

SHELBY COUNTY
Disparity Study
Draft Final Report

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CHAPTER 1: Legal Analysis

I. Introduction

This chapter presents the constitutional standard utilized by federal courts to review local governments' minority business enterprise contracting programs. The standard is set forth in the 1989 United States Supreme Court decision of *City of Richmond v. J.A. Croson Co.*¹ and its progeny. *Croson* reviewed the City of Richmond's locally funded Minority Business Enterprise (MBE) Program and established the most stringent evidentiary standard of review for race-based programs. *Croson* announced that programs employing racial classification would be subject to "strict scrutiny," the highest legal standard. Broad notions of equity or general allegations of historical and societal discrimination against minorities fail to meet the requirements of strict scrutiny. Where there are identified statistical findings of discrimination sufficient to warrant remediation, the remedy also must impose a minimal burden upon unprotected classes.

In 2007, the Board of County Commissioners passed Ordinance No. 324 adopting a race- and gender-neutral Locally Owned Small Business Program. If there is evidence of statistically significant underutilization of available minority and woman-owned businesses, the County's Locally Owned Small Business Program may be amended to employ race- and gender-conscious remedies to address the disparities. Those race- and gender-conscious measures would be subject to the strict scrutiny standard set forth in *Croson*.

II. Standard of Review

In this context, the standard of review refers to the level of scrutiny a court applies during its analysis of whether a particular law is constitutional. This chapter discusses the standards of review applied to remedial programs based on various classifications, including the heightened standard of review that the United States Supreme Court set forth in *Croson* for race-conscious programs.

1. Minority Business Enterprise Programs

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.² Specifically, the government must show that the race-conscious remedies are narrowly tailored to achieve a compelling state interest.³ The Court recognized that a state or local entity may take



¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989).

² *Croson*, 488 U.S. at 493-95.

³ *Croson*, 488 U.S. at 493.

action, in the form of an MBE program, to rectify the effects of *identified, systemic racial discrimination* within its jurisdiction.⁴ 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.⁵

2. Women Business Enterprise Programs

Since *Croson*, which dealt exclusively with the review of a race-conscious plan, 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 which gender is favored.

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.⁶ Intermediate review requires the governmental entity to demonstrate that the action taken furthers an “important governmental objective” employing a method that bears a fair and substantial relation to the goal.⁷ The courts have also described the test as requiring an “exceedingly persuasive justification” for classifications based on gender.⁸ 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.”⁹

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 programs¹⁰. The Third Circuit held that, whereas

⁴ *Croson*, 488 U.S. at 509.

⁵ *Id.* 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 provides fairly detailed guidance on how those concepts are to be treated in contracting. In education and employment, the concepts are not explicated to nearly the same extent. Therefore, references in those cases to “compelling governmental interest” and “narrow tailoring” for purposes of contracting are essentially generic and of little value in determining the appropriate methodology for disparity studies.

⁶ *See Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 930 (9th Cir. 1991); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*Philadelphia VT*”), 91 F.3d 586, 596-98 (3d Cir. 1996); *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 & County of Denver*, 321 F.3d 950, 960 (10th Cir. 2003) (“*Concrete Works*”); and *H.B. Rowe Co. v. Tippet*, 615 F.3d 233, 236 (4th Cir. 2010).

⁷ *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*”).

⁸ *Hogan*, 458 U.S. at 751; *see also Mich. Rd. Builders Ass’n, Inc. v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987).

⁹ *Hogan*, 458 U.S. at 728; *see also Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

¹⁰ *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*Philadelphia IV*”), 6 F.3d 990, 1001 (3d Cir. 1993).



MBE programs must be “narrowly tailored” to a “compelling state interest,” WBE programs must be “substantially related” to “important governmental objectives.”¹¹ 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.¹²

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.”¹³ 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.¹⁴

The Eleventh Circuit also applied intermediate scrutiny.¹⁵ 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 United States Court of Appeals cited the Third Circuit’s 1993 formulation in *Philadelphia*: “[T]his standard requires the [County] to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.”¹⁶ Although the Dade County II appellate court ultimately applied the intermediate scrutiny standard, it queried whether the United States Supreme Court decision in *United States v. Virginia*,¹⁷ finding the all-male program at Virginia Military Institute unconstitutional, signaled a heightened level of scrutiny.¹⁸ 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.¹⁹ 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.”²⁰

¹¹ *Philadelphia IV*, 6 F.3d at 1009-10.

¹² *Id.* at 1002.

¹³ *Associated Gen. Contractors of Cal. v. City & Cnty. of San Francisco*, 813 F.2d 1401, 940 (9th Cir. 1991) (hereinafter “AGCC I”).

¹⁴ *Ballard*, 419 U.S. at 508.

¹⁵ *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1579-80 (11th Cir. 1994).

¹⁶ *Dade County II*, 122 F.3d 895, 909 (1997) (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.”).

¹⁷ *Virginia*, 518 U.S. at 534.

¹⁸ *Dade County II*, 122 F.3d at 907-08.

¹⁹ *Virginia*, 518 U.S. at 534.

²⁰ *Dade County II*, 122 F.3d at 908.



