, 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"):⁹²

[I]t is incumbent upon the nonminority [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."⁹³

In *Philadelphia VI*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether or not facts constitute a "strong basis" in evidence for race-based remedies.⁹⁴ That Court wrote that the allocation of the burden of persuasion is

⁸⁶ *Concrete Works II*, 36 F.3d at 1522.

⁸⁷ *Id.* (citing *Croson*, 488 U.S. at 498).

⁸⁸ *See Croson*, 488 U.S. at 488.

⁸⁹ *Engineering Contractors Ass'n of S. Fla. v. Metropolitan Dade Co.*, 943 F. Supp. 1546, 1558-61 (S.D. Fla. 1996).

⁹⁰ *See Wygant*, 476 U.S. at 277-78, 293.

⁹¹ *Concrete Works IV*, 321 F.3d at 989.

⁹² *Id.* at 293 (O'Connor, S., concurrence).

⁹³ *Wygant*, 476 U.S. at 277-78.

⁹⁴ *Philadelphia VI*, 91 F.3d at 597.



dependent on the plaintiff's argument against the constitutionality of the program. 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.⁹⁵ If, on the other hand, the plaintiff argues there is no existence of past discrimination within the agency, the plaintiff must successfully rebut the agency's evidentiary facts and prove their inaccuracy.⁹⁶

However, the ultimate issue of whether sufficient evidence exists to prove past discrimination is a question of law. The burden of persuasion in the traditional sense plays no role in the Court's resolution of that ultimate issue.⁹⁷

Concrete Works VI 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 Constructors Inc. v. Slater*, 228 F.3d 1147, 1173 (10th Cir. 2000): "[g]eneral criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity study, is of little persuasive value."⁹⁸ The requisite burden of proof needed to establish a factual predicate for race and gender-conscious goals as set forth by *Croson* and its progeny is described in *Section IV*.

The Tenth and Eleventh Circuits present alternative approaches to the legal evidentiary requirements of the shifting burden of proof in racial classification cases. This split among the circuits pertains to the allocation of the burden of proof once the initial burden of persuading the Court is met—that persisting vestiges of discrimination exist.⁹⁹

The Tenth Circuit's opinion in *Concrete Works VI* states that the burden of proof remains with the plaintiff to demonstrate that an ordinance is unconstitutional.¹⁰⁰ On the other hand, the Eleventh Circuit in *Hershell* contends that the government, as the proponent of the classification, bears the burden of proving that its consideration of race is narrowly tailored to serve a compelling state interest, and that the government must always maintain a "strong basis in evidence" for undertaking affirmative action programs.¹⁰¹ Therefore, the proponent of the classification must meet a substantial burden of proof, a standard largely allocated to the government to prove that sufficient vestiges of discrimination exist to support the conclusion that remedial action is

⁹⁵ *Id.* at 597.

⁹⁶ *Id.* at 597-598.

⁹⁷ At first glance, the Third Circuit and the Eleventh Circuit positions appear to be inconsistent as to whether the issue at hand is a legal issue or a factual issue. However, the two courts were examining the issues in different scenarios. For instance, the Third Circuit was examining whether enough facts existed to determine if past discrimination existed, and the Eleventh Circuit was examining whether the remedy the agency utilized was the appropriate response to the determined past discrimination. Therefore, depending upon the Plaintiff's arguments, a court reviewing an MBE program is likely to be presented with questions of law and fact.

⁹⁸ *Concrete Works VI*, 321 F.3d at 979.

⁹⁹ *Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade Cnty.*, 333 F. Supp. 2d 1305, 1325 (S.D. Fla. 2004).

¹⁰⁰ *Concrete Works VI*, 321 F.3d at 959 (quoting *Adarand v. Peña*, 228 F.3d 1147, 1176 (10th Cir. 2000) ("We reiterate that the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of an affirmative-action program.")).

¹⁰¹ *Hershell*, 333 F. Supp. 2d at 1305 (stating that *Concrete Works* is not persuasive because it conflicts with the allocation of the burden of proof stated by Eleventh Circuit precedent in *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1244 (11th Cir. 2001)).



necessary. Within the Eleventh Circuit, judicial review of a challenged affirmative action program focuses primarily on whether or not the government entity can meet the burden of proof.

In practice, the standards prescribed in the Eleventh Circuit for proving the constitutionality of a proposed M/WBE framework are rooted in *Engineering Contractors Ass’n v. Metropolitan Dade County*, the same Eleventh Circuit case that was cited to in the Tenth Circuit.¹⁰² In *Dade County I*, the Court found that a municipality can justify affirmative action by demonstrating “gross statistical disparities” between the proportion of minorities awarded contracts and the proportion of minorities willing and able to do the work, or by presenting anecdotal evidence, especially if buttressed by statistical data.¹⁰³

V. Croson Evidentiary Framework

Government entities must construct a strong evidentiary framework to stave off legal challenges and ensure that the adopted MBE program comports with the requirements of the Equal Protection Clause of the United States Constitution. The framework must comply with the stringent requirements of the strict scrutiny standard. Accordingly, there must be a strong basis in evidence that tends to show past discrimination, and the race-conscious remedy must be “narrowly tailored,” as set forth in *Croson*.¹⁰⁴ A summary of the appropriate types of evidence to satisfy the first element of the *Croson* standard follows.

A. Active and 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.¹⁰⁵ However, the local entity need not have been an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court’s strict scrutiny review.¹⁰⁶ An entity will be considered an “active” participant if the evidence shows that it created barriers that actively exclude MBEs from its contracting opportunities. 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.¹⁰⁷

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. The Tenth Circuit, in *Concrete Works I*, considered a purely private sector definition of passive discrimination, holding that evidence of

¹⁰² 943 F. Supp. 1546 (S.D. Fla. 1996) (“*Dade County I*”).

¹⁰³ *Id.* at 1559-60.

¹⁰⁴ *Croson*, 488 U.S. at 486.

¹⁰⁵ *Id.* at 488.

¹⁰⁶ *Id.* at 492, 509.

¹⁰⁷ *Id.* at 492, accord *Coral Constr.*, 941 F.2d at 916.



a government entity infusing its tax dollars into a discriminatory system can satisfy passive discrimination.¹⁰⁸

In *Concrete Works I*, the district court granted summary judgment in favor of the City of Denver in 1993.¹⁰⁹ Concrete Works appealed to the Tenth Circuit, in *Concrete Works II*, in which the summary judgment in favor of the City of Denver was reversed and the case was remanded to the district court for trial.¹¹⁰ The case was remanded with specific instructions permitting the parties “to develop a factual record to support their competing interpretations of the empirical data.”¹¹¹ On remand, the district court entered a judgment in favor of the plaintiff, holding that the City’s ordinances violated the Fourteenth Amendment.¹¹²

The district court in *Concrete III* rejected the four disparity studies the City offered to support the continuation of Denver’s M/WBE program.¹¹³ The Court surmised that (1) the methodology employed in the statistical studies was not “designed to answer the relevant questions,”¹¹⁴ (2) the collection of data was flawed, (3) important variables were not accounted for in the analyses, and (4) the conclusions were based on unreasonable assumptions.¹¹⁵ The Court deemed that the “most fundamental flaw” in the statistical evidence was the lack of “objective criteria [to] define who is entitled to the benefits of the program and [which groups should be] excluded from those benefits.”¹¹⁶ The statistical analysis relied upon by the City to support its M/WBE program was conducted as a result of the ensuing litigation. The statistical evidence proffered by the City to the Court was not objective because it lacked a correlation to the current M/WBE program goals.

The Tenth Circuit on appeal rejected the district court’s analysis because 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 found that marketplace discrimination is relevant when the agency’s prime contractors’ practices are discriminatory against their subcontractors:

The Court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” (citation omitted). The City can satisfy this condition

¹⁰⁸ *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 823 F. Supp. 821, 824 (D. Colo. 1993)(“*Concrete Works I*”), rev’d, 36 F.3d 1513 (10th Cir. 1994), rev’d, 86 F. Supp. 2d 1042 (D. Colo. 2000), rev’d, 321 F.3d 950 (10th Cir. 2003).

¹⁰⁹ *Concrete Works I*, 823 F. Supp. at 824.

¹¹⁰ *Concrete Works II*, 36 F.3d at 1530-31.

¹¹¹ *Id.*

¹¹² *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 86 F. Supp. 2d 1042, 1079 (D. Colo. 2000)(“*Concrete Works III*”).

¹¹³ *Concrete Works III*, 86 F. Supp. 2d at 1065-68.

¹¹⁴ *Id.* at 1067, 1071.

¹¹⁵ *Id.* at 1057-58, 1071.

¹¹⁶ *Id.* at 1068.



by identifying the discrimination “*public or private*, with some specificity.” (internal quotes and citation omitted).¹¹⁷

In *Concrete Works IV*, the Tenth Circuit held that the governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.”¹¹⁸ The Tenth Circuit further held that the city was correct in its attempt to show that it “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.”¹¹⁹ While the Tenth Circuit noted that the record contained “extensive evidence” of private sector discrimination, the question of the adequacy of private sector discrimination as the factual predicate for a race-based remedy was not before the Court.¹²⁰

Ten months after *Concrete Works IV*, the question of whether or not a particular race-based remedy is narrowly tailored when it is based solely on business practices within the private sector was at issue in *Builders Association of Greater Chicago v. City of Chicago*.¹²¹ The plaintiff in *Builders Association of Greater Chicago* challenged the City’s construction set-aside program. The Court considered pre- and post-enactment evidence in support of the six-year-old M/WBE program.¹²² The challenged program consisted of a 16.9 percent MBE subcontracting goal, a 10-percent MBE prime contracting goal, a 4.5 percent WBE subcontracting goal, and a 1 percent WBE prime contracting goal.¹²³

The district court found that private sector business practices offered by the city, which were based on United States Census data and surveys, constituted discrimination against minorities in the Chicago market area.¹²⁴ However, the district court did not find the City’s M/WBE subcontracting goal to be a narrowly tailored remedy given the factual predicate. The Court found that the study did not provide a meaningful, individualized review of M/WBEs to formulate remedies “more akin to a laser beam than a baseball bat.”¹²⁵ The City was ordered to suspend its M/WBE goals program.

As recently as 2010, the Fourth Circuit in *H.B. Rowe Co. v. Tippet* ruled that the State of North Carolina could not rely on private-sector data to demonstrate that prime contractors underutilized

¹¹⁷ *Concrete Works IV*, 321 F.3d at 975-76.

¹¹⁸ *Id.* at 976 (quoting *Shaw v. Hunt*, 517 U.S. 804, 909 (1996)).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 959, 977, 990.

¹²¹ *Builders Ass’n of Greater Chi. v. City of Chi.*, 298 F. Supp. 2d 725, 732 (N.D. Ill. 2003).

¹²² *Builders Ass’n of Greater Chi.*, 298 F. Supp. 2d at 726, 729, 733-34.

¹²³ *Id.* at 729.

¹²⁴ *Id.* at 735-37.

¹²⁵ *Id.* at 737-39, 742.



women subcontractors in the general construction industry.¹²⁶ The Court found that the private sector data did not test whether the underutilization was statistically significant.¹²⁷

B. Systemic Discriminatory Exclusion

Croson established that a local government enacting a race-conscious contracting program must demonstrate identified systemic discriminatory exclusion on the basis of race or any other illegitimate criteria (arguably gender).¹²⁸ Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.¹²⁹ Using appropriate evidence of the entity's active or passive participation in the discrimination, as discussed above, past discriminatory exclusion must be identified for each racial group to which a remedy would apply.¹³⁰ Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

Croson elucidates two ways an entity may establish the requisite factual predicate of discrimination. 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.¹³¹ In other words, when the relevant statistical pool is used, a showing of statistically significant underutilization "may constitute prima facie proof of a pattern or practice of discrimination[.]"¹³²

The *Croson* Court made clear that both prime contract and subcontracting data were relevant.¹³³ 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."¹³⁴ Subcontracting data are also an important means by which to assess suggested future remedial actions. Because the decision makers are different for the awarding of prime

¹²⁶ *Rowe*, 615 F.3d at 236.

¹²⁷ *Id.* at 255.

¹²⁸ *Croson*, 488 U.S. at 492; see *Monterey Mech. Co. v. Pete Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); see also *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218-20 (1999) (held 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)).

¹²⁹ *Croson*, 488 U.S. at 509.

¹³⁰ *Id.* at 506. (The Court stated 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 *N. Shore Concrete & Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 * 55 (E.D.N.Y. April 12, 1998) (rejected the inclusion of Native Americans and Alaskan Natives in the City's program).

¹³¹ *Croson*, 488 U.S. at 509.

¹³² *Id.* at 501 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977)).

¹³³ *Id.* at 502-03.

¹³⁴ *Id.*



contracts and subcontracts, the remedies for discrimination identified at a prime contractor versus subcontractor level may 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.”¹³⁵ Thus, if a local government has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.¹³⁶ Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system “*by taking appropriate measures against those who discriminate* on the basis of race or other illegitimate criteria.”¹³⁷ Croson further states, “*In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.*”¹³⁸

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.¹³⁹ The Court held that both statistical and anecdotal evidence should be used to establish systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.¹⁴⁰

The Court explained that statistical evidence alone often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race neutral.¹⁴¹

Likewise, anecdotal evidence alone is unlikely to establish a systemic pattern of discrimination.¹⁴² Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”¹⁴³

1. Geographic Market

Croson did not speak directly to how the geographic market is to be determined. In *Coral Construction*, the Ninth Circuit Court of Appeals held that “an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction.”¹⁴⁴ Conversely, in *Concrete*

¹³⁵ *Id.* at 509.

¹³⁶ *Id.*

¹³⁷ *Id.* (emphasis added).

¹³⁸ *Id.* (emphasis added).

¹³⁹ *Coral Constr.*, 941 F.2d at 917-18, 920-26.

¹⁴⁰ *Id.* at 919.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (“*Teamster*”)).

¹⁴⁴ *Coral Constr.*, 941 F.2d at 925.



Works I, the district court specifically approved the Denver Metropolitan Statistical Area (MSA) as the appropriate market area since 80 percent of the construction contracts were based there.¹⁴⁵

Taken 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 local market area, the determination should be fact based. An entity may include consideration of evidence of discrimination within its own jurisdiction.¹⁴⁶ Extra-jurisdictional evidence may be permitted, when it is reasonably related to where the jurisdiction contracts.¹⁴⁷

2. Current Versus Historical Evidence

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

Croson requires that an MBE program be "narrowly tailored" to remedy current evidence of discrimination.¹⁴⁸ 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.¹⁴⁹ Therefore, the most recent two or three years of an entity's utilization data would suffice to determine if a statistical disparity exists between current M/WBE utilization and availability.¹⁵⁰

3. Statistical Evidence

To determine whether or not 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

¹⁴⁵ *Concrete Works I*, 823 F. Supp. at 835-836 (D. Colo. 1993); *rev'd on other grounds*, 36 F.3d 1513 (10th Cir. 1994).

¹⁴⁶ *Cone Corp. v. Hillsborough Cnty.*, 908 F.2d 908, 915 (11th Cir. 1990); *Associated Gen. Contractors v. Coal. for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991) ("AGCC II").

¹⁴⁷ 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.

¹⁴⁸ *See Croson*, 488 U.S. at 509-10.

¹⁴⁹ *Croson*, 488 U.S. at 499 (stating, "[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination").

¹⁵⁰ *See AGCC II*, 950 F.2d at 1414 (consultant study looked at City's MBE utilization over a one-year period).



or women contractor availability or composition in the population of available firms in the local market area.¹⁵¹ Disparity indexes have been found highly probative evidence of discrimination in which they ensure that the “relevant statistical pool” of minority or women contractors is being considered.¹⁵²

The Third Circuit Court of Appeals, in *Philadelphia VI*, ruled that the “relevant statistical pool” includes those businesses that not only exist in the marketplace but also are qualified and interested in performing the public agency’s work. In that case, the Third Circuit rejected a statistical disparity finding in which the pool of minority businesses used in comparing utilization to availability was composed of those merely licensed to operate in the City of Philadelphia. A license to do business with the City, standing alone, does not indicate either willingness or capability to do work for the City. The Court concluded that this particular statistical disparity did not satisfy *Croson*.¹⁵³

When using a pool of relevant statistical evidence, 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 M/WBEs that an entity utilizes in a given industry and the number of available M/WBEs in the relevant market area specializing in the specified product/service category would support an inference of discriminatory exclusion.

Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between an entity’s award of contracts to available market area non-minority male businesses and the award of contracts to M/WBEs. Thus, in *AGCC II*, an independent consultant’s study “compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs” over a one-year period.¹⁵⁴ The study found that available MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-

¹⁵¹ 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 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.

¹⁵² *Rowe*, 615 F.3d at 243-44; see *Dade County I*, 943 F. Supp. at 1546, 1559, *aff’d*, 122 F.3d 895 (11th Cir. 1997); see also *Concrete Works II*, 36 F.3d at 1513, 1523.

¹⁵³ *Philadelphia VI*, 91 F.3d at 601-603. 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.

¹⁵⁴ *AGCC II*, 950 F.2d at 1414.



minority counterparts.¹⁵⁵ *AGCC II* argued to the Ninth Circuit that the preferences given to MBEs violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. The district court determined that *AGCC II* only demonstrated a possibility of irreparable injury on the grounds that such injury is assumed for which constitutional rights have been alleged to be violated, but failed to demonstrate a likelihood of success on the merits. On appeal, The Ninth Circuit affirmed the district court’s ruling.¹⁵⁶

Whether a disparity index supports an inference that there is discrimination in the market area depends not only on what is being compared, but also on the statistical significance of any such disparity. 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.”¹⁵⁷ However, the Court has not assessed or attempted to cast bright lines for determining if a disparity index is sufficient to support an inference of discrimination. In the absence of such a formula, the Tenth Circuit determined that the analysis of the disparity index and the findings of its significance are to be judged on a case-by-case basis.¹⁵⁸

Following the dictates of *Croson*, courts may carefully examine whether there are data that show MBEs are qualified, ready, willing, and able to perform.¹⁵⁹ *Concrete Works II* 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 take into consideration the size of MBEs and WBEs.¹⁶⁰

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.

The Sixth Circuit Court of Appeals, in *Associated General Contractors of Ohio, Inc. v. Drabik* (“*Drabik*”), concluded that for statistical evidence to meet the legal standard of *Croson*, it must

¹⁵⁵ *Id.* 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.

¹⁵⁶ *Id.* at 1401.

¹⁵⁷ *Croson*, 488 U.S. at 501 (quoting *Hazelwood Sch. Dist.*, 433 U.S. at 307-308).

¹⁵⁸ *Concrete Works II*, 36 F.3d at 1522.

¹⁵⁹ The *Philadelphia* study was vulnerable on this issue.

¹⁶⁰ *Concrete Works II*, 36 F.3d at 1528.



consider the issue of capacity.¹⁶¹ The State’s factual predicate study based its statistical evidence on the percentage of MBE 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.”¹⁶² 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 percent of the total number of contracting firms in the State, but only get 3 percent 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.¹⁶³

Drabik also pointed out that the State not only relied upon the wrong type of statistical data, but also that the data sets were more than twenty years old. Therefore, an entity must study current data that indicate the availability and qualifications of the MBEs.

The opinions in *Philadelphia VI*¹⁶⁴ and *Dade County I*,¹⁶⁵ regarding disparity studies involving public sector contracting, are particularly instructive in defining availability. In *Philadelphia VI*, the earlier of the two decisions, contractors’ associations challenged a city ordinance that created set-asides for minority subcontractors on city public works contracts. The Third Circuit granted summary judgment in favor of the contractors.¹⁶⁶ The Third Circuit upheld the third appeal, affirming that there was no firm basis in evidence for finding that 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.¹⁶⁷

The Third Circuit reviewed the evidence of discrimination in prime contracting and stated that whether or not it is strong enough to infer discrimination is a “close call” that the Court “chose not to make.”¹⁶⁸ It was unnecessary to make this determination because the Court found that even if there were a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.¹⁶⁹

¹⁶¹ *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734-38 (6th Cir. 2000) (“*Drabik*”). The Court reviewed Ohio’s 1980, pre-Croson, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167, 176 (6th Cir. 1983), finding the program unconstitutional under Croson.

¹⁶² *Drabik*, 214 F.3d at 736.

¹⁶³ *Id.*

¹⁶⁴ *Philadelphia VI*, 91 F.3d at 604-605.

¹⁶⁵ *Dade County I*, 943 F. Supp. at 1582-83.

¹⁶⁶ *Philadelphia VI*, 91 F.3d at 590.

¹⁶⁷ *Id.* at 609-10.

¹⁶⁸ *Id.* at 605.

¹⁶⁹ *Id.*



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 valued at more than \$30,000.¹⁷⁰ The consultant determined that no MBEs were used during the study period based on recollections of the former general counsel to the General and Specialty Contractors Association of Philadelphia regarding whether or not the owners of the utilized firms were MBEs. The Court found this evidence insufficient as a basis for finding that prime contractors in the market area were discriminating against subcontractors.¹⁷¹

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity and that the practicality of the approach should also 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 that it was a “reasonable choice” under the circumstances to use a list of M/WBE-certified contractors as a source for available firms.¹⁷² 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.¹⁷³

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 works projects.”¹⁷⁴ The Court found certification to be an adequate process of identifying capable firms, recognizing that the process may even understate the availability of MBE firms.¹⁷⁵ 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.¹⁷⁶

In *Dade County I*, 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 could be better explained by other factors than discrimination. Statistical disparities existed only when disparity was measured between the proportion of minority businesses and the proportion of contract dollars that the firms received, but statistical disparities did not exist when presented in the award of contracts to minority business. The Court determined that the conflicts present in the statistical analysis was likely due to the County’s failure to account

¹⁷⁰ *Id.* at 600.

¹⁷¹ 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.

¹⁷² *Philadelphia VI*, 91 F.3d at 603.

¹⁷³ *Id.* at 603-605, 609.

¹⁷⁴ *Id.* at 603.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*



for business size in the availability analysis.¹⁷⁷ 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, then the results of the bidding process will be biased.¹⁷⁸ In addition, a comprehensive count of bidders is dependent on the adequacy of the agency's record keeping.¹⁷⁹

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 basis in evidence to justify race-conscious affirmative action.¹⁸⁰ The appellate court did not prescribe the district court's analysis or any other specific analysis for future cases.

C. Anecdotal Evidence

In *Croson*, 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."¹⁸¹ Anecdotal evidence should be gathered to determine if minority contractors are systematically being excluded from contracting opportunities in the relevant market area. 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 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 greater amount of evidence.¹⁸²

As discussed below, anecdotal evidence alone is insufficient to establish the requisite predicate for a race-conscious program. Its 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 to and relied on by the Ninth Circuit in both *Coral Construction and AGCC II*, to justify the existence of an M/WBE program:

¹⁷⁷ *Dade County I*, 943 F. Supp. at 1560-64.

¹⁷⁸ 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).

¹⁷⁹ 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).

¹⁸⁰ *Dade County I*, 943 F. Supp. at 1557; *Dade County II*, 122 F.3d at 904.

¹⁸¹ *Croson*, 488 U.S. at 509; see *Teamsters*, 431 U.S. at 338.

¹⁸² 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.]").



- M/WBEs denied contracts despite being the low bidders—*Philadelphia*¹⁸³
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs—*Cone Corporation v. Hillsborough County*¹⁸⁴
- M/WBEs’ inability to obtain contracts for private sector work—*Coral Construction*¹⁸⁵
- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties—*AGCC II*¹⁸⁶
- Attempts to circumvent M/WBE project goals—*Concrete Works II*¹⁸⁷
- Harassment of M/WBEs by an entity’s personnel to discourage them from bidding on an entity’s contracts—*AGCC II*¹⁸⁸

Courts must assess the extent to which relief measures disrupt settled “rights and expectations” when determining the appropriate corrective measures.¹⁸⁹ Presumably, courts would look more favorably upon anecdotal evidence in support of a less intrusive program than they would in support of 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.¹⁹⁰ 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, the *Croson* Court found that the City of Richmond’s MBE program was unconstitutional because the City failed to provide a factual basis to support its MBE program. 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.”¹⁹¹

In part, it was the absence of statistical evidence that proved fatal to the program. The 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.”¹⁹²

¹⁸³ *Philadelphia*, 6 F.3d at 994-5.

¹⁸⁴ *Cone Corp.*, 908 F.2d at 916.

¹⁸⁵ 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 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).

¹⁸⁶ *AGCC II*, 950 F.2d at 1415.

¹⁸⁷ *Concrete Works II*, 36 F.3d at 1530.

¹⁸⁸ *AGCC II*, 950 F.2d at 1415.

¹⁸⁹ *Wygant*, 476 U.S. at 283.

¹⁹⁰ *Teamsters*, 431 U.S. at 339; *Coral Constr.*, 941 F.2d at 919.

¹⁹¹ *Croson*, 488 U.S. at 509 (citing *Teamsters*, 431 U.S. at 338).

¹⁹² See *Id.* at 480.



This was not the situation confronting the Ninth Circuit in *Coral Construction*. There, the 700-plus page appellate records contained the affidavits of “at least 57 minority or women contractors, each of whom complain in varying degree 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.”¹⁹³

Nonetheless, this anecdotal evidence 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.”¹⁹⁴ After noting the 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 purely 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.¹⁹⁵

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.”¹⁹⁶

Two other circuit courts also suggested that anecdotal evidence might be dispositive in rare and exceptional cases, if ever, while rejecting it in the specific case before them. For example, in *Philadelphia IV*, 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 be “impermissible” for consideration under *Croson*.¹⁹⁷ The Third Circuit Court disapproved of the district court’s actions because, in its view, the Court’s rejection of this evidence betrayed the Court’s role in disposing of a motion for summary judgment.¹⁹⁸ The 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

¹⁹³ *Coral Constr.*, 941 F.2d at 917-18.

¹⁹⁴ *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).

¹⁹⁵ *Coral Constr.*, 941 F.2d at 919.

¹⁹⁶ *Id.*

¹⁹⁷ *Philadelphia IV*, 6 F.3d at 1002.

¹⁹⁸ *Id.* at 1003.



anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.¹⁹⁹

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*.²⁰⁰ The Court found that, in the face of conflicting statistical evidence, the anecdotal evidence there was not sufficient:

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. (internal citation omitted.) The more specific testimony about discrimination by white firms could not, in itself, support an industry-wide remedy (internal quotes and citation omitted). Anecdotal evidence is most useful as a supplement to strong statistical evidence—which the Council did not produce in this case.²⁰¹

The Eleventh Circuit in *Dade County II* is also in accord. In applying the “clearly erroneous” standard to its review of the district court’s decision in *Dade County II*, it commented that “[t]he picture painted by the anecdotal evidence is not a good one.”²⁰² However, it held that this was not the “exceptional case” in which, unreinforced by statistics, the anecdotal evidence was enough.²⁰³

In *Concrete Works II*, the Tenth Circuit Court of Appeals described the anecdotal evidence that is most compelling as 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 reflect 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.”²⁰⁴ 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*.²⁰⁵ There, the Court approved a “vast number of individual accounts of discrimination,” which included (1) numerous reports of MBEs denied contracts despite being the low bidder, (2) MBEs told that they were not qualified, although they were later found to be

¹⁹⁹ *Id.*

²⁰⁰ 963 F.2d 420, 427 (D.C. Cir. 1992).

²⁰¹ *O’Donnell*, 963 F.2d at 427.

²⁰² *Dade County II*, 122 F.3d at 925.

²⁰³ *Id.* at 926.

²⁰⁴ *Concrete Works II*, 36 F.3d at 1530.

²⁰⁵ *AGCC II*, 950 F.2d at 1401.



qualified when evaluated by outside parties, (3) MBEs refused work even after they were awarded the contracts as low bidder, and (4) MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal, the City pointed 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.²⁰⁶ 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. Anecdotal evidence alone may, in exceptional cases, show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan, but it must be so dominant and pervasive that it passes muster under the *Croson* standards.²⁰⁷

Pursuant to *Croson* and its progeny, case law suggests that, to be optimally persuasive, anecdotal evidence collectively should satisfy six particular requirements. These requirements are that the accounts:

- Are gathered from minority contractors, preferably those that are "qualified"²⁰⁸
- Concern specific, verifiable instances of discrimination²⁰⁹
- Involve the actions of governmental officials²¹⁰
- Involve events within the relevant jurisdiction's market area²¹¹
- Discuss the harm that the improper conduct has inflicted on the businesses in question²¹²
- Collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.²¹³

Given that neither *Croson* nor its progeny identify 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 an MBE program. However, the foregoing cases provide some guidance by implication. *Philadelphia IV* makes clear that 14 anecdotal accounts standing alone will not suffice.²¹⁴ The Court then turned to the statistical

²⁰⁶ *Id.* at 1415.

²⁰⁷ *Philadelphia IV*, 6 F.3d at 1003. The anecdotal evidence must be "dominant or pervasive."

²⁰⁸ *Philadelphia VI*, 91 F.3d at 603.

²⁰⁹ *Coral Constr.*, 941 F.2d at 917-18; *but see Concrete Works IV*, 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.").

²¹⁰ *Croson*, 488 U.S. at 509.

²¹¹ *Coral Constr.*, 941 F.2d at 925.

²¹² *O'Donnell*, 963 F.2d at 427.

²¹³ *Coral Constr.*, 941 F.2d at 919.

²¹⁴ *Philadelphia IV*, 6 F.3d. at 1002-03.



data.²¹⁵ While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type referenced above, were insufficient without statistical data to justify the program in *Coral Construction*. Therefore, no court has provided rules on the number of pieces of anecdotal evidence that is needed in conjunction with statistical evidence to pass constitutional muster.

The quantum of anecdotal evidence that a court would likely find acceptable will depend on the proposed remedy. 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.

D. Remedial Statutory Scheme

H.B. Rowe Company v. Tippet (“Rowe”) challenged the constitutionality of the North Carolina General Assembly’s Statute 136-28.4 (Statute), promulgated in 1983.²¹⁶ The Statute set forth a general policy to promote the use of small, minority, physically handicapped, and women contractors in non-federally funded State construction projects.²¹⁷ The 1983 Statute directed North Carolina Department of Transportation (NCDOT) to encourage and promote the policy.²¹⁸ Seven years later, in 1990, the Statute was amended to include specific participation goals on state funded transportation construction contracts for minority- and women-owned businesses.²¹⁹

As a result of the amendment, NCDOT created a Minority Business Enterprise and Women Business Enterprise Program (M/WBE Program) for non-federally funded highway and bridge construction contracts.²²⁰ In 1991, the constitutionality of the Statute was challenged.²²¹ The Court ruled in favor of the plaintiff, stating that, in order to implement race-conscious measures to remedy discrimination, the governmental entity must identify with “some specificity” the racial discrimination it seeks to remedy.²²² As a result of the challenge, NCDOT suspended its M/WBE program in 1991.²²³

In 1993, NCDOT commissioned a disparity study on state-funded transportation construction contracts.²²⁴ The study determined that minority and women subcontractors were underutilized at

²¹⁵ *Id.* at 1002-03.

²¹⁶ *Rowe*, 615 F.3d at 236.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 237; see *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693 (1994).

²²² *Rowe*, 615 F.3d at 237 (citing *Croson*, 488 U.S. at 504).

²²³ *Id.*

²²⁴ *Id.*



a statistically significant level and the M/WBE Program was re-implemented.²²⁵ In 1998, the North Carolina General Assembly again commissioned an update to the 1993 study.²²⁶ The 1998 update study concluded that minority- and women-owned businesses continued to be underutilized in state-funded road construction contracts.²²⁷

In 2002, H.B. Rowe Company was denied a NCDOT contract because the company's bid included 6.6 percent women subcontractor participation and no minority subcontractor participation.²²⁸ NCDOT claimed that H.B. Rowe Company failed to meet the good faith effort requirements of the M/WBE program.²²⁹ A third study was commissioned in 2004 to again study minority and women contractor participation in the State's highway construction industry.²³⁰ In 2006, relying on the 2004 study, the North Carolina General Assembly amended Statute 136-28.4.²³¹ The principal modifications were:

- Remedial action should be taken only when there is a strong basis in evidence of ongoing effects of past or present discrimination that prevent or limit disadvantaged minority- and women-owned businesses from participating as subcontractors in State-funded projects.
- The minority/women classification was limited to those groups that suffered discrimination.
- A disparity study should be performed every five years to respond to changing conditions.
- Inclusion of a sunset provision.²³²

First, the Court considered if the statutory scheme as it relates to minorities survives the strict scrutiny standard. The Fourth Circuit Court of Appeals reviewed the statistical evidence detailed in the 2004 disparity study to determine if the statutory scheme was based on strong statistical evidence to implement race-conscious subcontractor goals.²³³

The statistical evidence was also examined to determine if the statute's definition of minorities was over-inclusive by including minority groups that did not suffer discrimination pursuant to the statistical results of the 2004 disparity study.²³⁴

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 238.

²³¹ *Id.*

²³² *Id.* at 238-39.

²³³ *Id.* at 239.

²³⁴ *Id.*



The Court did not consider if the statistical methodology employed in the 2004 disparity study was sufficient to support a compelling state interest. Rather, the Court accepted the disparity index as the measure by which to determine the statistical significance of the underutilization of minorities in the State's subcontracts.²³⁵ The methodology used in the 2004 disparity study calculated a disparity at 0.05 confidence level.²³⁶ A statistical calculation is significant at the 0.05 confidence level because the probability of that result occurring by chance is 5 percent or less.²³⁷ The 0.05 confidence level is used in social and other sciences as a marker of when a result is a product of some external influence, rather than ordinary variation or sampling error.²³⁸

While the circuit court found that “*the study itself* sets out the standard by which one could confidently conclude that discrimination was at work[,]” the standard was not followed in the State's statutory scheme.²³⁹ The statistical evidence in the 2004 disparity study demonstrated that African American and Native American subcontractors were underutilized at a disparity index of less than 80 and that Hispanic American and Asian American subcontractors also were underutilized, but not at a 0.05 confidence level.²⁴⁰ The 2004 Study determined that the underutilization of Hispanic American and Asian American contractors was not statistically significant.

Therefore, the only statutory scheme ruled narrowly tailored to achieve the State's compelling interest was the one related to African American and Native American subcontractors. The statutory scheme pertaining to Hispanic American and Asian American subcontractors was deemed unconstitutional.²⁴¹ Thus, the State only provided a strong basis in evidence for the minority subcontractor participation goals pertaining to African American and Native American subcontractors.

Second, the Court considered if the statutory scheme as it relates to women survives the intermediate scrutiny standard. The evidence demonstrated that the State's prime contractors “substantially over-utilized” women-owned businesses on public road construction projects.²⁴² The 2004 disparity study calculated the overutilization of women subcontractors as statistically significant at a 0.05 confidence level, which the Court alternatively described as the 95% confidence level.²⁴³ The circuit court further noted that the private sector evidence was insufficient

²³⁵ *Id.* at 243-44.

²³⁶ *Id.* at 244.

²³⁷ *Id.* at 261 n. (citing SHERRI L. JACKSON, RESEARCH METHODS AND STATISTICS: A CRITICAL THINKING APPROACH 168-69 (3d ed. 2006) (noting that the .05 confidence level is generally used in the social sciences as indication that the result was produced as a consequence of an external influence)).

²³⁸ Rowe, 615 F.3d at 261 n. 12 (citing EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 483 (11th ed. 2007)).

²³⁹ See *Id.* at 261.

²⁴⁰ *Id.* at 245.

²⁴¹ *Id.* at 254.

²⁴² *Id.*

²⁴³ *Id.* at 254-55.



to overcome the strong evidence of overutilization.²⁴⁴ Consequently, the circuit court determined that the evidence in the 2004 disparity study did not provide “exceedingly persuasive justification” to include women-owned businesses in gender-based remedies.²⁴⁵

In light of the *Rowe* decision, caution should be exercised when determining which minority or gender group is appropriate for race-conscious or gender-conscious remedies. For an MBE program to be narrowly tailored there must be a statistical finding of underutilization of minority subcontractors. When the underutilization of a minority group is not found to be statistically significant, the minority group should not be included in race-conscious remedies.

The intermediate scrutiny standard for gender classifications can be met with statistical evidence of underutilization that is not statistically significant. However, this does not apply when there is demonstrated overutilization. Women-owned businesses should be considered for gender-based remedies when the statistical evidence demonstrates that the overutilization is not statistically significant.

VI. 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.²⁴⁶ An MBE program cannot stand if the sole barrier to M/WBE participation is a barrier that is faced by all new businesses, regardless of ownership.²⁴⁷ 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.²⁴⁸ In other words, if the barriers to minority participation are race neutral, then the program must be race neutral.

The requirement that race-neutral measures be considered does not mean that they must be exhausted before race-conscious remedies can be employed. The Supreme Court 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[.]”²⁴⁹

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 as detailed above in

²⁴⁴ *Id.* at 255.

²⁴⁵ *Id.*

²⁴⁶ *AGCC II*, 950 F.2d at 1417.

²⁴⁷ *Croson*, 488 U.S. at 508.

²⁴⁸ *Id.* at 507.

²⁴⁹ *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).



Section IV. If the evidence shows that in addition to capital and bonding requirements, which are race neutral, MBEs also face race discrimination in the awarding of contracts, then a race-conscious program will stand, as long as it also includes race-neutral measures to address the capital and bonding barriers.²⁵⁰

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.²⁵¹ 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 contract programs that have been implemented to improve MBE utilization should also be measured.²⁵²

VII. Conclusion

The decision of the United States Supreme Court in the *Croson* case changed the legal landscape for local governments’ race and gender-conscious public contracting programs. The United States Supreme Court modified the authority of a local government to use local funds to institute remedial race-conscious public contracting programs. This chapter has examined what *Croson* and its progeny require for a local government to institute a constitutional race or gender-conscious public contracting program.

Consistent with the case law, any race or gender-conscious recommendations for the City’s Affirmative Action Code that are presented in this Disparity Study will be based on a constitutionally sound factual predicate. The methodology employed to conduct the Disparity Study determined if the City has a compelling interest to implement a race- or gender-based program. The analysis is based on statistical evidence that is limited to the City’s market area, and the statistical model used in the disparity analysis is consistent with the standards proscribed in *Croson* progeny, and tailored to Sixth Circuit precedent. The disparity findings for prime contracts and subcontracts are calculated separately by industry, ethnicity, and gender.

The statistical findings of the City of Columbus Disparity Study support the implementation of race and gender-conscious remedial measures to address the identified disparity.

²⁵⁰ *Croson*, 488 U.S. at 507 (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

²⁵¹ *Coral Constr.*, 941 F.2d at 923.

²⁵² *Dade County II*, 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* section II, Standard of Review for the discussion of narrow tailoring in *Concrete Works IV*, *Adarand*, *County of Cook*, and *City of Chicago*.