In *Dade County II*, the Eleventh Circuit court noted that the Third Circuit in *Philadelphia* was the only federal appellate court that explicitly attempted to clarify the evidentiary requirement applicable to WBE programs.²¹ *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.’”²²

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;²³ 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”²⁴ but instead ensuring that the affirmative action is “a product of analysis rather than a stereotyped reaction based on habit.”²⁵

This determination requires “evidence of past discrimination in the economic sphere at which the affirmative action program is directed.”²⁶ 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.”²⁷

3. Local Business Enterprise Programs

In *AGCC I*, a pre-*Croscon* 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.²⁸

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.²⁹ 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

²¹ *Dade County II*, 122 F.3d at 909.

²² *Id.* at 910.

²³ *Id.* (quoting *Ensley Branch*, 31 F.3d at 1580).

²⁴ *Id.* (quoting *Hayes v. N. State Law Enforcement Officers Ass’n.*, 10 F.3d 207, 217 (4th Cir. 1993) (racial discrimination case)).

²⁵ *Id.* (quoting *Philadelphia IV*, 6 F.3d at 1010).

²⁶ *Id.* (quoting *Ensley Branch*, 31 F.3d at 1581).

²⁷ *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.).

²⁸ *AGCC I*, 813 F.2d at 943; *Lakeside Roofing Company v. State of Missouri*, et al., 2012 WL 709276 (E.D. Mo.).

²⁹ *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319–320 (1993)).



review.³⁰ 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.³¹ 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.³²

San Francisco conducted a detailed study of the economic disadvantages faced by San Francisco-based businesses as compared to businesses located in other jurisdictions. The study showed a competitive disadvantage in public contracting for businesses located within the City as 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."³³

4. Small Business Enterprise Programs

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.³⁴

In 1999, the Fifth Circuit affirmed that an agency contemplating an M/WBE program should demonstrate evidence that expressly links evidence of racial discrimination sufficient to demonstrate a compelling governmental interest in establishing an M/WBE Program specifically to the agency itself.³⁵ In *W.H. Scott Constr. Co. v. City of Jackson*, the Court criticized the City of Jackson for commissioning a disparity study, without subsequently adopting measures to target existing disparities identified in the findings of the study.³⁶

³⁰ *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. at 2080.

³¹ *Lakeside Roofing Company v. State of Missouri*, et al., 2012 WL 709276 (E.D. Mo.); see SULLIVAN, KATHLEEN M. & GUNTHER GERALD, CONSTITUTIONAL LAW FOUNDATION PRESS, New York, NY.16th ed. Chapter 9 (2007).

³² *Croson*, 488 U.S. at 515.

³³ *AGCC I*, 813 F.2d at 943.

³⁴ *Doe 1 v. Lower Merion Sch. Dist.*, 689 F. Supp. 2d 742, 748 (E.D. Pa. 2010).

³⁵ *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)).

³⁶ *Id.* at 218.



III. 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:³⁷

- Disparity exists due to race-neutral reasons,
- Methodology is flawed,
- Data are statistically insignificant, or
- 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.³⁸ Whether the government has produced a strong basis in evidence is a question of law.³⁹ The defendant in a constitutional claim against a disparity study has the initial burden of proof to show that there was past discrimination.⁴⁰ Once the defendant meets this initial burden, the burden of proof then shifts to the plaintiff to prove that the program is unconstitutional. Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.⁴¹ The adequacy of the government's evidence is “evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction].”⁴² The onus is upon 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.⁴³

³⁷ *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).

³⁸ *Philadelphia VI*, 91 F.3d at 586 (citing *Concrete Works of Colo. v. Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994)); see *Croson*, 488 U.S. at 510.

³⁹ *Id.* (citing *Associated Gen. Contractors v. New Haven*, 791 F. Supp. 941, 944 (D. Conn. 1992)).

⁴⁰ *Concrete Works of Colo. v. Denver* (“*Concrete Works I*”), 36 F.3d 1513, 1521-22 (10th Cir. 1994) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292 (1986)).

⁴¹ *Concrete Works I*, 36 F.3d at 1522.

⁴² *Concrete Works I*, 36 F.3d at 1522 (citing *Croson*, 488 U.S. at 498).

⁴³ See *Croson*, 488 U.S. at 488.



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.⁴⁴ 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.

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*”).⁴⁵

[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.”⁴⁶

In *Philadelphia VI*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether facts constitute a “strong basis” in evidence for race-based remedies.⁴⁷ That Court wrote that the allocation of the burden of persuasion is dependent upon 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.⁴⁸ 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.⁴⁹

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.⁵⁰

⁴⁴ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78, 293 (1986).

⁴⁵ *Wygant*, 476 U.S. at 277-78 (O’Connor, S., concurrence).

⁴⁶ *Wygant*, 476 U.S. at 277-78.

⁴⁷ *Philadelphia VI*, 91 F.3d at 597.

⁴⁸ *Id.* at 597.

⁴⁹ *Philadelphia VI*, 91 F.3d at 597-598.

⁵⁰ 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.



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.”⁵¹ 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 below in Section IV.

IV. *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 of past discrimination, and the race-conscious remedy must be “narrowly tailored,” as set forth in *Croson*.⁵² A summary of the appropriate types of evidence to satisfy the first element of the *Croson* standard follows.

A. *Active or Passive Participation*

Croson requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program.⁵³ 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.⁵⁴ An entity will be considered an “active” participant if the evidence shows it has 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.⁵⁵

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 a government entity infusing its tax dollars into a discriminatory system can satisfy passive discrimination.⁵⁶

⁵¹ *Concrete Works of Colo., Inc. v. Denver* (“*Concrete Works IV*”), 321 F.3d 950, 979 (10th Cir. 2003).

⁵² *Croson*, 488 U.S. at 486.

⁵³ *Id.* at 488.

⁵⁴ *Id.* at 509.

⁵⁵ *Croson*, 488 U.S. at 492, accord *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 916 (9th Cir. 1991).

⁵⁶ *Concrete Works of Colo., Inc. v. City & County of Denver* (“*Concrete Works I*”), 823 F. Supp. 821, 824 (D. Colo. 1993), *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).



In *Concrete Works I*, the district court granted summary judgment in favor of the City of Denver in 1993.⁵⁷ 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.⁵⁸ The case was remanded with specific instructions permitting the parties “to develop a factual record to support their competing interpretations of the empirical data.”⁵⁹ On remand, the district court entered a judgment in favor of the plaintiff holding that the City’s ordinances violated the Fourteenth Amendment.⁶⁰

The district court in *Concrete Works III* rejected the four disparity studies the city offered to support the continuation of Denver's M/WBEs program.⁶¹ The court surmised that (1) the methodology employed in the statistical studies was not “designed to answer the relevant questions,”⁶² (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.⁶³ 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.”⁶⁴ 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 in that 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 where the agency’s prime contractors’ practices are discriminatory against their subcontractors:

The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” (citation omitted). The City can satisfy this condition by identifying the discrimination “*public or private*, with some specificity.” (internal quotes and citation omitted).⁶⁵

⁵⁷ *Concrete Works I*, 823 F. Supp. at 994.

⁵⁸ *Concrete Works of Colo., Inc. v. City & County of Denver* (“*Concrete Works II*”), 36 F.3d 1513, 1530-31 (10th Cir. 1994).

⁵⁹ *Id.*

⁶⁰ *Concrete Works of Colo., Inc. v. City & County of Denver* (“*Concrete Works III*”), 86 F. Supp. 2d 1042, 1079 (D. Colo. 2000).

⁶¹ *Id.* at 1065-68.

⁶² *Concrete Works III*, 86 F. Supp. 2d. at 1067.

⁶³ *Id.* at 1057-58, 1071.

⁶⁴ *Id.* at 1068.

⁶⁵ *Concrete Works of Colo., Inc. v. Denver* (“*Concrete Works IV*”), 321 F.3d 950, 975-76 (10th Cir. 2003).



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.”⁶⁶ 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.”⁶⁷ 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.⁶⁸

Ten months after *Concrete Works IV* the question of whether a particular public sector 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*.⁶⁹ The plaintiff in *Builders Association of Greater Chicago* challenged the City’s construction set-aside program. The court considered pre-enactment and post-enactment evidence in support of the six-year old M/WBE program.⁷⁰ The challenged program consisted of a 16.9% MBE subcontracting goal, a 10% MBE prime contracting goal, a 4.5% WBE subcontracting goal and a 1% WBE prime contracting goal.⁷¹

The district court found that private sector business practices offered by the city, which were based on United States Census and surveys, constituted discrimination against minorities in the Chicago market area.⁷² 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 in order to formulate remedies “more akin to a laser beam than a baseball bat.”⁷³ The City was ordered to suspend its M/WBE goals program.

As recent as 2010, the Fourth Circuit in *H.B. Rowe Co. v. Tippett (Rowe)* ruled that the State of North Carolina could not rely on private-sector data to demonstrate that prime contractors underutilized women subcontractors in the general construction industry.⁷⁴ The court found that

⁶⁶ *Concrete Works IV*, 321 F.3d at 976 (quoting *Shaw v. Hunt*, 517 U.S. 804, 909 (1996)).

⁶⁷ *Concrete Works IV*, 321 F.3d at 976.

⁶⁸ *Id.* at 959, 977, 990.

⁶⁹ *Builders Ass’n of Greater Chi. v. City of Chi.*, 298 F. Supp. 2d 725, 732 (N.D. III. 2003).

⁷⁰ *Id.* at 726, 729, 733-34; *West Tenn. Chapter of Associated Builders & Contrs., Inc. v. Board of Educ.*, 64 F. Supp. 2d at 710 (1999) held that post-enactment evidence cannot be used to demonstrate a compelling need for defendants’ MWBE plans. (Citing *Coral Construction*, 941 F. 2d at 921; citing *Concrete Works*, 36 F. 3d at 1521).

⁷¹ *Builders Ass’n of Greater Chi. v. City of Chi.*, 298 F. Supp. 2d 725, 729 (N.D. III. 2003).

⁷² *Builders Ass’n of Greater Chi. v. City of Chi.*, 298 F. Supp. 2d at 735-37.