VIII. List of Authorities

Cases	Pages
<i>Adarand Constructors, Inc. v. Slater</i> , 228 F.3d 1147 (10th Cir. 2000)	15
<i>Armour v. City of Indianapolis, Ind.</i> , 132 S. Ct. 2073 (2012)	12
<i>Associated Gen. Contractors of Cal. v. City & Cnty. of San Francisco (“AGCC I”)</i> , 813 F.2d 922 (9th Cir. 1987)	11, 12, 13
<i>Associated Gen. Contractors v. Coal. for Econ. Equity (“AGCC II”)</i> , 950 F.2d 1401 (9th Cir. 1991)	passim
<i>Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik”)</i> , 214 F.3d 730 (6th Cir. 2000)	3, 5, 24
<i>Associated Gen. Contractors v. New Haven</i> , 791 F. Supp. 941 (D. Conn. 1992)	14
<i>Brunet v. City of Columbus</i> , 1 F.3d 390 (6th Cir. 1993)	10
<i>Builders Ass’n of Greater Chi. v. City of Chi.</i> , 298 F. Supp. 2d 725 (N.D. Ill. 2003)	18
<i>Builders Ass’n of Greater Chicago v. Cnty. of Cook</i> , 256 F.3d 642 (7th Cir. 2001)	12
<i>City of Richmond v. J.A. Croson Co. (“Croson”)</i> , 488 U.S. 469 (1989)	passim
<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works I”)</i> , 823 F. Supp. 821 (D. Colo. 1993)	17, 21
<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works II”)</i> , 36 F.3d 1513 (10th Cir. 1994)	passim
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<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works IV”)</i> , 321 F.3d 950 (10th Cir. 2003)	passim



<i>Cone Corp. v. Hillsborough Cnty.</i> , 908 F.2d 908 (11th Cir. 1990)	21, 27
<i>Contractors Ass’n of E. Pa. v. City of Philadelphia (“Philadelphia IV”)</i> , 6 F.3d 990 (3d Cir. 1993)	<i>passim</i>
<i>Contractors Ass’n of E. Pa. v. City of Philadelphia (“Philadelphia V”)</i> , 893 F. Supp. 419 (E.D. Pa.1995)	13
<i>Contractors Ass’n of E. Pa v. City of Philadelphia (“Philadelphia VI”)</i> , 91 F.3d 586 (3rd Cir. 1996)	<i>passim</i>
<i>Coral Constr. Co. v. King Cnty.</i> , 941 F.2d 910 (9th Cir. 1991)	<i>passim</i>
<i>Dickerson Carolina, Inc. v. Harrelson</i> , 114 N.C. App. 693 (1994)	31
<i>Doe 1 v. Lower Merion Sch. Dist.</i> , 689 F. Supp. 2d 742 (E.D. Pa. 2010)	13
<i>EEOC v. Am. Nat’l Bank</i> , 652 F.2d 1176 (4th Cir. 1981)	26
<i>Eng’g Contractors Ass’n v. Metro. Dade Cnty. (“Dade County I”)</i> , 943 F. Supp. 1546 (S.D. Fla. 1996)	<i>passim</i>
<i>Eng’g Contractors Ass’n v. Metro. Dade Cnty. (“Dade County II”)</i> , 122 F.3d 895 (11th Cir. 1997)	<i>passim</i>
<i>Ensley Branch N.A.A.C.P. v. Seibels</i> , 31 F.3d 1548 (11th Cir. 1994)	11, 12
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	35
<i>Hayes v. N. State Law Enforcement Officers Ass’n</i> , 10 F.3d 207 (4th Cir. 1993)	12
<i>Hazelwood Sch. Dist. v. United States</i> , 433 U.S. 299 (1977)	20, 23
<i>H.B. Rowe Co. v. N.C. Dep’t of Transp. (“Rowe”)</i> , 615 F.3d 233 (4th Cir. 2010)	<i>passim</i>



<i>Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade Cnty.</i> , 333 F. Supp. 2d 1305 (S.D. Fla. 2004)	16
<i>Int'l Bhd. of Teamsters v. United States ("Teamsters")</i> , 431 U.S. 324 (1977)	<i>passim</i>
<i>Johnson v. Board of Regents of the University of Georgia</i> , 263 F.3d 1234, 1244 (11th Cir. 2001)	16
<i>Lakeside Roofing Company v. State of Missouri, et al.</i> , 2012 WL 709276 (E.D.Mo. Mar. 5, 2012)	12, 13
<i>League of United Latin Am. Citizens v. Santa Ana</i> , 410 F. Supp. 873 (C.D. Cal. 1976)	26
<i>Mich. Rd. Builders Ass'n v. Milliken</i> , 834 F.2d 583 (6th Cir. 1987)	10
<i>Miss. Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982)	10
<i>Monterey Mech. Co. v. Pete Wilson et al.</i> , 125 F.3d 702 (9th Cir. 1997)	19
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<i>Ohio Contractors Ass'n v. Keip</i> , 1983 U.S. App. LEXIS 24185 (6th Cir. 1983)	5, 24
<i>Reynolds v. Sheet Metal Workers, Local 102</i> , 498 F. Supp. 952 (D. D.C. 1980)	26
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<i>Shaw v. Hunt</i> , 517 U.S. 899 (1996)	11
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	10, 11



<i>W.H. Scott Constr. Co. v. City of Jackson</i> , 199 F.3d 206 (1999)	19
<i>Wygant v. Jackson Bd. of Educ.</i> , 476 U.S. 267 (1986)	14, 15 27



CHAPTER 2: Procurement Policy Analysis

I. Introduction

This chapter is an overview of the purchasing standards defined in the City of Columbus, Ohio City Codes (City Code). The City Code governed the City of Columbus' (City) procurement policy during the January 1, 2012, to December 31, 2015, study period. Changes to the City Code that occurred during the study period are discussed herein.

II. Procurement Standards Overview

The City Code governing the procurement process for the purchase of construction, professional services, and goods and services is presented in Table 2.1. The exception to the application of the City Code is procurement using state or federal funds. The procurement standards for a state or federal grant may supersede the City Code.

Table 2.1: City Code Governing Procurement

City of Columbus City Code		
Title 3	Chapter 329	Procurement of Goods and Services – Sale of City Property
Title 39	Chapter 3901 et seq.	Affirmative Action Code

The authority to amend the City Code is vested in the City Council. The responsibility for implementing the procurement policy is delegated to Director of Finance and Management.

1. Chapter 329 of the City Code: Procurement of Goods and Services – except Sale of City Property

The procurement of construction, professional services, and goods and services (except sale of City property) is governed by the Chapter 329 of the City Code. During the study period, eight ordinances were passed by City Council to update Chapter 329. The initial modification to chapter 329 was effective January 1, 2014. Additional modifications to Chapter 329 became effective January 1, 2015.

2. Chapter 3901 of the City Code: Affirmative Action Provisions

Chapter 3901, the Affirmative Action Code, implemented race and gender-neutral programs, policies, and procedures to encourage the use of minority, female-owned and other small businesses on the City's contracts. During the study period, Title 39 was enforced by the Office of Equal Business Opportunity. Ordinance 3025-2016 repealed Title 39 and established the Office of Diversity and Inclusion (ODI) and the ODI Advisory Council. ODI was authorized to implement the objectives of the Affirmative Action Code.



III. Industry Definitions

Construction: The City Code did not include a definition of construction until January 1, 2014. Construction, as defined in the City Code as of January 2014, was:

any reconstruction, enlargement, alteration, repair, remodeling, renovation or new development of any public improvement. Construction includes, but is not limited to, dredging, shoring, demolition, deconstruction, drilling, blasting, excavating, scaffolding, installation, and any other change to or new development of the physical structure of a public improvement.

On July 16, 2015, the definition of construction was modified. Since 2015, the City Code defines construction as:

1. Public improvement, including the following:

- (a) The construction of new buildings and structures, including site preparation.
- (b) Additions, alterations, conversions, expansions, reconstruction, renovations, rehabilitations, and major replacements of a building or structure, including, but not limited to, the complete replacement of a roof.
- (c) Major mechanical and electrical system installations and upgrades, including, but not limited to, plumbing, heating and central air conditioning, boilers, ventilation systems, fire suppression systems, pump systems electrical work, elevators, escalators, and other similar building services that are built into the facility.
- (d) New, fixed outside structures or facilities, including, but not limited to, sidewalks and trails, highways and streets, bridges, parking lots, utility connections, outdoor lighting, water supply lines, sewers, water and signal towers, electric light and power distribution and transmission lines, playgrounds and equipment, parks with features, retaining walls, and similar facilities that are built into or fixed to the land, including site preparation.
- (e) Additions, alterations, expansions, reconstruction, renovations, rehabilitations, and major replacements of a fixed, outside structure.
- (f) Major earthwork for land improvements for parks and recreation fields.
- (g) Blasting, demolition, dredging, drilling, excavating and/or shoring.²⁵³

²⁵³ Construction, as it relates to a public improvement, does NOT include the following: (a) Annual, routine, or minor maintenance and repairs to existing buildings and structures, including, but not limited to, painting, patching, and carpet cleaning. (b) Annual, routine, or minor maintenance and repairs to building systems, including, but not limited to, plumbing, heating and central air conditioning, boilers, ventilation systems, fire suppression systems, pump systems electrical work, elevators, escalators, carpet replacement and other similar building services that are built into the facility. (c) Annual, routine, or minor maintenance and repairs to fixed, outside structures or facilities, including, but not limited to, cleaning, sealing, landscaping, and tree removal. (d) Cost and installation of special purpose equipment designed to prepare the structure for a specific use, including, but not limited to, furniture and equipment for an office. (3) For purposes of prequalification, as required by this Chapter, construction does not include demolition or deconstruction of any structure owned by the City's land bank or any structure located in an area zoned for residential use as defined in Title 33 of City Code (Ordinance 1196-2015).



Professional Service: The definition of professional service in the City Code did not change during the study period. Professional service usually requires advanced training and/or a significant degree of expertise to perform, and often requires official certification or authorization by the state as a condition precedent to the rendering of such service. By way of example, professional services include the personal services rendered by architects, attorneys-at-law, certified public accountants, financial consultants, city and regional planners, management consultants and professional engineers.

Goods and Services: The definition of goods and services did not change during the study period.

IV. Procurement Process Overview

Five solicitation methods are defined in the City Code. The methods are informal solicitations, competitive solicitations, sole source purchases, universal term contracts, and emergency purchases. Determination of the solicitation method is based on the estimated contract dollar amount and the funding source. The dollar amount that determines the solicitation method varies with the industry.

During the study period, the construction informal threshold changed from \$20,000 to \$100,000. The professional services informal threshold has two dollar levels that did not change during the study period. The two dollar thresholds are under \$20,000 and from \$20,000 to \$50,000.

The City Code requires departments to make reasonable efforts to secure competition in the procurement process unless the circumstances make it manifestly impractical to do so. Advertising is therefore required to solicit both informal and formal bids and proposals. Informal bids are advertised for a minimum of 24 hours. The advertising period for informal solicitations changed during the study period from 24 hours to three days. The solicitation for professional services is sometimes posted for at least seven days. The requirement is to post the notice on a City-approved electronic procurement system.

The competitive sealed bid is the formal solicitation method for the procurement of goods and services, many services, and construction.²⁵⁴ Request for Statement of Qualifications or a Request for Proposals is the solicitation method for the formal procurement of professional services.

There was a major change to the formal construction procurement standard during the study period. City Council established a prequalification requirement that defined the businesses that could bid for a construction prime and subcontract contract. As of January 1, 2015, the City Code limited construction bidders to prequalified contractors. Bids submitted in response to a solicitation for competitive sealed construction bids could be accepted only from a prequalified bidder. The bidder could list only prequalified subcontractors in the bid.

The development of the prequalification standards began in 2012. The Director of Finance and Management established the prequalification procedures in compliance with the City Code. The

²⁵⁴ Exceptions to the competitive sealed bidding requirement include formal purchases of commodities with fixed prices, sole source purchases, emergency purchases, and purchases within an existing universal term contract.



prequalification process required submittal of prequalified information once per year. Each application is objectively evaluated using a quantified point system, based on the specifications in the application. The Director of Finance and Management establishes specifications for the prequalification application and allocates specific maximum and minimum points for each responsibility factor. Three types of prequalification designations were created: 1) prequalified not responsible, 2) prequalified provisionally responsible, and 3) prequalified responsible. The Director of Finance and Management or authorized designee notifies applicants of their prequalification status in writing, stating the reasons for the determination and informing the applicant of any available administrative review or appeal procedures.

The criteria were established to allow for a uniform assignment of points based on an objective evaluation of the responsibility factors. This quantified point system establishes the minimum and maximum score by which an applicant is deemed prequalified not responsible, prequalified provisionally responsible, or prequalified responsible. To be deemed prequalified responsible, a business entity must meet five mandatory requirements, three of five necessary criteria, as well as receiving a necessary number of points on its total application. The City started accepting prequalification applications on January 1, 2014, and the City Code became effective on January 1, 2015. Except for a few clarifying revisions, the City Code has not been modified since 2014. (Reference ordinances 2607-2012, 2813-2012, 2808-2013, 1785-2014, 2612-2014, and 1196-2015.)

To bid on a construction contract, all potential bidders and licensed construction trade subcontractors who seek to perform any portion of work on the proposed construction or construction services contract must be classified as prequalified responsible or prequalified provisionally responsible on an annual basis. The solicitation methods for professional services and goods and services did not change during the study period.

V. Construction Procurement Process

A. Informal Construction Contracts Valued Less Than \$20,000

The informal threshold from January 1, 2012 to December 31, 2014 was \$20,000. Effective January 1, 2015, the threshold increased to \$100,000. Reasonable measures must be undertaken to provide for competition and to secure bids from at least three bidders. These requirements are satisfied if the user department solicits bids using an electronic procurement system approved by the Director of Finance and Management.



B. Formal Competitive Construction Contracts

Formal construction contracts are procured through a competitive sealed bidding process, unless otherwise authorized by the City Codes. The user department prepares the invitation for bid (IFB) containing the specifications and all contractual terms and conditions applicable to the project. Only construction contractors prequalified as responsible or prequalified provisionally responsible are eligible to submit a bid in response to a construction solicitation. In addition, a bidder's trade subcontractors must also be certified at the time of bid opening.

1. Advertising Requirements

Invitation for bids (IFB) must be publicly advertised in the Columbus City Bulletin, through an electronic procurement system, or on the City's website at least seven calendar days prior to the bid due date.

2. Evaluation and Recommendation for Award

Contract award is made to the lowest, responsive, responsible, and best bidder. A bidder is determined to be responsive after review of several factors, including compliance with bid specifications, submission requirements, and prequalification status. A bidder is determined to be responsible after a review of the firm's experience in the area of construction, its capital and human resources, and the ability to meet deadlines and control costs.

3. Approval and Authorization of the Award

The director of the user department recommends awarding the contract to the lowest, best, responsive, and responsible bidder, and awards the contract unless capital funds are used. If capital funds are used, the award must be approved by an ordinance of the City Council.

VI. Professional Services Procurement Process

A. Informal Professional Services Contracts Valued \$20,000 and Under

Professional services valued under \$20,000 and under may be procured without an RFP or RFSQ. There is no requirement to advertise the solicitation. When appropriate, reasonable measures must be undertaken to provide for competition among potential contractors.

B. Informal Professional Services Contracts Valued from \$20,000 to \$50,000

Professional services may be procured through a RFSQ, a RFP, a modified version of these solicitation methods, or some other process.



1. Advertisement

There is no requirement to advertise the solicitation. At a minimum, the user department must use a process that is designed to allow for competition among potential contractors in an objective manner.

2. Evaluation and Recommendation for Award

The user department reviews, evaluates, and recommends an award. The recommendation must include a detailed description of the vendors contacted, the process used, the basis of the award, and the method used to determine cost.

3. Authorization of Award

The award to the recommended vendor must be approved by the City Council.

C. Formal Competitive Professional Services Contracts Valued Over \$50,000

Professional services contracts valued over \$50,000 are procured through either the RFP or RFSQ process.

1. Advertising Requirements

RFPs and RFSQs must be publicly advertised in the Columbus City Bulletin and through an electronic procurement system at least seven calendar days prior to the submittal deadline.

2. Evaluation and Recommendation for Award

An RFP/RFSQ evaluation committee, made up of at least three members of the user department, other City agencies, or non-city employees, is constituted to evaluate each RFP and RFSQ. Unless manifestly impractical, at least one member of the evaluation committee must hold the professional license or certification required to conduct the services in the solicitation. The evaluation committee evaluates and ranks all responses based on the responsiveness to the specifications of the RFP/RFSQ.

In determining if a firm is qualified as presented in its response to an RFQ, the evaluation committee must consider the following evaluation factors, including 1) the technical training, education, and experience of the firm's personnel; 2) the ability to perform the required service competently and expeditiously, measured by the offeror's workload and availability of firm resources; 3) past performance; and 4) an environmental factor where appropriate.

The same four criteria are used in evaluating an RFP. However, one additional criterion is applied. The fifth criterion is the quality and feasibility of the offeror's technical proposal. The RFP evaluation committee may select at least two of the top-ranked firms to conduct additional



discussions. A presentation may be required. These discussions and presentations should explicate the firm's qualifications, proposed approach to the project, and ability to furnish the required services. The evaluation committee submits the rankings to the director of the user department with a written explanation.

The director of the user department has discretion in selecting the offeror with whom to negotiate. If negotiations fail with the highest ranked offeror, the director may negotiate with another offeror.

3. Approval and Authorization of the Award

The director of the user department recommends the award, which must be authorized by City Council.

VII. Goods and Services Procurement Process

The informal procurement of goods and services with a contract value less than \$1,000 is managed by the department. The department defines the solicitation, selects the vendor, and makes the award at its discretion.

The informal procurement of goods and services contracts valued at \$1,000 to \$50,000 must be procured through a competitive, sealed bidding process, unless otherwise authorized by the City Code. The user department prepares the invitation for bid (IFB) containing the specifications and all contractual terms and conditions applicable to the procurement.

A. Informal Goods and Services Contracts Valued \$1,000 and Under

Goods and services contracts valued \$1,000 and under may be procured without competition. When feasible, the user department is required to undertake reasonable measures to provide for competition among potential contractors.

B. Informal Goods and Services Contracts Valued \$20,000 and Under

Goods and services contracts valued under \$20,000 must be posted for at least 24 hours. The City must receive three bids or post the solicitations on an electronic procurement system approved by the finance and management director. The director of the user department authorizes the award.

C. Formal Competitive Goods and Services Contracts Valued Over \$20,000

Goods and services contracts valued over \$20,000 are procured through a competitive, sealed bidding process.



1. Advertising Requirements

IFBs must be publicly advertised in the Columbus City Bulletin and through an electronic procurement system at least seven calendar days prior to the bid due date.

2. Evaluation and Recommendation for Award

Contract award is made to the lowest, responsive, responsible, and best bidder. A bidder is determined to be responsive when the submitted bid complies with bid specifications and submission requirements. A bidder is determined to be responsible after a review of the firm's record of unsatisfactory judgments and the bidder's compliance with federal, state, or local laws, including affirmative action program requirements, local preference standards, and any minority business enterprise, female business enterprise, or equal business opportunity programs adopted by the City.

3. Approval and Authorization of the Award

Contract awards must be authorized by City Council.

VIII. Universal Term Contracts

Universal term contracts are procured using an IFB. The Director of Finance and Management establishes universal term contracts to purchase an indefinite quantity of goods or services at a specified rate or price schedule for a specific time period. The solicitation and award of universal term contracts follows the same process as that for formal contracts valued over \$20,000.

City departments establish purchase orders from these universal term contracts. Departments may encumber up to \$100,000 annually per contract without City Council approval. Amounts above \$100,000 annually per contract require City Council approval.

IX. Exceptions to Competitive Sealed Bidding

Construction and goods and services contracts can be procured without a competitive, sealed bidding process under certain circumstances. The exceptions include fixed price purchases, petty cash fund purchases, sole source purchases, purchases from existing universal term contracts (previously competitively bid), and emergency purchases.

A. Fixed Price Purchases

Fixed price items may be purchased directly by a user department. Fixed price items include utility services, memberships, subscriptions, professional organization certifications, and postage stamps.



B. Petty Cash Fund Purchases

Goods and services valued \$500 and under may be purchased by a director or buyers authorized to make purchases using a petty cash fund. No petty cash fund expenditures may be made for items available in the purchasing office storerooms, copy and print shop, or an existing universal term contract.

C. Sole Source Procurement

Sole source procurement may be used to procure goods and services when the Director of Finance and Management and the user department determine that the good or service is only available through one source. Contract negotiation must be held with the entity that is identified as the sole source for the goods or services.

If the contract amount for the sole source good/service is greater than \$20,000, legislation must be submitted to the City Council to approve entering into contract. The legislation must include evidence that the entity is the only source capable of supplying the needed materials, supplies, equipment, or service. In addition, the submission must include a summary of the efforts that were undertaken to obtain other bidders or offerors and the method used to establish the price or fee structure for the contract.

D. Emergency Purchases

Emergency purchases may be authorized for construction and goods and services in the event of a clear and present danger to public health, safety, welfare, or property. The Mayor may declare a state of emergency and authorize an emergency procurement of construction and goods and services. Emergency procurements may be made without advertisement or competitive, sealed bids. A record of the emergency purchase, including a written explanation of the basis of the emergency and the selection of the contractor, must be submitted at the earliest practicable time to the City Council.

X. Small Business Requirement

A. Affirmative Action Code

The current Affirmative Action Code (Code), which is race and gender-neutral, was authorized on December 19, 2016. The Code was enacted to develop and implement procedures and practices that encourage the use of minority and female-owned businesses and other small businesses on the City's contracts. The Office of Diversity and Inclusion (ODI) and the ODI Advisory Council were established by this Code.



B. Program Administration

The coordination of the Supplier Diversity Program, which includes a MWBE certification process, is the responsibility of the ODI. The ODI is authorized to implement the programs, policies, and procedures to meet the objectives of the Code and promote supplier and workforce diversity. The ODI is responsible for assisting underserved, under-utilized, and economically disadvantaged businesses gain access to City procurement opportunities and the resources necessary to build viable and sustainable businesses.

The ODI is authorized to perform the following duties and responsibilities:

1. Enforce compliance with the Affirmative Action Code
2. Establish written policies and procedures to execute the Code
3. Develop and refine workforce policy and procedures
4. Develop, refine, and coordinate supplier diversity and procurement activities, such as outreach, solicitation for small contracts, bid specification review and prompt payment, and contract dispute resolution procedures
5. Develop, refine, and coordinate assistance programs, including financing, bonding and insurance, and technical assistance programs
6. Develop and coordinate a mentor/protégé program and on-the-job training demonstrations
7. Develop and refine MWBE certification procedures and coordinate with the Purchasing Department's vendor registration system
8. Consider price preferences and sheltered market solicitations
9. Investigate alleged violations of the Code
10. Analyze and review programs on an annual, bi-annual, or quarterly basis
11. Analyze, review, and recommend adjustments to the City's annual participation goals
12. Establish and review specific contract participation goals
13. Establish advisory committees to further the goals and objectives of the Code
14. Conduct periodic review of compliance with the Code's reporting requirements and provide recommendations to the Mayor and City Council regarding additional efforts necessary to ensure the effective operation of the ODI

C. Certification Standards

The ODI administers the MWBE certification and verification processes. Eligible MWBEs are certified for a three-year period. To be eligible for certification, each applicant must meet the definition of a minority-owned business or women-owned business. Certified MWBEs graduate from the program if they exceed the three-year average gross revenue limit determined by the Director of the ODI.

1. MBE Certification

To qualify as an MBE, a business must be at least 51 percent owned, operated, and controlled by one or more minority citizens or resident aliens who are African American, Asian American, Hispanic American, or Native American. The minority owner(s) must maintain the authority to



independently control day-to-day business decisions, possess and exercise the legal authority and power to manage business assets, and direct business operations.

2. WBE Certification

To qualify as a WBE, a business must be at least 51 percent owned, operated, and controlled by one or more woman citizens or resident aliens. The woman owner(s) must maintain the authority to independently control day-to-day business decisions, possess and exercise the legal authority and power to manage business assets, and direct business operations.



CHAPTER 3: Prime Contractor Utilization Analysis

I. Introduction

This chapter documents the City of Columbus' (City) utilization of minority and woman business enterprise (MWBE)²⁵⁵ and non-minority male-owned business enterprise (non-MWBE) prime contractors, by ethnicity and gender during the January 1, 2012, to December 31, 2015, study period. The analysis of the City's expenditures during the study period were classified into three industries— construction, professional services, and goods and services.

- **Construction:** erection of new buildings and structures, including site preparation,²⁵⁶ additions, alterations, conversions, expansions, reconstruction, renovations, rehabilitations, and major replacements of a building or structure,²⁵⁷ major mechanical and electrical system installations and upgrades,²⁵⁸ and new, fixed outside structures or facilities.²⁵⁹
- **Professional Services:** services rendered by architects, engineers, attorneys, certified public accountants, financial consultants, city and regional planners, management consultants,²⁶⁰ and other services that require advanced training and a significant degree of expertise to perform, including services that require official certification or authorization by the State as a condition for rendering of the service.²⁶¹
- **Goods and Services:** materials, supplies, and equipment.²⁶² Services includes annual, routine, minor maintenance and repairs to existing buildings and structures, building

²⁵⁵ Hereinafter referred to as Minority and Caucasian Female Business Enterprise prime contractors in the statistical tables.

²⁵⁶ CITY OF COLUMBUS ORD. NO. 3062-2014, CH. 329 *Procurement of Goods and Services – Sale of City Property* §329.01(f)(1)(b) (December 15, 2014).

²⁵⁷ CITY OF COLUMBUS ORD. NO. 3062-2014, CH. 329 *Procurement of Goods and Services – Sale of City Property* §329.01(f)(1)(c) (December 15, 2014).

²⁵⁸ CITY OF COLUMBUS ORD. NO. 3062-2014, CH. 329 *Procurement of Goods and Services – Sale of City Property* §329.01(f)(1)(d) (December 15, 2014).

²⁵⁹ *Id.* at §329.01(f)(1)(e).

²⁶⁰ CITY OF COLUMBUS ORD. NO. 3062-2014, CH. 329 *Procurement of Goods and Services – Sale of City Property* §329.01(cc) (December 15, 2014).

²⁶¹ CITY OF COLUMBUS ORD. NO. 3062-2014, CH. 329 *Procurement of Goods and Services – Sale of City Property* §329.01(cc) (December 15, 2014).

²⁶² *Id.* at §329.18(a).



systems, outside structures, or facilities²⁶³ and costs and installation of special purpose equipment designed to prepare a structure for a specific use.²⁶⁴

The data in the Disparity Study (Study) are disaggregated into six ethnic and gender groups, listed in Table 3.1.

Table 3.1: Business Ethnic and Gender Groups

Ethnicity and Gender Category	Definition
African American	Businesses owned by male and female African Americans
Asian American	Businesses owned by male and female Asian Americans
Hispanic American	Businesses owned by male and female Hispanic Americans
Native American	Businesses owned by male and female Native Americans
Caucasian Female-owned (WBE)	Businesses owned by Caucasian females
Non-minority Male-owned (non-MWBE)	Businesses owned by Caucasian males, and businesses that could not be identified as minority or female-owned ²⁶⁵

II. Prime Contract Data Sources

The prime contract data consist of contract records extracted from the City’s financial system, using a Microsoft Access database. The payments were issued during the January 1, 2012, to December 31, 2015, study period. The City’s project and contract records and purchase order data were normalized and combined to create a single prime contract dataset. In this analysis, purchase orders and project and contract records for each unique procurement are referred to as contracts.

The records received from the City were grouped by object code. The records were further classified by using industry keywords against prime vendor names and object codes. Each contract was classified into one of the three industries—construction, professional services, and goods and services. Contracts with not-for-profit entities, state and other local government entities, claims/reimbursements, and utility companies are excluded from the disparity study analysis.²⁶⁶

²⁶³ CITY OF COLUMBUS ORD. NO. 3062-2014, CH. 329 *Procurement of Goods and Services – Sale of City Property* §329.01(f)(2)(a)-(c) (December 15, 2014).

²⁶⁴ *Id.* at §329.01(f)(2)(d).

²⁶⁵ See *Section II: Prime Contract Data Sources* for the methodology employed to identify the ethnicity and gender of the City’s utilized prime contractors.

²⁶⁶ The exclusions also included: courier services, educational institutions and services, fees and licenses, food purveyors, hotels, individuals, investment companies/ financial institutions /insurance companies, manufacturers, media (radio, TV, newspaper),



The City reviewed the assignment of industry classifications. From March 2018 to May 2019, a series of meetings were held with each City department to resolve the questions regarding the industry classifications. The industry classifications were updated based on the feedback received from the City. The City reviewed and approved the updated classifications.

Research was conducted to verify the ethnicity and gender of the prime contractors. Ethnicity and gender for most of the prime contractors were retrieved from the City's vendor list. Prime contractors whose ethnicity and gender could not be verified through the City's vendor list were contacted by telephone as part of an ethnicity and gender survey. Upon completion of the ethnicity and gender research and the cleaning of the purchase order records, the prime contractor utilization analysis was conducted.

III. Prime Contract Utilization Thresholds

The formal threshold, as defined in the City's Procurement Ordinance, includes contracts valued over \$100,000 for construction, over \$50,000 for professional services, and over \$20,000 for goods and services. For the prime contractor utilization analysis, this threshold had to be modified because the contract payment dataset was skewed.

Contract size is a depiction of the capacity that a willing business needs to successfully compete for the City's competitively bid prime contracts. The distribution of contracts was calculated using a quartile analysis within each industry, grouped by dollar amount. The quartile analysis was used to set the thresholds for the utilization analysis of prime contracts.

The analysis was limited by dollar value to contracts beneath the upper limit of contracts, representing the 75th percentile of the City's contracts awarded in each of the three industries. Applying this threshold mirrors the capacity of businesses enumerated in the availability analysis and ensures that contracts that are outliers in size and scope do not skew the results of the analysis. To this end, contracts within each of the three industries were analyzed at three threshold levels:

1. The first threshold level included all competitively solicited contracts regardless of award amount. This analysis is illustrative only, and no recommendations will be made based on the analysis of all contracts.
2. The second threshold level included competitively solicited contracts beneath the 75th percentile for each industry. These thresholds are listed in Table 3.2.
3. The third threshold level included all informal contracts. These thresholds are listed in Table 3.3.



medical/healthcare/rehabilitation/custodial care, megastores, miscellaneous, personal services, fuel companies, publishers, real estate, recreation, redevelopment/residential, staffing/employment companies, telecommunication companies, travel companies, and vehicle dealerships.

Table 3.2: Formal Contracts Thresholds by Industry

Industry	Formal Contracts Threshold
Construction	Over \$100,000 to \$1,550,000
Professional Services	Over \$50,000 to \$420,000
Goods and Services	Over \$20,000 to \$180,000

Table 3.3: Informal Contracts Threshold by Industry

Industry	Informal Contracts Threshold
Construction	\$100,000 and Under
Professional Services	\$50,000 and Under
Goods and Services	\$20,000 and Under

IV. Prime Contractor Utilization

A. All Prime Contractors

As depicted in Table 3.4, the City issued 20,972 prime contracts during the January 1, 2012, to December 31, 2015, study period. The 20,972 prime contracts included 1,003 for construction, 2,463 for professional services, and 17,506 for goods and services.

The payments made by the City during the study period totaled \$1,747,495,767 for all 20,972 prime contracts. Payments included \$985,673,556 for construction, \$409,660,816 for professional services, and \$352,161,395 for goods and services.



**Table 3.4: Total Prime Contracts and Dollars Expended:
All Industries, January 1, 2012, to December 31, 2015**

Industry	Total Number of Contracts	Total Dollars Expended
Construction	1,003	\$985,673,556
Professional Services	2,463	\$409,660,816
Goods and Services	17,506	\$352,161,395
Total Expenditures	20,972	\$1,747,495,767

B. Highly Used Construction Prime Contractors

The City awarded a total of 1,003 construction contracts during the study period. As shown in Table 3.5, The City's 1,003 construction prime contracts were received by 235 unique vendors.

Table 3.5: Construction Prime Contracts

Total Prime Contracts	1,003
Total Utilized Vendors	235
Total Expenditures	\$985,673,556

Table 3.6 presents the distribution of the City's construction prime contracts by the number of vendors. Fifteen of the 235 vendors received \$683,710,963, or 69%, of the total construction prime contract dollars. The findings illustrate that a small group of prime contractors received the majority of construction prime contract dollars spent by the City.

Table 3.6: Construction Prime Contracts Distributed by Number of Vendors

Vendors	Total Dollars	Percent of Dollars ²⁶⁷	Number of Contracts	Percent of Contracts ²⁶⁸
15 Highly Used Vendors	\$683,710,963	69%	162	16%
220 Vendors	\$301,962,593	31%	841	84%
235 Total Vendors	\$985,673,556	100%	1,003	100%

Table 3.7 presents the ethnicity and gender of the most highly used construction prime contractors who received approximately 50% of the construction prime contract dollars. The seven most



²⁶⁷ Percentages are rounded to the nearest whole number.

²⁶⁸ Percentages are rounded to the nearest whole number.

highly used prime contractors were Non-minority Male-owned businesses. The contracts received by these seven businesses ranged from \$10,623 to \$95,082,793.

Table 3.7: Top Seven Highly Used Construction Prime Contractors

Ethnicity/ Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Non-minority Males	\$501,117,822	50.84%	81	8.08%

C. Highly Used Professional Services Prime Contractors

The City awarded a total of 2,463 professional services contracts during the study period. As shown in Table 3.8, The City's 2,463 professional services prime contracts were received by 495 unique vendors.

Table 3.8: Professional Services Prime Contracts

Total Prime Contracts	2,463
Total Utilized Vendors	495
Total Expenditures	\$409,660,816

Table 3.9 presents the distribution of the City's professional services prime contracts by the number of vendors. Twenty-three of the 495 vendors received \$285,879,443, or 70%, of the total professional services prime contract dollars. The findings illustrate that a small group of prime contractors received the majority of professional services prime contract dollars spent by the City.

**Table 3.9: Professional Services Prime Contracts
Distributed by Number of Vendors**

Vendors	Total Dollars	Percent of Dollars²⁶⁹	Number of Contracts	Percent of Contracts²⁷⁰
23 Highly Used Vendors	\$285,879,443	70%	360	15%
472 Vendors	\$123,781,373	30%	2,103	85%
495 Total Vendors	\$409,660,816	100%	2,463	100%

Table 3.10 presents the ethnicity and gender of the most highly used professional services prime contractors, who received approximately 50% of professional services prime contract dollars. The seven most highly used prime contractors were Asian American and Non-minority Male-owned businesses. The contracts received by these seven businesses were valued up to \$31,148,558.



²⁶⁹ Percentages are rounded to the nearest whole number.

²⁷⁰ Percentages are rounded to the nearest whole number.

Table 3.10: Top Seven Highly Used Professional Services Prime Contractors

Ethnicity/ Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Asian Americans	\$18,041,159	4.40%	47	1.91%
Non-minority Males	\$181,363,477	44.27%	122	4.95%

D. Highly Used Goods and Services Prime Contractors

The City awarded a total of 17,506 goods and services contracts during the study period. As shown in Table 3.11, the City's 17,506 goods and services prime contracts were received by 1,124 unique vendors.

Table 3.11: Goods and Services Prime Contracts

Total Prime Contracts	17,506
Total Utilized Vendors	1,124
Total Expenditures	\$352,161,395

Table 3.12 presents the distribution of the City's goods and services prime contracts by the number of vendors. Eighty-nine of the 1,124 vendors received \$246,799,675, or 70%, of the total goods and services prime contract dollars. The findings illustrate that a small group of prime contractors received the majority of goods and services prime contract dollars spent by the City.

Table 3.12: Goods and Services Prime Contracts Distributed by Number of Vendors

Vendors	Total Dollars	Percent of Dollars²⁷¹	Number of Contracts	Percent of Contracts²⁷²
89 Highly Used Vendors	\$246,799,675	70%	4,867	28%
1,035 Vendors	\$105,361,720	30%	12,639	72%
1,124 Total Vendors	\$352,161,395	100%	17,506	100%

Table 3.13 presents the ethnicity and gender of the most highly used goods and services prime contractors, who received approximately 50% of the goods and services prime contract dollars. The 32 most highly used prime contractors were African American, Caucasian female, and Non-minority Male-owned businesses. The contracts received by these 32 businesses were valued up to \$15,908,645.



²⁷¹ Percentages are rounded to the nearest whole number.

²⁷² Percentages are rounded to the nearest whole number.

Table 3.13: Top 32 Highly Used Goods and Services Prime Contractors

Ethnicity/ Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
African Americans	\$4,550,166	1.29%	77	0.44%
Caucasian Females	\$4,545,775	1.29%	507	2.90%
Non-minority Males	\$167,800,359	47.65%	942	5.38%

E. All Prime Contracts by Industry

1. Construction Prime Contract Utilization: All Contracts

Table 3.14 summarizes all prime contract dollars expended by the City on construction prime contracts. Minority Business Enterprises (MBEs) received 1.49% of the construction prime contract dollars; Caucasian Female-owned Business Enterprises (WBEs) received 2.71%; and Non-minority Male-owned Business Enterprises (non-MWBEs) received 95.80%.

African Americans received 56, or 5.58%, of all construction prime contracts awarded during the study period, representing \$13,924,682, or 1.41%, of the construction prime contract dollars.

Asian Americans received 2, or 0.20%, of all construction prime contracts awarded during the study period, representing \$61,325, or 0.01%, of the construction prime contract dollars.

Hispanic Americans received 9, or 0.90%, of all construction prime contracts awarded during the study period, representing \$564,407, or 0.06%, of the construction prime contract dollars.

Native Americans received 2, or 0.20%, of all construction prime contracts awarded during the study period, representing \$156,757, or 0.02%, of the construction prime contract dollars.

Caucasian Females received 105, or 10.47%, of all construction prime contracts awarded during the study period, representing \$26,734,956, or 2.71%, of the construction prime contract dollars.

Non-minority Males received 829, or 82.65%, of all construction prime contracts awarded during the study period, representing \$944,231,430, or 95.80%, of the construction prime contract dollars.



**Table 3.14: Construction Prime Contract Utilization:
All Contracts, January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	56	5.58%	\$13,924,682	1.41%
Asian Americans	2	0.20%	\$61,325	0.01%
Hispanic Americans	9	0.90%	\$564,407	0.06%
Native Americans	2	0.20%	\$156,757	0.02%
Caucasian Females	105	10.47%	\$26,734,956	2.71%
Non-minority Males	829	82.65%	\$944,231,430	95.80%
TOTAL	1,003	100.00%	\$985,673,556	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	56	5.58%	\$13,924,682	1.41%
Asian American Females	1	0.10%	\$48,825	0.00%
Asian American Males	1	0.10%	\$12,500	0.00%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	9	0.90%	\$564,407	0.06%
Native American Females	2	0.20%	\$156,757	0.02%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	105	10.47%	\$26,734,956	2.71%
Non-minority Males	829	82.65%	\$944,231,430	95.80%
TOTAL	1,003	100.00%	\$985,673,556	100.00%



2. Professional Services Prime Contract Utilization: All Contracts

Table 3.15 summarizes all prime contract dollars expended by the City on professional services prime contracts. MBEs received 11.66% of the professional services prime contract dollars; WBEs received 3.07%; and non-MWBEs received 85.28%.

African Americans received 214, or 8.69%, of all professional services prime contracts awarded during the study period, representing \$17,585,981, or 4.29%, of the professional services prime contract dollars.

Asian Americans received 176, or 7.15%, of all professional services prime contracts awarded during the study period, representing \$30,001,382, or 7.32%, of the professional services prime contract dollars.

Hispanic Americans received 10, or 0.41%, of all professional services prime contracts awarded during the study period, representing \$52,499, or 0.01%, of the professional services prime contract dollars.

Native Americans received 4, or 0.16%, of all professional services prime contracts awarded during the study period, representing \$112,550, or 0.03%, of the professional services prime contract dollars.

Caucasian Females received 387, or 15.71%, of all professional services prime contracts awarded during the study period, representing \$12,565,854, or 3.07%, of the professional services prime contract dollars.

Non-minority Males received 1,672, or 67.88%, of all professional services prime contracts awarded during the study period, representing \$349,342,550, or 85.28%, of the professional services prime contract dollars.



**Table 3.15: Professional Services Prime Contract Utilization:
All Contracts, January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	214	8.69%	\$17,585,981	4.29%
Asian Americans	176	7.15%	\$30,001,382	7.32%
Hispanic Americans	10	0.41%	\$52,499	0.01%
Native Americans	4	0.16%	\$112,550	0.03%
Caucasian Females	387	15.71%	\$12,565,854	3.07%
Non-minority Males	1,672	67.88%	\$349,342,550	85.28%
TOTAL	2,463	100.00%	\$409,660,816	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	70	2.84%	\$1,410,951	0.34%
African American Males	144	5.85%	\$16,175,031	3.95%
Asian American Females	31	1.26%	\$1,729,934	0.42%
Asian American Males	145	5.89%	\$28,271,448	6.90%
Hispanic American Females	7	0.28%	\$12,600	0.00%
Hispanic American Males	3	0.12%	\$39,899	0.01%
Native American Females	2	0.08%	\$42,250	0.01%
Native American Males	2	0.08%	\$70,300	0.02%
Caucasian Females	387	15.71%	\$12,565,854	3.07%
Non-minority Males	1,672	67.88%	\$349,342,550	85.28%
TOTAL	2,463	100.00%	\$409,660,816	100.00%



3. Goods and Services Prime Contract Utilization: All Contracts

Table 3.16 summarizes all contract dollars expended by the City on goods and services prime contracts. MBEs received 5.42% of the goods and services prime contract dollars; WBEs received 6.13%; and non-MWBEs received 88.45%.

African Americans received 556, or 3.18%, of all goods and services prime contracts awarded during the study period, representing \$13,804,422, or 3.92%, of the goods and services prime contract dollars.

Asian Americans received 993, or 5.67%, of all goods and services prime contracts awarded during the study period, representing \$4,397,614, or 1.25%, of the goods and services prime contract dollars.

Hispanic Americans received 38, or 0.22%, of all goods and services prime contracts awarded during the study period, representing \$651,120, or 0.18%, of the goods and services prime contract dollars.

Native Americans received 28, or 0.16%, of all goods and services prime contracts awarded during the study period, representing \$235,537, or 0.07%, of the goods and services prime contract dollars.

Caucasian Females received 2,348, or 13.41%, of all goods and services prime contracts awarded during the study period, representing \$21,579,818, or 6.13%, of the goods and services prime contract dollars.

Non-minority Males received 13,543, or 77.36%, of all goods and services prime contracts awarded during the study period, representing \$311,492,885, or 88.45%, of the goods and services prime contract dollars.