⁷³ *Builders Ass’n of Greater Chi. v. City of Chi.*, 298 F. Supp. 2d at 737-39, 742.

⁷⁴ *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 236 (4th Cir. 2010) (“*Rowe*”).



the private sector data did not test whether the underutilization was statistically significant or just mere chance.⁷⁵

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).⁷⁶ Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.⁷⁷ 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.⁷⁸ Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

Croson enumerates 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.⁷⁹ 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 [.]"⁸⁰

The *Croson* Court made clear that both prime contract and subcontracting data was relevant.⁸¹ 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."⁸² Subcontracting data is also an important means by which to assess suggested future remedial actions. Because the decision makers are different for the awarding of prime contracts and subcontracts, the remedies for discrimination identified at a prime contractor versus subcontractor level might also be different.

⁷⁵ *Rowe*, 615 F.3d at 236.

⁷⁶ *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)).

⁷⁷ *Croson*, 488 U.S. at 509.

⁷⁸ *Id.* at 506.

⁷⁹ *Croson*, 488 U.S. at 509.

⁸⁰ *Croson*, 488 U.S. at 501 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977)).

⁸¹ *Croson*, 488 U.S. at 502-03.

⁸² *Id.*



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.”⁸³ 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.⁸⁴ 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.”⁸⁵ *Croson* further states, “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”⁸⁶

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.⁸⁷ The Court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.⁸⁸ The court explained that statistical evidence, standing alone, often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.⁸⁹

Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.⁹⁰ Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”⁹¹

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.”⁹² Conversely, in *Concrete Works I*, the district court specifically approved the Denver Metropolitan Statistical Area (MSA) as the appropriate market area since 80% of the construction contracts were let there.⁹³

⁸³ *Croson*, 488 U.S. at 509.

⁸⁴ *Id.*

⁸⁵ *Croson*, 488 U.S. at 509 (emphasis added).

⁸⁶ *Id.* (emphasis added).

⁸⁷ *Coral Constr.*, 941 F.2d at 917-18, 920-26.

⁸⁸ *Coral Constr.*, 941 F.2d at 919.

⁸⁹ *Id.*

⁹⁰ *Coral Constr.*, 941 F.2d at 919.

⁹¹ *Id.* (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

⁹² *Coral Constr.*, 941 F.2d at 925.

⁹³ *Concrete Works I*, 823 F. Supp. at 835-836 (D. Colo. 1993); *rev’d on other grounds*, 36 F.3d 1513 (10th Cir. 1994).



Read together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. Because *Croson* and its progeny did not provide a bright line rule for local market area, the determination should be fact-based. An entity may include consideration of evidence of discrimination within its own jurisdiction.⁹⁴ Extra-jurisdictional evidence may be permitted, when it is reasonably related to where the jurisdiction contracts.⁹⁵

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 was 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.⁹⁶ 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.⁹⁷ Therefore, the most recent two or three years of an entity's utilization data would suffice to determine whether a statistical disparity exists between current M/WBE utilization and availability.⁹⁸

3. Statistical Evidence

To determine whether statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the "disparity index," which consists of the percentage of minority or women contractor participation in local contracts divided by the percentage of minority or women contractor availability or composition in the population of available firms in the local market

⁹⁴ *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 I").

⁹⁵ 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.

⁹⁶ See *Croson*, 488 U.S. at 509-10.

⁹⁷ *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").

⁹⁸ See *AGCC II*, 950 F.2d at 1414 (consultant study looked at City's MBE utilization over a one-year period)



area.⁹⁹ Disparity indexes have been found highly probative evidence of discrimination where they ensure that the “relevant statistical pool” of minority or women contractors is being considered.¹⁰⁰ 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 where 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*.¹⁰¹

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 give rise to an inference of discriminatory exclusion.

Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between 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.¹⁰² The study found that available MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-minority counterparts.¹⁰³ *AGCC* argued to the Ninth Circuit that the preferences given to MBEs

⁹⁹ 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.

¹⁰⁰ *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 236 (4th Cir. 2010); see *Engineering Contractors Association of South Florida v. Metropolitan Dade County*, 1546 (S.D. Fla. 1996), aff’d, 122 F.3d 895 (11th Cir. 1997); see also *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994).

¹⁰¹ *Philadelphia VI*, 91 F.3d at 601-602. 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.

¹⁰² *AGCC II*, 950 F.2d at 1414.

¹⁰³ *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.



violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. The district court determined that AGCC only demonstrated a possibility of irreparable injury on the ground that such injury is assumed where 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.¹⁰⁴

Whether a disparity index supports an inference that there is discrimination in the market area turns 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."¹⁰⁵ 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 the analysis of the disparity index and the findings of its significance are to be judged on a case-by-case basis.¹⁰⁶

Following the dictates of *Croson*, courts may carefully examine whether there are data that show MBEs are qualified, ready, willing, and able to perform.¹⁰⁷ *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 takes into consideration the size of MBEs and WBEs.¹⁰⁸

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*, concluded that for statistical evidence to meet the legal standard of *Croson*, it must consider the

¹⁰⁴ *Associated General Contractors of California Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (1991).