**Table 3.16: Goods and Services Contract Utilization:
All Contracts, January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	556	3.18%	\$13,804,422	3.92%
Asian Americans	993	5.67%	\$4,397,614	1.25%
Hispanic Americans	38	0.22%	\$651,120	0.18%
Native Americans	28	0.16%	\$235,537	0.07%
Caucasian Females	2,348	13.41%	\$21,579,818	6.13%
Non-minority Males	13,543	77.36%	\$311,492,885	88.45%
TOTAL	17,506	100.00%	\$352,161,395	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	137	0.78%	\$3,770,222	1.07%
African American Males	419	2.39%	\$10,034,200	2.85%
Asian American Females	819	4.68%	\$1,585,298	0.45%
Asian American Males	174	0.99%	\$2,812,316	0.80%
Hispanic American Females	5	0.03%	\$479,812	0.14%
Hispanic American Males	33	0.19%	\$171,308	0.05%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	28	0.16%	\$235,537	0.07%
Caucasian Females	2,348	13.41%	\$21,579,818	6.13%
Non-minority Males	13,543	77.36%	\$311,492,885	88.45%
TOTAL	17,506	100.00%	\$352,161,395	100.00%



F. Informal Prime Contracts by Industry

1. Construction Prime Contract Utilization: Contracts Valued \$100,000 and Under

Table 3.17 summarizes all contract dollars expended by the City on construction prime contracts valued \$100,000 and under. MBEs received 9.16% of the construction prime contract dollars; WBEs received 13.06%; and non-MWBEs received 77.78%.

African Americans received 30, or 5.25%, of the construction prime contracts valued \$100,000 and under awarded during the study period, representing \$928,505, or 7.23%, of the construction prime contract dollars.

Asian Americans received 2, or 0.35%, of the construction prime contracts valued \$100,000 and under awarded during the study period, representing \$61,325, or 0.48%, of the construction prime contract dollars.

Hispanic Americans received 7, or 1.23%, of the construction prime contracts valued \$100,000 and under awarded during the study period, representing \$181,507, or 1.41%, of the construction prime contract dollars.

Native Americans received 1, or 0.18%, of the construction prime contracts valued \$100,000 and under awarded during the study period, representing \$6,000, or 0.05%, of the construction prime contract dollars.

Caucasian Females received 73, or 12.78%, of the construction prime contracts valued \$100,000 and under awarded during the study period, representing \$1,677,781, or 13.06%, of the construction prime contract dollars.

Non-minority Males received 458, or 80.21%, of the construction prime contracts valued \$100,000 and under awarded during the study period, representing \$9,992,890, or 77.78%, of the construction prime contract dollars.



**Table 3.17: Construction Prime Contract Utilization:
Contracts Valued \$100,000 and Under, January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	30	5.25%	\$928,505	7.23%
Asian Americans	2	0.35%	\$61,325	0.48%
Hispanic Americans	7	1.23%	\$181,507	1.41%
Native Americans	1	0.18%	\$6,000	0.05%
Caucasian Females	73	12.78%	\$1,677,781	13.06%
Non-minority Males	458	80.21%	\$9,992,890	77.78%
TOTAL	571	100.00%	\$12,848,008	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	30	5.25%	\$928,505	7.23%
Asian American Females	1	0.18%	\$48,825	0.38%
Asian American Males	1	0.18%	\$12,500	0.10%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	7	1.23%	\$181,507	1.41%
Native American Females	1	0.18%	\$6,000	0.05%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	73	12.78%	\$1,677,781	13.06%
Non-minority Males	458	80.21%	\$9,992,890	77.78%
TOTAL	571	100.00%	\$12,848,008	100.00%



2. Professional Services Prime Contract Utilization: Contracts Valued \$50,000 and Under

Table 3.18 summarizes all contract dollars expended by the City on professional services prime contracts valued \$50,000 and under. MBEs received 16.85% of all professional services prime contract dollars; WBEs received 14.16%; and non-MWBEs received 68.99%.

African Americans received 168, or 9.37%, of the professional services prime contracts valued \$50,000 and under awarded during the study period, representing \$1,683,933, or 9.04%, of the professional services prime contract dollars.

Asian Americans received 114, or 6.36%, of the professional services prime contracts valued \$50,000 and under awarded during the study period, representing \$1,353,616, or 7.26%, of the professional services prime contract dollars.

Hispanic Americans received 10, or 0.56%, of the professional services prime contracts valued \$50,000 and under awarded during the study period, representing \$52,499, or 0.28%, of the professional services prime contract dollars.

Native Americans received 3, or 0.17%, of the professional services prime contracts valued \$50,000 and under awarded during the study period, representing \$50,630, or 0.27%, of the professional services prime contract dollars.

Caucasian Females received 337, or 18.80%, of the professional services prime contracts valued \$50,000 and under awarded during the study period, representing \$2,638,932, or 14.16%, of the professional services prime contract dollars.

Non-minority Males received 1,161, or 64.75%, of the professional services prime contracts valued \$50,000 and under awarded during the study period, representing \$12,857,338, or 68.99%, of the professional services prime contract dollars.



**Table 3.18: Professional Services Prime Contract Utilization:
Contracts Valued \$50,000 and Under, January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	168	9.37%	\$1,683,933	9.04%
Asian Americans	114	6.36%	\$1,353,616	7.26%
Hispanic Americans	10	0.56%	\$52,499	0.28%
Native Americans	3	0.17%	\$50,630	0.27%
Caucasian Females	337	18.80%	\$2,638,932	14.16%
Non-minority Males	1,161	64.75%	\$12,857,338	68.99%
TOTAL	1,793	100.00%	\$18,636,948	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	65	3.63%	\$561,985	3.02%
African American Males	103	5.74%	\$1,121,948	6.02%
Asian American Females	26	1.45%	\$347,026	1.86%
Asian American Males	88	4.91%	\$1,006,590	5.40%
Hispanic American Females	7	0.39%	\$12,600	0.07%
Hispanic American Males	3	0.17%	\$39,899	0.21%
Native American Females	2	0.11%	\$42,250	0.23%
Native American Males	1	0.06%	\$8,380	0.04%
Caucasian Females	337	18.80%	\$2,638,932	14.16%
Non-minority Males	1,161	64.75%	\$12,857,338	68.99%
TOTAL	1,793	100.00%	\$18,636,948	100.00%



3. Goods and Services Prime Contract Utilization: Contracts Valued \$20,000 and Under

Table 3.19 summarizes all contract dollars expended by the City on goods and services prime contracts valued \$20,000 and under. MBEs received 8.36% of the goods and services prime contract dollars; WBEs received 11.61%; and non-MWBEs received 80.03%.

African Americans received 447, or 2.76%, of the goods and services prime contracts valued \$20,000 and under awarded during the study period, representing \$1,596,969, or 3.46%, of the goods and services prime contract dollars.

Asian Americans received 982, or 6.06%, of the goods and services prime contracts valued \$20,000 and under awarded during the study period, representing \$1,981,742, or 4.29%, of the goods and services prime contract dollars.

Hispanic Americans received 32, or 0.20%, of the goods and services prime contracts valued \$20,000 and under awarded during the study period, representing \$129,908, or 0.28%, of the goods and services prime contract dollars.

Native Americans received 26, or 0.16%, of the goods and services prime contracts valued \$20,000 and under awarded during the study period, representing \$148,888, or 0.32%, of the goods and services prime contract dollars.

Caucasian Females received 2,243, or 13.83%, of the goods and services prime contracts valued \$20,000 and under awarded during the study period, representing \$5,358,544, or 11.61%, of the goods and services prime contract dollars.

Non-minority Males received 12,483, or 76.99%, of the goods and services prime contracts valued \$20,000 and under awarded during the study period, representing \$36,928,119, or 80.03%, of the goods and services prime contract dollars.



**Table 3.19: Goods and Services Prime Contract Utilization:
Contracts Valued \$20,000 and Under, January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	447	2.76%	\$1,596,969	3.46%
Asian Americans	982	6.06%	\$1,981,742	4.29%
Hispanic Americans	32	0.20%	\$129,908	0.28%
Native Americans	26	0.16%	\$148,888	0.32%
Caucasian Females	2,243	13.83%	\$5,358,544	11.61%
Non-minority Males	12,483	76.99%	\$36,928,119	80.03%
TOTAL	16,213	100.00%	\$46,144,171	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	106	0.65%	\$281,728	0.61%
African American Males	341	2.10%	\$1,315,242	2.85%
Asian American Females	816	5.03%	\$1,470,238	3.19%
Asian American Males	166	1.02%	\$511,503	1.11%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	32	0.20%	\$129,908	0.28%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	26	0.16%	\$148,888	0.32%
Caucasian Females	2,243	13.83%	\$5,358,544	11.61%
Non-minority Males	12,483	76.99%	\$36,928,119	80.03%
TOTAL	16,213	100.00%	\$46,144,171	100.00%



G. Formal Contracts by Industry

1. Construction Prime Contract Utilization: Contracts Valued Over \$100,000 to \$1,550,000

Table 3.20 summarizes all contract dollars expended by the City on construction prime contracts valued over \$100,000 to \$1,550,000. MBEs received 6.62% of the construction prime contract dollars; WBEs received 8.04%; and non-MWBEs received 85.34%.

African Americans received 25, or 7.72%, of the construction prime contracts valued over \$100,000 to \$1,550,000 awarded during the study period, representing \$9,951,575, or 6.28%, of the construction prime contract dollars.

Asian Americans received 0, or 0.00%, of the construction prime contracts valued over \$100,000 to \$1,550,000 awarded during the study period, representing \$0, or 0.00%, of the construction prime contract dollars.

Hispanic Americans received 2, or 0.62%, of the construction prime contracts valued over \$100,000 to \$1,550,000 awarded during the study period, representing \$382,900, or 0.24%, of the construction prime contract dollars.

Native Americans received 1, or 0.31%, of the construction prime contracts valued over \$100,000 to \$1,550,000 awarded during the study period, representing \$150,757, or 0.10%, of the construction prime contract dollars.

Caucasian Females received 29, or 8.95%, of the construction prime contracts valued over \$100,000 to \$1,550,000 awarded during the study period, representing \$12,734,713, or 8.04%, of the construction prime contract dollars.

Non-minority Males received 267, or 82.41%, of the construction prime contracts valued over \$100,000 to \$1,550,000 awarded during the study period, representing \$135,180,652, or 85.34%, of the construction prime contract dollars.



**Table 3.20: Construction Prime Contract Utilization:
Contracts Valued Over \$100,000 to \$1,550,000, January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	25	7.72%	\$9,951,575	6.28%
Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	2	0.62%	\$382,900	0.24%
Native Americans	1	0.31%	\$150,757	0.10%
Caucasian Females	29	8.95%	\$12,734,713	8.04%
Non-minority Males	267	82.41%	\$135,180,652	85.34%
TOTAL	324	100.00%	\$158,400,597	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	25	7.72%	\$9,951,575	6.28%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	2	0.62%	\$382,900	0.24%
Native American Females	1	0.31%	\$150,757	0.10%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	29	8.95%	\$12,734,713	8.04%
Non-minority Males	267	82.41%	\$135,180,652	85.34%
TOTAL	324	100.00%	\$158,400,597	100.00%



2. Professional Services Prime Contract Utilization: Contracts Valued Over \$50,000 to \$420,000

Table 3.21 summarizes all contract dollars expended by the City on professional services prime contracts valued over \$50,000 to \$420,000. MBEs received 15.47% of the professional services prime contract dollars; WBEs received 8.51%; and non-MWBEs received 76.02%.

African Americans received 32, or 6.36%, of the professional services prime contracts valued over \$50,000 to \$420,000 awarded during the study period, representing \$5,485,558, or 6.33%, of the professional services prime contract dollars.

Asian Americans received 46, or 9.15%, of the professional services prime contracts valued over \$50,000 to \$420,000 awarded during the study period, representing \$7,856,054, or 9.07%, of the professional services prime contract dollars.

Hispanic Americans received 0, or 0.00%, of the professional services prime contracts valued over \$50,000 to \$420,000 awarded during the study period, representing \$0, or 0.00%, of the professional services prime contract dollars.

Native Americans received 1, or 0.20%, of the professional services prime contracts valued over \$50,000 to \$420,000 awarded during the study period, representing \$61,920, or 0.07%, of the professional services prime contract dollars.

Caucasian Females received 46, or 9.15%, of the professional services prime contracts valued over \$50,000 to \$420,000 awarded during the study period, representing \$7,373,102, or 8.51%, of the professional services prime contract dollars.

Non-minority Males received 378, or 75.15%, of the professional services prime contracts valued over \$50,000 to \$420,000 awarded during the study period, representing \$65,871,462, or 76.02%, of the professional services prime contract dollars.



**Table 3.21: Professional Services Prime Contract Utilization:
Contracts Valued Over \$50,000 to \$420,000, January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	32	6.36%	\$5,485,558	6.33%
Asian Americans	46	9.15%	\$7,856,054	9.07%
Hispanic Americans	0	0.00%	\$0	0.00%
Native Americans	1	0.20%	\$61,920	0.07%
Caucasian Females	46	9.15%	\$7,373,102	8.51%
Non-minority Males	378	75.15%	\$65,871,462	76.02%
TOTAL	503	100.00%	\$86,648,096	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	4	0.80%	\$336,311	0.39%
African American Males	28	5.57%	\$5,149,246	5.94%
Asian American Females	4	0.80%	\$539,552	0.62%
Asian American Males	42	8.35%	\$7,316,502	8.44%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	1	0.20%	\$61,920	0.07%
Caucasian Females	46	9.15%	\$7,373,102	8.51%
Non-minority Males	378	75.15%	\$65,871,462	76.02%
TOTAL	503	100.00%	\$86,648,096	100.00%



3. Goods and Services Prime Contract Utilization: Contracts Valued Over \$20,000 to \$180,000

Table 3.22 summarizes all contract dollars expended by the City on goods and services prime contracts valued over \$20,000 to \$180,000. MBEs received 10.04% of the goods and services prime contract dollars; WBEs received 9.71%; and non-MWBEs received 80.25%.

African Americans received 99, or 10.24%, of the goods and services prime contracts valued over \$20,000 to \$180,000 awarded during the study period, representing \$5,497,030, or 8.50%, of the goods and services prime contract dollars.

Asian Americans received 7, or 0.72%, of the goods and services prime contracts valued over \$20,000 to \$180,000 awarded during the study period, representing \$387,426, or 0.60%, of the goods and services prime contract dollars.

Hispanic Americans received 6, or 0.62%, of the goods and services prime contracts valued over \$20,000 to \$180,000 awarded during the study period, representing \$521,212, or 0.81%, of the goods and services prime contract dollars.

Native Americans received 2, or 0.21%, of the goods and services prime contracts valued over \$20,000 to \$180,000 awarded during the study period, representing \$86,648, or 0.13%, of the goods and services prime contract dollars.

Caucasian Females received 85, or 8.79%, of the goods and services prime contracts valued over \$20,000 to \$180,000 awarded during the study period, representing \$6,281,855, or 9.71%, of the goods and services prime contract dollars.

Non-minority Males received 768, or 79.42%, of the goods and services prime contracts valued over \$20,000 to \$180,000 awarded during the study period, representing \$51,913,322, or 80.25%, of the goods and services prime contract dollars.



**Table 3.22: Goods and Services Prime Contract Utilization:
Contracts Valued Over \$20,000 to \$180,000, January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	99	10.24%	\$5,497,030	8.50%
Asian Americans	7	0.72%	\$387,426	0.60%
Hispanic Americans	6	0.62%	\$521,212	0.81%
Native Americans	2	0.21%	\$86,648	0.13%
Caucasian Females	85	8.79%	\$6,281,855	9.71%
Non-minority Males	768	79.42%	\$51,913,322	80.25%
TOTAL	967	100.00%	\$64,687,493	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	28	2.90%	\$2,194,373	3.39%
African American Males	71	7.34%	\$3,302,657	5.11%
Asian American Females	3	0.31%	\$115,060	0.18%
Asian American Males	4	0.41%	\$272,366	0.42%
Hispanic American Females	5	0.52%	\$479,812	0.74%
Hispanic American Males	1	0.10%	\$41,400	0.06%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	2	0.21%	\$86,648	0.13%
Caucasian Females	85	8.79%	\$6,281,855	9.71%
Non-minority Males	768	79.42%	\$51,913,322	80.25%
TOTAL	967	100.00%	\$64,687,493	100.00%



V. Summary

The prime contract utilization analysis examined \$1,747,495,767 of the City's expenditures on prime contracts awarded during the January 1, 2012, to December 31, 2015, study period. The \$1,747,495,767 expended included \$985,673,556 for construction, \$409,660,816 for professional services, and \$352,161,395 for goods and services. A total of 20,972 prime contracts were analyzed, which included 1,003 for construction, 2,463 for professional services, and 17,506 for goods and services.

The utilization analysis was performed separately for informal and formal prime contracts. The informal levels included contracts valued \$100,000 and under for construction, \$50,000 and under for professional services, and \$20,000 and under for goods and services. The analysis of formal contracts was conducted at two-dollar thresholds: all contracts and contracts valued \$100,000 to \$1,550,000 for construction, \$50,000 to \$420,000 for professional services, and \$20,000 to \$180,000 for goods and services. *Chapter 7: Prime Contract Disparity Analysis* presents the statistical analysis of disparity in each of the three industries.



CHAPTER 4: Subcontractor Utilization Analysis

I. Introduction

As required by *Croson*, a disparity study must document the local government's utilization of available Minority and Woman-owned Business Enterprises (MWBE) and non-minority male-owned businesses (non-MWBE) as prime contractors and subcontractors. The objective of this chapter is to present the utilization of MWBEs and non-MWBEs as construction and professional services subcontractors by ethnicity and gender. The analysis examined the subcontracts awarded by the City of Columbus' (City) prime contractors on construction and professional services prime contracts valued over \$300,000.

II. Data Collection Process

Several methods were used to compile a comprehensive dataset of construction and professional service subcontractors. The initial effort was the collection of the subcontract records maintained by the City departments. The Supplier Diversity Program required prime contractors to submit a subcontractor reporting form. The departments that had the forms on file submitted them. In addition to the subcontractor reporting forms maintained by the departments, the project files in twelve departments were reviewed in search of additional subcontract records. The on-site data collection occurred at four departments. Subcontract records were also solicited directly from the prime contractors.

A. City of Columbus Records

An electronic file containing subcontract award and payment records were requested directly from the City's departments that awarded construction and professional service contracts during the study period. Of the twelve departments that were contacted, six provided subcontract records for one or more of their prime contracts and six did not provide any subcontract records.

1. On-Site Subcontract Data Collection

On-site data collection was conducted at four departments to review the project files for subcontracts. The collection effort focused on the prime contracts that were not included in the dataset provided by the departments. In preparation for the on-site visits, the departments were asked to pull the prime contract project files for examination by the field research team. Electronic and hard copy records were retrieved from the departments.



2. Prime Contractor Expenditure Survey

The prime contractors were solicited directly for their subcontract records. To maximize the response rate, a letter from the City's Director of Diversity and Inclusion requesting the prime contractors' cooperation accompanied each survey. Mason Tillman made follow-up calls to each prime contractor to address any questions concerning the Study and encouraged the business to submit its subcontract records. A survey response was received from 24 prime contractors.

B. Subcontract Data Analysis

The subcontract records compiled from the research were appended to the relational database to perform the statistical analysis. The dataset was cleaned to remove duplicate records. The ethnicity and gender of each subcontractor was verified through a combination of certification directories, Internet research, and telephone surveys. The subcontract utilization tables prepared for the two industries presented the data by ethnicity and gender.

III. Subcontractor Utilization

A. All Subcontracts

As shown in Table 4.1, 1,227 subcontracts were compiled using the above research methods. The subcontracts included 887 construction and 340 professional services subcontracts.

There were \$275,833,736 subcontract dollars analyzed for the January 1, 2012, to December 31, 2015, study period. These dollars included \$167,768,748 for construction and \$108,064,989 for professional services subcontracts.

**Table 4.1: Subcontracts Awarded and Dollars Expended by Industry,
January 1, 2012, to December 31, 2015**

Industry	Total Number of Subcontracts	Total Amount Expended
Construction	887	\$167,768,748
Professional Services	340	\$108,064,989
Total	1,227	\$275,833,736

* Totals might be different from actual value due to rounding.



B. Subcontracts by Industry

1. Construction Subcontracts

Table 4.2 lists the analyzed construction subcontracts awarded by the City's prime contractors. Minority-owned businesses (MBE) received 6.07%; Caucasian female-owned businesses (WBE) received 4.22%; and non-minority male-owned businesses (non-MWBE) received 89.71% of the construction subcontract dollars awarded.

African Americans received 33, or 3.72%, of the City's construction subcontracts during the study period, representing \$5,158,271, or 3.07%, of the construction subcontract dollars.

Asian Americans received 5, or 0.56%, of the City's construction subcontracts during the study period, representing \$394,352, or 0.24%, of the construction subcontract dollars.

Hispanic Americans received 4, or 0.45%, of the City's construction subcontracts during the study period, representing \$4,610,632, or 2.75%, of the construction subcontract dollars.

Native Americans received 1, or 0.11%, of the City's construction subcontracts during the study period, representing \$14,261, or 0.01%, of the construction subcontract dollars.

Caucasian Females received 67, or 7.55%, of the City's construction subcontracts during the study period, representing \$7,077,541, or 4.22%, of the construction subcontract dollars.

Non-minority Males received 777, or 87.60%, of the City's construction subcontracts during the study period, representing \$150,513,690, or 89.71%, of the construction subcontract dollars.



**Table 4.2: Construction Subcontractor Utilization,
January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	33	3.72%	\$5,158,271	3.07%
Asian Americans	5	0.56%	\$394,352	0.24%
Hispanic Americans	4	0.45%	\$4,610,632	2.75%
Native Americans	1	0.11%	\$14,261	0.01%
Caucasian Females	67	7.55%	\$7,077,541	4.22%
Non-minority Males	777	87.60%	\$150,513,690	89.71%
TOTAL	887	100.00%	\$167,768,748	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	2	0.23%	\$112,104	0.07%
African American Males	31	3.49%	\$5,046,167	3.01%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	5	0.56%	\$394,352	0.24%
Hispanic American Females	2	0.23%	\$193,043	0.12%
Hispanic American Males	2	0.23%	\$4,417,590	2.63%
Native American Females	1	0.11%	\$14,261	0.01%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	67	7.55%	\$7,077,541	4.22%
Non-minority Males	777	87.60%	\$150,513,690	89.71%
TOTAL	887	100.00%	167,768,748	100.00%



2. Professional Services Subcontracts

Table 4.3 lists the professional services subcontracts issued by the City's prime contractors. MBEs received 16.32%; WBEs received 12.97%; and non-MWBEs received 70.71% of the professional services subcontract dollars awarded.

African Americans received 46, or 13.53%, of the City's professional services subcontracts during the study period, representing \$10,875,759, or 10.06%, of the professional services subcontract dollars.

Asian Americans received 29, or 8.53%, of the City's professional services subcontracts during the study period, representing \$6,288,948, or 5.82%, of the professional services subcontract dollars.

Hispanic Americans received 1, or 0.29%, of the City's professional services subcontracts during the study period, representing \$472,171, or 0.44%, of the professional services subcontract dollars.

Native Americans received 0, or 0.00%, of the City's professional services subcontracts during the study period, representing \$0, or 0.00%, of the professional services subcontract dollars.

Caucasian Females received 85, or 25.00%, of the City's professional services subcontracts during the study period, representing \$14,018,622, or 12.97%, of the professional services subcontract dollars.

Non-minority Males received 179, or 52.65%, of the City's professional services subcontracts during the study period, representing \$76,409,488, or 70.71%, of the professional services subcontract dollars.



**Table 4.3: Professional Services Subcontractor Utilization,
January 1, 2012, to December 31, 2015**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	46	13.53%	\$10,875,759	10.06%
Asian Americans	29	8.53%	\$6,288,948	5.82%
Hispanic Americans	1	0.29%	\$472,171	0.44%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	85	25.00%	\$14,018,622	12.97%
Non-minority Males	179	52.65%	\$76,409,488	70.71%
TOTAL	340	100.00%	\$108,064,989	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	8	2.35%	\$431,924	0.40%
African American Males	38	11.18%	\$10,443,836	9.66%
Asian American Females	10	2.94%	\$448,203	0.41%
Asian American Males	19	5.59%	\$5,840,745	5.40%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	1	0.29%	\$472,171	0.44%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	85	25.00%	\$14,018,622	12.97%
Non-minority Males	179	52.65%	\$76,409,488	70.71%
TOTAL	340	100.00%	108,064,989	100.00%



IV. Summary

Several methods were used to compile the most comprehensive dataset of subcontracts awarded by the City's construction and professional services prime contractors. The subcontract utilization analysis, which was limited to construction and professional services prime contracts valued over \$300,000, included a total of 1,227 subcontracts. There were 887 construction subcontracts and 340 professional services subcontracts. The total subcontract dollars analyzed for the January 1, 2012, to December 31, 2015, study period was \$275,833,736, which included \$167,768,748 for construction and \$108,064,989 for professional services subcontracts.



CHAPTER 5: Market Area Analysis

I. Market Area Definition

A. Legal Criteria for Geographic Market Area

The Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*²⁷³ (*Croson*) held that programs established by local governments to set goals for the participation of minority-owned business enterprises (MBEs) must be supported by evidence of past discrimination in the award of their contracts. Prior to the *Croson* decision, local agencies could implement race-conscious programs without developing a detailed public record to document the underutilization of MBEs in their award of contracts. Instead, they relied on widely recognized societal patterns of discrimination.²⁷⁴

Croson established that a local government could not rely on society-wide discrimination as the basis for a race-based program. Instead, the local government was required to identify discrimination within its own contracting jurisdiction.²⁷⁵ In *Croson*, the United States Supreme Court found the City of Richmond, Virginia's MBE construction program to be unconstitutional because there was insufficient evidence of discrimination in the local construction market.

Croson was explicit in saying that the local construction market was the appropriate geographical framework in which to perform statistical comparisons of business availability to business utilization. Therefore, the identification of the local market area is particularly important because it establishes the parameters in which to conduct a disparity study.

B. Application of the Croson Standard

While *Croson* emphasized the importance of the local market area, it provided little assistance in defining its parameters. However, it is informative to review the Court's definition of the City of Richmond, Virginia's market area. In discussing the geographic parameters of the constitutional violation that must be investigated, the Court interchangeably used the terms "relevant market," "Richmond construction industry,"²⁷⁶ and "city's construction industry."²⁷⁷ These terms were used to define the proper scope for examining the existence of discrimination within the City of Richmond. This interchangeable use of terms lends support to a definition of market area that coincides with the boundaries of a contracting jurisdiction.

²⁷³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁷⁴ *United Steelworkers v. Weber*, 433 U.S. 193, 198, n. 1 (1979).

²⁷⁵ *Croson*, 488 U.S. at 497.

²⁷⁶ *Id.* at 500.

²⁷⁷ *Id.* at 470.



An analysis of the cases following *Croson* reveals a pattern that provides additional guidance for defining the market area. The body of cases examining the *reasonable* market area definition is *fact-based*—rather than dictated by a specific formula.²⁷⁸ In *Cone Corporation v. Hillsborough County*,²⁷⁹ the United States Court of Appeals for the Eleventh Circuit considered a study in support of Hillsborough County, Florida’s MBE program, which used minority contractors located in Hillsborough County as the measure of available firms. The program was found to be constitutional under the compelling governmental interest component of the strict scrutiny standard.

Hillsborough County’s program was based on statistics indicating that specific discrimination existed in the construction contracts awarded by Hillsborough County, not in the construction industry in general. Hillsborough County extracted data from within its own jurisdictional boundaries and assessed the percentage of minority businesses available in Hillsborough County. The court stated that the disparity study was properly conducted within the “local construction industry.”²⁸⁰

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII)*,²⁸¹ the United States Court of Appeals for the Ninth Circuit found the City and County of San Francisco, California’s MBE program to have the factual predicate necessary to survive strict scrutiny. San Francisco’s MBE program was supported by a study that assessed the number of available MBE contractors within the City and County of San Francisco. The court found it appropriate to use the City and County of San Francisco as the relevant market area in which to conduct a disparity study.²⁸²

In *Coral Construction v. King County*, the United States Court of Appeals for the Ninth Circuit held that “a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program.”²⁸³ In support of its MBE program, King County, Washington offered studies compiled by other jurisdictions, including entities completely within the county, others coterminous with the boundaries of the county, and a jurisdiction completely outside of King County. The plaintiffs contended that *Croson* required King County, Washington to compile its own data and cited *Croson* as prohibiting data sharing.

The court found that data sharing could potentially lead to the improper use of societal discrimination data as the factual basis for a local MBE program and that innocent third parties could be unnecessarily burdened if an MBE program were based on outside data. However, the court found that the data from entities within King County and from coterminous jurisdictions

²⁷⁸ See e.g., *Concrete Works of Colorado v. City of Denver, Colorado*, 36 F.3d 1513, 1528 (10th Cir. 1994) (“*Concrete Works*”).

²⁷⁹ *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

²⁸⁰ *Cone*, 908 F.2d at 915.

²⁸¹ *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991).

²⁸² *AGCC II*, 950 F.2d at 1415.

²⁸³ *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).



were relevant to discrimination in the county. The court also found that the data posed no risk of unfairly burdening innocent third parties.

The court concluded that data gathered by a neighboring county could not be used to support King County's MBE program. The court noted, "It is vital that a race-conscious program align itself as closely to the scope of the problem sought to be rectified by the governmental entity. To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries."²⁸⁴ However, the court did note that the "world of contracting does not conform itself neatly to jurisdictional boundaries."²⁸⁵

There are other situations in which courts have approved a market area definition that extended beyond a jurisdiction's geographic boundaries. In *Concrete Works v. City and County of Denver* (*Concrete Works*),²⁸⁶ the United States Court of Appeals for the Tenth Circuit directly addressed the issue of whether extra-jurisdictional evidence of discrimination can be used to determine the "local market area" for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver, Colorado Metropolitan Statistical Area (Denver MSA) to support its MBE program. Plaintiffs argued that the federal constitution prohibited consideration of evidence beyond jurisdictional boundaries, but the Court of Appeals disagreed.

Critical to the court's acceptance of the Denver MSA as the relevant local market was the finding that more than 80% of construction and design contracts awarded by the City and County of Denver were awarded to contractors within the Denver MSA. Another consideration was that the City and County of Denver's analysis was based on United States Census data, which were available for the Denver MSA but not for the City of Denver itself. There was no undue burden placed on nonculpable parties, as the City and County of Denver had expended a majority of its construction contract dollars within the area defined as the local market. Citing *AGCC II*,²⁸⁷ the court noted "that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions that the city has taken in the past have visited racial discrimination on such individuals."²⁸⁸

Similarly, New York State conducted a disparity study in which the geographic market consisted of New York State and eight counties in northern New Jersey. The geographic market was defined as the area encompassing the location of businesses that received more than 90% of the dollar value of all contracts awarded by the agency.²⁸⁹

State and local governments must pay special attention to the geographical scope of their disparity studies. *Croson* determined that the statistical analysis should focus on the number of qualified

²⁸⁴ *Coral Construction Co. v. King County*, 941 F.2d at 917.

²⁸⁵ *Id.*

²⁸⁶ *Concrete Works*, 36 F.3d at 1528.

²⁸⁷ *AGCC II*, 950 F.2d at 1401.

²⁸⁸ *Concrete Works*, 36 F.3d at 1528.

²⁸⁹ *Opportunity Denied! New York State's Study*, 26 Urban Lawyer No. 3, Summer 1994.



minority business owners in the government's marketplace.²⁹⁰ The text of *Croson* itself suggests that the geographical boundaries of the government entity comprise an appropriate market area, and other courts have agreed with this finding. It follows then that an entity may limit consideration of evidence of discrimination to discrimination occurring within its own jurisdiction.

II. Market Area Analysis

Although *Croson* and its progeny do not provide a bright-line rule for the delineation of the local market area, taken collectively, the case law supports a definition of the market area as the geographical boundaries of the government entity. Given the City of Columbus' jurisdiction, the study's market area is determined to be the geographical boundaries of Franklin County. Additionally, the market area analysis revealed that the City spent over 70% of its dollars with businesses located in Franklin County during the study period.

A. Summary of the Distribution of All Prime Contracts Awarded

The City of Columbus awarded 20,972 prime contracts valued at \$1,747,495,767 during the January 1, 2012, to December 31, 2015, study period. Businesses located in the market area received 63.73% of the prime contracts that the City awarded and 74.73% of the dollars. The distribution of all prime contracts awarded, and dollars received by all firms domiciled inside and outside of the market area, are shown below in Table 5.1.

Table 5.1: Distribution of All Contracts Awarded

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Franklin	13,365	63.73%	\$1,305,821,100	74.73%
Stark	49	0.23%	\$58,825,015	3.37%
Summit	153	0.73%	\$33,594,151	1.92%
Cuyahoga	486	2.32%	\$24,745,870	1.42%
Delaware	165	0.79%	\$19,042,515	1.09%
Madison	224	1.07%	\$18,083,687	1.03%
Hamilton	202	0.96%	\$13,059,883	0.75%
Fairfield	148	0.71%	\$12,957,484	0.74%
Pickaway	71	0.34%	\$11,689,508	0.67%
Huron	41	0.20%	\$11,247,007	0.64%
Richland	23	0.11%	\$9,777,612	0.56%
Knox	3	0.01%	\$8,793,859	0.50%
Montgomery	167	0.80%	\$6,619,803	0.38%
Licking	97	0.46%	\$6,197,376	0.35%
Lake	99	0.47%	\$2,886,449	0.17%
Scioto	1	0.00%	\$2,499,662	0.14%
Mahoning	91	0.43%	\$2,207,706	0.13%

²⁹⁰ *Croson*, 488 U.S. at 501.





Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Butler	42	0.20%	\$1,941,074	0.11%
Seneca	2	0.01%	\$1,593,783	0.09%
Clark	72	0.34%	\$1,574,630	0.09%
Muskingum	115	0.55%	\$1,412,854	0.08%
Wood	51	0.24%	\$1,313,892	0.08%
Auglaize	107	0.51%	\$999,254	0.06%
Highland	7	0.03%	\$944,327	0.05%
Clermont	72	0.34%	\$824,024	0.05%
Lorain	14	0.07%	\$803,291	0.05%
Morgan	64	0.31%	\$801,432	0.05%
Pike	3	0.01%	\$692,079	0.04%
Crawford	37	0.18%	\$633,673	0.04%
Medina	35	0.17%	\$609,071	0.03%
Lawrence	1	0.00%	\$601,120	0.03%
Portage	17	0.08%	\$432,033	0.02%
Ross	14	0.07%	\$386,452	0.02%
Marion	4	0.02%	\$369,211	0.02%
Fayette	33	0.16%	\$327,544	0.02%
Sandusky	2	0.01%	\$268,599	0.02%
Greene	44	0.21%	\$221,411	0.01%
Trumbull	42	0.20%	\$197,471	0.01%
Shelby	21	0.10%	\$184,797	0.01%
Geauga	8	0.04%	\$176,677	0.01%
Logan	11	0.05%	\$165,621	0.01%
Lucas	10	0.05%	\$161,890	0.01%
Union	7	0.03%	\$151,253	0.01%
Hocking	8	0.04%	\$150,701	0.01%
Van Wert	21	0.10%	\$141,853	0.01%
Warren	27	0.13%	\$107,893	0.01%
Miami	39	0.19%	\$87,459	0.01%
Holmes	5	0.02%	\$53,696	0.00%
Athens	12	0.06%	\$34,596	0.00%
Ashland	9	0.04%	\$29,027	0.00%
Ottawa	8	0.04%	\$21,717	0.00%
Paulding	5	0.02%	\$19,730	0.00%
Columbiana	6	0.03%	\$15,858	0.00%
Jackson	12	0.06%	\$14,447	0.00%
Mercer	3	0.01%	\$12,070	0.00%
Henry	8	0.04%	\$11,468	0.00%
Erie	3	0.01%	\$10,035	0.00%
Out-of-State	4,569	21.79%	\$180,298,433	10.32%
Out-of-Country	17	0.08%	\$650,635	0.04%
Total	20,972	100.00%	\$1,747,495,767	100.00%

B. Distribution of Construction Prime Contracts

The City awarded 1,003 construction prime contracts valued at \$985,673,556 during the study period. Businesses located in the market area received 77.67% of the construction prime contracts and 77.15% of the dollars. The distribution of the construction prime contracts awarded, and dollars received by all firms domiciled inside and outside of the market area, are shown below in Table 5.2.

Table 5.2: Distribution of Construction Prime Contracts

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Franklin	779	77.67%	\$760,419,535	77.15%
Stark	2	0.20%	\$56,948,403	5.78%
Summit	9	0.90%	\$28,875,156	2.93%
Delaware	31	3.09%	\$17,090,763	1.73%
Cuyahoga	9	0.90%	\$15,769,130	1.60%
Madison	27	2.69%	\$15,503,631	1.57%
Huron	9	0.90%	\$10,797,612	1.10%
Richland	11	1.10%	\$9,761,189	0.99%
Knox	3	0.30%	\$8,793,859	0.89%
Fairfield	22	2.19%	\$8,073,409	0.82%
Pickaway	13	1.30%	\$6,858,087	0.70%
Licking	26	2.59%	\$5,410,473	0.55%
Montgomery	6	0.60%	\$3,299,332	0.33%
Scioto	1	0.10%	\$2,499,662	0.25%
Butler	4	0.40%	\$1,722,387	0.17%
Seneca	2	0.20%	\$1,593,783	0.16%
Mahoning	2	0.20%	\$1,373,277	0.14%
Clark	8	0.80%	\$914,592	0.09%
Muskingum	2	0.20%	\$813,176	0.08%
Lake	1	0.10%	\$690,026	0.07%
Marion	3	0.30%	\$360,711	0.04%
Wood	1	0.10%	\$78,615	0.01%
Lorain	2	0.20%	\$73,992	0.01%
Morgan	1	0.10%	\$34,573	0.00%
Highland	1	0.10%	\$32,690	0.00%
Auglaize	3	0.30%	\$3	0.00%
Out-of-State	25	2.49%	\$27,885,491	2.83%
Total	1,003	100.00%	\$985,673,556	100.00%



C. Distribution of Professional Services Prime Contracts

The City awarded 2,463 professional services prime contracts valued at \$409,660,816 during the study period. Businesses located in the market area received 67.36% of the professional services prime contracts and 86.31% of the dollars. The distribution of the professional services prime contracts awarded, and dollars received by all firms domiciled inside and outside of the market area, are shown below in Table 5.3.

Table 5.3: Distribution of Professional Services Prime Contracts

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Franklin	1,659	67.36%	\$353,580,511	86.31%
Cuyahoga	45	1.83%	\$6,161,180	1.50%
Hamilton	28	1.14%	\$2,428,358	0.59%
Fairfield	25	1.02%	\$2,024,573	0.49%
Summit	15	0.61%	\$1,819,429	0.44%
Stark	13	0.53%	\$1,324,074	0.32%
Huron	18	0.73%	\$324,252	0.08%
Delaware	34	1.38%	\$287,855	0.07%
Montgomery	16	0.65%	\$286,551	0.07%
Madison	8	0.32%	\$84,617	0.02%
Licking	22	0.89%	\$61,434	0.01%
Medina	6	0.24%	\$49,745	0.01%
Lucas	1	0.04%	\$44,905	0.01%
Greene	16	0.65%	\$43,757	0.01%
Wood	1	0.04%	\$32,784	0.01%
Auglaize	8	0.32%	\$29,808	0.01%
Ottawa	8	0.32%	\$21,717	0.01%
Richland	11	0.45%	\$16,048	0.00%
Butler	2	0.08%	\$12,750	0.00%
Miami	1	0.04%	\$3,074	0.00%
Clermont	1	0.04%	\$2,949	0.00%
Henry	2	0.08%	\$2,639	0.00%
Out-of-State	515	20.91%	\$40,646,002	9.92%
Out-of-Country	8	0.32%	\$371,806	0.09%
Total	2,463	100.00%	\$409,660,816	100.00%



D. Distribution of Goods and Services Prime Contracts

The City awarded 17,506 goods and services prime contracts valued at \$352,161,395 during the study period. Businesses located in the market area received 62.42% of the goods and services prime contracts and 54.47% of the dollars. The distribution of the goods and services prime contracts awarded, and dollars received by all firms domiciled inside and outside of the market area, are shown below in Table 5.4.

Table 5.4: Distribution of Goods and Services Prime Contracts

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Franklin	10,927	62.42%	\$191,821,055	54.47%
Hamilton	174	0.99%	\$10,631,525	3.02%
Pickaway	58	0.33%	\$4,831,421	1.37%
Montgomery	145	0.83%	\$3,033,920	0.86%
Summit	129	0.74%	\$2,899,565	0.82%
Fairfield	101	0.58%	\$2,859,503	0.81%
Cuyahoga	432	2.47%	\$2,815,559	0.80%
Madison	189	1.08%	\$2,495,440	0.71%
Lake	98	0.56%	\$2,196,422	0.62%
Delaware	100	0.57%	\$1,663,897	0.47%
Wood	49	0.28%	\$1,202,494	0.34%
Auglaize	96	0.55%	\$969,443	0.28%
Highland	6	0.03%	\$911,636	0.26%
Mahoning	89	0.51%	\$834,429	0.24%
Clermont	71	0.41%	\$821,075	0.23%
Morgan	63	0.36%	\$766,859	0.22%
Lorain	12	0.07%	\$729,299	0.21%
Licking	49	0.28%	\$725,469	0.21%
Pike	3	0.02%	\$692,079	0.20%
Clark	64	0.37%	\$660,038	0.19%
Crawford	37	0.21%	\$633,673	0.18%
Lawrence	1	0.01%	\$601,120	0.17%
Muskingum	113	0.65%	\$599,678	0.17%
Medina	29	0.17%	\$559,326	0.16%
Stark	34	0.19%	\$552,538	0.16%
Portage	17	0.10%	\$432,033	0.12%
Ross	14	0.08%	\$386,452	0.11%
Fayette	33	0.19%	\$327,544	0.09%
Sandusky	2	0.01%	\$268,599	0.08%
Butler	36	0.21%	\$205,937	0.06%
Trumbull	42	0.24%	\$197,471	0.06%
Shelby	21	0.12%	\$184,797	0.05%
Greene	28	0.16%	\$177,654	0.05%
Geauga	8	0.05%	\$176,677	0.05%



Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Logan	11	0.06%	\$165,621	0.05%
Union	7	0.04%	\$151,253	0.04%
Hocking	8	0.05%	\$150,701	0.04%
Van Wert	21	0.12%	\$141,853	0.04%
Huron	14	0.08%	\$125,143	0.04%
Lucas	9	0.05%	\$116,985	0.03%
Warren	27	0.15%	\$107,893	0.03%
Miami	38	0.22%	\$84,385	0.02%
Holmes	5	0.03%	\$53,696	0.02%
Athens	12	0.07%	\$34,596	0.01%
Ashland	9	0.05%	\$29,027	0.01%
Paulding	5	0.03%	\$19,730	0.01%
Columbiana	6	0.03%	\$15,858	0.00%
Jackson	12	0.07%	\$14,447	0.00%
Mercer	3	0.02%	\$12,070	0.00%
Erie	3	0.02%	\$10,035	0.00%
Henry	6	0.03%	\$8,829	0.00%
Marion	1	0.01%	\$8,500	0.00%
Richland	1	0.01%	\$375	0.00%
Out-of-State	4,029	23.01%	\$111,766,940	31.74%
Out-of-Country	9	0.05%	\$278,829	0.08%
Total	17,506	100.00%	\$352,161,395	100.00%

III. Summary

During the study period, the City of Columbus awarded 20,972 construction, professional services, and goods and services prime contracts valued at \$1,747,495,767. The City awarded 63.73% of prime contracts and 74.73% of dollars to businesses domiciled within the market area.

Table 5.5 below presents an overview of the number of construction, professional services, and goods and services prime contracts the City awarded, and the dollars spent in the market area.

Construction Prime Contracts: 779, or 77.67%, of construction prime contracts were awarded to market area businesses. Construction prime contracts in the market area accounted for \$760,419,535, or 77.15%, of the total construction prime contract dollars.

Professional Services Prime Contracts: 1,659, or 67.36%, of professional services prime contracts were awarded to market area businesses. Professional services prime contracts in the market area accounted for \$353,580,511, or 86.31%, of the total professional services prime contract dollars.

Goods and Services Prime Contracts: 10,927, or 62.42%, of goods and services prime contracts were awarded to market area businesses. Goods and services prime contracts in the market area accounted for \$191,821,055, or 54.47%, of the total goods and services prime contract dollars.



Table 5.5: City of Columbus Contract Distribution

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Combined Industries				
Market Area	13,365	63.73%	\$1,305,821,100	74.73%
Outside Market Area	7,607	36.27%	\$441,674,667	25.27%
TOTAL	20,972	100.00%	\$1,747,495,767	100.00%
Construction				
Market Area	779	77.67%	\$760,419,535	77.15%
Outside Market Area	224	22.33%	\$225,254,022	22.85%
TOTAL	1,003	100.00%	\$985,673,556	100.00%
Professional Services				
Market Area	1,659	67.36%	\$353,580,511	86.31%
Outside Market Area	804	32.64%	\$56,080,305	13.69%
TOTAL	2,463	100.00%	\$409,660,816	100.00%
Goods and Services				
Market Area	10,927	62.42%	\$191,821,055	54.47%
Outside Market Area	6,579	37.58%	\$160,340,340	45.53%
TOTAL	17,506	100.00%	\$352,161,395	100.00%



CHAPTER 6: Prime Contractor and Subcontractor Availability Analysis

I. Introduction

According to *City of Richmond v. J.A. Croson Co. (Croson)*, availability is defined as the number of businesses in the jurisdiction's market area that are ready, willing, and able to provide the goods or services procured by the jurisdiction.²⁹¹ To determine the availability of minority and woman-owned business enterprises²⁹² (MWBE) and non-minority male-owned business enterprises (non-MWBE) within the jurisdiction's market area, businesses domiciled within the market area need to be enumerated. As defined in *Chapter 5: Market Area Analysis*, the market area for the Study is determined to be the jurisdictional boundaries of Franklin County.

When considering sources to determine the number of available MWBEs and non-MWBEs in the market area, the selection must be based on whether two aspects about the population in question can be gauged from the sources. One consideration is a business' interest in contracting with the jurisdiction, as implied by the term "willing." The other is the business' ability or capacity to provide a service or good, as implied by the term "able." The enumeration of available businesses met these criteria.

II. Prime Contractor Availability Data Sources

A. Identification of Willing Businesses Within the Market Area

Four main sources of information were used to identify willing and able businesses in Franklin County that provide the construction, professional services, and goods and services contracts that the City of Columbus (City) procures. The sources include the City's records, including bidders and vendors lists, government certification directories, business owners who attended the City's Disparity Study business community meetings, and business association membership lists. The business associations included trade organizations, professional organizations, and chambers of commerce. Extensive targeted outreach to business associations in the market area was performed to identify and secure business membership directories. Only businesses on the membership lists that were determined to be willing, ready, and able were added to the availability list. Any business listed in more than one source was counted only once in the relevant industry. If a business was willing and able to provide goods or services in more than one industry, the business was listed separately in each industry.

²⁹¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁹² Hereinafter referred to as Minority and Caucasian female-owned businesses in the statistical tables.



The four sources were ranked according to their reliability in determining a business' willingness to contract with the City, with the highest ranking assigned to utilized businesses, bidders, and vendors. Government certification lists ranked second, community meeting attendees ranked third, and business association membership lists ranked fourth. Therefore, the first document used to build the availability database was the City's utilized businesses. Bidders and vendor lists were then appended to the availability database. Businesses identified from federal and local government certification agencies were thereafter appended. The local certification lists included small, minority, and woman-owned businesses. The presence of a business at a business community meeting was the affirmation of the business' willingness to contract with the City. Therefore, the registration list was appended to the availability list. Businesses identified from association membership lists were surveyed, and businesses that affirmed their willingness were also appended.

B. Prime Contractor Sources

Table 6.1 lists the City's records, certification directories, and business association listings from which the list of willing businesses was completed. Each source was reviewed for MWBE and non-MWBE information.

Table 6.1: Prime Contractor Availability Data Sources

Source	Type of Information
City of Columbus Records	
Office of Diversity and Inclusion Contract Data Vendors	MWBE
Construction Prequalification Business List	MWBE and Non-MWBE
Government Certification Directories	
City of Columbus Certified Business Directory	MWBE and Non-MWBE
Columbus City Schools Local Economically Disadvantaged Enterprise	MWBE and Non-MWBE
Ohio Department of Administrative Services, Equal Opportunity Division (MBE certification)	MWBE
Ohio Department of Administrative Services, Equal Opportunity Division (EDGE Certification)	MWBE
Ohio Department of Transportation, Unified Certification Program	MWBE and Non-MWBE
United States Small Business Administration, 8(a) Certified or 8(a) Joint Venture	MWBE
United States Small Business Administration, HUBZone Certification	MWBE and Non-MWBE
United States Small Business Administration, Small Disadvantaged Business	MWBE and Non-MWBE
United States Small Business Administration, Veteran-owned Business	MWBE and Non-MWBE
United States Small Business Administration, Woman-owned Business	MWBE
Business Association Membership Lists	
Air Conditioning Contractors of Central Ohio	MWBE and Non-MWBE



Source	Type of Information
American Concrete Pumping Association	MWBE and Non-MWBE
American Council of Engineering Companies, Ohio	MWBE and Non-MWBE
American Subcontractors Association of Ohio	MWBE and Non-MWBE
AmSpirit Business Connections	MWBE and Non-MWBE
Associated Electrical Contractors, Central Ohio Chapter	MWBE and Non-MWBE
Associated General Contractors of Ohio	MWBE and Non-MWBE
Central Ohio Minority Business Association	MWBE
Columbus Hispanic Chamber of Commerce	MWBE
Mechanical Contractors Association of Central Ohio	MWBE and Non-MWBE
National Electrical Contractors Association	MWBE and Non-MWBE
National Electrical Contractors Association, Central Ohio Chapter	MWBE and Non-MWBE
Ohio Aggregates & Industrial Minerals Association	MWBE and Non-MWBE
Ohio Glass Association	MWBE and Non-MWBE
Ohio Precast Concrete Association	MWBE and Non-MWBE

C. Determination of Willingness

From the three types of availability sources listed above, 1,979 unique market area businesses that can provide goods or services in one or more of the three industries were identified. An enumeration of the willing businesses derived by source is listed below.

1. City Records

A total of 1,187 unique market area businesses were added to the availability database from City records.

2. Government Certification Lists

A total of 715 unique market area businesses were added to the availability database from government certification lists.

3. Business Community Meetings

A total of 32 unique market area businesses were added to the availability database from the City's Disparity Study community meetings.

4. Business Association Membership Lists

A total of 45 unique market area businesses were added to the availability database from business association membership lists. There were 270 businesses identified from business association membership lists. These businesses were surveyed to determine their willingness to contract with the City. Of the 270 surveyed businesses, 3 refused to participate, 204 did not respond despite



multiple attempts to reach them by email and telephone, 11 telephone numbers were disconnected, and 52 businesses completed the survey, 45 of which were deemed willing and added to the availability database.

D. Distribution of Available Prime Contractors by Source, Ethnicity, and Gender

Table 6.2 through Table 6.4 present the distribution of willing prime contractors by source. A distribution of available businesses by source was also calculated for each industry. As noted in Table 6.2, 96.32% of the construction businesses identified were derived from the City's records, other government agencies' records, and government certification lists. Companies identified through community meeting attendees and business association membership lists represent 3.68% of the willing businesses.

Table 6.2: Distribution of Prime Contractor Availability Data Sources, Construction

Sources	MWBE Percentage	Non-MWBE Percentage	Source Percentage
Prime Contractor Utilization	33.33%	63.84%	52.69%
Pre-Qualified Firms	60.47%	18.75%	33.99%
Certification Lists	3.88%	12.95%	9.63%
Subtotal	97.67%	95.54%	96.32%
Community Meeting Attendees	0.78%	0.00%	0.28%
Willingness Survey	0.78%	1.79%	1.42%
Business Survey	0.78%	2.68%	1.98%
Subtotal	2.33%	4.46%	3.68%
Grand Total*	100.00%	100.00%	100.00%

*The percentages may not total 100% due to rounding.

Table 6.3 lists the data sources for the available professional services prime contractors. As noted, 94.82% of the professional services businesses identified were derived from the City's records, other government agencies' records, and government certification lists. Companies identified through community meeting attendees and business association membership lists represent 5.18% of the willing businesses.



**Table 6.3: Distribution of Prime Contractor Availability Data Sources,
Professional Services**

Sources	MWBE Percentage	Non-MWBE Percentage	Source Percentage
Prime Contractor Utilization	30.47%	55.89%	42.49%
Pre-Qualified Firms	64.62%	37.26%	51.68%
Certification Lists	0.25%	1.10%	0.65%
Subtotal	95.33%	94.25%	94.82%
Community Meeting Attendees	3.69%	1.92%	2.85%
Willingness Survey	0.49%	0.82%	0.65%
Business Survey	0.49%	3.01%	1.68%
Subtotal	4.67%	5.75%	5.18%
Grand Total*	100.00%	100.00%	100.00%

*The percentages may not total 100% due to rounding.

Table 6.4 lists the data sources for the available goods and services prime contractors. As noted, 97.70% of the goods and services businesses identified were derived from the City's records, other government agencies' records, and government certification lists. Companies identified through community meeting attendees and business association membership lists represent 2.30% of the willing businesses.



**Table 6.4: Distribution of Prime Contractor Availability Data Sources,
Goods and Services**

Sources	MWBE Percentage	Non-MWBE Percentage	Source Percentage
Prime Contractor Utilization	45.62%	85.63%	71.76%
Pre-Qualified Firms	50.40%	12.25%	25.48%
Certification Lists	0.27%	0.56%	0.46%
Subtotal	96.29%	98.45%	97.70%
Community Meeting Attendees	2.12%	0.14%	0.83%
Willingness Survey	0.27%	0.70%	0.55%
Business Survey	1.33%	0.70%	0.92%
Subtotal	3.97%	1.55%	2.39%
Grand Total*	100.00%	100.00%	100.00%

*The percentages may not total 100% due to rounding.

III. Capacity

The second component of the availability requirement set forth in *Croson* is to assess the capacity or ability of a business to perform the contracts awarded by the jurisdiction.²⁹³ Capacity requirements are not delineated in *Croson*, but capacity has been considered in subsequent cases. Specifically, the Third Circuit held certification to be a valid method of defining availability.²⁹⁴ In *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)*, the court held that utilizing a list of certified contractors was a rational approach to identify qualified, willing firms.²⁹⁵ As noted in *Philadelphia*, “[t]he issue of qualifications can be approached at different levels of specificity[.]”²⁹⁶ The court stated that “[a]n analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach [of qualification].”²⁹⁷ Researchers have attempted to define capacity by profiling the age of the business, education of the business owner, revenue, number of employees, and bonding limits

²⁹³ *Croson*, 488 U.S. 469.

²⁹⁴ *Contractors Ass’n of E. Pa.*, 91 F.3d at 603.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 610

²⁹⁷ *Id.* at 603; see also, *Concrete Works IV*, 321 F.3d at 966 (noting a less sophisticated method to calculate availability does not render a disparity study flawed.)



using census data. However, these conventional indices are themselves impacted by race and gender-based discrimination.²⁹⁸

Mason Tillman used five methods to compare the capacity of MWBEs to similarly situated Caucasian male-owned businesses, using measures that controlled for the impact of race and gender discrimination: 1) review of the distribution of contracts to determine the size of the contracts that the City awarded, 2) identification of the largest contracts awarded to MWBEs, 3) analysis of the frequency distribution of City contracts awarded to MWBEs and Caucasian male-owned firms, 4) threshold analysis that limited the range of the formal prime contracts to be analyzed by eliminating outliers, and 5) assessment of capacity-related economic factors of minority and woman-owned businesses and Caucasian male-owned businesses using the results of the capacity eSurvey.

A. *Prime Contract Size Distribution*

All of the City's contracts were ordered by the size of the award to determine the distribution of the awarded contracts. The purpose of this distribution is to gauge the capacity required to perform the City's contracts. In Table 6.5, contract awards in the three industries were grouped into nine size ranges and are presented by ethnicity classification as non-minority females, non-minority males, minority females, and minority males.²⁹⁹

More than 90% of the prime contracts awarded by the City were less than \$100,000. Additionally, 95.94% were less than \$250,000, 97.66% were less than \$500,000, 98.74% were less than \$1,000,000, and 99.59% were less than \$3,000,000. Only 0.41% of the awarded prime contracts were valued \$3,000,000 and greater.

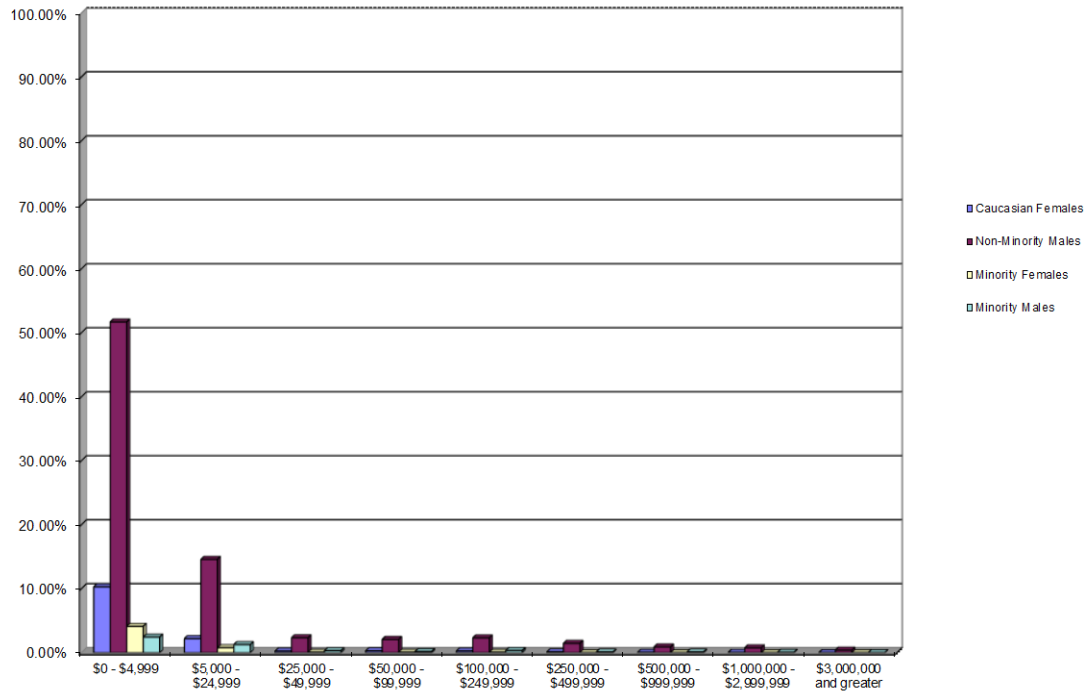
**Table 6.5: All Industry Contracts by Size
January 1, 2012, to December 31, 2015**

Size	Non-minority				Minority				Total	
	Females		Males		Females		Males			
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
\$0 - \$4,999	2,157	10.29%	10,840	51.69%	864	4.12%	513	2.45%	14,374	68.54%
\$5,000 - \$24,999	461	2.20%	3,058	14.58%	161	0.77%	264	1.26%	3,944	18.81%
\$25,000 - \$49,999	53	0.25%	491	2.34%	16	0.08%	68	0.32%	628	2.99%
\$50,000 - \$99,999	62	0.30%	434	2.07%	14	0.07%	37	0.18%	547	2.61%
\$100,000 - \$249,999	57	0.27%	485	2.31%	14	0.07%	72	0.34%	628	2.99%
\$250,000 - \$499,999	29	0.14%	307	1.46%	2	0.01%	23	0.11%	361	1.72%
\$500,000 - \$999,999	12	0.06%	188	0.90%	3	0.01%	22	0.10%	225	1.07%
\$1,000,000 - \$2,999,999	8	0.04%	159	0.76%	0	0.00%	12	0.06%	179	0.85%
\$3,000,000 and greater	1	0.00%	82	0.39%	0	0.00%	3	0.01%	86	0.41%
Total	2,840	13.54%	16,044	76.50%	1,074	5.12%	1,014	4.84%	20,972	100.00%

²⁹⁸ David G. Blanchflower & Phillip B. Levine & David J. Zimmerman, 2003. "Discrimination in the Small-Business Credit Market," The Review of Economics and Statistics, MIT Press, vol. 85(4).

²⁹⁹ The nine- dollar ranges are \$0 - \$4,999; \$5,000 - \$24,999; \$25,000 - \$49,999; \$50,000 - \$99,999; \$100,000 - \$249,999; \$250,000 - \$499,999; \$500,000 - \$999,999; \$1,000,000 - \$2,999,999; and \$3,000,000 and greater.

**Chart 6.1: All Industry Contracts by Size
January 1, 2012, to December 31, 2015**



The size of the City's prime contracts is a determinant of the capacity that a willing business needs to be competitive at the prime contract level. That more than 90% of the City's contracts are less than \$100,000, illustrates that the capacity needed to perform a significant number of the City's contracts is not considerable.

B. Largest MWBE Prime Contracts Awarded by Industry

Table 6.6 shows that MWBEs demonstrated the capacity to perform contracts as large as \$7,866,841 in construction, \$7,781,881 in professional services, and \$3,150,980 in goods and services. The size of the largest prime contracts that the City awarded to MWBEs illustrates that MWBEs have the capacity to perform substantial formal contracts.



Table 6.6: Largest Prime Contracts Awarded by the City of Columbus to MWBEs

Ethnic/Gender Group	Construction	Professional Services	Goods and Services
African American Female	----	\$512,654	\$681,969
African American Male	\$3,044,601	\$1,093,704	\$3,150,980
Asian American Female	\$48,825	\$843,357	\$62,175
Asian American Male	\$12,500	\$7,781,881	\$1,012,474
Hispanic American Female	----	\$5,600	\$175,000
Hispanic American Male	\$230,481	\$19,900	\$41,400
Native American Female	\$150,757	\$41,250	----
Native American Male	----	\$61,920	\$50,438
Caucasian Female	\$7,866,841	\$796,532	\$1,991,310
Largest Dollar Amounts MBEs	\$3,044,601	\$7,781,881	\$3,150,980
Largest Dollar Amounts WBEs	\$7,866,841	\$843,357	\$1,991,310

(----) Denotes a group that was not awarded any contracts within the respective industry.

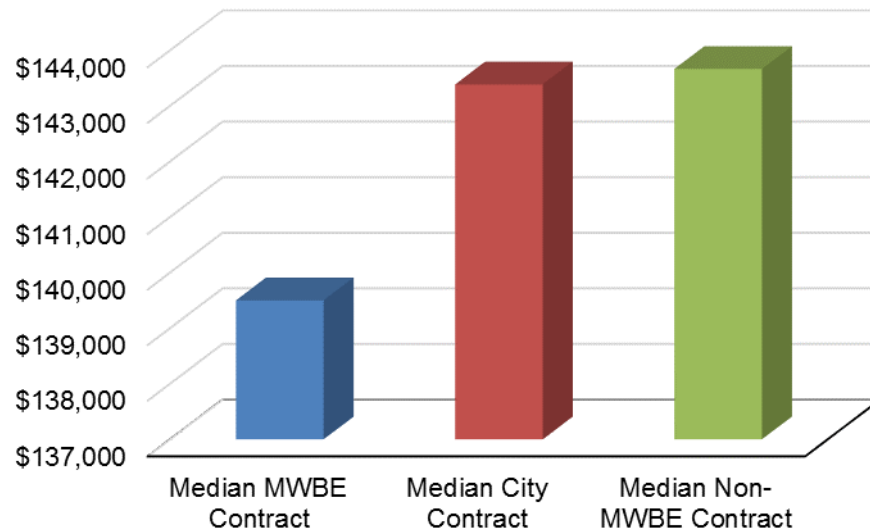
C. Frequency Distribution

The City's formal contracts were valued up to \$95,082,793. A frequency distribution was calculated for all City prime contracts to illustrate the center point of the dataset at which the size of a contract marks the midpoint between the smallest and largest contracts. The same distribution was calculated separately for MWBEs and non-MWBEs. Within each frequency distribution, the median, or center point, of the dataset was determined. As shown in Chart 6.2, the median of all City prime contracts for all industries was \$143,385. This median marks the value at which 50% of contracts were above and below \$143,385. The median prime contract awarded to MWBEs was \$139,500 and to Caucasian males was \$143,662.

These statistics show only a \$3,885 difference between the median of all City prime contracts and the median prime contract performed by MWBEs, illustrating that MWBEs have comparable capacity to perform a significant number of the prime contracts awarded by the City. As shown in Table 6.6, there are MWBEs that have the capacity to perform very large contracts. Furthermore, there are other methods commonly used by prime contractors to increase capacity in the presence of contracting opportunities, such as subcontracting, joint ventures, and staff augmentation.



Chart 6.2: Median Contract Value



D. Formal Contract Threshold Analysis

As a further measure to ensure that the available businesses have the capacity to perform the contracts analyzed in the disparity analysis, the prime contracts subject to the statistical analysis was limited. As discussed in *Chapter 3: Prime Contractor Utilization Analysis*, the analysis of formal contracts was limited to the awarded contracts with a dollar value beneath the 75th percentile. The decision to limit the analysis of disparity to contracts at or below the 75th percentile was made to eliminate outliers, which increased the reliability of the statistical findings, and reduced the business capacity requirements. Table 6.7 lists the contract distribution for each industry by percentile.

Table 6.7: Threshold Analysis by Size and Industry

Contract Distribution	All Industries Combined	Construction	Professional Services	Goods and Services
Minimum	\$20,000	\$100,000	\$50,000	\$20,000
25 th Percentile	\$58,218	\$231,307	\$98,316	\$35,000
50 th Percentile	\$142,272	\$567,183	\$204,320	\$75,000
75 th Percentile	\$380,000	\$1,550,000	\$420,000	\$180,000
Maximum	\$95,082,793	\$95,082,793	\$31,148,558	\$15,908,645

E. Business Capacity Assessment

To assess the relative capacity of the minority and woman-owned businesses and Caucasian male-owned businesses enumerated in the availability analysis, an eSurvey was administered to the

1,979 available businesses to address the socioeconomic factors of the willing businesses identified in the City’s market area.

The findings indicate that the majority of business owned by minority, woman-owned businesses and/or Caucasian male-owned businesses are small, employing 10 or fewer individuals. Additionally, the findings show that both MWBEs and Caucasian male-owned businesses have the capacity to perform the majority of contracts issued by the City.

1. Profile of Respondents

The business capacity survey was completed by 217 unique businesses, of which 45.16% were African American, 10.14% were Asian American, 3.23% were Hispanic American, 1.38% were Native American, 2.30% were other minorities,³⁰⁰ and 37.79% were Caucasian American. 34.56% of the respondents were female and 65.44% were male.

Table 6.8: Ethnicity and Gender of Businesses

Response	African American	Asian American	Hispanic American	Native American	Other Minorities	Caucasian American	Total
Female	32.65%	31.82%	42.86%	0.00%	20.00%	39.02%	34.56%
Male	67.35%	68.18%	57.14%	100.00%	80.00%	60.98%	65.44%
Total	45.16%	10.14%	3.23%	1.38%	2.30%	37.79%	100.00%

Due to the limited number of responses, ethnic groups were combined and analyzed as “minority males” and “minority females.” As shown in Table 6.9, 29.03% of businesses provided construction services; 17.05% of businesses provided professional services; and 53.92% of businesses provided goods and services.

Table 6.9: Business Owners’ Ethnicity, Gender, and Primary Industry

Primary Industry	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Construction	11.63%	29.35%	25.00%	46.00%	29.03%
Professional Services	20.93%	14.13%	9.38%	24.00%	17.05%
Goods and Services	67.44%	56.52%	65.63%	30.00%	53.92%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

2. Capacity Assessment Findings

Table 6.10 details business annual gross revenue, which shows that the majority of businesses had annual gross revenues equal to \$1,000,000 or less. As detailed below, 46.08% of businesses earned \$500,000 or less; 11.98% of businesses earned \$500,001 to \$1,000,000; 13.82% of businesses earned \$1,000,001 to \$3,000,000; 4.15% of businesses earned \$3,000,001 to \$5,000,000; 5.99%

³⁰⁰ Other minority includes individuals who belong to two or more racial groups.



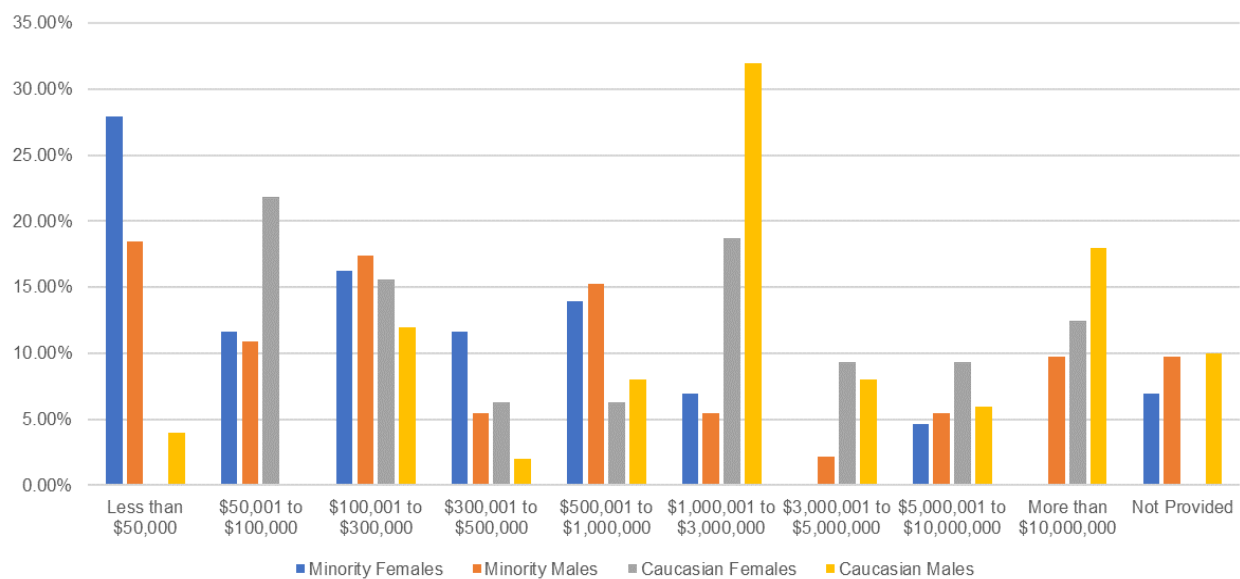
of businesses earned \$5,000,001 to \$10,000,000; and 10.14% of businesses earned over \$10 million.

Table 6.10: Annual Gross Revenue

Annual Gross Revenue	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Less than \$50,000	27.91%	18.48%	0.00%	4.00%	14.29%
\$50,001 to \$100,000	11.63%	10.87%	21.88%	0.00%	10.14%
\$100,001 to \$300,000	16.28%	17.39%	15.63%	12.00%	15.67%
\$300,001 to \$500,000	11.63%	5.43%	6.25%	2.00%	5.99%
\$500,001 to \$1,000,000	13.95%	15.22%	6.25%	8.00%	11.98%
\$1,000,001 to \$3,000,000	6.98%	5.43%	18.75%	32.00%	13.82%
\$3,000,001 to \$5,000,000	0.00%	2.17%	9.38%	8.00%	4.15%
\$5,000,001 to \$10,000,000	4.65%	5.43%	9.38%	6.00%	5.99%
More than \$10,000,000	0.00%	9.78%	12.50%	18.00%	10.14%
Not Provided	6.98%	9.78%	0.00%	10.00%	7.83%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

Chart 6.3 illustrates the annual gross revenue of all businesses, including minority females, minority males, Caucasian females, and Caucasian males. The gross revenue is most similar at the \$100,001 to \$300,000 level. This finding infers that the majority of businesses are small, regardless of the ethnicity and gender of the owner, though the majority of the Caucasian males had annual revenue over \$1,000,000.

Chart 6.3: Annual Gross Revenue



As shown in Table 6.11, 47.47% of business had 0 to 5 employees,³⁰¹ 12.44% had 6 to 10 employees, 3.69% had 11 to 20 employees, 5.53% had 21 to 30 employees, 13.82% had 31 to 50 employees, and 13.36% had more than 50 employees. The majority of the businesses had fewer than 10 employees.

Table 6.11: Number of Employees

Employees	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
0 to 5 Employees	72.09%	54.35%	31.25%	24.00%	47.47%
6 to 10 Employees	6.98%	3.26%	21.88%	28.00%	12.44%
11 to 20 Employees	0.00%	4.35%	3.13%	6.00%	3.69%
21 to 30 Employees	0.00%	6.52%	6.25%	8.00%	5.53%
31-50 Employees	18.60%	16.30%	15.63%	4.00%	13.82%
Over 50 Employees	2.33%	9.78%	18.75%	26.00%	13.36%
Not Provided	0.00%	5.43%	3.13%	4.00%	3.69%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

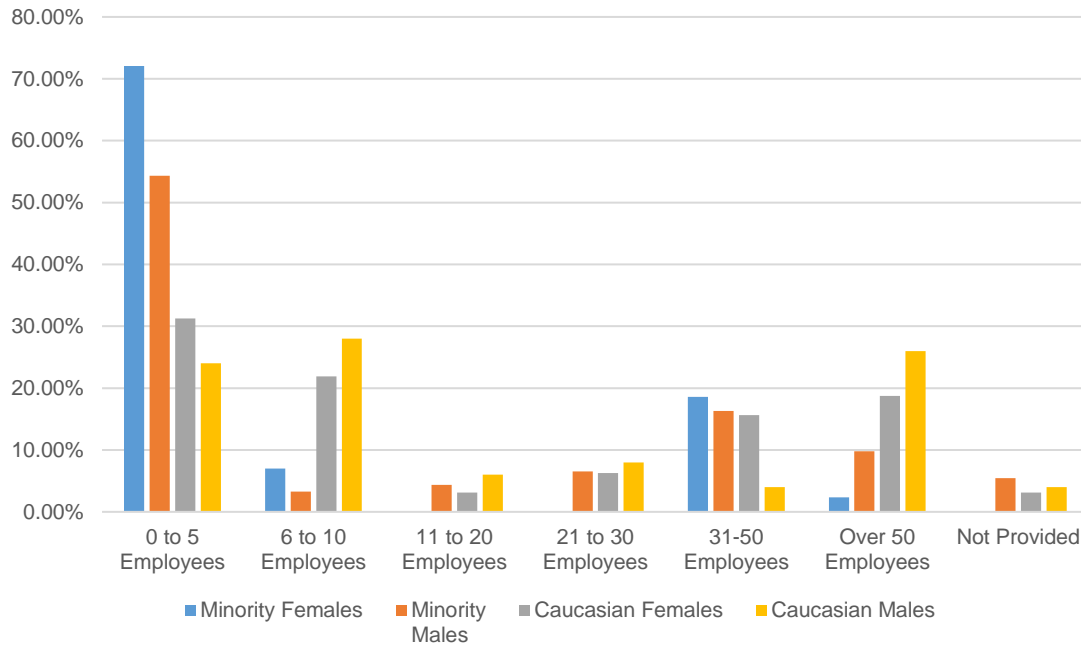
Chart 6.4 illustrates that most businesses maintain a small number of employees. As reported in the eSurvey, 59.91% of all businesses are small, employing 10 or fewer individuals. The responding businesses are larger than the average Franklin County business, as reported by the United States Census Survey of Business Owners. The Census reports that 64.71% of businesses in Franklin County employ 10 or fewer individuals.³⁰²



³⁰¹ Business owners are not counted as employees.

³⁰² United States Census Bureau, 2007 Survey of Business Owners.

Chart 6.4: Number of Employees



One consideration of capacity, as discussed in the caselaw, is a business' ability to bid and perform multiple contracts.³⁰³ These factors relate to the human resources and capital resources a business has available to perform multiple contracts concurrently. Table 6.12 illustrates that most businesses, including minority and woman-owned businesses and Caucasian male-owned businesses, performed multiple concurrent contracts within the previous calendar year. Only 9.22% of businesses reported performing a single public or private contract.

Table 6.12: Percent of Annual Contracts

Annual Contracts	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
1 Contract	16.28%	10.87%	0.00%	6.00%	9.22%
2-5 Contracts	20.93%	20.65%	12.50%	6.00%	16.13%
6-10 Contracts	6.98%	7.61%	6.25%	2.00%	5.99%
11-20 Contracts	2.33%	9.78%	3.13%	6.00%	6.45%
More than 20 Contracts	13.95%	14.13%	50.00%	36.00%	24.42%
Not Applicable	32.56%	23.91%	18.75%	34.00%	27.19%
Not Provided	6.98%	13.04%	9.38%	10.00%	10.60%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

³⁰³ See *Rothe Development Corporation v. U.S. Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001); see also *Rothe Development Corporation v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).



Chart 6.5 illustrates that most businesses, including minority and woman-owned businesses and Caucasian male-owned businesses, performed more than 10 contracts. These findings illustrate that minority and woman-owned businesses and Caucasian male-owned businesses have successfully performed multiple contracts concurrently.

Chart 6.5: Number of Contracts

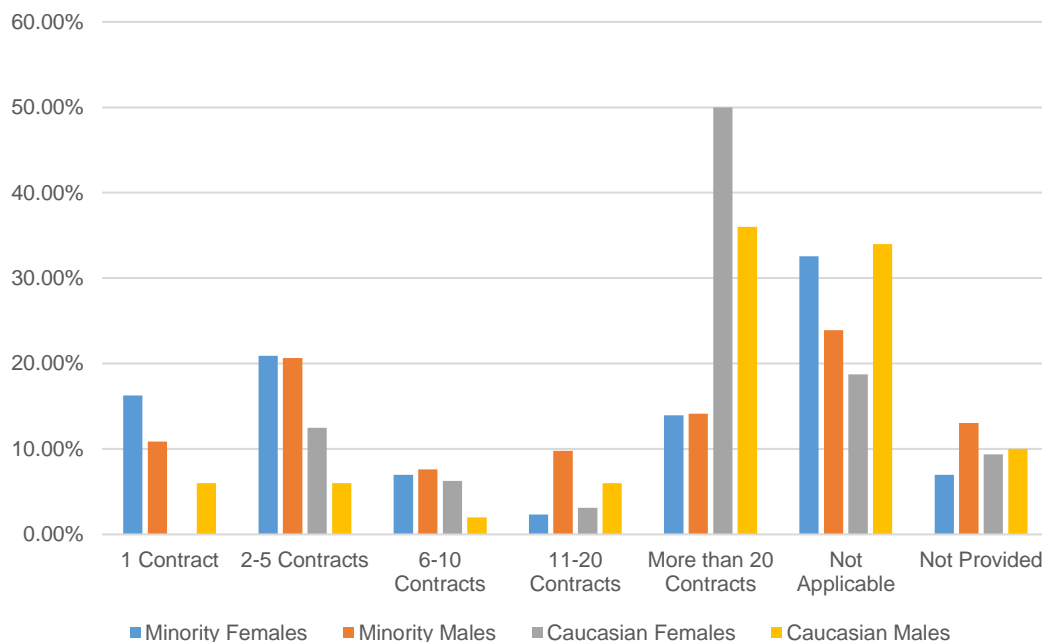


Table 6.13 shows that 44.70% of businesses are less than ten years old, illustrating that there are mature minority and woman-owned businesses within the pool of available businesses. Only 2.17% of minority male-owned businesses were 50 years or older, and there were no minority female-owned business that were 50 years or older. By contrast, 6.25% of Caucasian female-owned businesses and 16.00% of Caucasian male-owned businesses were over 50 years old. This finding is consistent with the passage of anti-discrimination legislation, beginning with the Civil Rights Act of 1964, which spawned the 1971 Executive Order 11625. This early legislation that applied to federally funded contracts and minimally affected local laws. Local government affirmative action policies were not accelerated until the promulgation of the United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) regulations in 1983. The DBE regulations required states, counties, cities, and transportation agencies to implement affirmative action contracting programs as a condition of USDOT funding.



Table 6.13: Years in Business Operation

Years in Operation	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Less than 5 years	23.26%	27.17%	12.50%	6.00%	19.35%
6 -10 years	34.88%	23.91%	28.13%	18.00%	25.35%
11 - 20 years	23.26%	16.30%	25.00%	6.00%	16.59%
21 - 30 years	13.95%	11.96%	12.50%	14.00%	12.90%
31 - 50 years	2.33%	15.22%	15.63%	38.00%	17.97%
More than 50 years	0.00%	2.17%	6.25%	16.00%	5.53%
Not Provided	2.33%	3.26%	0.00%	2.00%	2.30%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

Chart 6.6 illustrates that MWBEs are a growing group of entrepreneurs. However, the availability pool also includes mature MWBEs with significant experience in their respective fields.