¹⁰⁵ *Croson*, 488 U.S. at 501 (quoting *Hazelwood Sch. Dist.*, 433 U.S. at 307-308).

¹⁰⁶ *Concrete Works II*, 36 F.3d at 1522.

¹⁰⁷ The *Philadelphia* study was vulnerable on this issue.

¹⁰⁸ *Concrete Works II*, 36 F.3d at 1528.



issue of capacity.¹⁰⁹ 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.”¹¹⁰ 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.¹¹¹

Drabik also pointed out that the State not only relied upon the wrong type of statistical data, but also the data 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*¹¹² and *Dade County I*,¹¹³ 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. A summary judgment was granted for the contractors.¹¹⁴ 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.¹¹⁵

The Third Circuit reviewed the evidence of discrimination in prime contracting and stated that whether it is strong enough to infer discrimination is a “close call” which the court “chose not to make.”¹¹⁶ It was unnecessary to make this determination because the court found that even if there

¹⁰⁹ *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734-38 (6th Cir. 2000). The Court reviewed Ohio’s 1980, pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167, 176 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

¹¹⁰ *Drabik*, 214 F.3d at 736.

¹¹¹ *Drabik*, 214 F.3d at 736.

¹¹² *Philadelphia VI*, 91 F.3d at 604-605.

¹¹³ *Eng’g Contractors Ass’n v. Metro. Dade County* (“*Dade County I*”), 943 F. Supp. 1546, 1582-83 (S.D. Fla. 1996).

¹¹⁴ *Philadelphia VI*, 91 F.3d at 590.

¹¹⁵ *Id.* at 609-10.

¹¹⁶ *Id.* at 605.



was a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.¹¹⁷

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% of project engineer logs on projects valued at more than \$30,000.¹¹⁸ The consultant determined that no MBEs were used during the study period based upon recollections of the former general counsel to the General and Specialty Contractors Association of Philadelphia regarding whether 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.¹¹⁹

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that “[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE” and that it was a “reasonable choice” under the circumstances to use a list of M/WBE certified contractors as a source for available firms.¹²⁰ 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.¹²¹ In order to qualify for certification, the federal certification program required firms to detail their bonding capacity, size of prior contracts, number of employees, financial integrity, and equipment owned. According to the court, “the process by which the firms were certified [suggests that] those firms were both qualified and willing to participate in public work projects.”¹²² 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.¹²³ 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.

Furthermore, the court discussed whether bidding was required in prime construction contracts as the measure of “willingness” and stated, “[p]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work.”¹²⁴

¹¹⁷ *Philadelphia VI*, 91 F.3d at 605.

¹¹⁸ *Id.* at 600.

¹¹⁹ 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.

¹²⁰ *Philadelphia VI*, 91 F.3d at 603.

¹²¹ *Philadelphia VI*, 91 F.3d at 603-605, 609.

¹²² *Philadelphia VI*, 91 F.3d at 603.

¹²³ *Id.*

¹²⁴ *Id.* at 603.



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 disappeared when the size of the M/WBEs was taken into account.¹²⁵ 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.¹²⁶ In addition, a comprehensive count of bidders is dependent on the adequacy of the agency's record-keeping.¹²⁷

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.¹²⁸ 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."¹²⁹ 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 larger amount of evidence.¹³⁰

As discussed below, anecdotal evidence alone is insufficient to establish the requisite predicate for a race-conscious program. Its great value lies in pointing to remedies that are "narrowly tailored,"

¹²⁵ *Dade County I*, 943 F. Supp. at 1560.

¹²⁶ 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).

¹²⁷ 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).

¹²⁸ *Dade County I*, 943 F. Supp. at 1557.

¹²⁹ *Croson*, 488 U.S. at 509; see *Teamsters*, 431 U.S. at 338.

¹³⁰ 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.]").



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

- M/WBEs denied contracts despite being the low bidders — *Philadelphia*¹³¹
- Prime contractors showing M/WBE bids to non-minority subcontractors to find a non-minority firm to underbid the M/WBEs — *Cone Corporation v. Hillsborough County*¹³²
- M/WBEs' inability to obtain contracts for private sector work — *Coral Construction*¹³³
- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties — *AGCC II*¹³⁴
- Attempts to circumvent M/WBE project goals — *Concrete Works II*¹³⁵
- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on an entity's contracts — *AGCC II*¹³⁶

Courts must assess the extent to which relief measures disrupt settled “rights and expectations” when determining the appropriate corrective measures.¹³⁷ Presumably, courts would look more favorably upon anecdotal evidence in support of a less intrusive program than it would in support of a more intrusive one. For example, if anecdotal accounts related experiences of discrimination in obtaining bonds, they may be sufficient evidence to support a bonding program that assists M/WBEs.¹³⁸ 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.”¹³⁹

¹³¹ *Philadelphia IV*, 6 F.3d at 1002.

¹³² *Cone Corp.*, 908 F.2d at 916.

¹³³ 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 Construction*, 941 F.2d 910 at 933 (WBE’s affidavit indicated that less than 7 percent of the firm’s business came from private contracts and that most of its business resulted from gender-based set-asides).

¹³⁴ *AGCC II*, 950 F.2d at 1415.