Chart 6.6: Years in Operation

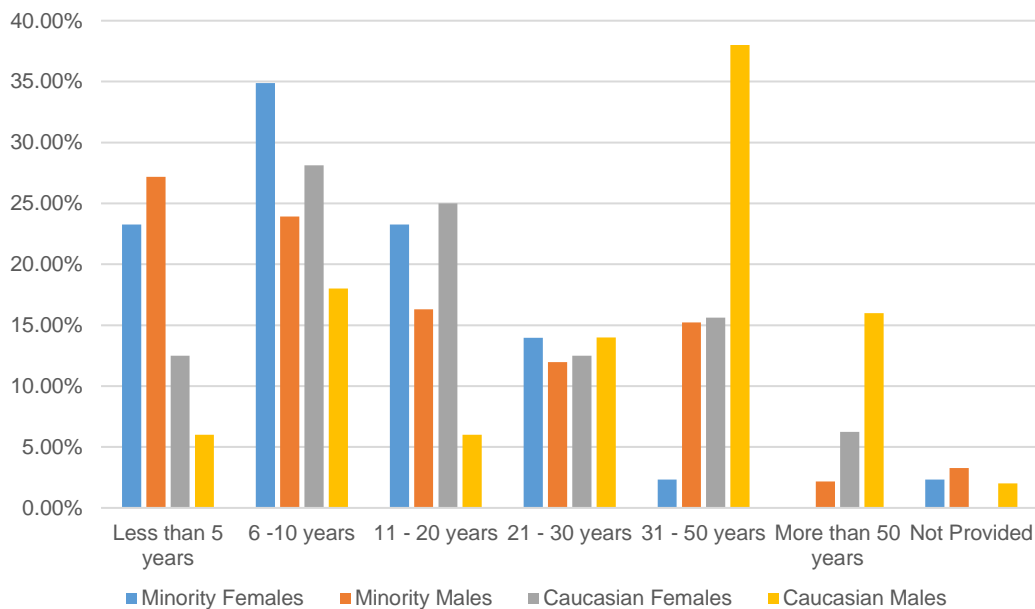


Table 6.14 shows that 36.87% of business owners have a bachelor's degree. However, within this pool, minority males obtained graduate degrees at a higher frequency than Caucasian male business owners. Despite the educational attainment of minority female and male business owners, Caucasian male-owned businesses still received most of the City's contracts as detailed in *Chapter 3: Prime Contractor Utilization Analysis* and *Chapter 4: Subcontractor Utilization Analysis*.

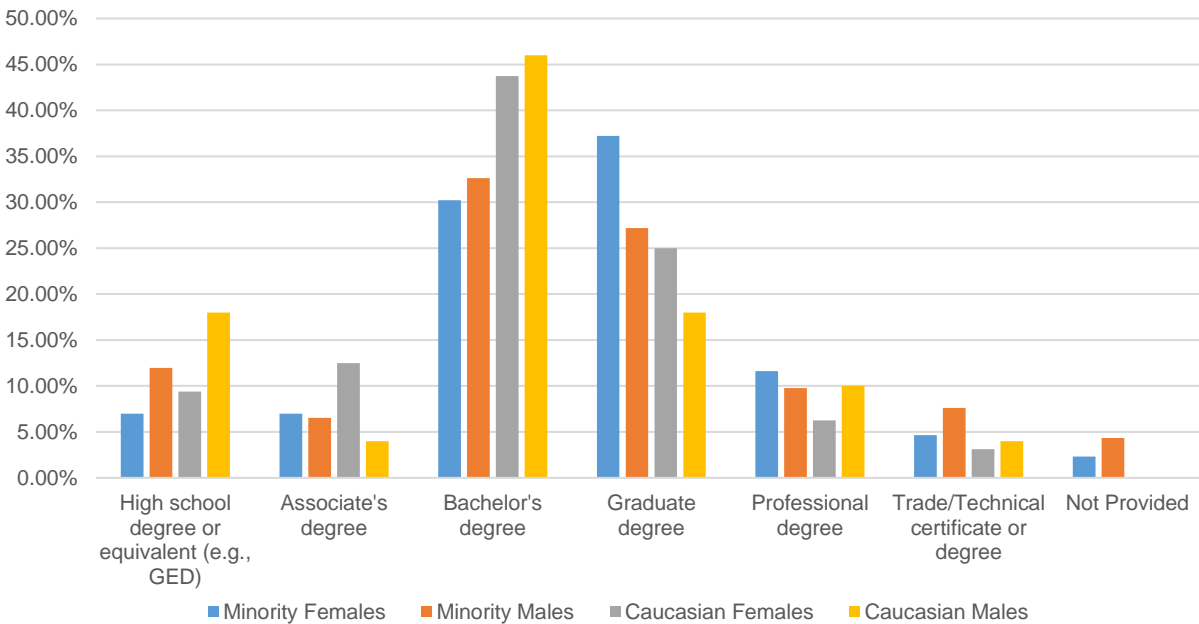


Table 6.14: Education Level of Business Owners

Education	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
High school degree or equivalent (e.g., GED)	6.98%	11.96%	9.38%	18.00%	11.98%
Associate's degree	6.98%	6.52%	12.50%	4.00%	6.91%
Bachelor's degree	30.23%	32.61%	43.75%	46.00%	36.87%
Graduate degree	37.21%	27.17%	25.00%	18.00%	26.73%
Professional degree	11.63%	9.78%	6.25%	10.00%	9.68%
Trade/Technical certificate or degree	4.65%	7.61%	3.13%	4.00%	5.53%
Not Provided	2.33%	4.35%	0.00%	0.00%	2.30%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

Chart 6.7 illustrates that most business owners have a bachelor's degree. It should also be noted that minority males and females are the majority of business owners with graduate, professional/trade, and technical degrees.

Chart 6.7: Educational Attainment



The analysis shows that among similarly situated minority and woman-owned businesses and Caucasian male-owned businesses, the relative capacity of firms is comparable. Most businesses enumerated in the availability analysis, including minority and woman-owned businesses and Caucasian males, have the following profile:

- Employ less than 10 individuals
- Performed 10 or more public and private contracts concurrently
- Have gross revenue of \$100,001 to 300,000
- Operated their business for up to 10 years
- Have a bachelor's degree

Considering the metrics reviewed in this analysis, Caucasian males are not awarded more contracts because of any single socioeconomic factor or combination of factors. The fact that Caucasian males are awarded more contracts is more likely a function of discrimination in public- and private-sector business practices. The results of this eSurvey is evidence that willing minority and woman-owned businesses have demonstrated capacity comparable to Caucasian male-owned businesses.

IV. Prime Contractor Availability Analysis

The prime contractor availability analysis is based on the 1,979 willing and able businesses identified in the City's market area. The availability of willing market area businesses is presented by ethnicity, gender, and industry in the sections below.

A. Construction Prime Contractor Availability

The distribution of available construction prime contractors is summarized in Table 6.15 below.

African Americans account for 19.83% of the construction prime contractors in the City's market area.

Asian Americans account for 2.27% of the construction prime contractors in the City's market area.

Hispanic Americans account for 1.70% of the construction prime contractors in the City's market area.

Native Americans account for 1.42% of the construction prime contractors in the City's market area.

Caucasian Females account for 11.33% of the construction prime contractors in the City's market area.

Non-minority Males account for 63.46% of the construction prime contractors in the City's market area.



**Table 6.15: Available Construction Prime Contractors,
January 1, 2012, to December 31, 2015**

Ethnicity	Percent of Businesses
African Americans	19.83%
Asian Americans	2.27%
Hispanic Americans	1.70%
Native Americans	1.42%
Caucasian Females	11.33%
Non-minority Males	63.46%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	2.83%
African American Males	17.00%
Asian American Females	0.85%
Asian American Males	1.42%
Hispanic American Females	0.85%
Hispanic American Males	0.85%
Native American Females	0.28%
Native American Males	1.13%
Caucasian Females	11.33%
Non-minority Males	63.46%
TOTAL	100.00%



B. Professional Services Prime Contractor Availability

The distribution of available professional services prime contractors is summarized in Table 6.16 below.

African Americans account for 22.41% of the professional services prime contractors in the City's market area.

Asian Americans account for 8.16% of the professional services prime contractors in the City's market area.

Hispanic Americans account for 1.94% of the professional services prime contractors in the City's market area.

Native Americans account for 0.52% of the professional services prime contractors in the City's market area.

Caucasian Females account for 19.69% of the professional services prime contractors in the City's market area.

Non-minority Males account for 47.28% of the professional services prime contractors in the City's market area.



**Table 6.16: Available Professional Services Prime Contractors,
January 1, 2012, to December 31, 2015**

Ethnicity	Percent of Businesses
African Americans	22.41%
Asian Americans	8.16%
Hispanic Americans	1.94%
Native Americans	0.52%
Caucasian Females	19.69%
Non-minority Males	47.28%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	8.94%
African American Males	13.47%
Asian American Females	3.11%
Asian American Males	5.05%
Hispanic American Females	0.78%
Hispanic American Males	1.17%
Native American Females	0.13%
Native American Males	0.39%
Caucasian Females	19.69%
Non-minority Males	47.28%
TOTAL	100.00%



C. Goods and Services Prime Contractor Availability

The distribution of available goods and services prime contractors is summarized in Table 6.17 below.

African Americans account for 17.94% of the goods and services prime contractors in the City's market area.

Asian Americans account for 2.76% of the goods and services prime contractors in the City's market area.

Hispanic Americans account for 1.10% of the goods and services prime contractors in the City's market area.

Native Americans account for 0.55% of the goods and services prime contractors in the City's market area.

Caucasian Females account for 12.24% of the goods and services prime contractors in the City's market area.

Non-minority Males account for 65.41% of the goods and services prime contractors in the City's market area.



**Table 6.17: Available Goods and Services Prime Contractors,
January 1, 2012, to December 31, 2015**

Ethnicity	Percent of Businesses
African Americans	17.94%
Asian Americans	2.76%
Hispanic Americans	1.10%
Native Americans	0.55%
Caucasian Females	12.24%
Non-minority Males	65.41%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	5.98%
African American Males	11.96%
Asian American Females	1.56%
Asian American Males	1.20%
Hispanic American Females	0.37%
Hispanic American Males	0.74%
Native American Females	0.09%
Native American Males	0.46%
Caucasian Females	12.24%
Non-minority Males	65.41%
TOTAL	100.00%



V. Subcontractor Availability Analysis

A. Source of Willing and Able Subcontractors

All available prime contractors were included in the calculation of the subcontractor availability. Additional subcontractors in the City's market area were identified using the source in Table 6.18.

Subcontractor availability was not calculated for the goods and services, as the subcontracting activity in that industry was limited.

Table 6.18: Unique Subcontractor Availability Data Source

Type Record	Type Information
Subcontract awards provided by the City	MWBEs and non-MWBEs

B. Determination of Willingness and Capacity

Subcontractor availability was limited to the utilized prime contractors and the unique businesses utilized as subcontractors. Therefore, the determination of willingness and capacity was achieved. Furthermore, *Croson* does not require a separate measure of subcontractor capacity in the analysis of subcontractor availability.



C. Construction Subcontractor Availability

The distribution of available construction subcontractors is summarized in Table 6.19 below.

African Americans account for 15.06% of the construction subcontractors in the City's market area.

Asian Americans account for 2.30% of the construction subcontractors in the City's market area.

Hispanic Americans account for 1.26% of the construction subcontractors in the City's market area.

Native Americans account for 1.05% of the construction subcontractors in the City's market area.

Caucasian Females account for 10.88% of the construction subcontractors in the City's market area.

Non-minority Males account for 69.46% of the construction subcontractors in the City's market area.



**Table 6.19: Available Construction Subcontractors,
January 1, 2012, to December 31, 2015**

Ethnicity	Percent of Businesses
African Americans	15.06%
Asian Americans	2.30%
Hispanic Americans	1.26%
Native Americans	1.05%
Caucasian Females	10.88%
Non-minority Males	69.46%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	2.09%
African American Males	12.97%
Asian American Females	0.63%
Asian American Males	1.67%
Hispanic American Females	0.63%
Hispanic American Males	0.63%
Native American Females	0.21%
Native American Males	0.84%
Caucasian Females	10.88%
Non-minority Males	69.46%
TOTAL	100.00%



D. Professional Services Subcontractor Availability

The distribution of available professional services subcontractors is summarized in Table 6.20 below.

African Americans account for 21.15% of the professional services subcontractors in the City's market area.

Asian Americans account for 7.81% of the professional services subcontractors in the City's market area.

Hispanic Americans account for 1.80% of the professional services subcontractors in the City's market area.

Native Americans account for 0.48% of the professional services subcontractors in the City's market area.

Caucasian Females account for 19.23% of the professional services subcontractors in the City's market area.

Non-minority Males account for 49.52% of the professional services subcontractors in the City's market area.



**Table 6.20: Available Professional Services Subcontractors,
January 1, 2012, to December 31, 2015**

Ethnicity	Percent of Businesses
African Americans	21.15%
Asian Americans	7.81%
Hispanic Americans	1.80%
Native Americans	0.48%
Caucasian Females	19.23%
Non-minority Males	49.52%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	8.29%
African American Males	12.86%
Asian American Females	2.88%
Asian American Males	4.93%
Hispanic American Females	0.72%
Hispanic American Males	1.08%
Native American Females	0.12%
Native American Males	0.36%
Caucasian Females	19.23%
Non-minority Males	49.52%
TOTAL	100.00%



VI. Summary

This chapter presented the enumeration of 1,979 willing and able market area businesses by ethnicity, gender, and industry. The capacity of the enumerated businesses was assessed using five methods: 1) review of the City's contract size distribution to identify the capacity needed to perform most City contracts; 2) determination of the largest contracts the City awarded to MWBEs; 3) frequency distribution that defined the median size of contracts awarded to both MWBE and non-MWBEs; 4) threshold analysis that defined the formal contracts within the 75th percentile in order to eliminate outliers and increase the reliability of the statistical findings; and 5) business capacity analysis that assessed relevant socioeconomic factors in the private sector affecting business formation and revenue.

The findings from these analyses illustrate that MWBEs have a socioeconomic profile comparable to similarly situated Caucasian male-owned businesses, and the capacity to perform large City contracts. Minority-owned businesses account for 25.37% of construction, professional services, and goods and services prime contractors, Caucasian female-owned businesses account for 14.81%, and non-minority male-owned business account for 59.83%. Minority-owned businesses account for 27.08% of construction and professional services subcontractors, Caucasian female-owned businesses account for 16.28%, and non-minority male-owned businesses account for 56.63%.



CHAPTER 7: Prime Contract Disparity Analysis

I. Introduction

The objective of the disparity analysis is to determine the levels at which Minority and Woman Business Enterprises (MWBE)³⁰⁴ and non-minority male-owned businesses are utilized on the City of Columbus' (City) prime contracts. Under a fair and equitable system of awarding prime contracts, the proportion of prime contract dollars awarded to MWBEs should be relatively close to the corresponding proportion of available MWBEs in the relevant market area.³⁰⁵ If the ratio of utilized MWBE prime contractors to available MWBE prime contractors is less than one, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio or any event that is less probable. This analysis assumes a fair and equitable system.³⁰⁶ *Croson* states that an inference of discrimination can be made *prima facie* if the disparity is statistically significant. Under the *Croson* model, non-minority male-owned businesses (non-MWBE) are not subjected to a statistical test of underutilization.

The first step in conducting the statistical test is to calculate the contract value that each ethnic and gender group is expected to receive. This value is based on each group's availability in the market area and shall be referred to as the **expected contract amount**. The next step computes the difference between each ethnic and gender group's expected contract amount and the **actual contract amount** received by each group. The **disparity ratio** is then computed by dividing the actual contract amount by the expected contract amount.

For parametric and non-parametric analyses, the p-value takes into account the number of contracts, amount of contract dollars, and variation in contract dollars. If the difference between the actual and expected number of contracts and total contract dollars has a p-value equal to or less than 0.05, the difference is statistically significant.³⁰⁷

In the simulation analysis, the p-value takes into account a combination of the distribution formulated from the empirical data and the contract dollar amounts or contract rank. If the actual contract dollar amount, or actual contract rank, falls below the fifth percentile of the distribution, it denotes a p-value less than 0.05, which is statistically significant.

³⁰⁴ Hereinafter referred to as Minority and Caucasian female-owned businesses.

³⁰⁵ Availability is defined as the number of ready, willing, and able firms. The methodology for determining willing and able firms is detailed in *Chapter 6: Prime Contractor and Subcontractor Availability Analysis*.

³⁰⁶ When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100-percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95-percent confidence level is considered by the statistical standard to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analysis here was done within the 95-percent confidence level.

³⁰⁷ A statistical test is not performed for underutilization of non-minority males or when the ratio of utilized to available businesses is greater than one for MWBEs.



Our statistical model employs all three methods simultaneously to each industry. Findings from one of the three methods are reported. If the p-value from any one of the three methods is less than 0.05, the finding is reported in the disparity tables as statistically significant. If the p-value is greater than 0.05, the finding is reported as not statistically significant.

II. Statistical Disparity Analysis

A prime contract disparity analysis was performed on the contracts awarded in the construction, professional services, and goods and services industries during the January 1, 2012, to December 31, 2015, study period. The informal thresholds were defined according to the City's procurement policies. The informal thresholds for each industry are listed in Table 7.1.

Table 7.1: Informal Contract Thresholds for Analysis by Industry

Industry	Contract Threshold
Construction	\$100,000 and Under
Professional Services	\$50,000 and Under
Goods and Services	\$20,000 and Under

The thresholds utilized in each industry for the formal contract analysis were derived from a statistical analysis, which calculated the contract values that would skew the disparity analysis. The statistical analysis was thus limited to data points representing the 75th percentile of the contracts the City awarded in each of the three industries. Outliers over the 75th percentile were removed when the thresholds were set for each industry. The statistical analysis performed to define the formal contract thresholds analyzed is discussed in *Chapter 3: Prime Contractor Utilization Analysis*. The formal contract thresholds for each industry are listed in Table 7.2.

Table 7.2: Formal Contract Thresholds for Analysis by Industry

Industry	Formal Threshold Amount
Construction	Over \$100,000 to \$1,550,000
Professional Services	Over \$50,000 to \$420,000
Goods and Services	Over \$20,000 to \$180,000

The findings from the methods employed to calculate statistical significance, as discussed on page 7-1, are presented in the subsequent sections. The outcomes of the statistical analyses are presented in the "P-Value" column of the tables. A description of these statistical outcomes, as shown in the disparity tables, is presented below in Table 7.3.



Table 7.3: Statistical Outcome Descriptions

P-Value Outcome	Definition of P-Value Outcome
< .05 *	This underutilization is statistically significant.
not significant	<ul style="list-style-type: none"> MWBEs: This underutilization is not statistically significant. Non-minority males: This overutilization is not statistically significant.
----	While this group was underutilized, there were too few available firms to determine statistical significance.
**	This study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.
< .05 †	This overutilization is statistically significant.

A. *Disparity Analysis: All Informal Prime Contracts, by Industry*

1. Construction Prime Contracts Valued \$100,000 and Under

The disparity analysis of construction prime contracts valued \$100,000 and under is described below and shown in Table 7.4 and Chart 7.1.

African Americans represent 19.83% of the available construction businesses and received 7.23% of the dollars on construction contracts valued \$100,000 and under. This underutilization is statistically significant.

Asian Americans represent 2.27% of the available construction businesses and received 0.48% of the dollars on construction contracts valued \$100,000 and under. This underutilization is statistically significant.

Hispanic Americans represent 1.70% of the available construction businesses and received 1.41% of the dollars on construction contracts valued \$100,000 and under. This underutilization is not statistically significant.

Native Americans represent 1.42% of the available construction businesses and received 0.05% of the dollars on construction contracts valued \$100,000 and under. This underutilization is statistically significant.

Caucasian Females represent 11.33% of the available construction businesses and received 13.06% of the dollars on construction contracts valued \$100,000 and under. This study does not test statistically the overutilization of gender groups.

Non-minority Males represent 63.46% of the available construction businesses and received 77.78% of the dollars on construction contracts valued \$100,000 and under. This overutilization is statistically significant.



**Table 7.4: Disparity Analysis: Construction Prime Contracts Valued \$100,000 and Under,
January 1, 2012, to December 31, 2015**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$928,505	7.23%	19.83%	\$2,547,764	-\$1,619,258	0.36	< .05 *
Asian Americans	\$61,325	0.48%	2.27%	\$291,173	-\$229,848	0.21	< .05 *
Hispanic Americans	\$181,507	1.41%	1.70%	\$218,380	-\$36,873	0.83	not significant
Native Americans	\$6,000	0.05%	1.42%	\$181,983	-\$175,983	0.03	< .05 *
Caucasian Females	\$1,677,781	13.06%	11.33%	\$1,455,865	\$221,916	1.15	**
Non-minority Males	\$9,992,890	77.78%	63.46%	\$8,152,844	\$1,840,046	1.23	< .05 †
TOTAL	\$12,848,008	100.00%	100.00%	\$12,848,008			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	2.83%	\$363,966	-\$363,966	0.00	< .05 *
African American Males	\$928,505	7.23%	17.00%	\$2,183,797	-\$1,255,292	0.43	< .05 *
Asian American Females	\$48,825	0.38%	0.85%	\$109,190	-\$60,365	0.45	----
Asian American Males	\$12,500	0.10%	1.42%	\$181,983	-\$169,483	0.07	< .05 *
Hispanic American Females	\$0	0.00%	0.85%	\$109,190	-\$109,190	0.00	----
Hispanic American Males	\$181,507	1.41%	0.85%	\$109,190	\$72,317	1.66	**
Native American Females	\$6,000	0.05%	0.28%	\$36,397	-\$30,397	0.16	----
Native American Males	\$0	0.00%	1.13%	\$145,586	-\$145,586	0.00	< .05 *
Caucasian Females	\$1,677,781	13.06%	11.33%	\$1,455,865	\$221,916	1.15	**
Non-minority Males	\$9,992,890	77.78%	63.46%	\$8,152,844	\$1,840,046	1.23	< .05 †
TOTAL	\$12,848,008	100.00%	100.00%	\$12,848,008			

(*) denotes a statistically significant underutilization.

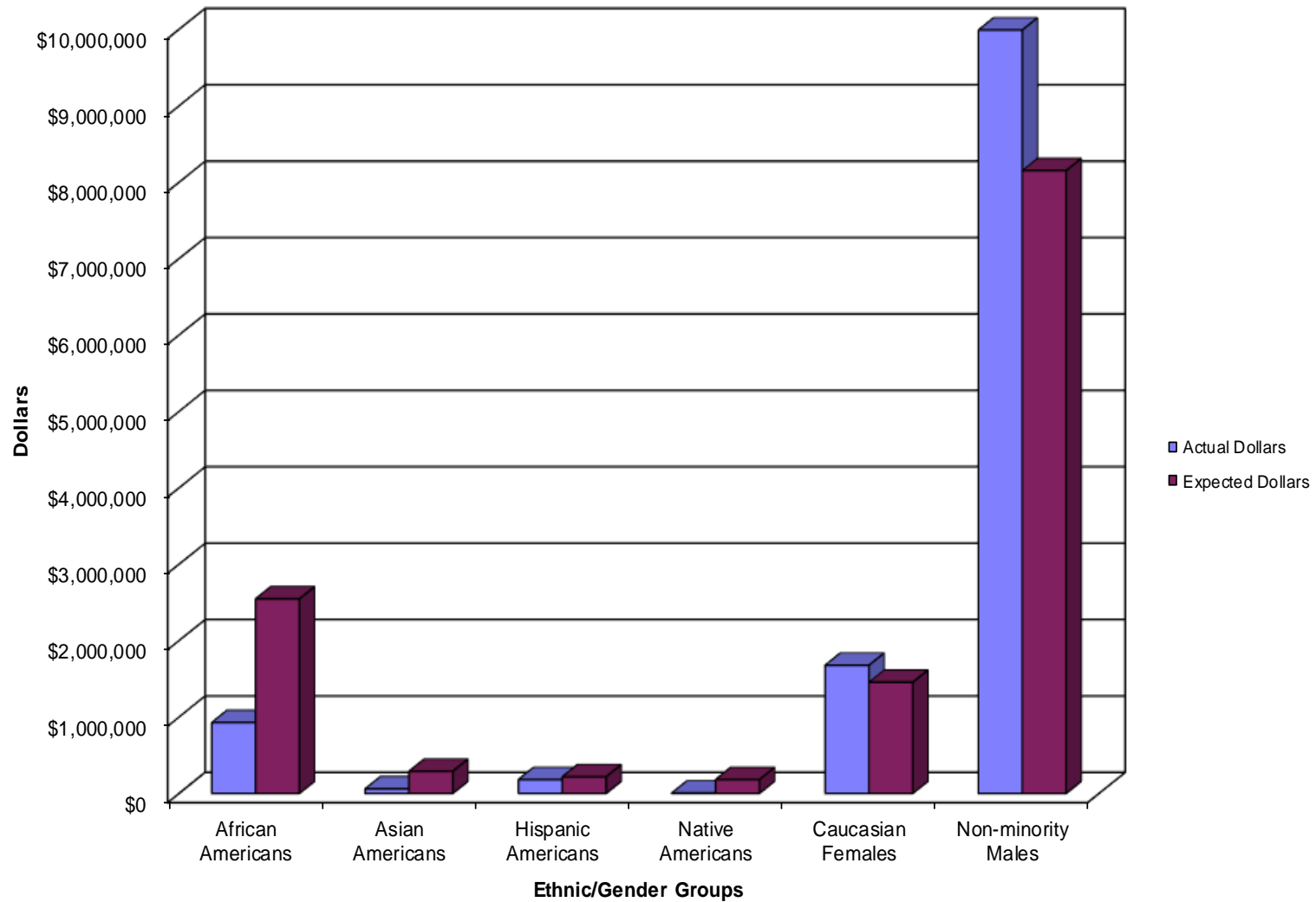
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

(----) denotes an underutilized group with too few available firms to test statistical significance.



**Chart 7.1: Disparity Analysis: Construction Prime Contracts Valued \$100,000 and Under,
January 1, 2012, to December 31, 2015**



2. Professional Services Prime Contracts Valued \$50,000 and Under

The disparity analysis of professional services prime contracts valued \$50,000 and under is described below and shown in Table 7.5 and Chart 7.2.

African Americans represent 22.41% of the available professional services businesses and received 9.04% of the dollars on professional services contracts valued \$50,000 and under. This underutilization is statistically significant.

Asian Americans represent 8.16% of the available professional services businesses and received 7.26% of the dollars on professional services contracts valued \$50,000 and under. This underutilization is not statistically significant.

Hispanic Americans represent 1.94% of the available professional services businesses and received 0.28% of the dollars on professional services contracts valued \$50,000 and under. This underutilization is statistically significant.

Native Americans represent 0.52% of the available professional services businesses and received 0.27% of the dollars on professional services contracts valued \$50,000 and under. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 19.69% of the available professional services businesses and received 14.16% of the dollars on professional services contracts valued \$50,000 and under. This underutilization is statistically significant.

Non-minority Males represent 47.28% of the available professional services businesses and received 68.99% of the dollars on professional services contracts valued \$50,000 and under. This overutilization is statistically significant.



**Table 7.5: Disparity Analysis: Professional Services Prime Contracts Valued \$50,000 and Under,
January 1, 2012, to December 31, 2015**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$1,683,933	9.04%	22.41%	\$4,176,414	-\$2,492,481	0.40	< .05 *
Asian Americans	\$1,353,616	7.26%	8.16%	\$1,520,891	-\$167,275	0.89	not significant
Hispanic Americans	\$52,499	0.28%	1.94%	\$362,117	-\$309,618	0.14	< .05 *
Native Americans	\$50,630	0.27%	0.52%	\$96,564	-\$45,934	0.52	----
Caucasian Females	\$2,638,932	14.16%	19.69%	\$3,669,451	-\$1,030,519	0.72	< .05 *
Non-minority Males	\$12,857,338	68.99%	47.28%	\$8,811,510	\$4,045,828	1.46	< .05 †
TOTAL	\$18,636,948	100.00%	100.00%	\$18,636,948			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$561,985	3.02%	8.94%	\$1,665,738	-\$1,103,752	0.34	< .05 *
African American Males	\$1,121,948	6.02%	13.47%	\$2,510,677	-\$1,388,729	0.45	< .05 *
Asian American Females	\$347,026	1.86%	3.11%	\$579,387	-\$232,361	0.60	< .05 *
Asian American Males	\$1,006,590	5.40%	5.05%	\$941,504	\$65,086	1.07	**
Hispanic American Females	\$12,600	0.07%	0.78%	\$144,847	-\$132,247	0.09	----
Hispanic American Males	\$39,899	0.21%	1.17%	\$217,270	-\$177,371	0.18	< .05 *
Native American Females	\$42,250	0.23%	0.13%	\$24,141	\$18,109	1.75	**
Native American Males	\$8,380	0.04%	0.39%	\$72,423	-\$64,043	0.12	----
Caucasian Females	\$2,638,932	14.16%	19.69%	\$3,669,451	-\$1,030,519	0.72	< .05 *
Non-minority Males	\$12,857,338	68.99%	47.28%	\$8,811,510	\$4,045,828	1.46	< .05 †
TOTAL	\$18,636,948	100.00%	100.00%	\$18,636,948			

(*) denotes a statistically significant underutilization.

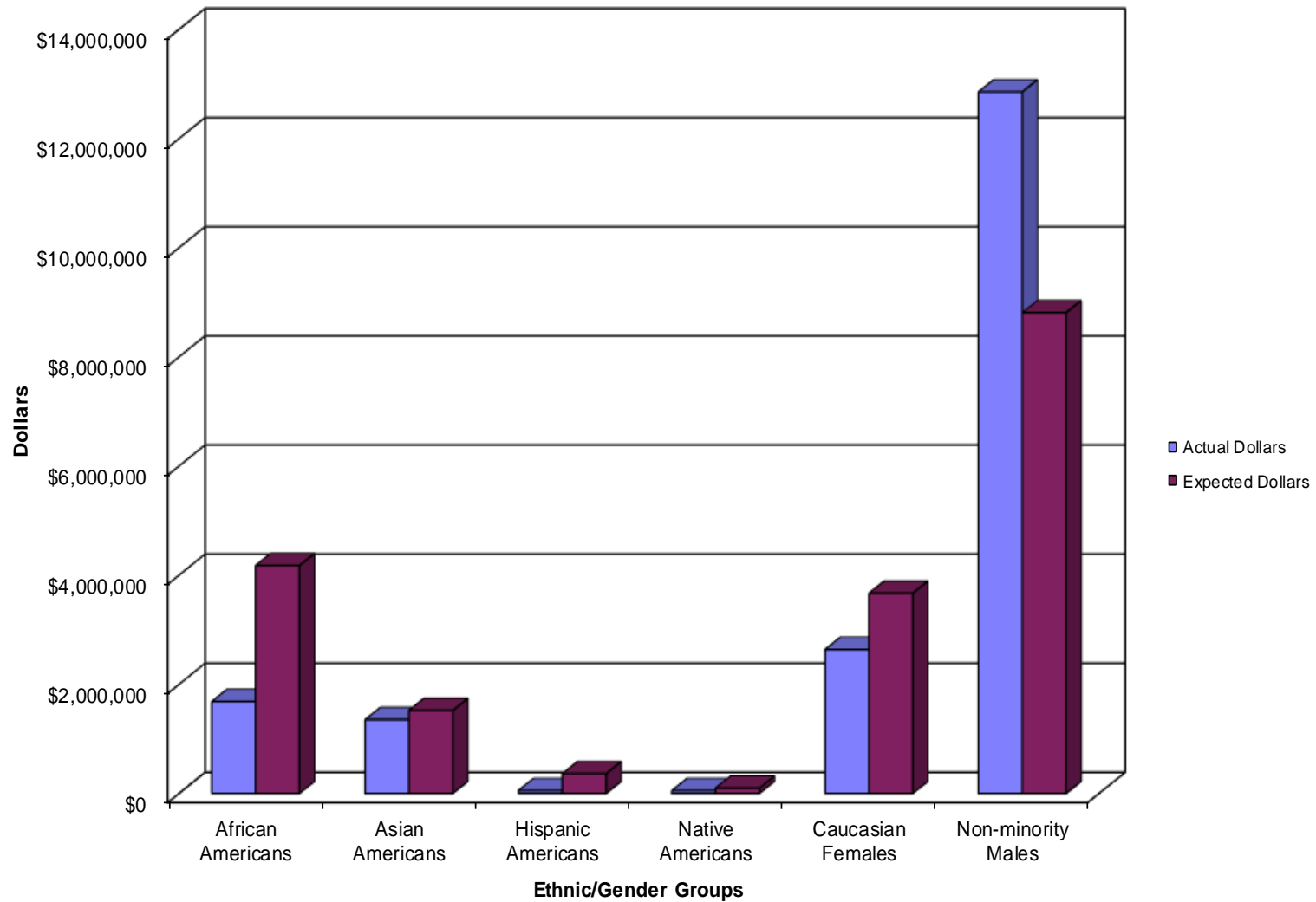
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

(----) denotes an underutilized group with too few available firms to test statistical significance.



**Chart 7.2: Disparity Analysis: Professional Services Prime Contracts Valued \$50,000 and Under,
January 1, 2012, to December 31, 2015**



3. Goods and Services Prime Contracts Valued \$20,000 and Under

The disparity analysis of goods and services prime contracts valued \$20,000 and under is described below and shown in Table 7.6 and Chart 7.3.

African Americans represent 17.94% of the available goods and services businesses and received 3.46% of the dollars on goods and services contracts valued \$20,000 and under. This underutilization is statistically significant.

Asian Americans represent 2.76% of the available goods and services businesses and received 4.29% of the dollars on goods and services contracts valued \$20,000 and under. This study does not test statistically the overutilization of minority groups.

Hispanic Americans represent 1.10% of the available goods and services businesses and received 0.28% of the dollars on goods and services contracts valued \$20,000 and under. This underutilization is statistically significant.

Native Americans represent 0.55% of the available goods and services businesses and received 0.32% of the dollars on goods and services contracts valued \$20,000 and under. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 12.24% of the available goods and services businesses and received 11.61% of the dollars on goods and services contracts valued \$20,000 and under. This underutilization is not statistically significant.

Non-minority Males represent 65.41% of the available goods and services businesses and received 80.03% of the dollars on goods and services contracts valued \$20,000 and under. This overutilization is statistically significant.



**Table 7.6: Disparity Analysis: Goods and Services Prime Contracts Valued \$20,000 and Under,
January 1, 2012, to December 31, 2015**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$1,596,969	3.46%	17.94%	\$8,277,933	-\$6,680,964	0.19	< .05 *
Asian Americans	\$1,981,742	4.29%	2.76%	\$1,273,528	\$708,213	1.56	**
Hispanic Americans	\$129,908	0.28%	1.10%	\$509,411	-\$379,503	0.26	< .05 *
Native Americans	\$148,888	0.32%	0.55%	\$254,706	-\$105,817	0.58	----
Caucasian Females	\$5,358,544	11.61%	12.24%	\$5,645,975	-\$287,430	0.95	not significant
Non-minority Males	\$36,928,119	80.03%	65.41%	\$30,182,618	\$6,745,501	1.22	< .05 †
TOTAL	\$46,144,171	100.00%	100.00%	\$46,144,171			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$281,728	0.61%	5.98%	\$2,759,311	-\$2,477,583	0.10	< .05 *
African American Males	\$1,315,242	2.85%	11.96%	\$5,518,622	-\$4,203,381	0.24	< .05 *
Asian American Females	\$1,470,238	3.19%	1.56%	\$721,666	\$748,572	2.04	**
Asian American Males	\$511,503	1.11%	1.20%	\$551,862	-\$40,359	0.93	not significant
Hispanic American Females	\$0	0.00%	0.37%	\$169,804	-\$169,804	0.00	----
Hispanic American Males	\$129,908	0.28%	0.74%	\$339,608	-\$209,699	0.38	----
Native American Females	\$0	0.00%	0.09%	\$42,451	-\$42,451	0.00	----
Native American Males	\$148,888	0.32%	0.46%	\$212,255	-\$63,366	0.70	----
Caucasian Females	\$5,358,544	11.61%	12.24%	\$5,645,975	-\$287,430	0.95	not significant
Non-minority Males	\$36,928,119	80.03%	65.41%	\$30,182,618	\$6,745,501	1.22	< .05 †
TOTAL	\$46,144,171	100.00%	100.00%	\$46,144,171			

(*) denotes a statistically significant underutilization.

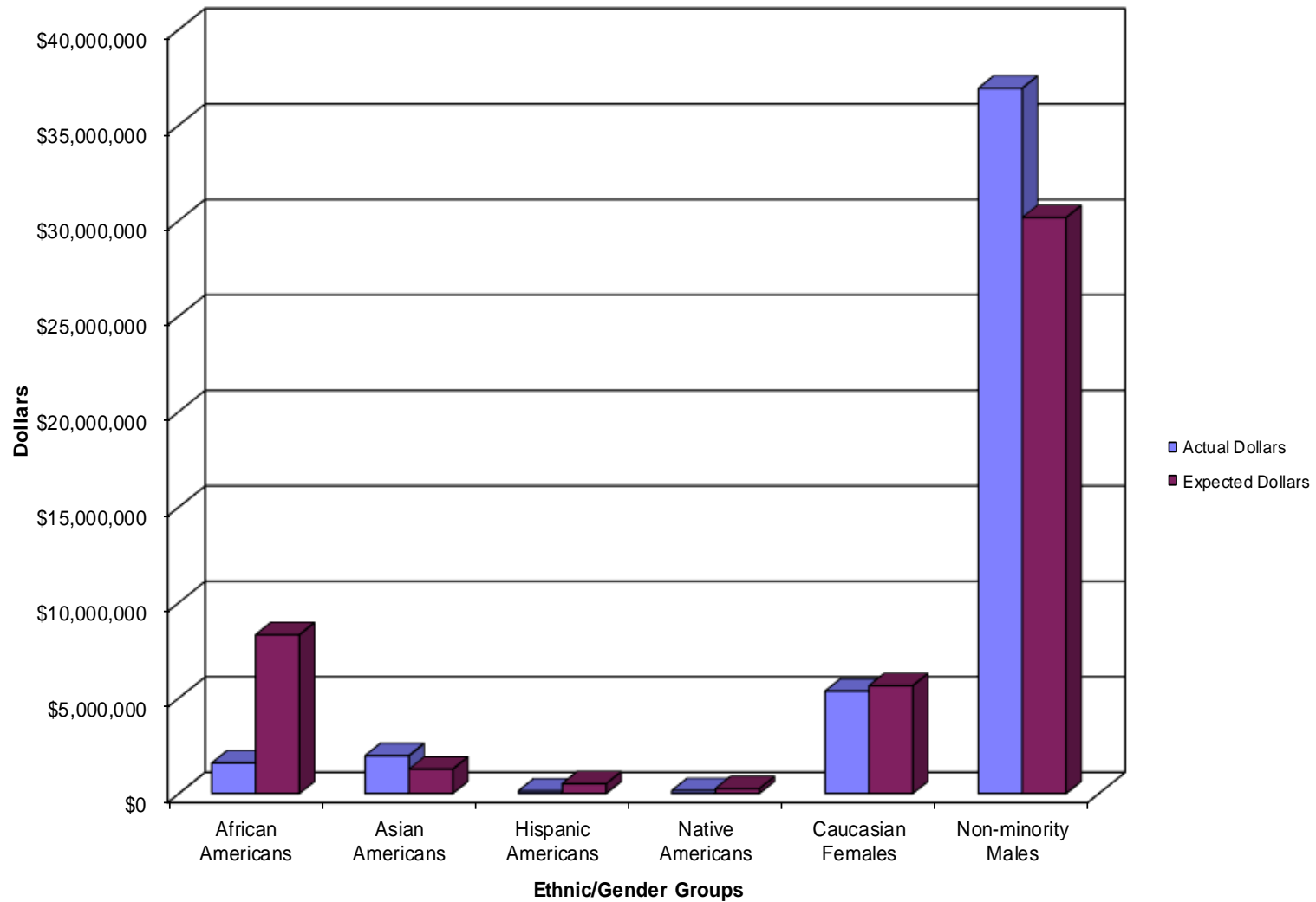
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

(----) denotes an underutilized group with too few available firms to test statistical significance.



**Chart 7.3: Disparity Analysis: Goods and Services Prime Contracts Valued \$20,000 and Under,
January 1, 2012, to December 31, 2015**



B. Disparity Analysis: All Formal Prime Contracts, by Industry

1. Construction Prime Contracts Valued Over \$100,000 to \$1,550,000

The disparity analysis of construction prime contracts valued over \$100,000 to \$1,550,000 is described below and shown in Table 7.7 and Chart 7.4.

African Americans represent 19.83% of the available construction businesses and received 6.28% of the dollars on construction contracts valued over \$100,000 to \$1,550,000. This underutilization is statistically significant.

Asian Americans represent 2.27% of the available construction businesses and received 0.00% of the dollars on construction contracts valued over \$100,000 to \$1,550,000. This underutilization is statistically significant.

Hispanic Americans represent 1.70% of the available construction businesses and received 0.24% of the dollars on construction contracts valued over \$100,000 to \$1,550,000. This underutilization is statistically significant.

Native Americans represent 1.42% of the available construction businesses and received 0.10% of the dollars on construction contracts valued over \$100,000 to \$1,550,000. This underutilization is statistically significant.

Caucasian Females represent 11.33% of the available construction businesses and received 8.04% of the dollars on construction contracts valued over \$100,000 to \$1,550,000. This underutilization is not statistically significant.

Non-minority Males represent 63.46% of the available construction businesses and received 85.34% of the dollars on construction contracts valued over \$100,000 to \$1,550,000. This overutilization is statistically significant.



**Table 7.7: Disparity Analysis: Construction Prime Contracts Valued Over \$100,000 to \$1,550,000,
January 1, 2012, to December 31, 2015**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$9,951,575	6.28%	19.83%	\$31,410,883	-\$21,459,308	0.32	< .05 *
Asian Americans	\$0	0.00%	2.27%	\$3,589,815	-\$3,589,815	0.00	< .05 *
Hispanic Americans	\$382,900	0.24%	1.70%	\$2,692,361	-\$2,309,461	0.14	not significant
Native Americans	\$150,757	0.10%	1.42%	\$2,243,635	-\$2,092,878	0.07	< .05 *
Caucasian Females	\$12,734,713	8.04%	11.33%	\$17,949,076	-\$5,214,363	0.71	not significant
Non-minority Males	\$135,180,652	85.34%	63.46%	\$100,514,827	\$34,665,825	1.34	< .05 †
TOTAL	\$158,400,597	100.00%	100.00%	\$158,400,597			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	2.83%	\$4,487,269	-\$4,487,269	0.00	< .05 *
African American Males	\$9,951,575	6.28%	17.00%	\$26,923,614	-\$16,972,039	0.37	< .05 *
Asian American Females	\$0	0.00%	0.85%	\$1,346,181	-\$1,346,181	0.00	----
Asian American Males	\$0	0.00%	1.42%	\$2,243,635	-\$2,243,635	0.00	< .05 *
Hispanic American Females	\$0	0.00%	0.85%	\$1,346,181	-\$1,346,181	0.00	----
Hispanic American Males	\$382,900	0.24%	0.85%	\$1,346,181	-\$963,281	0.28	----
Native American Females	\$150,757	0.10%	0.28%	\$448,727	-\$297,970	0.34	----
Native American Males	\$0	0.00%	1.13%	\$1,794,908	-\$1,794,908	0.00	< .05 *
Caucasian Females	\$12,734,713	8.04%	11.33%	\$17,949,076	-\$5,214,363	0.71	not significant
Non-minority Males	\$135,180,652	85.34%	63.46%	\$100,514,827	\$34,665,825	1.34	< .05 †
TOTAL	\$158,400,597	100.00%	100.00%	\$158,400,597			

(*) denotes a statistically significant underutilization.

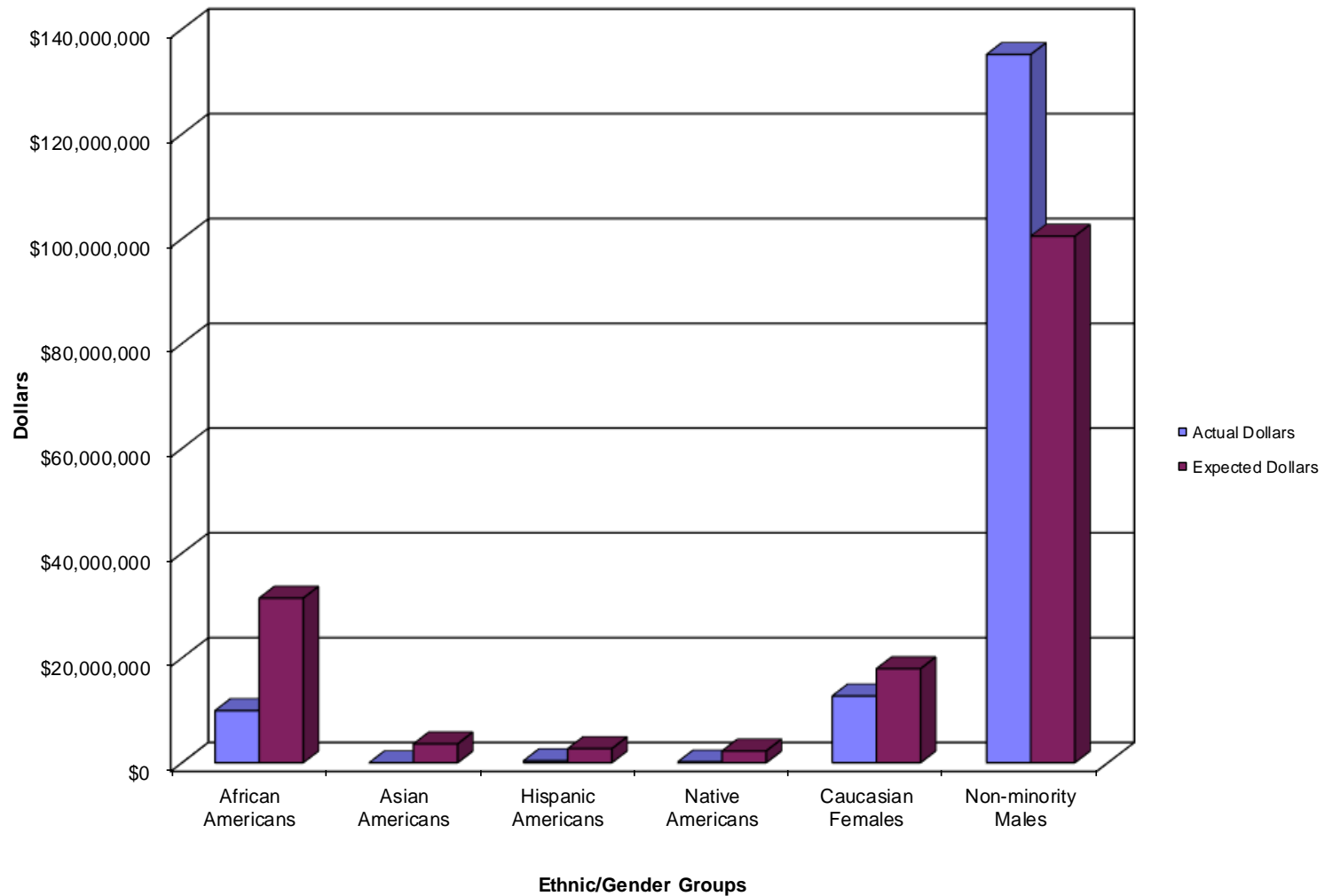
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

(----) denotes an underutilized group with too few available firms to test statistical significance.



**Chart 7.4: Disparity Analysis: Construction Prime Contracts Valued Over \$100,000 to \$1,550,000,
January 1, 2012, to December 31, 2015**



2. Professional Services Prime Contracts Valued Over \$50,000 to \$420,000

The disparity analysis of professional services prime contracts valued over \$50,000 to \$420,000 is described below and shown in Table 7.8 and Chart 7.5.

African Americans represent 22.41% of the available professional services businesses and received 6.33% of the dollars on professional services prime contracts valued over \$50,000 to \$420,000. This underutilization is statistically significant.

Asian Americans represent 8.16% of the available professional services businesses and received 9.07% of the dollars on professional services prime contracts valued over \$50,000 to \$420,000. This study does not test statistically the overutilization of minority groups.

Hispanic Americans represent 1.94% of the available professional services businesses and received 0.00% of the dollars on professional services prime contracts valued over \$50,000 to \$420,000. This underutilization is statistically significant.

Native Americans represent 0.52% of the available professional services businesses and received 0.07% of the dollars on professional services prime contracts valued over \$50,000 to \$420,000. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 19.69% of the available professional services businesses and received 8.51% of the dollars on professional services prime contracts valued over \$50,000 to \$420,000. This underutilization is statistically significant.

Non-minority Males represent 47.28% of the available professional services businesses and received 76.02% of the dollars on professional services prime contracts valued over \$50,000 to \$420,000. This overutilization is statistically significant.



**Table 7.8: Disparity Analysis: Professional Services Prime Contracts Valued Over \$50,000 to \$420,000,
January 1, 2012, to December 31, 2015**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$5,485,558	6.33%	22.41%	\$19,417,255	-\$13,931,697	0.28	< .05 *
Asian Americans	\$7,856,054	9.07%	8.16%	\$7,071,023	\$785,031	1.11	**
Hispanic Americans	\$0	0.00%	1.94%	\$1,683,577	-\$1,683,577	0.00	< .05 *
Native Americans	\$61,920	0.07%	0.52%	\$448,954	-\$387,034	0.14	----
Caucasian Females	\$7,373,102	8.51%	19.69%	\$17,060,247	-\$9,687,145	0.43	< .05 *
Non-minority Males	\$65,871,462	76.02%	47.28%	\$40,967,040	\$24,904,422	1.61	< .05 †
TOTAL	\$86,648,096	100.00%	100.00%	\$86,648,096			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$336,311	0.39%	8.94%	\$7,744,454	-\$7,408,143	0.04	< .05 *
African American Males	\$5,149,246	5.94%	13.47%	\$11,672,800	-\$6,523,554	0.44	< .05 *
Asian American Females	\$539,552	0.62%	3.11%	\$2,693,723	-\$2,154,172	0.20	< .05 *
Asian American Males	\$7,316,502	8.44%	5.05%	\$4,377,300	\$2,939,202	1.67	**
Hispanic American Females	\$0	0.00%	0.78%	\$673,431	-\$673,431	0.00	----
Hispanic American Males	\$0	0.00%	1.17%	\$1,010,146	-\$1,010,146	0.00	< .05 *
Native American Females	\$0	0.00%	0.13%	\$112,238	-\$112,238	0.00	----
Native American Males	\$61,920	0.07%	0.39%	\$336,715	-\$274,795	0.18	----
Caucasian Females	\$7,373,102	8.51%	19.69%	\$17,060,247	-\$9,687,145	0.43	< .05 *
Non-minority Males	\$65,871,462	76.02%	47.28%	\$40,967,040	\$24,904,422	1.61	< .05 †
TOTAL	\$86,648,096	100.00%	100.00%	\$86,648,096			

(*) denotes a statistically significant underutilization.

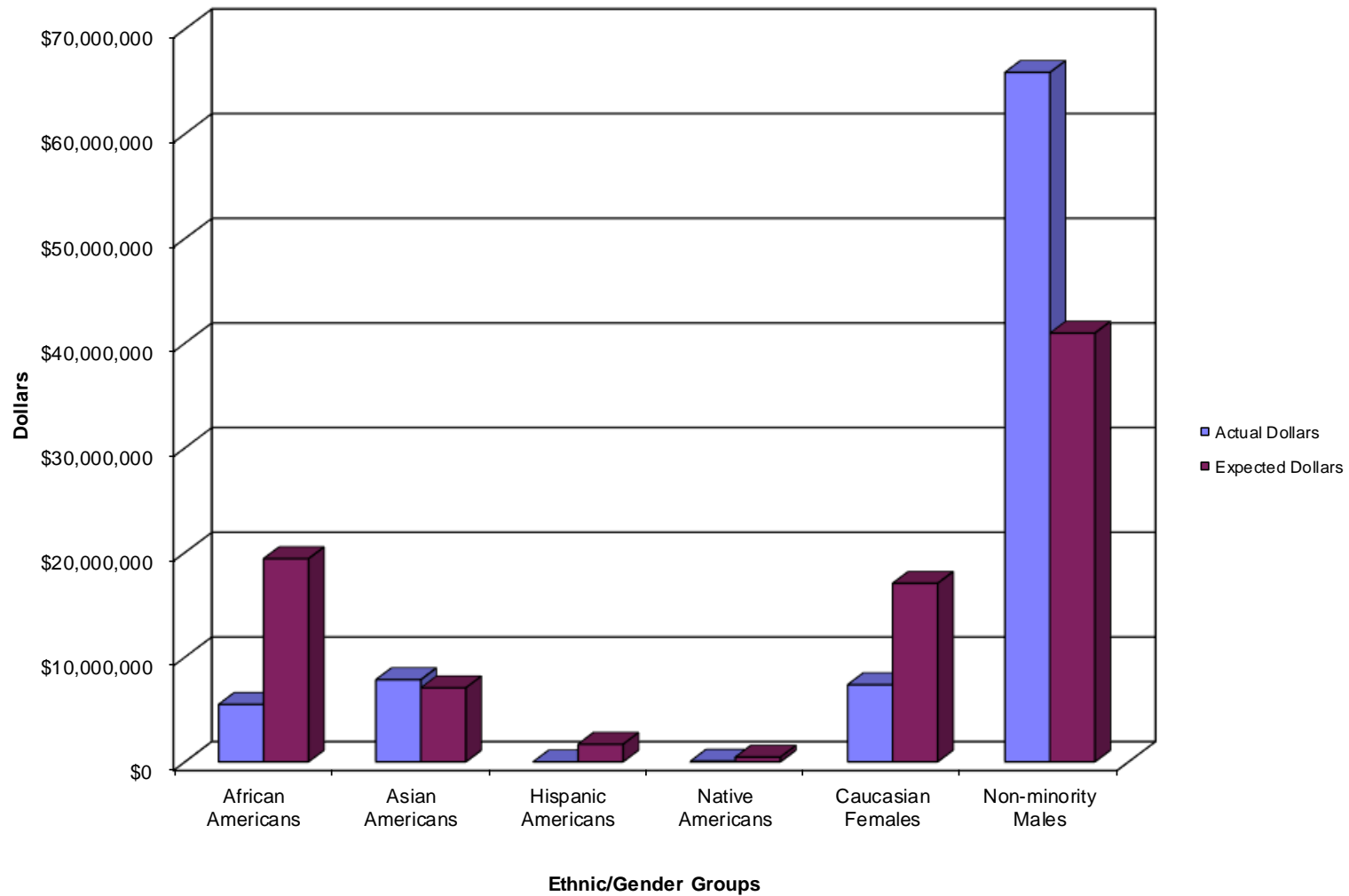
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

(----) denotes an underutilized group with too few available firms to test statistical significance.



**Chart 7.5: Disparity Analysis: Professional Services Prime Contracts Valued Over \$50,000 to \$420,000,
January 1, 2012, to December 31, 2015**



3. Goods and Services Prime Contracts Valued Over \$20,000 to \$180,000

The disparity analysis of goods and services prime contracts valued over \$20,000 to \$180,000 is described below and shown in Table 7.9 and Chart 7.6.

African Americans represent 17.94% of the available goods and services businesses and received 8.50% of the dollars on goods and services prime contracts valued over \$20,000 to \$180,000. This underutilization is statistically significant.

Asian Americans represent 2.76% of the available goods and services businesses and received 0.60% of the dollars on goods and services prime contracts valued over \$20,000 to \$180,000. This underutilization is statistically significant.

Hispanic Americans represent 1.10% of the available goods and services businesses and received 0.81% of the dollars on goods and services prime contracts valued over \$20,000 to \$180,000. This underutilization is not statistically significant.

Native Americans represent 0.55% of the available goods and services businesses and received 0.13% of the dollars on goods and services prime contracts valued over \$20,000 to \$180,000. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 12.24% of the available goods and services businesses and received 9.71% of the dollars on goods and services prime contracts valued over \$20,000 to \$180,000. This underutilization is statistically significant.

Non-minority Males represent 65.41% of the available goods and services businesses and received 80.25% of the dollars on goods and services prime contracts valued over \$20,000 to \$180,000. This overutilization is statistically significant.



**Table 7.9: Disparity Analysis: Goods and Services Prime Contracts Valued Over \$20,000 to \$180,000,
January 1, 2012, to December 31, 2015**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$5,497,030	8.50%	17.94%	\$11,604,472	-\$6,107,442	0.47	< .05 *
Asian Americans	\$387,426	0.60%	2.76%	\$1,785,303	-\$1,397,878	0.22	< .05 *
Hispanic Americans	\$521,212	0.81%	1.10%	\$714,121	-\$192,910	0.73	not significant
Native Americans	\$86,648	0.13%	0.55%	\$357,061	-\$270,412	0.24	----
Caucasian Females	\$6,281,855	9.71%	12.24%	\$7,914,845	-\$1,632,990	0.79	< .05 *
Non-minority Males	\$51,913,322	80.25%	65.41%	\$42,311,690	\$9,601,632	1.23	< .05 †
TOTAL	\$64,687,493	100.00%	100.00%	\$64,687,493			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$2,194,373	3.39%	5.98%	\$3,868,157	-\$1,673,785	0.57	< .05 *
African American Males	\$3,302,657	5.11%	11.96%	\$7,736,315	-\$4,433,658	0.43	< .05 *
Asian American Females	\$115,060	0.18%	1.56%	\$1,011,672	-\$896,612	0.11	< .05 *
Asian American Males	\$272,366	0.42%	1.20%	\$773,631	-\$501,266	0.35	< .05 *
Hispanic American Females	\$479,812	0.74%	0.37%	\$238,040	\$241,771	2.02	**
Hispanic American Males	\$41,400	0.06%	0.74%	\$476,081	-\$434,681	0.09	----
Native American Females	\$0	0.00%	0.09%	\$59,510	-\$59,510	0.00	----
Native American Males	\$86,648	0.13%	0.46%	\$297,551	-\$210,902	0.29	----
Caucasian Females	\$6,281,855	9.71%	12.24%	\$7,914,845	-\$1,632,990	0.79	< .05 *
Non-minority Males	\$51,913,322	80.25%	65.41%	\$42,311,690	\$9,601,632	1.23	< .05 †
TOTAL	\$64,687,493	100.00%	100.00%	\$64,687,493			

(*) denotes a statistically significant underutilization.

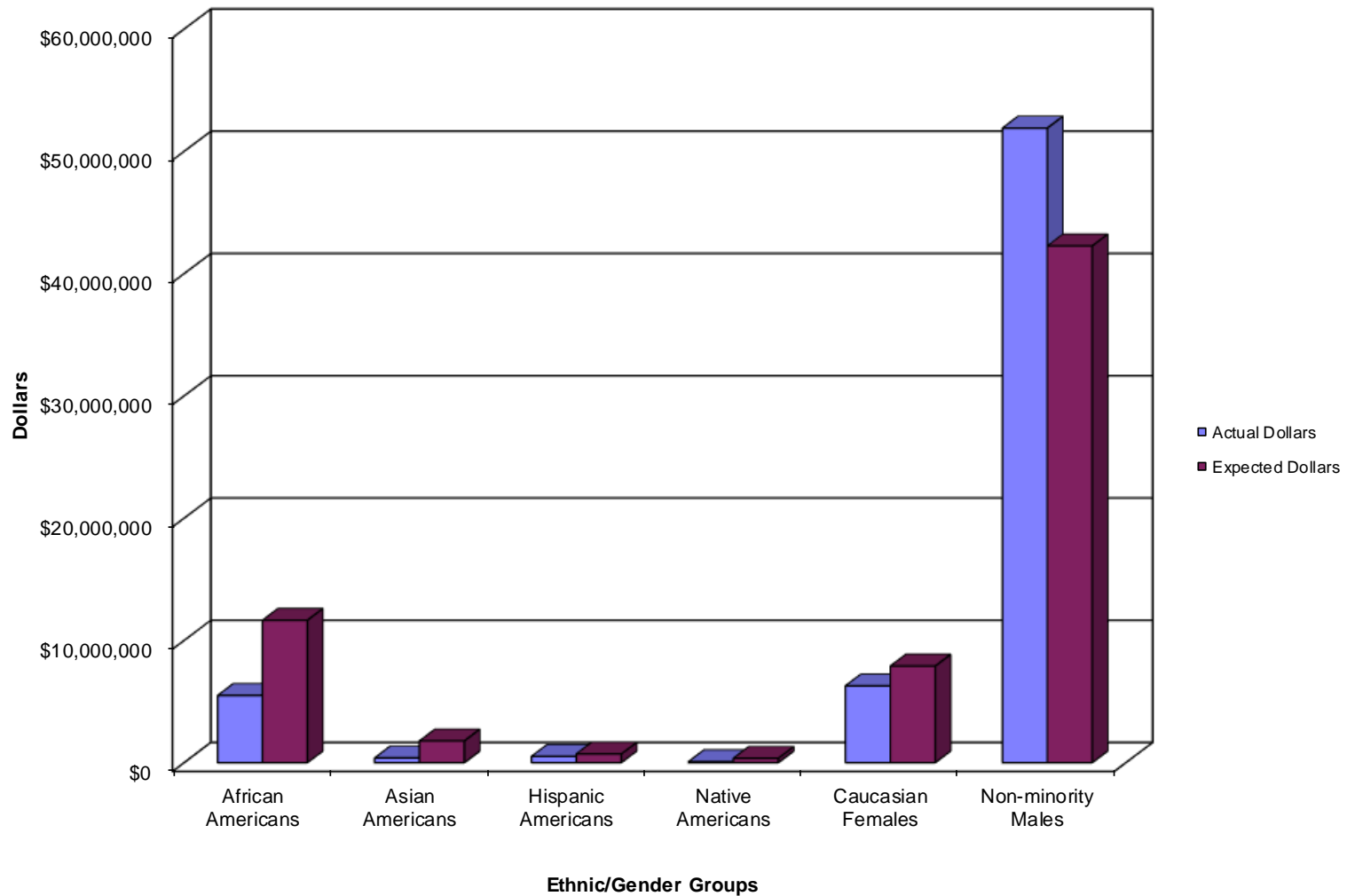
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

(----) denotes an underutilized group with too few available firms to test statistical significance.



**Chart 7.6: Disparity Analysis: Goods and Services Prime Contracts Valued Over \$20,000 to \$180,000,
January 1, 2012, to December 31, 2015**



III. Disparity Analysis Summary

A. Construction Prime Contracts

As indicated in Table 7.10 below, disparity was found for African American, Asian American, and Native American prime contractors on construction contracts valued \$100,000 and under. Disparity was also found for African American, Asian American, and Native American prime contractors on construction contracts valued over \$100,000 to \$1,550,000.

**Table 7.10: Disparity Summary: Construction Prime Contract Dollars,
January 1, 2012, to December 31, 2015**

Ethnicity/Gender	Construction	
	Prime Contracts Valued \$100,000 and Under	Prime Contracts Valued Over \$100,000 to \$1,550,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	<i>Disparity</i>
Hispanic Americans	No Disparity	No Disparity
Native Americans	<i>Disparity</i>	<i>Disparity</i>
Caucasian Females	Overutilized	Underutilized



B. Professional Services Prime Contracts

As indicated in Table 7.11 below, disparity was found for African American, Hispanic American, and Caucasian female prime contractors on professional services contracts valued \$50,000 and under. Disparity was also found for African American, Hispanic American, and Caucasian female prime contractors on professional services contracts valued over \$50,000 to \$420,000.

**Table 7.11: Disparity Summary: Professional Services Prime Contract Dollars,
January 1, 2012, to December 31, 2015**

Ethnicity/Gender	Professional Services	
	Prime Contracts Valued \$50,000 and Under	Prime Contracts Valued Over \$50,000 to \$420,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	No Disparity	No Disparity
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>
Native Americans	No Disparity	No Disparity
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>



C. Goods and Services Prime Contracts

As indicated in Table 7.12 below, disparity was found for African American and Hispanic American prime contractors on goods and services contracts valued \$20,000 and under. Disparity was also found for African American, Asian American, and Caucasian female prime contractors on goods and services contracts valued over \$20,000 to \$180,000.

**Table 7.12: Disparity Summary: Goods and Services Prime Contract Dollars,
January 1, 2012, to December 31, 2015**

Ethnicity/Gender	Goods and Services	
	Prime Contracts Valued \$20,000 and Under	Prime Contracts Valued Over \$20,000 to \$180,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	No Disparity	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>	No Disparity
Native Americans	No Disparity	No Disparity
Caucasian Females	Underutilized	<i>Disparity</i>



CHAPTER 8: Subcontract Disparity Analysis

I. Introduction

The objective of this chapter is to determine if available Minority and Woman-owned Business Enterprise (MWBE) subcontractors were underutilized in the award of the City of Columbus' (City) contracts during the January 1, 2012, to December 31, 2015, study period. A detailed discussion of the statistical procedures for conducting a disparity analysis is set forth in *Chapter 7: Prime Contract Disparity Analysis*. The same statistical procedures are used to perform the subcontract disparity analysis.

Under a fair and equitable system of awarding subcontracts, the proportion of subcontracts and subcontract dollars awarded to MWBE subcontractors should be relatively close to the proportion of available MWBE subcontractors in the City's market area. Availability is defined as the number of willing and able businesses. The methodology for determining willing and able businesses is detailed in *Chapter 6: Prime Contractor and Subcontractor Availability Analysis*.

If the ratio of utilized MWBE subcontractors to available MWBE subcontractors is less than one, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio or any event which is less probable.³⁰⁸ *Croson* states that an inference of discrimination can be made *prima facie* if the observed disparity is statistically significant. Under the *Croson* standard, non-minority male-owned businesses (non-MWBE) are not subject to a statistical test of underutilization.³⁰⁹

II. Disparity Analysis

As detailed in *Chapter 4: Subcontractor Utilization Analysis*, extensive efforts were undertaken to obtain subcontractor records for the City's construction and professional services prime contracts. The disparity analysis was performed on subcontracts issued from January 1, 2012, to December 31, 2015.

The subcontract disparity findings in the two industries under consideration are detailed in *Section III*. The outcomes of the statistical analyses are presented in the "P-Value" column of the tables. A description of the statistical outcomes in the disparity tables are presented in Table 8.1.



³⁰⁸ When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100-percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95-percent confidence level is the statistical standard used in physical and social sciences and is thus used in the present report to determine if an inference of discrimination can be made.

³⁰⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

Table 8.1: Statistical Outcome Descriptions

P-Value Outcome	Definition of P-Value Outcome
< .05 *	This underutilization is statistically significant.
not significant	<ul style="list-style-type: none"> • MWBEs: This underutilization is not statistically significant. • Non-minority males: This overutilization is not statistically significant.
< .05 †	This overutilization is statistically significant.
----	While this group was underutilized, there were too few available firms to determine statistical significance.
**	This study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

III. Disparity Analysis: All Subcontracts by Industry

A. Construction Subcontracts

The disparity analysis of construction subcontracts is described below and shown in Table 8.2 and Chart 8.1.

African Americans represent 15.06% of the available construction businesses and received 3.07% of the construction subcontract dollars. This underutilization is statistically significant.

Asian Americans represent 2.30% of the available construction businesses and received 0.24% of the construction subcontract dollars. This underutilization is statistically significant.

Hispanic Americans represent 1.26% of the available construction businesses and received 2.75% of the construction subcontract dollars. This study does not test statistically the overutilization of minority groups.

Native Americans represent 1.05% of the available construction businesses and received 0.01% of the construction subcontract dollars. This underutilization is statistically significant.

Caucasian Females represent 10.88% of the available construction businesses and received 4.22% of the construction subcontract dollars. This underutilization is statistically significant.

Non-minority Males represent 69.46% of the available construction businesses and received 89.71% of the construction subcontract dollars. This overutilization is statistically significant.



**Table 8.2: Disparity Analysis: Construction Subcontracts,
January 1, 2012, to December 31, 2015**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$5,158,271	3.07%	15.06%	\$25,270,606	-\$20,112,335	0.20	< .05 *
Asian Americans	\$394,352	0.24%	2.30%	\$3,860,787	-\$3,466,435	0.10	< .05 *
Hispanic Americans	\$4,610,632	2.75%	1.26%	\$2,105,884	\$2,504,749	2.19	**
Native Americans	\$14,261	0.01%	1.05%	\$1,754,903	-\$1,740,642	0.01	< .05 *
Caucasian Females	\$7,077,541	4.22%	10.88%	\$18,250,993	-\$11,173,452	0.39	< .05 *
Non-minority Males	\$150,513,690	89.71%	69.46%	\$116,525,574	\$33,988,116	1.29	< .05 †
TOTAL	\$167,768,748	100.00%	100.00%	\$167,768,748			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$112,104	0.07%	2.09%	\$3,509,806	-\$3,397,703	0.03	< .05 *
African American Males	\$5,046,167	3.01%	12.97%	\$21,760,800	-\$16,714,633	0.23	< .05 *
Asian American Females	\$0	0.00%	0.63%	\$1,052,942	-\$1,052,942	0.00	----
Asian American Males	\$394,352	0.24%	1.67%	\$2,807,845	-\$2,413,493	0.14	< .05 *
Hispanic American Females	\$193,043	0.12%	0.63%	\$1,052,942	-\$859,899	0.18	----
Hispanic American Males	\$4,417,590	2.63%	0.63%	\$1,052,942	\$3,364,648	4.20	**
Native American Females	\$14,261	0.01%	0.21%	\$350,981	-\$336,719	0.04	----
Native American Males	\$0	0.00%	0.84%	\$1,403,923	-\$1,403,923	0.00	----
Caucasian Females	\$7,077,541	4.22%	10.88%	\$18,250,993	-\$11,173,452	0.39	< .05 *
Non-minority Males	\$150,513,690	89.71%	69.46%	\$116,525,574	\$33,988,116	1.29	< .05 †
TOTAL	\$167,768,748	100.00%	100.00%	\$167,768,748			

(*) denotes a statistically significant underutilization.

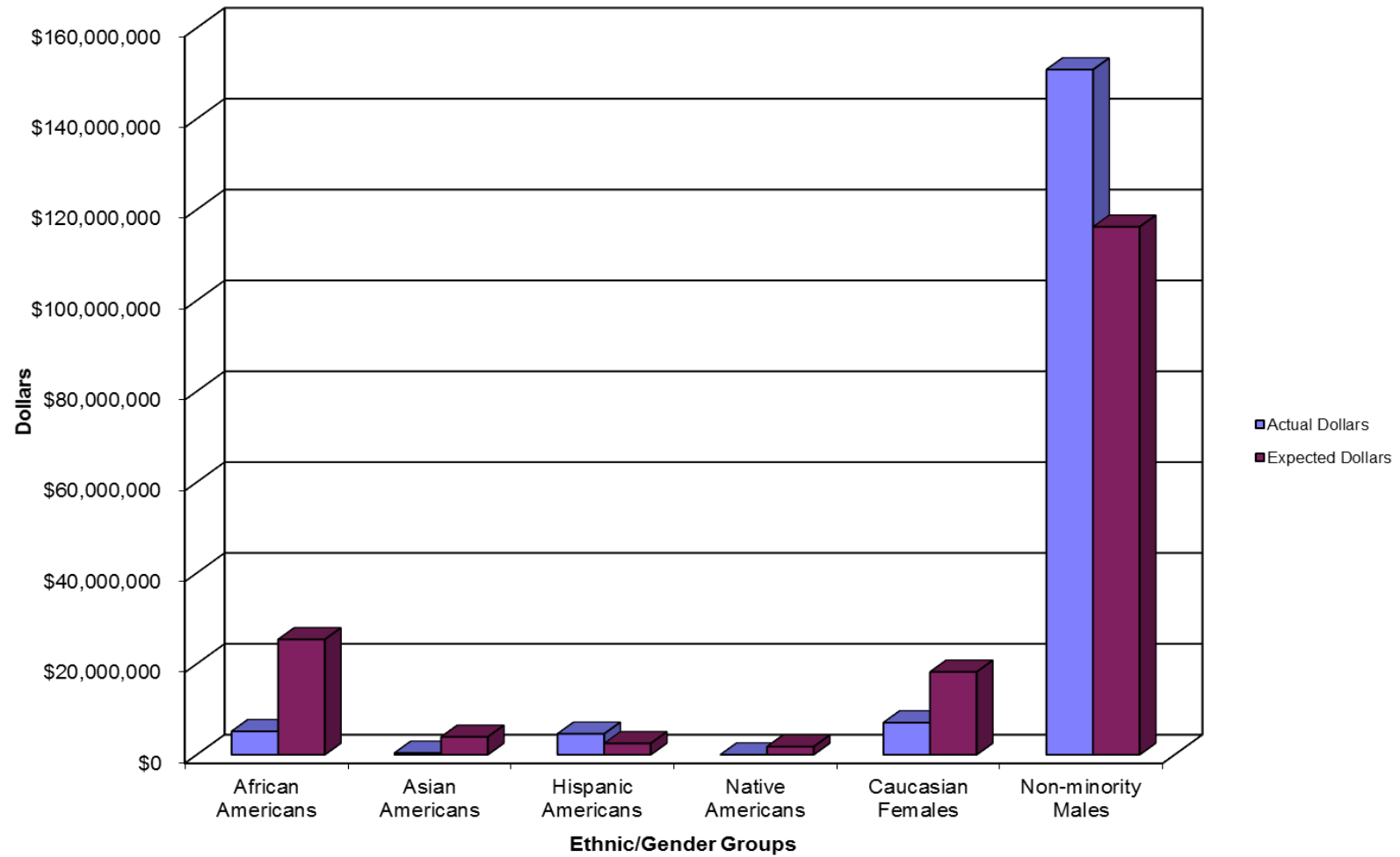
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

(----) denotes an underutilized group with too few available firms to test statistical significance.



**Chart 8.1: Disparity Analysis: Construction Subcontracts,
January 1, 2012, to December 31, 2015**



B. Professional Services Subcontracts

The disparity analysis of professional services subcontracts is described below and shown in Table 8.3 and Chart 8.2.

African Americans represent 21.15% of the available professional services businesses and received 10.06% of the professional services subcontract dollars. This underutilization is statistically significant.

Asian Americans represent 7.81% of the available professional services businesses and received 5.82% of the professional services subcontract dollars. This underutilization is not statistically significant.

Hispanic Americans represent 1.80% of the available professional services businesses and received 0.44% of the professional services subcontract dollars. This underutilization is not statistically significant.

Native Americans represent 0.48% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 19.23% of the available professional services businesses and received 12.97% of the professional services subcontract dollars. This underutilization is not statistically significant.

Non-minority Males represent 49.52% of the available professional services businesses and received 70.71% of the professional services subcontract dollars. This overutilization is statistically significant.



**Table 8.3: Disparity Analysis: Professional Services Subcontracts,
January 1, 2012, to December 31, 2015**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$10,875,759	10.06%	21.15%	\$22,859,901	-\$11,984,142	0.48	< .05 *
Asian Americans	\$6,288,948	5.82%	7.81%	\$8,442,577	-\$2,153,629	0.74	not significant
Hispanic Americans	\$472,171	0.44%	1.80%	\$1,948,287	-\$1,476,116	0.24	not significant
Native Americans	\$0	0.00%	0.48%	\$519,543	-\$519,543	0.00	----
Caucasian Females	\$14,018,622	12.97%	19.23%	\$20,781,729	-\$6,763,107	0.67	not significant
Non-minority Males	\$76,409,488	70.71%	49.52%	\$53,512,951	\$22,896,537	1.43	< .05 †
TOTAL	\$108,064,989	100.00%	100.00%	\$108,064,989			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$431,924	0.40%	8.29%	\$8,962,120	-\$8,530,197	0.05	< .05 *
African American Males	\$10,443,836	9.66%	12.86%	\$13,897,781	-\$3,453,945	0.75	not significant
Asian American Females	\$448,203	0.41%	2.88%	\$3,117,259	-\$2,669,056	0.14	not significant
Asian American Males	\$5,840,745	5.40%	4.93%	\$5,325,318	\$515,427	1.10	**
Hispanic American Females	\$0	0.00%	0.72%	\$779,315	-\$779,315	0.00	----
Hispanic American Males	\$472,171	0.44%	1.08%	\$1,168,972	-\$696,801	0.40	not significant
Native American Females	\$0	0.00%	0.12%	\$129,886	-\$129,886	0.00	----
Native American Males	\$0	0.00%	0.36%	\$389,657	-\$389,657	0.00	----
Caucasian Females	\$14,018,622	12.97%	19.23%	\$20,781,729	-\$6,763,107	0.67	not significant
Non-minority Males	\$76,409,488	70.71%	49.52%	\$53,512,951	\$22,896,537	1.43	< .05 †
TOTAL	\$108,064,989	100.00%	100.00%	\$108,064,989			

(*) denotes a statistically significant underutilization.

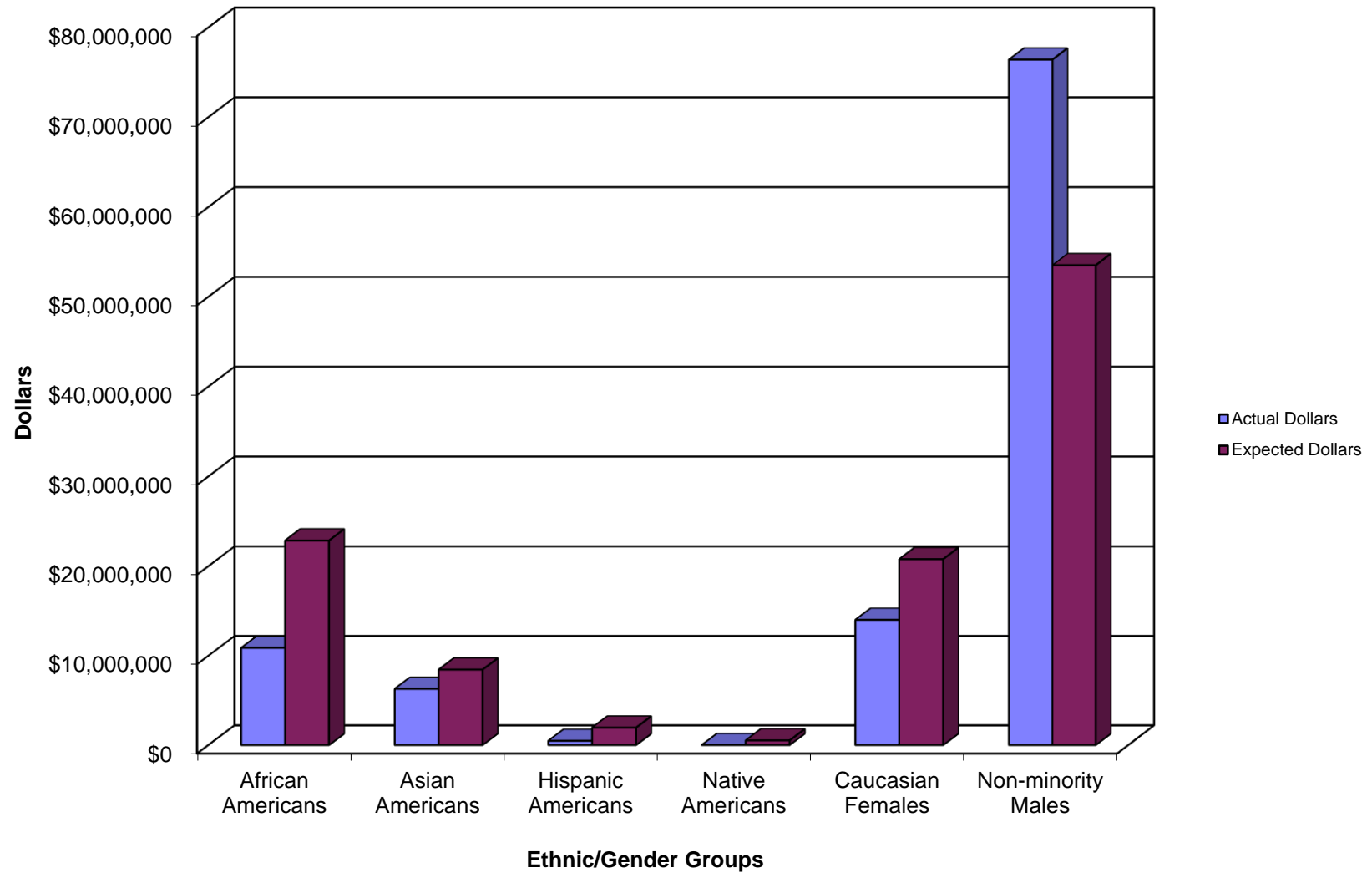
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

(----) denotes an underutilized group with too few available firms to test statistical significance.



**Chart 8.2: Disparity Analysis: Professional Services Subcontracts,
January 1, 2012, to December 31, 2015**



IV. Subcontract Disparity Summary

As indicated in Table 8.4, disparity was found for African American, Asian American, Native American, and Caucasian female construction subcontractors. Disparity was also found for African American professional services subcontractors.

**Table 8.4: Subcontract Disparity Summary,
January 1, 2012, to December 31, 2015**

Ethnicity / Gender	Construction	Professional Services
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	No Disparity
Hispanic Americans	No Disparity	No Disparity
Native Americans	<i>Disparity</i>	No Disparity
Caucasian Females	<i>Disparity</i>	Underutilized



CHAPTER 9: Anecdotal Analysis

I. Introduction

This chapter presents anecdotal testimony gathered through in-depth, one-on-one interviews and business community meetings. The purpose of this examination is to determine whether the City of Columbus (City) has committed acts that may have prevented Minority and Women-owned Business Enterprises' (MWBE) access to City contract opportunities. The anecdotal testimony was analyzed to supplement the statistical findings of the City's Disparity Study (Study).