¹³⁵ *Concrete Works II*, 36 F.3d at 1530.

¹³⁶ *AGCC II*, 950 F.2d at 1415.

¹³⁷ *Wygant*, 476 U.S. at 283.

¹³⁸ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (U.S.1977); *Coral Constr.*, 941 F.2d at 919.

¹³⁹ *Croson*, 488 U.S. at 509 (citing *Teamsters*, 431 U.S. at 338).



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.”¹⁴⁰

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.”¹⁴¹

Nonetheless, this anecdotal evidence standing alone was insufficient to justify King County’s MBE program since “[n]otably absent from the record, however, is *any* statistical data in support of the County’s MBE program.”¹⁴² 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.¹⁴³

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.”¹⁴⁴

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*.¹⁴⁵ The Third Circuit Court disapproved of the district court’s actions, because in its view the court’s rejection of this

¹⁴⁰ *Croson*, 488 U.S. at 480.

¹⁴¹ *Coral Constr.*, 941 F.2d at 917-18.

¹⁴² *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).

¹⁴³ *Coral Constr.*, 941 F.2d at 919.

¹⁴⁴ *Id.*

¹⁴⁵ *Philadelphia IV*, 6 F.3d at 1002.



evidence betrayed the court’s role in disposing of a motion for summary judgment.¹⁴⁶ “Yet,” 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 anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.¹⁴⁷

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*.¹⁴⁸ 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.¹⁴⁹

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.”¹⁵⁰ However, it held that this was not the “exceptional case” where, unreinforced by statistics, the anecdotal evidence was enough.¹⁵¹

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

¹⁴⁶ *Philadelphia IV*, 6 F.3d at 1003.

¹⁴⁷ *Id.* at 1003.

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

¹⁴⁹ *O’Donnell Constr. Co. v. D.C.*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹⁵⁰ *Dade County II*, 122 F.3d at 925.

¹⁵¹ *Id.* at 926.



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.”¹⁵² 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*¹⁵³. 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 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.¹⁵⁴ Based on *AGCC II*, it would appear that the Ninth Circuit’s standard for acceptable anecdotal evidence is more lenient than other Circuits that have considered the issue.

Taken together, these statements constitute a taxonomy of appropriate anecdotal evidence. The case law suggests that, to be optimally persuasive, anecdotal evidence collectively should satisfy six particular requirements.¹⁵⁵ These requirements are that the accounts:

- are gathered from minority contractors, preferably those that are “qualified”¹⁵⁶
- concern specific, verifiable instances of discrimination¹⁵⁷
- involve the actions of governmental officials¹⁵⁸
- involve events within the relevant jurisdiction’s market area¹⁵⁹
- discuss the harm that the improper conduct has inflicted on the businesses in question¹⁶⁰
- collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.¹⁶¹

¹⁵² *Concrete Works II*, 36 F.3d at 1530.

¹⁵³ *AGCC II*, 950 F.2d at 1401.

¹⁵⁴ *AGCC II*, 950 F.2d at 1415.

¹⁵⁵ *Philadelphia IV*, 6 F.3d at 1003. The anecdotal evidence must be “dominant or pervasive.”

¹⁵⁶ *Philadelphia VI*, 91 F.3d at 603.

¹⁵⁷ *Coral Constr.*, 941 F.2d at 917-18; *but see Concrete Works II*, 321 F.3d at 989 (“There is no merit to [plaintiff’s] argument that the witnesses’ accounts must be verified to provide support for Denver’s burden.”).

¹⁵⁸ *Croson*, 488 U.S. at 509.

¹⁵⁹ *Coral Constr.*, 941 F.2d at 925.

¹⁶⁰ *O’Donnell*, 963 F.2d at 427.

¹⁶¹ *Coral Constr.*, 941 F.2d at 919.



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.¹⁶² The court then turned to the statistical data.¹⁶³ 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 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

Rowe challenged the constitutionality of the North Carolina General Assembly's Statute 136-28.4 (Statute), promulgated in 1983.¹⁶⁴ 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.¹⁶⁵ The Statute directed North Carolina Department of Transportation (NCDOT) to encourage and promote the policy.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ In 1991, the constitutionality of the statute was challenged.¹⁶⁹ 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

¹⁶² *Philadelphia IV*, 6 F.3d. at 1002-03.

¹⁶³ *Id.*

¹⁶⁴ *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 236 (4th Cir. 2010).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Rowe*, 615 F.3d at 236.