The importance of anecdotal testimony in a disparity study was discussed in the landmark case, *City of Richmond v. J.A. Croson Co.*³¹⁰ (*Croson*). The United States Supreme Court, in the 1989 *Croson* decision, questioned whether or not anecdotal testimony can be used by local governments to justify remedial race-conscious relief in the relevant market area. The Court opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a [local entity's] determination that broader remedial relief [be] justified."³¹¹

Anecdotal testimony of individual discriminatory acts, when paired with statistical data, can document the routine practices affecting MWBEs' access to contracting opportunities. The statistical data can quantify the results of discriminatory practices, while anecdotal testimony provides the human context to understand the numbers. Anecdotal testimony from business owners provides information on the types of barriers that are perceived to exist within the market area and affect the development of MWBEs. In addition, anecdotal testimony was solicited from prime contractors, subcontractors, and suppliers who received a City contract to provide a comprehensive perspective of their experiences.

A. Anecdotal Evidence of Discrimination - Active and Passive Participation

Croson authorizes anecdotal inquiries along two lines. The first line of inquiry investigates active government discrimination as reflected in the award of prime contracts or the government's procurement policy and practices.

Anecdotal evidence of passive discrimination pertains to the actions of private sector entities. Thus, the second line of inquiry examines the government's passive support of exclusionary practices that occur in the market area in which its funds are infused. Passive discrimination results from government officials knowingly using public funds to contract with companies that discriminate against MWBEs or failure to take positive steps to prevent discrimination by contractors who receive public contracts.³¹²

³¹⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 509 (1989).

³¹¹ *Croson*, 488 U.S.

³¹² *Id.* at 491-93, 509.



The Court cautioned that anecdotal evidence of discrimination is entitled to less evidentiary weight than statistical findings because the evidence concerns more private than government-sponsored activities. Less weight should be afforded to personal accounts of discrimination that reflect isolated incidents compared to anecdotal evidence of a municipality's institutional practices because of the impact that institutional practices have on market conditions.³¹³ Nonetheless, when paired with appropriate statistical data, anecdotal evidence of either active or passive forms of discrimination can support the imposition of a race or gender-conscious remedial program.³¹⁴

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.”³¹⁵ Nevertheless, the Court found that anecdotal evidence has value because it can paint a portrait of the practices and procedures that generally govern the award of public contracts in the relevant market area. These narratives, according to *Croson*, can identify specific generic practices that the City can implement, improve, or eliminate to increase contracting opportunities for businesses owned by all citizens. In this Study, the utility of the anecdotal evidence is considered within the parameters of the law.

B. Anecdotal Methodology

The methods used to collect anecdotal information consisted of soliciting public comments from the business community meetings and one-on-one interviews. Extensive effort was undertaken to solicit business owners that were willing to provide anecdotal accounts. The sources used to identify potential interviewees included business community meetings, certification directories, and outreach efforts. All of the business owners interviewed were domiciled in the geographical market area. The boundaries of the market area are described in *Chapter 5: Market Area Analysis*.

1. Business Community Meetings

The initial phase of the anecdotal process was the collection of public comments at two business community meetings that were held in May 2017. The objective of the meetings was to announce the Study; inform the business community about the Study's legal framework, methodology, and timeline; and give business owners the opportunity to speak with City representatives regarding contracting opportunities. The meetings also sought to solicit the business community's support for the Study and to identify business owners willing to participate in the anecdotal interviews.

The outreach efforts to promote the two business community meetings targeted firms in the construction, professional services (including architectural and engineering services), and goods and services industries. The meetings were held at the following times and locations:

³¹³ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d at 1530 (10th Cir. 1994): “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.”

³¹⁴ *Croson*, 488 U.S. at 509.

³¹⁵ *Id.*



Table 9.1: Community Meeting Dates and Locations

CITY OF COLUMBUS – Business Community Meetings		
Location	Date	Time
Driving Park Recreation Center	May 24, 2017	9:00 a.m.
Douglas Recreation Center	May 24, 2017	5:30 p.m.

Testimony from these meetings has been incorporated in this chapter.

2. One-on-One Interviews

The second phase of the anecdotal process was screening businesses that indicated an interest in being interviewed. A screener was used to collect basic demographic data and specific information to determine the relevant experiences of the business owner. The screener also captured information regarding the interviewee's experience with public contracting and willingness to recount the experiences to a trained interviewer.

In the one-on-one interviews, anecdotal probes were used to solicit information from the interviewees. The questions sought to determine if the business owner encountered or had specific knowledge of instances in which formal or informal contracting practices had a positive or adverse impact on MWBEs during the January 1, 2012, to December 31, 2015, study period. A total of 40 interviews were completed with African American, Asian American, Hispanic American, Native American, Caucasian female, and non-minority male business owners who provide the types of goods and services procured by the City.

II. Anecdotal Findings

The anecdotes describe general market conditions and the range of experiences encountered by interviewees doing business, or attempting to do business, with the City. The following are anecdotal findings culled from the one-on-one interviews and comments from the business community meetings.



PRIME CONTRACTOR
AVAILABILITY
ANALYSIS, CHAPTER 6

Statistical findings revealed that MWBEs have the capacity to perform substantial formal contracts

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MWBEs demonstrated the capacity to perform construction prime contracts as large as \$7,866,841

∞

MWBEs demonstrated the capacity to perform professional services prime contracts as large as \$7,781,881

∞

A. **Racial Barriers and Sexism**

Some minority business owners believe that racial barriers and sexism have affected their business development. The perception of their experiences is presented below.

A minority male owner of a construction company explained why he believes the participation of MWBEs have declined on the City's contracts:

Even though the City didn't have a Supplier Diversity Program, then Mayor Mike Coleman wanted minorities to be involved in the City's contracts. And we were able to get involved on City projects. After Mayor Coleman, a new guy took over and it went downhill for Black folks. If you look at his history, Blacks got nothing.

A minority male owner of a professional services company reported that he was stereotyped because of his appearance:

At one particular company, they made direct comments to me about my appearance. I was told that it would not be safe if I were allowed to be near equipment that could be potentially dangerous because of my appearance. I was told I look like a terrorist. Also, there were videos posted in the City of Columbus, by hate groups where they were videotaping Indian and minority families saying, "We're losing all our jobs to foreigners."

A minority male owner of a goods and services company believes that MWBEs are unfairly judged compared to their counterparts:

There has always been a stigmatism against minorities. No matter how open we are and how wonderful the culture is as a whole, there's still a stigmatism if you're not an Anglo-Saxon White American. Back when I started my company and still today people think that it costs more to work with a minority company. In actuality, it doesn't because it's the same cost as working with a non-minority



owned business especially when there's a big prime contractor involved. A prime contractor can control the pricing on either side of the fence.

A minority male owner of a professional services company explained that his work is held to a higher standard of review because he is a MWBE:

I have seen large companies from other markets, come to the City and win contracts, when it takes us a while to develop relationships to get a small piece of work as a subcontractor let alone as a prime contractor. So, I definitely believe race is a factor. There is an assumption that our work is not going to be up to par or not going to be quality work. We have to prove that wrong, but we shouldn't have to walk in the door with that assumption from the very beginning.

A minority male owner of a professional services company explained the fiscal impact on small businesses because of excessive monitoring:

When project managers hold us to a higher standard it ends up costing us more and we can't get our margins. So, it hinders growth and limits the size and scale of projects that we can go after. But some managers are immediately dismissive of MWBEs even though our team has the capability and qualifications of doing the work.

A minority male owner of a construction company described an incident where he believes a colleague was treated unfairly because of his race:

I know a contractor that did work on an electrical substation for the City of Columbus. It required doing concrete foundation work. There was a little delay between concrete trucks, and the City claimed it was outside of the specifications. They got a professional engineer and they said no there was no issue with the structural integrity to the concrete foundation. Their bonding company gave them a bond to cover any loss, or mistakes if there were a problem with the foundation. Well, the City refused to accept the bond and he had to tear the entire structure out and redo, it which cost him almost half million dollars because he was a minority. I know they've accepted bonds from other people who were non-minorities."



PRIME CONTRACTOR
UTILIZATION ANALYSIS,
CHAPTER 3

Fifteen of the City's 241 construction vendors received \$689,732,041 or 70% of the total prime contract dollars

∞

Twenty-two of the City's 489 professional services vendors received \$282,879,398 or 70% of the total prime contract dollars

∞

Eighty-six of the City's 1,124 goods and services vendors received \$258,289,825 or 70% of the total prime contract dollars

B. Preferred Contractors

Interviewees expressed concern that some City managers prefer to work with the same few business owners rather than giving less established businesses an opportunity.

A minority male owner of a construction company described the barriers he experienced breaking into the City's contracting network:

The City's Request for Proposals (RFPs) or Request for Qualifications (RFQs) normally include requirements that are beyond the scope that we offer so we have to team with a larger company. The problem is that the City doesn't require a pre-proposal meeting, so we never know the interested parties that we could possibly team with. I have asked the City to require a pre-proposal meeting so that small minority companies can get to know the larger guys in order to team with them.

A Caucasian female owner of a professional services company has not benefitted from networking events:

Someone once told me that we were all bottom feeders. And that we are given hand-outs and therefore not important or needed for jobs. We need them, but they don't need us. So, they don't need to invite us to their networking event. I've gone after construction management work and been told by well-known local firms that, "We don't need you."

A minority female owner of a professional services company reported that the City's RFPs are not uniformly evaluated:

The scoring for certain projects are weighted to favor firms that have already done the type of work being requested. So, it's no surprise when they hire the same firms over and over again. I once had a debriefing with the City's Facilities Department and I was given the scoring for a proposal we submitted. Two of the evaluator's scores were similar but the third person's scores were total outliers.



Their scores were weighted towards the firm that previously had the contract. He scored that firm so high in certain categories that there was no way to overcome the difference. It's already difficult for new firms and this is the reason why most minority firms do not celebrate their 50th or 75th anniversary.

A minority male owner of a professional services company reported that some proposals are designed to benefit specific contractors:

On a couple of occasions, the Department of Public Service designed the requirements to fit the experience of a certain company. We could tell that they were tailored towards a specific firm.

A minority male owner of a professional services company is concerned that the City's pre-qualification requirements prevent small businesses from competing with large established firms:

I think they prefer to work with certain size firms. No one wants to do a bad job. But I think some firms are discriminated against based upon size and not just on big projects but small ones too. And, the pre-qualifications are written to preclude small firms because the City requires five years of project experience. If you're a new business, you can't meet that criteria.

A minority female owner of a professional services company recounted that retaliation by City managers prevent some MWBEs from complaining about preferred contractors:

The City keeps using the same guys over and over again. They allow them to dictate the type of specifications that are needed, to ensure they can satisfy the proposal requirements. But if we pushback it can create a larger issue. Oftentimes, minority contractors are quiet because they obviously need these guys to survive. So, they can't really say anything in fear of retaliation that they won't receive any future work.



This same business owner further elaborated:

I usually don't get any work at networking events. They walk around jolly and when I approach them I get the cold shoulder. Typically, it's a circle of White men in blazers, a button up, and khakis looking at me like I am an alien.

A minority male owner of a professional services firm criticized the City for not having a diverse pool of contractors:

I don't know how to inform the City's decision makers that there are companies that have experience to do the needed work besides their preferred contractors. These companies have been through the growing pains to develop best practices to successfully work on the City's projects. But we do not get in front of the decision makers.

A minority female owner of a professional services company explained that a City manager implied that the size of her business was inadequate to perform on City projects:

At the City I was asked, "How do you know if you can handle a certain dollar level project?" Well I have experience handling a million-dollar project and over 30 years of experience working in the public sector. Most people don't launch their business with millions of dollars in assets.

A minority male owner of a professional services company is disappointed that he was unable to secure work from the City despite his extensive marketing efforts:

We spend a tremendous amount of time marketing to government entities like the City of Columbus. We have been able to succeed with other entities, but not within our home town, which is frustrating. My staff have dedicated a lot of time and energy to get work from the City, but we haven't gotten any work. So, the time we spent marketing has been wasted. One of my colleagues told me that she was getting the run around from the City, so she stopped trying. She's another small business owner. We see each other at least every four months and discuss our challenges, as well as successes. We both have had a consistent challenge in dealing with the City.



This same business owner further elaborated:

When you are the only minority in the room, people look at you differently. They talk to you differently and oftentimes assume that I don't speak English.

PRIME CONTRACTOR
AVAILABILITY ANALYSIS,
CHAPTER 6

Non-minority males account for 60.86% of available construction firms and received 81.56% of the construction prime contracts valued under \$100,000, representing 77.90% of the dollars

∞

Non-minority males account for 46.11% of available professional services firms and received 63.44% of the professional services prime contracts valued under \$50,000, representing 67.97% of the dollars

∞

Non-minority males account for 59.95% of the available goods and services firms and received 77.53% of the prime contracts valued under \$20,000, representing 80.83% of the dollars

C. Good Old Boy Network

The good old boy network is an informal network that could advantage friends, colleagues, and associates in the award of prime contracts and subcontracts. Many instances were described where interviewees believed that the good old boy network operates as a barrier to their participation on the City's contracts.

A minority male owner of a construction company identified a specific City department that engages preferred contractors for repeat work:

At the Department of Public Utilities, there is one particular large contractor that gets 70 percent of the department's large utility work. They get the work even though they bid 10 percent over the City's estimate. I think they actually design the specifications to fit the capabilities of that company. They estimate these jobs between \$30 and \$50 million dollars to benefit large companies. Just by the mere size of the job, they dictate what company can bid the job.

This same business owner further elaborated:

Also, within the last couple of years, I bid jobs to prime contractors on City projects and I have been told that my price is very competitive. But at the end of the day, they always give the job to a competitor because they felt more comfortable with another company. And those companies happen to be non-minority firms.



A Caucasian female owner of a professional services company is disheartened because the good old boy network prevented her from participating on the City's contracts:

There is definitely a good old boys club. I get that feeling a lot. It's a common occurrence, and there's specific prime contractors that I could name. I feel like I'm excluded because I'm a woman. Frankly, the male contractors will say, "She doesn't know anything or she's just a WBE. We only need to give her 2% and have her take the meeting minutes." It has really been that derogatory. It's very frustrating and I imagine it's much more frustrating for Black women because they have to deal with both the gender and the race thing. So, it's very frustrating trying to bid on projects and get flicked to the side because I'm a woman.

A minority female owner of a professional services company reported that decision-makers are reluctant to work with MWBEs:

In most cities, including the City of Columbus, those that determine who gets the contract opportunities are headed by men. It's the boys club. They are in charge and not necessarily amenable to working with MWBEs. They don't consider their actions as discriminatory, but the effects of their actions are.

A minority male owner of a professional services company complained that certain RFPs are intended to advantage preferred firms:

At times, it seems the RFPs include required experience that is tailor-made for the larger or good old boy firms. It's almost like the incumbent firm wrote the proposal for themselves. So, it's hard to compete when the RFP is tailor made for a certain firm. In terms of networking, everyone says the right things to your face, but when it comes to actually working on a project we have not received anything. How am I supposed to break through these barriers?



A minority male owner of a professional services company reported that some prime contractors have a revolving door relationship with certain City departments:

I'm in the professional services industry. There are a lot of prime consultants that are design and engineer firms that know each other. There is a revolving door between the City departments and those firms. They have a steady relationship that we don't get to participate in. If you don't get invited to the informal meetings with the insiders, you will never develop a relationship and learn who to team with. They talk to each other a lot, so they tend to know who is going after contracts.

A minority female owner of a professional services company believes her extensive qualifications are insufficient to secure work with the City:

The architecture and engineering industry tends to be a male dominated field. Historically, it's always been a White male dominated field. After interviewing over a period time, I learned that, on paper, I'm well-qualified but when it comes to the interview, people hire who they feel comfortable working with. And, I think in general people feel comfortable with people who are like them.

A minority female owner of a goods and services company has not benefitted from networking events:

When I go to meetings, others will assume that I'm the sales person or a project manager. But then once they realize I'm the owner, they say, "Oh, you're a female owned company." And then the climate changes because it's a male dominated industry. I typically work with construction contractors. So, when I attend networking events, the major contractors will refer me to other contractors and it goes nowhere.



PRIME CONTRACT
DISPARITY CHAPTER,
CHAPTER 7

African Americans represent 21.41% of available construction firms and received 6.85% of the dollars on contracts \$100,000 and under

∞

Asian Americans represent 2.45% of available construction firms and received 0.44% of the dollars on contracts \$100,000 and under

∞

Hispanic Americans represent 2.45% of available construction firms and received 1.31% of the dollars on contracts \$100,000 and under

∞

Native Americans represent 1.53% of available construction firms and received 0.04% of the dollars on contracts valued \$100,000 and under

∞

Caucasian Females represent 11.31% of the available construction firms and received 13.14% of the dollars on contracts valued \$100,000 and under

D. Difficulty Navigating the Bid Process

Several business owners described barriers they encountered trying to navigate the City's bid process, which diminished their ability to prepare a responsive bid.

A minority female owner of a professional services company explained why she believes some proposals are written specifically to benefit certain contractors:

We usually do not have any lead time to prepare a competitive proposal. Just recently, we were given a five or seven-day window from the time they released the proposal to the due date. And, I had problems trying to get into the City's vendor portal to review the bid. Five or seven days is not enough time to respond.

A Caucasian female owner of a professional services firm reported that she experienced difficulty responding to the City's RFPs because of inadequate lead time:

There have been short turnaround times for RFPs for a firm of my size. It's very difficult to turn in a quality proposal with little notice because we don't have the resources. It takes us a little longer than a larger firm. Our submittals will not be near the quality of bigger firms that have marketing staff to respond to bids.

A Caucasian female owner of a goods and services company encountered problems with the City's bid notification system:

When we created our vendor profile, I thought we would be notified of projects based on our line of work. But I didn't get notified through the City's vendor information system. We do not get matched up the with the services that our company offers.



A minority male owner of a professional services company also reported difficulty using the City's vendor information system:

I think the City's vendor information system is a little awkward. Some opportunities that might fit my commodity code could pop-up in my email and then a lot of them don't. So, the bid can be on the street before I even know about it. And, then if you are a subcontractor you have to spend time figuring out who's going to bid on it which might take another week. Now my ability to produce a good proposal and get on a good team is diminished.

E. Pre-qualification Requirements

A minority male owner of a construction company explained why he believes that the construction pre-qualification requirements are a deterrent for MWBEs:

My main concern or issue with the City of Columbus is the construction prequalification process. The requirements for pre-qualification generates a lot of paperwork, including past performance records, tax returns, insurance documentation, etc. In my opinion, the prequalification process is the biggest barrier to minorities doing construction work for the City of Columbus. If you look at the City's prequalified list, you will find hundreds of businesses but very few minority contractors. A lot of the prequalification requirements are set by the unions. Most minority contractors don't have pension plans, insurance, and apprenticeship programs. There are only four minorities on the whole list and there will never be more than that based on the requirements. I think the standards are geared toward larger and unionized contractors.

A Caucasian male owner of a construction company believes the pre-qualification requirements should be streamlined to reduce duplicity in the bidding process:

One of the challenges to doing business with the City of Columbus is their pre-qualification process. The forms are very cumbersome. Their rules are supposed to eliminate some of the documentation you need when you submit as a prime contractor but, there are still many duplicates.



A minority male owner of a professional services company believes the prequalification process advantages large companies:

I think there's a general bias towards smaller firms. Particularly due to the way the prequalification requirements are written.

F. City Managers Creating Barriers

Some business owners described experiences where City managers created barriers that prevented them from successfully completing their project.

A minority male owner of a construction company faced barriers from City staff:

We were the low bidder on [project name withheld] and they made my life a living hell from day one. The City of Columbus construction management team made us jump through all kinds of hoops. They delayed the job to make us go back and correct mistakes they made. They required certain materials that were no longer available. We had to get letters from manufacturers to prove that the materials were no longer made even though it was their job to determine it. We had to prove that the materials were not applicable anymore and at the end of the day, we ended up with a job that ran over almost a year. It felt like overkill with the hoops they made us jump through even though they were in the wrong. I saw a total lack of diversity training among their upper management staff. They didn't have a clue because they were used to working in their own little vacuum and with their specific group of firms. They were especially not open to Black folks. I had one person in the Public Utilities Department say we were getting too much money. And, we didn't need any more. Stupid stuff like that.

A minority female owner of a professional services company described several instances where City managers acted as a deterrent:

There have been occasions when the City did not follow its own procurement procedures and guidelines. If they followed their own procedures, the award may have played out differently. There were times where the best bidder never received the award because of their gender or racial makeup. And, there were other times where the City gave us the award the day before the work had to start and we had to work with staff who rather we weren't there. They were difficult and would not cooperate to help us satisfactorily fulfill the requirements



of the project. We still had to make sure that everything worked smoothly in spite of those challenges which really hampered our success.

G. Barriers to Financing

Access to adequate financing is vital to business survival and especially crucial to the solvency of small, minority, and new businesses. Many business owners reported challenges obtaining financing for their small companies.

A minority female owner of a goods and services company was not offered the same discounts as larger established firms:

There is a lot of variance in price because it's not uncommon for manufacturers to have their preferred dealers or vendors that get better prices because of their relationships. They will sometimes get additional discounts or points that we would not necessarily receive. Also, I applied for a small line of credit for \$50,000 and at the time my credit was good. I was told that I was denied because I was a newer business. I had already done over \$2,500,000 in federal business, but I was still told I was too new. I had to use a more expensive way to find funding for my business. It's a struggle for MWBEs to receive funding from banks. I've talked to other colleagues and they complain about the same thing. It's almost impossible to find funding.

A minority male owner of a professional services company reported that some financial institutions refuse to work with MWBEs:

I don't think banks want to deal with minority businesses. We are unable to get low interest loans. It would be great if we could get financial assistance from the City.

A minority male owner of a professional services company was unable to secure financing from traditional resources:

Our biggest challenge is getting financing. Our first two years in business we couldn't get a line of credit. We couldn't even get a loan. Eventually, we were blessed to have a relationship with an Ohio minority business association. Otherwise all other doors were closed.



A minority male owner of a goods and services company was denied a loan despite his positive credit history:

I tried to get a loan from [financial institution name withheld]. I was solicited from that bank because they got my name from a MWBE register. I have exceptional credit and I am never late on my payments. They pulled my credit, asked for my tax information, and my business plans. I was still turned down. I was going to use the loan to buy equipment.

H. Late Payments

Interviewees shared how late payments by both the City and its prime contractors affected their businesses.

A Caucasian female owner of a professional services company endured financial hardship due to late payments from prime contractors:

I think the major issue is between the subcontractors and prime contractors. I was paid late from a prime contractor because they didn't turn in our invoice right away to the City. They sent it to the City two months after I submitted it to them. This delayed payment hurt me a lot because I was unable to go after other projects. I had to pull money out of my retirement fund to pay my staff. The subcontractors will submit an invoice and then the prime contractor won't submit it to the City right away. They don't necessarily review it right away. They submit it to the City at their leisure. I have no idea who to call at the City for the status of my invoice. The prime contractors aren't always responsive to our needs not realizing that they are really hurting our business.

A minority male owner of a professional services company explained that there is no protection for subcontractors:

As a prime contractor to the City, the departments generally approve our invoice in a timely manner. There is normally a thirty-day window and in some cases a couple of weeks. Now with my subcontractor relationships, trying to get paid can be all over the place. I wait 90 days out on a project before I try to get an answer. I recall a project that started in May, we invoiced first in June and still hadn't seen the first check after submitting four invoices. They were not depending on the money like us. They had no sense of urgency about following up with the City to determine the status of our invoice. Most subcontractors are



depending on their money to come in timely, we don't have reserves to rely on. There is no accountability for subcontractors being paid in a timely manner.

A minority male owner of a professional services company explained that some prime contractors purposefully pay their subcontractors late:

Even though we invoice in a timely manner, the prime contractor is slow on how they process our invoices. Oftentimes, they will hold on to our money for a period of time to pay their debts which is really harmful for small businesses. There was a project that we wanted to bid on, but we needed to hire two more people and we did not respond because we hadn't received payment from our prime contractor. I had to give up paying myself to make sure that my employees and bills were paid.

A minority male owner of a professional services company was negatively impacted by the City's late payments:

We had a project with the City of Columbus and did not get paid for nine months. Eventually I had to use my credit cards to pay for payroll to make sure my employees were paid. But you can only do that for so long and then you amass a lot of debt. In the end we were understaffed and overworked because we didn't have the bandwidth or cash flow. We weren't able to go after some projects because we were overwhelmed.

A minority female owner of a goods and services company stopped seeking work from the City because of late payments:

There is absolutely an issue getting paid by the City. That is part of the reason why I struggled working with the City. I actually stopped seeking work from the City for a while.

A minority male owner of a professional services firm waited up to 180 days to receive payment from the City:

The City pays at a minimum 120 to 180 days after receipt of the invoice. I find this unacceptable especially for a minority or small disadvantaged business. We don't have an established line of credit or individual funds to carry us. The City



could do a much better job paying on time. A lot of the MWBEs are hesitant to do work with the City because you have to wait a long time for payment. I believe the Office of Diversity and Inclusion could play a more significant role by monitoring the payments made to MWBEs.

A Caucasian female owner of a professional services company reported that the City usually processes her invoices within 90 days:

We have waited anywhere from 30 days to 120 days to get paid. With the City of Columbus, if everything goes smoothly we usually get paid in about 90 days.

A minority male owner of a goods and services company waits over 30 days for payment from the City:

The City never pays on time. They don't pay within 30 days even though most contracts require a term of 30 days. The City of Columbus pays on time if you get lucky.

SUBCONTRACT DISPARITY ANALYSIS, CHAPTER 8

*African Americans represent 16.41% of
available subcontract construction firms and
received 2.82% of the subcontract dollars*

∞

*Asian Americans represent 2.24% of
available subcontract construction firms and
received 0.21% of the subcontract dollars*

∞

*Native Americans represent 1.12% of
available subcontract construction firms and
received 0.01% of the subcontract dollars*

∞

*Caucasian Females represent 10.54% of the
available subcontract construction firms and
received 4.17% of the dollars*



I. Supplier Diversity Program

The interviewees reported on their observations regarding the City's Supplier Diversity Program. Recommendations to enhance the programs were also offered by the business owners.

A Caucasian female owner of a professional services company described the advantages and disadvantages of the Supplier Diversity Program:

I do find the City's Supplier Diversity Program valuable. But there is a lack of value because we get listed on projects just because we're a WBE and then we don't always get the work. Or they want to give us secretarial work or things that aren't significant in

many cases. They also need to ensure that the goals are met.

A minority male owner of a goods and services company believes the State's MWBE program is structured better than the City's program:

The Supplier Diversity Program has not been valuable for my company. The State's program is designed so that MBEs only compete against other MBEs. And their EDGE program which is for construction virtually works the same way.

A minority male owner of a professional services company described the benefits of the Office of Diversity and Inclusion:

I think the biggest advantages of the Office of Diversity and Inclusion (ODI) is twofold. One is the task of promoting and monitoring workforce diversity within the City departments. I think that the Office of Diversity and Inclusion and diverse leaders in the City can create opportunities for small and minority businesses by having staff that understands the plight of MWBEs and the implicit biases that they encounter. And secondly, I would say I think the ability of ODI to advocate and connect businesses to opportunities within the City and do more targeted kinds of solicitations is an asset to the departments who often argue that they don't know where to go to find good MWBE contractors.

A minority male owner of a goods and services company believes the Supplier Diversity Program lacks accountability:

I think the City should do more for its MBE and not just talk. They should put some hard-core policies in place for MBEs. They have these diversity fairs, but its smoke and mirrors. I've attended those events at the City and they are smoke and mirrors.

A Caucasian male owner of a construction company does not support MWBE goals:

I think, in general, there is some level of discrimination against minorities and women to a degree. However, setting aside a certain percentage public works projects for women and minority owned businesses is not perfect. Are there instances where the City may be overpaying for services for the benefit of a



couple of businesses? Sure. Again, someone is always going to find a way to take advantage of the program. So, I don't know how it should be structured to eliminate that.

A Caucasian male owner of a construction company opposes MWBE participation goals:

I don't believe in set asides because I built my company from scratch. If I can do it, anybody can do it. I'm not that different than anyone else. I went from zero to over \$12 million in sales by doing things the right way. A 20 percent goal is a big number on a construction contract. There is not a lot to subcontract work and the prime contractor is not going to give up any of their work. They are going to take it out of the subcontractors, which really hurts the little guy.

J. Exemplary Practices of the City

Many business owners credited the work they received from the City for growing their small business. Others lauded the City's management practices as influential in gaining access to contracting opportunities.

A minority female owner of a goods and services company is optimistic that the City's leadership is committed to assisting MWBEs grow and thrive:

I feel like the current City administration is definitely trying to assist MWBEs and small businesses by doing more business with us. I do appreciate that.

A minority male owner of a professional services company supports the Office of Diversity and Inclusion:

I think creating the Office of Diversity and Inclusion was a great move on the City's part. And, making the head a cabinet level position ensures all the departments are aware of the City's commitment to diversity within its contracting opportunities.



A minority male owner of a goods and services company had positive experiences at MWBE events hosted by the City:

I have benefitted from attending conferences where I can reach out to other small businesses. And being in-front of the mayor and the Chief Diversity Officers at the minority business panels. Staying in the loop helps you out.

A minority male owner of a professional services company also had a positive experience at City sponsored networking events:

I find the open houses and trade shows really beneficial because all of the City leaders attend. Anytime MWBEs can network with those involved in economic development is a good thing. Usually everyone from the City is there including all the key decision makers. It's in a relaxed environment and people know they are there to network.

K. Recommendations to Enhance the City's Procurement Standards

SUBCONTRACT DISPARITY ANALYSIS, CHAPTER 8

African Americans represent 21.15% of available subcontract professional services firms and received 14.02% of the subcontract dollars

∞

Caucasian Females represent 19.62% of the available subcontract professional services firms and received 12.06% of the subcontract dollars

The interviewees provided recommendations to enhance and expand the City's procurement standards to make them more transparent and efficient.

A minority male owner of a professional services company recommends mandatory MWBE goals and enhancements to the City's MWBE database:

The City needs MWBE goals that are enforced. They should be mandatory because good intentions don't get you very far. My other suggestion is to expand their database of MBEs to include specific information about the services they provide. Currently, I think the City has a list of MBE companies, but they really don't provide much information on what these companies do. They should provide information on what is their core business expertise and the services and products they provide. Without this information, looking for an MBE is like a shot in the dark.



A minority female owner of a professional services company recommends participation goals for MWBEs:

I talked to other minority architectural firms in the City and we all agreed that if the City really wants minority firms to lead architecture projects, then MBE or WBE goals are needed. That would be the only way a minority firm would be the lead.

A minority male owner of a construction company recommends goals for MWBEs and provisions requiring prime contractors to submit their list of subcontractors and award amount at the time of bid opening:

I think the City should use the data in the study to establish a numerical goal for MWBEs. All prime contractors should be required to name their subcontractors at bid time including the amount of the subcontract.

A minority male owner of a professional services company also suggests MWBE goals:

I think it would be great if the City had goals to increase MWBE participation. The goals should be on certain projects but not all of them. Then the MWBE certifications would seem valuable.

A minority male owner of a professional services company suggests a Sheltered Market Program:

I don't think small and minority business will grow until a sheltered market program is implemented. The goals need to have teeth by strengthening the accountability of the decision makers so that subcontractors that are listed in the proposals get the work. That would allow me to compete and increase my capacity to grow. It's scary for a lot of firms and some have decided the City is not a client that wants to work with us. I think this can diminish the value of the work that the City receives because they may end up paying more for services. Some MWBE firms charge less than some of the bigger firms, but they don't go after the work because they don't feel like they are going to get the work.



A minority male owner of a construction company recommends a financial assistance program for small companies to help offset the cost of start-ups:

The City needs a funding program. There are a lot of small contractors that need startup money. They might win the bid, but they could be out money for 90 days before the first check arrives. The City should invest in a capital financing program.

A minority female owner of a goods and services company suggests the City disseminate information describing its bidding procedures:

I recommend having someone that we could call for assistance when we are trying to submit a bid. We don't get any response when we seek assistance. If there was some way to get assistance even with a questionnaire that describes the City's purchasing procedures that would be helpful in terms of getting work from the City, so they don't keep using their same old vendors each time.

A Caucasian female owner of a professional services company recommends a mentor protégé program:

I would recommend a mentor protégé program. There should be two programs, one for construction firms and another for professional services. Once I was teamed with a large professional services business, and I received one-on-one mentoring that really made a difference in how I ran my business. I don't think the City has ever done that, but I would definitely mentor a smaller business. It would be a great way for the City to help small businesses because in the professional services arena, the teaming happens because they know each other. You have to learn to sell your company and your services, and people need to get to know you.

III. Summary

This chapter presented a qualitative analysis of the barriers and exemplary practices business owners experienced while working on or seeking work from the City. The interviewees were identified from business community meetings, certification directories, and outreach efforts. The anecdotes were solicited through one-on-one interviews and the public comment period at the business community meetings.

The interviewees referenced barriers to accessing contracts based on conditions such as the City's use of preferred contractors, the good old boy network, and delays in receiving payment. Commendations were given to the mission and services of the City's Supplier Diversity Program. Recommendations were offered to improve the Program's effectiveness in fulfilling its mission.



This anecdotal information, together with the statistical findings will inform the remedies presented in *Chapter 10: Recommendations*.



CHAPTER 10: Recommendations

I. Introduction

This chapter presents recommendations to address the disparities that were documented in the City of Columbus Disparity Study (Study). The Study included statistical analyses of minority and women-owned business enterprise (MWBE) disparity on construction, professional services (including architectural and engineering services), and goods and services prime contracts. The analysis also included construction and professional services subcontracts issued during the January 1, 2012, to December 31, 2015, study period. The chapter is organized into six sections: 1) *Introduction*; 2) *Disparity Analysis Findings*; 3) *Overview of the Equal Business Opportunity Program*; 4) *Race and Gender-Conscious Recommendations*; 5) *Enhancements to the Supplier Diversity Program*; and 6) *Race and Gender-Neutral Recommendation*.

II. Disparity Analysis Findings

The statistically significant findings of disparity in the award of both prime contracts and subcontracts were calculated in compliance with the constitutional parameters set forth in *City of Richmond v. J.A. Croson (Croson)*³¹⁶ and its progeny. The statistical findings of disparity summarized in this chapter are detailed in *Chapter 7: Prime Contract Disparity Analysis* and *Chapter 8: Subcontract Disparity Analysis*.

A. Number of Prime Contracts

As shown in Table 10.1, 20,972 prime contracts awarded by the City of Columbus (City) during the study period were analyzed. The prime contracts included 1,003 construction contracts, 2,463 professional services contracts, and 17,506 goods and services contracts.

The dollars the City awarded during the study period totaled \$1,747,495,767. Prime contract expenditures included \$985,673,556 for construction, \$409,660,816 for professional services, and \$352,161,395 for goods and services contracts.



³¹⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

**Table 10.1: Total Prime Contracts and Dollars Expended: All Industries,
January 1, 2012, to December 31, 2015**

Industry	Total Number of Contracts	Total Dollars Expended
Construction	1,003	\$985,673,556
Professional Services	2,463	\$409,660,816
Goods and Services	17,506	\$352,161,395
Total Expenditures	20,972	\$1,747,495,767

B. Number of Subcontracts

As shown in Table 10.2, 1,227 subcontracts were analyzed. The analysis included 887 construction and 340 professional services subcontracts. The subcontract dollars expended during the study period totaled \$275,833,736, including \$167,768,748 for construction subcontracts and \$108,064,989 for professional services subcontracts. The goods and services contracts were not included in the subcontract analysis since the subcontracting activity in that industry was limited.

**Table 10.2: Total Subcontracts and Dollars Expended: All Industries,
January 1, 2012, to December 31, 2015**

Industry	Total Number of Subcontracts	Total Amount Expended
Construction	887	\$167,768,748
Professional Services	340	\$108,064,989
Total	1,227	\$275,833,736

*The total and summed counts may differ due to rounding.

C. Prime Contract Disparity Findings

The prime contract disparity analysis was performed at two thresholds. One was the informal threshold defined by the City's Procurement Ordinance. The informal threshold for each industry is as follows:

- Construction - \$100,000 and under
- Professional services - \$50,000 and under
- Goods and services - \$20,000 and under

The second threshold included formal contracts defined in Title 3, Chapter 329 of the Ohio Code of Ordinances, Section 329.23 as contracts valued over \$100,000 for construction, over \$50,000 for professional services, and over \$20,000 for goods and services. The formal thresholds, as set



forth in Title 3, Chapter 329 of the Ohio Code of Ordinance, were modified for this analysis. As detailed in Chapter 3, *Prime Contract Utilization Analysis*, the prime contract dataset included a number of very large outliers that distorted the distribution of the dataset. Therefore, the formal threshold analyzed for the Study was limited to contracts within the 75th percentile of all contracts awarded by industry. Contracts beyond the 75th percentile were excluded from the analyses. The formal prime contract threshold used in this analysis for each industry is as follows:

- Construction – over \$100,000 to \$1,550,000
- Professional services – over \$50,000 to \$420,000
- Goods and services – over \$20,000 to \$180,000

A description of the disparity analysis outcomes is defined in Table 10.3 below.

Table 10.3: Statistical Outcome Descriptions

Disparity Analysis Outcome	Definition of Outcome
Disparity	This underutilization is statistically significant.
Underutilized	This underutilization is not statistically significant.
No Disparity	This utilization is at parity with or higher than availability.
----	While this group was underutilized, there were too few available firms to determine statistical significance.



1. Prime Contract Disparity Findings

Table 10.4 shows the prime contract disparity findings at two thresholds: 1) formal and 2) informal contracts by industry.

**Table 10.4: Prime Contract Disparity Summary by Industry,
January 1, 2012, to December 31, 2015**

Ethnicity/Gender	Construction	Professional Services	Goods and Services
	\$100,000 and Under	\$50,000 and Under	\$20,000 and Under
African American Males	Disparity	Disparity	Disparity
African American Females	Disparity	Disparity	Disparity
Asian American Males	Disparity	No Disparity (Overutilized)	No Disparity
Asian American Females	Underutilized	Disparity	No Disparity (Overutilized)
Hispanic American Males	No Disparity (Overutilized)	Disparity	----
Hispanic American Females	Underutilized	Underutilized	Underutilized
Native American Males	Disparity	----	----
Native American Females	Underutilized	No Disparity (Overutilized)	Underutilized
Caucasian Females	No Disparity (Overutilized)	Disparity	Underutilized
Ethnicity/Gender	\$100,000 to \$1,550,000	\$50,000 to \$420,000	\$20,000 to \$180,000
African American Males	Disparity	Disparity	Disparity
African American Females	Disparity	Disparity	Disparity
Asian American Males	Disparity	No Disparity (Overutilized)	Disparity
Asian American Females	Underutilized	Disparity	Disparity
Hispanic American Males	----	Disparity	----
Hispanic American Females	Underutilized	Underutilized	No Disparity (Overutilized)
Native American Males	Disparity	----	----
Native American Females	Underutilized	Underutilized	Underutilized
Caucasian Females	Underutilized	Disparity	Disparity

(----) denotes an underutilized group with too few available firms to test statistical significance.



D. Subcontract Disparity Findings

The subcontract disparity analyses were limited to the construction and professional services subcontracts issued by the prime contractors during the study period. As detailed in *Chapter 4: Subcontractor Utilization Analysis*, the subcontract data were compiled by the City in collaboration with Mason Tillman Associates, Ltd. (Mason Tillman).

1. Subcontract Disparity Findings

Table 10.5 shows the subcontract disparity findings by industry.

**Table 10.5: Subcontract Disparity Summary:
January 1, 2012, to December 31, 2015**

Ethnicity / Gender	Construction	Professional Services
African American Males	Disparity	No Disparity
African American Females	Disparity	Disparity
Asian American Males	Disparity	No Disparity (Overutilized)
Asian American Females	Underutilized	Underutilized
Hispanic American Males	No Disparity (Overutilized)	No Disparity
Hispanic American Females	Underutilized	Underutilized
Native American Males	----	----
Native American Females	Underutilized	Underutilized
Caucasian Females	Disparity	Underutilized

(----) denotes an underutilized group with too few available firms to test statistical significance.

III. Overview of the Equal Business Opportunity Program

The City's equal business opportunity programs date back three decades to 1989. The main objective of the programs has been to ensure MWBEs are afforded equitable opportunities to participate in the City's prime and subcontracts.

A. Race and Gender Specific Ordinances Implemented by the City

Since 1989, the City has enacted several ordinances intended to create equitable contract opportunities for MWBEs. The City's initial affirmative action program was promulgated in



January 1989 under Ordinance 29-89. The Ordinance established the Equal Business Opportunity (EBO) Code of 1989 and authorized minority and female-owned business goals in the award of construction subcontracts. The subcontracting goals were authorized at 21 percent for minority-owned businesses and 10 percent for female-owned businesses.

In 1989, the Central Ohio Division of Associated General Contractors of America (AGC) in *Associated General Contractors of America v. City of Columbus (AGC)* challenged Ordinance 29-89. *Croson*, which was decided January 23, 1989, required race-based remedies to be predicated on statistical evidence of discrimination in the government's award of its contracts. Ordinance 29-89 was not predicated on statistical findings of disparity. To settle the case, the City entered a consent decree and amended Ordinance 29-89 by removing the numerical quotas. The race neutral components of the EBO Program were unchanged.

In December 1993, the City enacted a new Equal Business Opportunity Code after completing a disparity study. The EBO Code of 1993 authorized race and gender-based preferences in the City's award of contracts. The City then petitioned the court to dissolve the consent order and permit the implementation of the EBO Code of 1993. Three years later, in August 1996, a trial was held to determine whether the new legislation and the evidence in the disparity study met the requirements of *Croson*.³¹⁷

The court concluded that the factual predicate relied upon to enact the EBO Code of 1993 did not establish that the City had been an active or passive participant in discrimination against minority or female-owned construction businesses in the City's geographic market area. In the 1996 decision, the court found the City's EBO Code of 1993 to be unconstitutional.³¹⁸

The court identified several flaws in the disparity study that were used to support the City's EBO Code of 1993. The court found that the evidence did not validate any institutional practices that were discriminatory against minority or female-owned construction businesses, nor did it demonstrate that the City's spending practices exacerbated a pattern of prior discrimination. Thus, the court decided that the City's EBO Code of 1993 was not narrowly tailored.³¹⁹

The City appealed the decision to the United States Court of Appeals for the Sixth Circuit (Sixth Circuit Court) on March 26, 1999. The Sixth Circuit Court found that the district court lacked jurisdiction because no case or controversy existed that precipitated the filing of the complaint.³²⁰ Specifically, AGC alleged that the racial and gender requirements of the EBO Code of 1993 could have the effect of preventing AGC's members, who regularly bid on public works contracts and subcontracts, from competing on an equal basis.³²¹ The district court's decision was therefore

³¹⁷ *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996), vacated and remanded, 172 F.3d 411 (6th Cir. 1999).

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Associated Gen. Contractors of America*, 172 F.3d at 421.

³²¹ *Id.* at 421-2.



vacated by the Sixth Circuit Court, with instructions to dismiss the case because AGC had no injured party.

In 2001, AGC filed a second complaint challenging the EBO Code of 1993, and the United States District Court for the Southern District of Ohio, Eastern Division, ruled that AGC proffered the same allegations as in its previous complaint without providing any additional evidence.³²² Again, AGC's complaint focused on actions that could discriminate against its members but failed to name an injured party. The court held that the complaint was not ripe for review.³²³ Furthermore, the City argued that the EBO Code of 1993 had not been effectuated or enforced. The City reported that it had not awarded any contracts nor intended to award any contracts subject to the provisions of the EBO Code of 1993.³²⁴ The court reasoned that since the issues were not ripe, the district court could only render an advisory opinion and not a binding legal ruling. Thus, AGC's appeal was denied and the case was dismissed in its entirety.³²⁵ The City's race and gender-neutral efforts to achieve equity in the award of its prime and subcontracts continued notwithstanding the legal challenges to the race and gender specific ordinances.

The statistical findings have revealed that parity has not been achieved in the award of prime contracts or subcontracts to willing and able MWBEs in the City's market area. The disparity findings found statistically significant underutilization documented at the prime level for contracts awarded by the City and at the subcontract level on contracts awarded by the City's prime contractors.

According to *Croson*, documented statistically significant underutilization of MBEs is discrimination.³²⁶ Thus, the City, according to *Croson*, has an obligation to remedy the documented effects of discrimination. In *Brunet v. City of Columbus*,³²⁷ the United States Court of Appeals for the Sixth Circuit, ruled that appropriate statistical evidence establishing a prima facie case of discrimination suffices as a strong basis in evidence for Ohio's local governments to enact affirmative action remedial measures. Given the Sixth Circuit's holding, the factual predicate documented in this Study, constitutes a sufficient factual predicate for the City to implement race and gender conscious remedies. Thus, the race and gender-conscious recommendations set forth in this chapter are narrowly tailored to the statistical evidence of discrimination documented in the Study. Given the obligation of government to address the documented discrimination in its market area, this chapter offers both race and gender-conscious and race and gender-neutral remedies to achieve parity in the City's award of both prime contracts and subcontracts to available MWBEs.

³²² *Associated Gen. Contractors of Am. v. City of Columbus*, 147 F. Supp. 2d 864 (S.D. Ohio 2001).

³²³ *Associated Gen. Contractors of America*, 147 F. Supp. 2d.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ 1 F.3d 390 (Sixth Circuit, 1993).



IV. Race- and Gender-Conscious Recommendations

This section presents prime contracts and subcontract race and gender recommendations to remedy the statistically significant findings of disparity documented in the Study. Pursuant to the *Croson* standard, the United States Supreme Court requires that race-conscious remedies are narrowly tailored to remedy documented statistically significant disparity in the award of contracts to available minority-owned businesses.³²⁸ *Croson* did not apply the strict scrutiny standard to women-owned businesses. Therefore, the intermediate standard applies to the statistical analysis of the utilization of women-owned businesses. The intermediate standard only requires evidence of underutilization.

A. Prime Contract Remedies

The recommended prime contract remedies would mitigate the adverse impact of the discrimination documented in the City's award of prime contracts. The proposed remedies include bid discounts for low bid prime contracts and evaluation points on professional service contracts when the award is not based on low bid.

1. Apply Bid Discount to Construction Prime Contracts

A bid discount for construction prime contracts should be implemented. The bid discount should be applied when ranking the prime contractor's bid amount. To determine the lowest bidder during the evaluation process, the bid amount for eligible MWBE bidders should be reduced by the discount percentage. The amount of the bid, as the basis for the bid award, should remain unchanged. The maximum discount should not exceed \$50,000. The eligible groups with statistically significant underutilization are listed in Table 10.6.

Table 10.6: Groups Eligible for Construction Bid Discount

Ethnicity/Gender
African American
Asian American
Hispanic American
Native American
Caucasian Female



³²⁸ *Croson*, 488 U.S.

2. Apply Bid Discount to Goods and Services Prime Contracts

A bid discount for groups with statistically significant disparity on goods and services prime contracts should be implemented. The bid discount should be applied when ranking the prime contractor's bid amount. To determine the lowest bidder during the evaluation process, the bid amount for eligible MWBE bidders should be reduced by the discount percentage. The amount of the bid, as the basis for the bid award, should remain unchanged. The maximum discount should not exceed \$50,000. The eligible groups with statistically significant disparity are listed in Table 10.7.

Table 10.7: Groups Eligible for Goods and Services Bid Discounts

Ethnicity/Gender
African Americans
Asian Americans
Hispanic American Females
Native American Females
Caucasian Female

3. Establish Evaluation Points for Professional Services Prime Contracts

Evaluation points for the groups with a disparity should be standard on professional services prime contracts. Evaluation points should be applied during the evaluation process to local professional services prime contractors who are members of the minority and gender groups that were underutilized at a statistically significant level. The eligible groups with statistically significant disparity are listed in Table 10.8. The eligible MWBE must also meet the requirements of a local business as defined in Title, 3, Chapter 329, Procurement of Goods and Services – Sale of City Property, Section 329.01(u).

Table 10.8: Groups Eligible for Professional Services Evaluation Points

Ethnicity/Gender
African Americans
Asian American Females
Hispanic Americans
Native American Females
Caucasian Females



B. Subcontract Remedies

Race- and gender-conscious remedies should apply to subcontracts awarded on construction and professional service contracts.

1. Construction Subcontract Goals

To meet the narrowly tailored standard, the subcontract goals should not exceed the availability levels of the groups that had a statistically significant disparity. Table 10.9 lists the construction subcontractor availability documented in the Study for the groups with a statistically significant disparity.

Table 10.9: MWBE Construction Subcontractor Availability

Ethnicity / Gender	Construction
African Americans	15.06%
Asian American Males	1.67%
Asian American Females	0.63%
Hispanic American Females	0.63%
Native American Females	0.63%
Caucasian Females	10.88%

2. Professional Services Subcontract Goals

African Americans had a statistically significant disparity on the professional services subcontracts awarded by the City's prime contractors. All women were underutilized on the professional services subcontracts awarded by the City's prime contractors.³²⁹ An MBE and WBE subcontract goal should be set to address the documented disparity. The MBE goal should apply to African Americans and Hispanic Americans, while the WBE goal should apply to all females.

To meet the narrowly tailored standard, the subcontract goals should not exceed the group's availability levels. Table 10.10 shows the professional services subcontractor availability documented in the Study for the groups with a statistically significant disparity.



³²⁹ The strict scrutiny standard set forth in *Croson* is not applicable to gender-based remedies. Intermediate standard, a less rigorous standard applies to gender-based remedies. Underutilization of a gender group is sufficient factual predicate to implement gender-based remedies.

Table 10.10: MWBE Professional Services Subcontractor Availability

Ethnicity / Gender	Availability
African American Females	8.29%
Asian American Females	2.88%
Hispanic American Females	0.72%
Native American Females	0.12%
Caucasian Females	19.23%

3. Require Subcontract Goal Attainment at Bid Opening

The prime contractor should be required to meet the MWBE subcontract goals at the time of bid opening with a certified business capable of performing a commercially useful function or document a good faith effort to do so. Bidders who fail to meet the goal with an MBE to perform a commercially useful function and wish to be considered for an award must document that a good faith effort was made to meet the goal. If the good faith effort documentation is not submitted with the bid or the submittal is not approved, the City should move to the next lowest bidder. If the commercially useful function requirement is not approved, the City should also move to the next lowest bidder. The next lowest bidder's response to the goal should be reviewed until a responsive bidder is identified. If no bidder is found to be responsive, the contract should be cancelled and re-advertised.

4. Quantify Good Faith Efforts Criteria

Good faith effort elements should be quantified to determine whether a prime contractor has provided sufficient evidence of a good faith effort to meet the MWBE subcontract goals. The maximum score should be 100 points. To be considered a responsive bidder, the prime contractor must demonstrate a bona fide good faith effort that is sufficient to achieve a minimum score of 80% of the required points. The following are examples of good faith elements and recommended point assignments:

a. Advertise (5 points)

Subcontracting opportunities for MWBEs should be advertised to certified MWBEs in three digital or print media outlets at least twice during the two weeks prior to the bid opening, except when advertisement in print media is required, unless the solicitation waives this requirement. Examples of the media outlets include general circulation media, minority-focused media, trade association publications, or trade-related publications. The advertisement should include the project name, the name of the bidder, areas of work available for subcontracting, contact person's name and telephone number, information on the availability of plans and specifications, date the subcontractor's written bid is due to the prime contractor, and assistance available to subcontractors in obtaining bonds, financing, and insurance.



b. Outreach to Identify MWBEs (15 points)

Prime contractors should communicate with MWBEs through personal and frequent contact by promptly returning telephone calls and emails. Correspondence logs should list the names of the business, the representative contacted, and dates of the contact. Copies of correspondence with each business contacted, including the responses received, should be a part of the good faith effort documentation. Documentation should also include facsimile transmittal confirmation slips or written confirmation of receipt by email with the date of transmission. At least three businesses should be contacted.

c. Attend the Pre-bid Meeting (5 points)

Attendance at the scheduled pre-bid meeting should be considered to comply with the good faith effort requirement. The prime contractor's name on the pre-bid meeting sign-in sheet should serve as documentation.

d. Provide Timely Written Notification (20 points)

Prime contractors should be required to solicit, in writing, subcontract bids from relevant MWBEs at least two weeks prior to the bid opening. Relevant businesses are those that could feasibly provide the goods or services required to satisfy the terms specified in the City's solicitation. When soliciting bids and proposals, the prime contractor should provide the project name, subcontract items, the primary contact person's name and telephone number, information on the availability of plans and specifications, and the date on which the subcontractor's written bid should be submitted. Documentation should also include facsimile transmittal confirmation slips or written confirmation of receipt by email with the date of transmission and the subcontractor's name and contact person.

e. Contact Follow-up (15 points)

Prime contractors should be required to promptly return the subcontractor's telephone calls, facsimiles, and emails after the initial solicitation. The follow-up should consist of a telephone call, facsimile, or email during normal business hours at least two weeks prior to the bid opening. The prime contractor should maintain correspondence logs that list the subcontractors who were contacted, including the results of the contact. The list should also include the names of the eligible businesses and contact persons, as well as telephone numbers, dates of contact, and notes regarding the outcome of said contact. The record should also identify the scope of work on which each subcontractor was asked to bid.

f. Identify Items of Work (15 points)

Subcontracts should be broken down into discrete items or bid packages that MWBEs may find economically feasible to perform. The documentation should list the specific items of work solicited from eligible businesses, as well as notices and advertisements targeting MWBE subcontractors.



g. Negotiate in Good Faith (15 points)

Prime contractors should negotiate fairly with interested MWBEs even if selection of the MWBE would nominally increase costs or the contractor could self-perform the work at a lower cost. Prime contractors may not unjustifiably reject bids, quotes, or proposals prepared by eligible businesses based on the subcontractor's standing within its industry, or on membership in a specific group, organization, association, and/or political or social affiliation. A written statement with names, addresses, and telephone numbers of subcontractors contacted and the negotiated price and services should be submitted. This list should include dates of the negotiations with businesses that could provide a commercially useful function, and document the bids received.

h. Assist in Securing Financing, Insurance, or Competitive Supplier Pricing (10 points)

Prime contractors should provide MWBEs with technical assistance regarding plans, specifications, and requirements of the contract in a timely manner to facilitate responses to solicitations. Prime contractors may not deny a subcontract solely because a certified MWBE cannot obtain a bond. And efforts should be made to assist interested businesses in obtaining the financing, bonds, and insurance at a competitive price if required by the City. The prime contractor should provide a written description of the type of assistance offered, the finance or surety company's name, contact person and telephone number, and the name of the person who provided the assistance, as well as the supplier that offered competitive pricing.

5. Verification of Commercially Useful Function

The determination of the certified businesses can perform a commercially useful function must be made at the time of bid opening. Title 39 of the Affirmative Action Code defines a commercially useful function as "the performance of real and actual services in the discharge of any contractual endeavor. Services are real and actual if such services would be provided in the normal course of conducting business or trade activities. The contractor must perform a distinct element of work which the business has the skill and expertise as well as the responsibility of actually performing, managing and supervising." The responsibility for demonstrating that the listed MWBEs can perform a commercially useful function is the sole responsibility of the prime contractor. The commercially useful function requirement should apply to all procurement activity, including change orders, substitutions, and task orders.

A business that performs a commercially useful function minimally does the following:

- Executes a distinct element of the contract scope of work
- Carries out its obligations by performing, managing, and supervising the assigned work involved and, in the case of a supplier, warehousing its materials, supplies, and equipment
- Performs work that is normal business practice for its industry
- Completes its scope of work and does not further subcontract portions of the work greater than that expected to be subcontracted by normal industry standards



V. Enhancements to the Supplier Diversity Program

The Supplier Diversity Program is the responsibility of the Office of Diversity and Inclusion (ODI). The ODI is authorized to implement the policies, and procedures to promote supplier and workforce diversity. ODI is responsible for assisting underserved, under-utilized, and economically disadvantaged businesses to gain access to City procurement opportunities and the resources necessary to build viable and sustainable businesses.³³⁰ The ODI is authorized to perform the following duties and responsibilities:

1. Enforce compliance with the Affirmative Action Code
2. Establish written policies and procedures to execute the Code
3. Develop and refine workforce policy and procedures
4. Develop, refine, and coordinate supplier diversity and procurement activities, such as outreach, solicitation for small contracts, bid specification review and prompt payment, and contract dispute resolution procedures
5. Develop, refine, and coordinate assistance programs, including financing, bonding and insurance, and technical assistance programs
6. Develop and coordinate a mentor/protégé program and on-the-job training demonstrations
7. Develop and refine MWBE certification procedures and coordinate with the Purchasing Department's vendor registration system
8. Consider price preferences and sheltered market solicitations
9. Investigate alleged violations of the Code
10. Analyze and review programs on an annual, bi-annual, or quarterly basis
11. Analyze, review, and recommend adjustments to the City's annual participation goals
12. Establish and review specific contract participation goals
13. Establish advisory committees to further the goals and objectives of the Code
14. Conduct periodic review of compliance with the Code's reporting requirements and provide recommendations to the Mayor and City Council regarding additional efforts necessary to ensure the effective operation of the ODI.³³¹

1. Certification Standards

The ODI administers the MWBE certification and verification process.³³² Eligible MWBEs are certified for a three-year period.³³³ To be eligible for certification, each applicant must meet the definition of a minority-owned business or women-owned business.³³⁴ Certified businesses should be required to submit a recertification application annually. The recertification application should

³³⁰ CITY OF COLUMBUS ORD. NO. 3025-2016, CH. 329 Affirmative Action Code §3902.01 (December 12, 2016).

³³¹ CITY OF COLUMBUS ORD. NO. 3025-2016, CH. 329 Affirmative Action Code §3902.01(A)-(N) (December 12, 2016).

³³² *Id.* at § 3905.02.

³³³ *Id.* at § 3905.03.

³³⁴ *Id.* at § 3905.02



require an affidavit certifying that the businesses still meets the eligibility standards. Every three years, a complete certification application should be required.

Certified MWBEs are graduated from the program if they exceed the three-year average gross revenue.³³⁵ Graduation standards should be eliminated from the certification eligibility standards.

a. MBE Certification

To qualify as an MBE, a business must be at least 51 percent owned, operated, and controlled by one or more minority citizens or resident aliens who are African American, Asian American, Hispanic American, or Native American.³³⁶ The minority owner(s) must maintain the authority to independently control day-to-day business decisions, possess and exercise the legal authority and power to manage business assets, and direct business operations.

b. WBE Certification

To qualify as a WBE, a business must be at least 51 percent owned, operated, and controlled by one or more-woman citizens or resident aliens.³³⁷ The woman owner(s) must maintain the authority to independently control day-to-day business decisions, possess and exercise the legal authority and power to manage business assets, and direct business operations.

c. Utilization Reporting Standards

A monthly utilization report must be submitted to the ODI for all contracts estimated to exceed 60 days. The prime contractor must submit the report on or before the tenth day of each month until the contract is completed. The report must comply with all submission requirements established by the ODI.³³⁸

The ODI is responsible for reviewing City contracting, compiling data, and conducting analyses of the effectiveness of the Affirmative Action Code.³³⁹ Quarterly utilization reports detailing contract awards, contract payments, and vendor registration data must be compiled.³⁴⁰ The ODI is required to conduct an annual review and evaluation of the effectiveness of the program, summarizing MWBE utilization. An annual progress report must be submitted to the City Council, containing an analysis of the utilization of certified businesses, recommendations for future action, and any information as requested by City Council.³⁴¹

³³⁵ CITY OF COLUMBUS ORD. NO. 3025-2016, CH. 329 Affirmative Action Code § 3905.04 (December 12, 2016).

³³⁶ *Id.* at § 3901.01(G); (J); (K); (M).

³³⁷ CITY OF COLUMBUS ORD. NO. 3025-2016, CH. 329 Affirmative Action Code § 3901.01(G); (M); (P) (December 12, 2016).

³³⁸ CITY OF COLUMBUS ORD. NO. 3025-2016, CH. 329 Affirmative Action Code § 3901.01(G); (M); (P) (December 12, 2016).

³³⁹ *Id.* at § 3906.05.

³⁴⁰ *Id.* at § 3906.05(A).

³⁴¹ *Id.* at § 3906.04.



A. *Supplier Diversity Program Recommendations*

The discrimination in the award of City contracts, as documented in this Study, is evidence that the race and gender-neutral Supplier Diversity Program has been ineffective in achieving full and equitable participation of all available MWBEs. The evidence of MWBE statistical disparity documented in *Section II: Disparity Analysis Findings* provides a sufficient predicate for the race and gender-conscious components recommended in this chapter. Additional recommendations are being offered to increase the utilization of MWBEs on the City's contracts.

1. Incentives for MWBE Joint Ventures

As set forth in Title 39, joint ventures with MWBEs are encouraged to increase contracting opportunities with the minority and women business owners. When economically feasible, ODI is urged to establish joint ventures to ensure prime contracting opportunities for certified MWBEs on eligible projects or contracts. The joint venture policy should be expanded to include incentives to encourage joint ventures that include MWBE firms. Evaluation points could be assigned to a joint venture with significant MWBE participation.

2. Fully Staff the Office of Diversity and Inclusion

The staff should be augmented to support the responsibilities of ODI. The Office of Diversity and Inclusion should be staffed with an adequate number of experienced professionals to ensure that the program components can be fully implemented and compliance with the Program can be effectively monitored. The staff should include individuals with technical skills, knowledge and abilities sufficient to manage the rigorous program being proposed. Additionally, the City should establish the position of Office of Diversity and Inclusion Ombudsman to mediate disputes between MWBEs and prime contractors or City managers. Minimally, the technical staff that report to the Chief Diversity Officer of the Office of Diversity and Inclusion should include:

- **Contract Compliance Manager:** Assists the Chief Diversity Officer in managing the Supplier Diversity Program, oversees pre-award compliance with the Program requirements stipulated in the solicitation, and monitors post-contract compliance to ensure that the contract provisions are adhered to during the term of the contract. The Contract Compliance Manager must demonstrate proficiency in Microsoft Office Suite, knowledge of construction and construction-related procurement processes, and the ability to work with a variety of individuals with diverse interests and backgrounds.
- **Certification Analyst:** Perform site visits and advise applicants on the status of their applications, including whether they are suitable for evaluation. The Certification Analyst will also participate in business outreach activities to increase the number of certification applications submitted. The Certification Analyst must demonstrate proficiency in Microsoft Office Suite, business record auditing skills, knowledge of construction and construction-related procurement processes, and the ability to work with a variety of individuals with diverse interests and backgrounds.



- **Contract Compliance Specialist:** Monitors MWBE contract compliance and MWBE contractor and subcontractor project participation, investigates complaints, ensures contracts are properly and legally executed, and creates a profile of each contractor by preparing a site visit report. The Contract Compliance Specialist must demonstrate proficiency in Microsoft Office Suite, knowledge of construction, professional services and goods and services procurement processes, and the ability to work with public officials and the general public as well as with a variety of individuals with diverse interests and backgrounds.
- **Data Analyst:** Compiles, verifies, and reports data measuring the user department's compliance with contract goals and monitoring requirements. The Data Analyst manages the data management system to ensure it can generate the reports required to measure compliance with Title 39, Affirmative Action Code. In addition, the Data Analyst manages all solicitations received from the user departments and develops comprehensive outreach strategies to meet the MWBE goals using digital media vehicles. The Data Analyst must demonstrate proficiency in Microsoft Office Suite, knowledge of databases, design, data collection, and manipulation, and the ability to work with a variety of individuals with diverse interests and backgrounds.
- **Ombudsperson:** Provides dispute resolution services and direct investigations of complaints from user departments, as well as from prime contractors and subcontractors. The Ombudsperson must demonstrate proficiency in Microsoft Office Suite, knowledge of legal and mediation training methods and construction, professional services, and goods and services procurement processes, as well as the ability to work with a variety of individuals with diverse interests and backgrounds.

3. Create a Business Advisory Council

Title 39, Affirmative Action Code, authorizes the Office of Diversity and Inclusion to establish committees and advisors to achieve the goals of the Code. To support the ODI in meeting the proposed MWBE prime contract and subcontract initiatives, the City should establish a Business Advisory Council (BAC), appointed by the Mayor and approved by the City Council, to serve as an advocate for MWBEs. The BAC would serve as an advisory council to ODI and be responsible for:

- Increasing access to contracting opportunities for MWBEs
- Reviewing and advancing initiatives that impact MWBE participation
- Enhancing the notification process regarding prospective contract opportunities

The BAC membership and guidelines should be published on the Office of Diversity and Inclusion's webpage. The BAC should include five, but not more than nine, members and a member should not serve more than one term. Members should serve for staggered terms of three years. Initially up to four members should be appointed for a term of three years, up to three



members should be appointed for a term of two years, and up to two members should be appointed for a term of one year.

The Mayor should designate and appoint a Chairman and the committee would elect a Secretary who shall each serve for three years. The committee should monitor the effectiveness of the City's program and make such recommendations to the Office of Diversity and Inclusion.

4. Supplier Diversity Program Training Manual

A Supplier Diversity Program Training Manual describing the Program's mission, policy, and procedures should be available to all staff electronically and be downloadable from the Office of Diversity and Inclusion webpage. The *Supplier Diversity Program Training Manual* should be developed to standardize the delivery of the Program's requirements within the City departments. The manual could ensure that staff in all departments have the knowledge and skills to fulfill their Supplier Diversity Program duties. The requirements set forth in the manual should become standard operating procedure in each department. The *Training Manual* would also provide staff with clear guidance on its responsibilities to track and report the participation of MWBEs. The *Training Manual* should also be incorporated into a new employee orientation.

5. Supplier Diversity Program Training

The Office of Diversity and Inclusion should conduct routine training to ensure all personnel are knowledgeable about the Supplier Diversity Program requirements and capable of supporting the Program and its policies and objectives. The training programs should minimally include:

- Annual training seminar - to inform staff of any changes to the Supplier Diversity Program policy and procedures, and to promote the Program enhancements.
- New employee training - to ensure that new employees understand the established policies and procedures. A printed copy of the Supplier Diversity Program Training Manual should be provided to each new City employee. The training should be conducted quarterly.

6. Conduct an Outreach and Marketing Campaign

Promotion of the expanded race and gender-conscious and neutral components of the Supplier Diversity Program should be executed to encourage local businesses to apply for certification through a comprehensive outreach campaign and marketing campaign. The outreach campaign should communicate the goals and objectives of the Program to MWBEs. The following outreach and marketing objectives should be considered:



- Collaborate with minority and women business trade associations, chambers, and advocacy groups to publish contracting opportunities and recommendations resulting from this Study on their websites.
- Provide networking opportunities at pre-bid and pre-proposal conferences and certification workshops.
- Host marketing forums that allow MWBEs to deliver technical presentations on the services that they provide directly to City staff with contracting authority. The forums should be industry-specific and held on a quarterly basis.
- Enhance the City's digital presence by releasing an MWBE business development newsletter with corresponding e-notifications to certified businesses regarding contracting opportunities. Publish the newsletter regularly—newsletters can supplement procurement email notification systems and enhance communication with MWBEs. The City should use a monthly digital publication as a tool to keep business owners updated on important announcements. The newsletter should provide detailed information on upcoming projects, project status, and City announcements, including networking opportunities and upcoming capacity building workshops. The newsletter should be published on schedule each month and remain on the City's website for at least 36 months.

VI. Race- and Gender-Neutral Recommendations

Race and gender-neutral recommendations are offered to expand the responsibility of the ODI to more effectively address the barriers that market area MWBEs encounter while trying to do business in the City.

A. Pre-Award Recommendations

1. Create a Uniform Procurement Manual

It is the City's policy to use sound procurement practices to increase the participation of MWBEs and other small businesses on its contracts. Uniform procurement procedures can establish standards to eliminate inconsistencies in the contracting process. A uniform procurement manual is an excellent tool for establishing and maintaining fixed procurement standards for all City departments. It can also be used as a curriculum tool for training staff and new hires.

The procurement practices delineated in the manual should simplify and clarify the City's procedures concerning the solicitation and evaluation of competitive sealed bids, proposals and quotations, small purchases, sole source procurements, and emergency procurements. Guidelines for publishing the procurement process should also be implemented to increase the transparency and uniformity of each department's role and responsibility in the procurement process.



2. Implement One-Step Process to Obtain Registration, Certification and Prequalification Status

The City should centralize the process for vendors to obtain information on the vendor registration, MWBE certification, and pre-qualification application process status. Currently, the process for vendors to obtain their status are managed separately and the required forms and applications are maintained in different locations in both electronic and hardcopy format. A centralized system is needed for vendors and City staff to determine whether a vendor is compliant with the City's pre-qualification, registration, and MWBE requirements.

3. Re-evaluate the Construction Prequalification Requirements

To bid on a construction contract, the construction prime contractor and trade subcontractors that seek to perform any portion of work on a construction contract must be prequalified as responsible or prequalified as provisionally responsible before responding to a solicitation. The prequalification application must be resubmitted on an annual basis.³⁴² Many of the prequalification requirements for both prime contractors and subcontractors could be a barrier to participation by MWBE and other small businesses. It may also be a barrier to businesses that are not aware of the requirement to be prequalified at the time of bid opening.

The documents that a contractor must have in place when applying for prequalification are excessive and expensive to maintain. And they must be maintained in anticipation of receiving a solicitation to bid. Some of the costs associated with the prequalification documents would not otherwise be incurred unless the contractor elected to submit a bid in response to a City solicitation.

Together, MBE prime contractors and subcontractors represent 19.67% of the City's available construction contractors but received only 6.07% of all construction dollars during the study period. This low level of utilization is particularly significant because MWBEs were underutilized on the City's small contracts before the prequalification requirement was adopted.

The City should consider best management strategies that increase MWBEs access to and capacity for construction contracts. Pursuant to best management practices, government agencies are directed to ensure "that prequalification procedures are not used to restrict full and open competition."³⁴³ Furthermore, agencies are cautioned against crafting unnecessary technical prequalifying requirements during the procurement planning stage that can limit competition. The mandatory criteria used to determine eligibility for prequalification include:

- Current and valid worker's compensation insurance policy or is legally self-insured
- Current and valid unemployment compensation insurance policy.
- Affidavit at the time of bid submission stating that the applicant will provide a bid bond, certified check, cashier's check, or letter of credit for the amount specified in the bid; and



³⁴² CITY OF COLUMBUS ORD. NO. 3062-2014, CH. 329 *Procurement of Goods and Services – Sale of City Property* §329.21(a); 329.21(f) (December 15, 2014).

³⁴³ *Best Practices Procurement & Lessons Learned Manual*, Federal Transit Administration (October 2016 FTA Report No. 0105).

a notarized letter from its surety company dated within the last thirty days that is signed by the surety company's attorney in fact. The letter should also include the surety power of attorney provided that the surety is prepared to provide a performance and payment bond.

- Signed affidavit agreeing to make the business entity's financial statement for the most recently completed fiscal year available to the City for viewing upon request.
- Confirmation that the applicant is not currently debarred or otherwise disqualified from bidding on or completing work on any government agency or public works project.
- Confirmation that the applicant is either current and compliant in the payment of any City of Columbus taxes on payroll and net profits or is not current and compliant in the payment of any city of Columbus taxes on payroll and net profits; and that the applicant has entered into an agreement to pay any delinquency and is abiding by the terms of the agreement at the time such proof is submitted.

The applicant must also affirmatively meet at least three of the following five criteria:

- A local workforce as defined in Title 3, Chapter 329, Section 329.01
- Employees meet the quality training criteria as defined Section 329.01, provided that, for purposes of full inclusion and creation of entry-level opportunities in the construction trades, up to ten percent of a business entity's employees performing licensed construction trade work in Ohio may be participating in pre-apprenticeship programs, career technical programs, or otherwise have less training and experience.
- Health insurance as defined in Section 329.01
- Retirement or pension plan as defined in Section 329.01
- Local business as defined in Section 329.01

If the above requirements are met, the following criteria are used to determine “responsibility prequalification” by confirming whether the applicant has:

- Been debarred or otherwise disqualified from bidding on or completing work on any government agency or public works project within the last five years.
- Received an unsatisfactory judgment, as defined in Section 329.01, in which a conviction was imposed for any crime related to its business conduct within the last ten years.
- Received an unsatisfactory judgment, as defined in Section 329.01, in which civil liability was imposed concerning the applicant’s bid for and/or work on any public or private construction project within the last five years.
- A history of breach of contract, or inferior or substandard performance on projects that have resulted in litigation being brought forth by the city within the last five years.
- A record of claims against bonds secured on any public construction project within the last five years.
- Been assessed or paid liquidated damages for any construction project with either a public or private owner within the last five years.
- A record of unsatisfactory judgments, as defined in Section 329.01, with any applicable federal, state, and local laws and regulations within the last five years.



- A record of unsatisfactory judgments, as defined in Section 329.01, with any applicable affirmative action programs, or any local, state, or federal laws prohibiting discrimination against job applicants or employees within the last five years.
- A record of unsatisfactory judgments, as defined in Section 329.01, with Ohio's Drug-Free Workplace requirements, pursuant to Ohio Revised Code Section 153.03 or a successor to that section, within the last five years.

The requirements should also be assessed to identify unintended barriers to the participation of MWBEs. In addition to re-evaluating the criteria as detailed in Chapter 329 of the City Code, consideration should be given to establishing a contract threshold for invoking the prequalification requirements. A re-evaluation of the application of the prequalification requirement is particularly germane given the size of the City's prime contracts. The prime contract utilization analysis determined that 475 construction contracts valued under \$50,000 were awarded by the City during the study period. MBEs only received 31 of the 475 contracts, which represented 3% of the total dollars on contracts valued under \$50,000. For contracts valued under \$5,000, MBEs received only 0.20% of the total dollars. These statistics are no doubt influenced in some meaningful way by the number of MWBEs that are prequalified.

Furthermore, on smaller contracts, the City's bonding requirements are sufficient to address the risk protected through the prequalification process. Each construction bid requires a bid guarantee and/or performance bond. The bid guarantee must be a minimum of ten percent of the bid amount and the performance bond is a minimum of 50 percent of the contract amount or as identified in the invitation for bid. Based on the best management practices and the City's rigorous guarantee bond and performance bond requirements, the construction pre-qualification requirements should be reassessed to ensure that they do not serve as a barrier to MWBE and other small contractors' participation.

4. Evaluate the Use of Universal Term Agreements

Universal term contracts (UTC) are awarded on construction, professional services, and goods and services procurements. Under a UTC contract, any department can purchase directly from the vendor without soliciting bids if the total expenditures do not exceed \$100,000 in any fiscal year. A department, with City Council approval, can exceed the \$100,000 limit for the fiscal year.

The use of UTCs should be reviewed to determine the number of small contract opportunities removed from competition because they are awarded to one vendor under a UTC. The UTC solicitation should apply the race and gender remedies for prime and subcontracting.

5. Revise Informal Bid Process

The City should require that the solicitation of quotes for informal bids include at least one MWBE. For informal construction and professional services solicitations, City departments should be required to obtain at least one quote from the M/WBEs that were found to have a statistically significant disparity.



6. Implement Sheltered Market Program

A Sheltered Market Program should be implemented to maximize the award of contracts valued at \$20,000 and under to minority, woman-owned, and other small business enterprises. The program should limit competition for contracts valued at \$20,000 and under to participating M/WBEs and other small businesses. The Program should minimally include the following components:

- Program standards
- Rotational contracts and notification to eligible businesses
- Eligibility standards
- Application process
- Eligible business participation database
- Communication and outreach plan
- Standards for tracking and reporting contract awards
- Contract selection criteria
- Management criteria
- Staff training

7. Implement an Owner-controlled Insurance Program

An Owner Controlled Insurance Program (OCIP) should be established to consolidate risk management costs and reduce the burden of the insurance premium for MWBEs and small business owners. Under an OCIP, a single insurance program provides coverage for the owner and all eligible (on-site) project contractors and subcontractors. An OCIP could be established in cooperation with other local governmental agencies. The City and any other participating governmental agencies would benefit as well, since the vendor passes the fee for the surety bond to the City in its pricing.

8. Establish an Unbundling Policy

Large multi-year contracts should be unbundled into smaller projects when feasible to increase the number of businesses participating at both the prime contracting and subcontracting levels. Conditions that are often conducive to unbundling solicitations for construction and design services include the following:

- Projects with phased delivery of the work
- Projects conducted at multiple locations
- Specialty work, such as signage, public art, demolition, trucking, traffic studies, and surveying



9. Provide Debriefing Sessions for Unsuccessful Bidders

Debriefing sessions can provide vital information to help small businesses prepare more competitive submittals. The City provides debriefing sessions if requested. The City should publish the option for a debriefing session on its website for all unsuccessful bidders. The sessions should be provided by the purchasing department and include participation of the awarding department. The procedures for scheduling the debriefing session should be set forth in the solicitation and the bid award notice. Prior to the debriefing session, the bidder should be provided a copy of the evaluation scores and the winning bid.

10. Enhance Solicitation Requirements

When soliciting bids, proposals, and statements of qualifications for construction and professional services contracts, City departments should be required to adhere to the following affirmative steps:

- Ensure that the gender and ethnic groups that were found to have a disparity are solicited for construction, professional services, and goods and services prime contracts
- Include lists of potential proposers from the Supplier Diversity Program
- Conduct outreach to the identified MWBEs before the request for proposals is released to notify them of upcoming opportunities
- Email the notice of opportunities to the listed potential MWB proposers
- Maintain an email log of all MWBEs solicited for construction, professional services, and goods and services contracts

11. Establish a Designated Design Consultant Selection Committee

A Design Consultant Professional Services Selection Committee should evaluate design professionals' proposals and statements of qualifications. The Committee should be authorized to make the recommendation for award. The Committee should reflect the City's ethnic and gender diversity. In addition to staff, the Committee should minimally include two minority and women panel members who are architecture and engineering professionals or have professional experience in the related fields. A designee from the Office of Diversity and Inclusion should also be a voting member of the Committee. All panel members should be required to sign a conflict of interest statement to foster transparency in the City's procurement process. The Committee members should not be actively engaged in professional consulting or employed by a design consulting firm.

12. Waive Bond Requirements on Small Contracts

Bonding requirements should be waived when the engineer's estimate is less than \$25,000. A small contracts bond waiver provision could serve as a significant incentive for small businesses to bid on City projects, potentially increasing the number of MWBEs awarded small contracts.



B. Post-Award Recommendations

1. Standardize Subcontractor Substitution Standards

Standards for formal subcontractor substitution should be included in each solicitation and prime contract. The standard should require the prime contractor to provide a written request to substitute a listed subcontractor providing the reason for the substitution. Due process should be afforded the subcontractor, who should be notified in writing of its prime contractor's request for substitution.

2. Enhance the City's Financial Management System

The process of securing the City's prime and subcontract data evidenced a decentralized and fragmented management of the contracting and procurement data needed to track and verify contracts awarded during the study period. The City's financial management system to track and monitor prime contract data for construction, professional services, and goods and services procurements should be centralized to improve the management of contracts and compliance with MWBE utilization requirements. Additionally, the system should have the capacity to interact with each City department's accounting database for City-wide uniformity.

Critical information was missing from the prime contract dataset maintained by the City's financial management system. Mason Tillman recommends several modifications to track comprehensive MWBE and non-MWBE prime contractor and subcontractor data:

- Centralize the financial management system
- Develop a Subcontractor Payment Verification Program to include complete contact information for each subcontractor and the subcontractor award and payments on the first two tiers
- Implement a cloud-based contract compliance reporting system to track the participation of all subcontractors, subconsultants, suppliers, and truckers for the duration of each contract as detailed below:

A subcontract monitoring system should be incorporated into a relational database application to allow for linking the subcontractor data to the appropriate prime contract. The prime contracts should be coded in the solicitation by industry classification using North American Industry Classification System (NAICS) code.

Currently, City departments provide the Office of Diversity and Inclusion with the Subcontractor Reporting Form in hardcopy format. A data-tracking application with a cloud-based interface should be implemented to allow virtual submission of the required data by prime contractors and subcontractors, thereby eliminating the need for the City to enter the information into its system. Computerized data entry forms could be designed to capture all the necessary information required to produce the required utilization reports. The required information could be entered into the tracking system directly by the prime contractor and subcontractor. Customized queries designed in the contract monitoring system would analyze the data to identify any omissions in the forms or contradictions in the subcontract data entered by the prime contractor and subcontractor.



Standard reports could be designed to meet the MWBE reporting requirements. Queries necessary to generate the reports could be designed to run automatically. The reporting module could list the different reports. The user would simply have to point, click, and print the named report.

3. Institute a Subcontract Payment Verification Program

The proposed data tracking application should also monitor compliance with the City's prompt payment policy set forth in the Ohio Revised Code Section 4113.6. The application should allow subcontractors to notify the City of late payments or non-payments in real time. In addition, each subcontractor listed as paid for the previous billing cycle could be contacted electronically to verify that payment was received. The verification program would eliminate reliance on self-reporting by the prime contractors.

If a subcontractor reports a discrepancy in the amount actually received from the prime contractor, the discrepancy should be resolved before any additional payments are made to the prime contractor. The simplest resolution is to have the prime contractor submit to the City with each invoice an image of the cancelled check written to the subcontractor to pay for the previous invoice. The payment verification program should be published on the City's website, in solicitation documents, and in contract documents. The prime contractors' compliance with the payment verification program should be a mandatory provision of the prime contract.

4. Publish Prime Contractor Payments

Prime contractor payments should be posted on the City's website to allow subcontractors to track the City's payments of prime contractor's invoices. Payment data should be updated weekly or bi-weekly on the same day of the week. The reported prime contract payment information should be searchable by contract number, project name, and prime contractor name. This system would enable subcontractors and suppliers to track the disbursements to their prime contractors in real time and thereby eliminate the subcontractor's need to ask the City for the status of its prime contractor's invoice payment.





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