¹⁶⁹ *Id.* at 237; see *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693 (1994).



discrimination it seeks to remedy.¹⁷⁰ As a result of the challenge, NCDOT suspended its M/WBE program in 1991.¹⁷¹

In 1993, NCDOT commissioned a disparity study on State-funded transportation construction contracts.¹⁷² The study determined that minority and women subcontractors were underutilized at a statistically significant level and the M/WBE Program was re-implemented.¹⁷³ In 1998, the North Carolina General Assembly again commissioned an update to the 1993 study.¹⁷⁴ The 1998 update study concluded that minority and women-owned businesses continued to be underutilized on State-funded road construction contracts.¹⁷⁵

In 2002, *Rowe* was denied a NCDOT contract because the company's bid included 6.6% women subcontractor participation and no minority subcontractor participation.¹⁷⁶ NCDOT claimed that *Rowe* failed to meet the good faith effort requirements of the M/WBE program.¹⁷⁷ A third study was commissioned in 2004 to again study minority and women contractor participation on the State's highway construction industry.¹⁷⁸ In 2006, relying on the 2004 study, the North Carolina General Assembly amended Statute 136-28.4.¹⁷⁹ 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 prevents or limits 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.¹⁸⁰

In *Rowe*, the Fourth Circuit Court of Appeals first considered whether the statutory scheme as it relates to minorities survives the strict scrutiny standard. The Court reviewed the statistical evidence detailed in the 2004 disparity study to determine if the statutory scheme was based on

¹⁷⁰ *Rowe*, 615 F.3d at 237 (citing *Croson*, 488 U.S. at 504).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Rowe*, 615 F.3d at 237.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Rowe*, 615 F.3d at 237.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 238.

¹⁷⁹ *Id.*

¹⁸⁰ *Rowe*, 615 F.3d at 238-39.



strong statistical evidence to implement race-conscious subcontractor goals.¹⁸¹ 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.¹⁸²

The court did not consider whether 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.¹⁸³ The methodology used in the 2004 disparity study calculated a disparity at .05 confidence level.¹⁸⁴ A statistical calculation is significant at the .05 confidence level because the probability of that result occurring by chance is 5% or less.¹⁸⁵ The .05 confidence level is used in social sciences as a marker of when a result is a product of some external influence, rather than ordinary variation or sampling error.¹⁸⁶

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.¹⁸⁷ 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 .05 confidence level.¹⁸⁸ 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.¹⁸⁹ Thus, the State only provided a strong basis in evidence for the minority subcontractor participation goals pertaining to African American and Native American subcontractors.

¹⁸¹ *Rowe*, 615 F.3d at 238.

¹⁸² *Coral Constr.*, 941 F.2d at 239.

¹⁸³ *Id.* at 243-44.

¹⁸⁴ *Id.* at 244.

¹⁸⁵ *Id.* at 261 n.12 (*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)).

¹⁸⁶ *Coral Constr.*, 941 F.2d at 261 n.12 (*citing* EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 483 (11th ed. 2007)).

¹⁸⁷ *Id.* at 261.

¹⁸⁸ *Coral Constr.*, 941 F.2d at 245.

¹⁸⁹ *Id.* at 254.



Second, the court considered whether 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.¹⁹⁰ The 2004 disparity study calculated the overutilization of women subcontractors as statistically significant at a .05 confidence level.¹⁹¹ The circuit court further noted that the private sector evidence was insufficient to overcome the strong evidence of overutilization.¹⁹² 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.¹⁹³

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 by ethnic and gender group. Where the underutilization of a minority group is not found to be statistically significant, the minority group should not be included in the race-conscious remedy.

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 a gender-based remedy when the statistical evidence demonstrates that the overutilization is not statistically significant.

E. Post-Enactment Evidence

As discussed above, a governmental entity may enact remedial legislation based upon race where a compelling state interest exists, and the legislation is narrowly tailored to accomplish that purpose. Remedying the effects of past or present racial discrimination may constitute a compelling state interest sufficient to enact remedial legislation based upon race. Such legislation will only survive the compelling interest prong of strict scrutiny analysis if the governmental entity can meet two evidentiary conditions: (1) the entity must offer evidence that identifies active or passive discrimination with some specificity; and (2) the entity must have a "strong basis" in evidence that remedial action was necessary before the remedy is narrowly tailored, and the entity may enact a remedial program based upon race.

The first condition emphasizes the necessity of tracing discrimination to the actions of the governmental entity.¹⁹⁴ The second condition ensures that the legislative body is motivated by the constitutionally permissible purpose of remedying past or present racial discrimination that existed

¹⁹⁰ *Coral Constr.*, 941 F.2d at 254.

¹⁹¹ *Rowe*, 615 F.3d at 254-55.

¹⁹² *Id.* at 255.

¹⁹³ *Id.*

¹⁹⁴ *Croson*, 488 U.S. at 492, 109 S. Ct. at 721.



prior to the law's enactment.¹⁹⁵ Although *Shaw* holds that post-enactment evidence alone may be insufficient to justify remedial legislation, it may fairly be interpreted to allow post-enactment evidence to supplement a plan's "proper factual basis" in order to prove that a strong basis existed to use race-conscious legislation as a remedial tool.¹⁹⁶

Post-enactment evidence of discrimination may be introduced to supplement pre-enactment evidence. Five circuits that have decided the issue are unanimous in permitting the introduction of post-enactment evidence, though the circuits disagree on the rationale that supports that determination. A substantial disagreement of opinion therefore exists as to the proper role played by post-enactment evidence, and the means of its introduction. In reliance on *Croson*, the Tenth Circuit held that the city must "identify [the] discrimination . . . with some specificity before [it] may use race-conscious relief."¹⁹⁷ The court reasoned that *Croson* does not foreclose consideration of post-enactment evidence.

The Western District of Tennessee has made two alternative rulings on the issue of post-enactment evidence, and the Sixth Circuit has not rendered a decision on the matter.¹⁹⁸ In *Board of Education*, the Western District held that admitting post-enactment evidence to demonstrate a compelling need for remedying past discrimination by instituting an MWBE plan was contrary to federal precedent. Therefore, post-enactment evidence may not be used.¹⁹⁹ However, the district court in *West Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis* held that the matter of post-enactment evidence was a controlling issue of law sufficient to certify an interlocutory appeal. The district court identified that substantial disagreement of opinion exists as to the admissibility of post-enactment evidence, and stated that the Sixth Circuit needed to decide the issue of post-enactment evidence.²⁰⁰ The interlocutory appeal was later denied because of administrative concerns, and the matter was not decided on the merits.²⁰¹

V. Consideration of Race-Neutral Options

A remedial program must address the source of the disadvantage faced by minority businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.²⁰² An MBE program cannot stand if the sole barrier to M/WBE participation is a barrier that is faced by

¹⁹⁵ *Shaw*, 517 U.S. at 910, 116 S. Ct. at 1903.

¹⁹⁶ *West Tenn. Assoc. Builders v. City of Memphis*, 138 F. Supp. 2d 1015 (W.D. 2000) (citing *Shaw*, 517 U.S. at 908 n. 4).

¹⁹⁷ *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 504, 109 S.Ct. at 727).

¹⁹⁸ See *Assoc'd Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F. 3d 730 (6th Cir. 2000); *West Tenn. Chapter of Associated Builders & Contrs., Inc. v. Board of Educ.*, 64 F. Supp. 2d 714 (W.D. Tenn. 1999).

¹⁹⁹ *Board of Education*, 64 F. Supp. 2d 714 (W.D. Tenn. 1999).

²⁰⁰ *W. Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis*, 138 F. Supp 2d 1015, 1027 (W.D. 2000) ("City of Memphis").

²⁰¹ *City of Memphis*, 293 F.3d at 345.

²⁰² *AGCC II*, 950 F.2d at 1404.



all new businesses, regardless of ownership.²⁰³ 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.²⁰⁴ 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[.]”²⁰⁵

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 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, so long as it also includes race-neutral measures to address the capital and bonding barriers.²⁰⁶

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.²⁰⁷ 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.²⁰⁸

VI. Conclusion

The decision of the United States Supreme Court in the *Croson* case changed the legal landscape for business affirmative action programs. The United States Supreme Court altered the authority of a local government to use local and federal funds to institute remedial race-conscious public

²⁰³ *Croson*, 488 U.S. at 508.

²⁰⁴ *Id.* at 507.

²⁰⁵ *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

²⁰⁶ *Croson*, 488 U.S. at 507 (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

²⁰⁷ *Coral Constr.*, 941 F.2d at 910.

²⁰⁸ *Dade County II*, 122 F.3d at 927; *Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305 (S.D. Fla. 2004). 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*.



contracting programs. This chapter has examined what *Croson* and its progeny require for a local or state government agency to institute a constitutional race or gender-conscious public contracting program.

Depending on the statistical findings of the Legal Analysis and Disparity Study, Shelby County may consider race- and gender-based remedies for its local and state funded contracts. Given the case law discussed in this Chapter, any race- or gender-conscious affirmative action contracting program recommended will be based on a constitutionally sound factual predicate.

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CHAPTER 2: Procurement Practice Analysis

I. Introduction

This chapter is an overview of the policies that governed Shelby County's (County) procurement and contracting during the January 1, 2012 to December 31, 2014, study period. The Study will include a legal analysis and disparity analysis of Minority and Woman Business Enterprises (hereinafter referred to as M/WBEs) and non-M/WBEs on construction, professional services (including architecture and engineering), and commodities and services contracts awarded by the County.

The County's procurement is governed by the County Mayor, the appointed Purchasing Agent or designee (Purchasing Agent), and the Board of Commissioners. The Board of Commissioners is comprised of 13 legislative officials elected at large by district voters in the County.²⁰⁹ The Shelby County Government Purchasing Policy Rules and Regulations and the Locally Owned Small Business Ordinance were reviewed in preparation of this chapter.

II. Governing Laws and Regulations

The applicable laws governing the County's purchase of construction, professional services, and commodities and services contracts are set forth by County Ordinance. The Administrator of Purchasing, referred to as the County Purchasing Agent, is authorized by ordinance to adopt and promulgate rules and regulations governing the procurement of construction, professional services, and commodities and services contracts, together with the Director of Administration and Finance and with the approval of the County Mayor.²¹⁰ State of Tennessee Statutes, Shelby County Government Purchasing Policy Rules and Regulations and relevant charter provisions, and the Equal Opportunity Compliance Manual and related documents were reviewed in preparation of this procurement manual.²¹¹



²⁰⁹ "Shelby County Board of Commissioners," Shelby County, TN Official Website, accessed March 4, 2015, <https://www.shelbycountyttn.gov/index.aspx?nid=71>

²¹⁰ SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(1) (2010).

²¹¹ Shelby County, Tn., Office of Equal Opportunity Compliance Manual.

Table 2.1: Governing Laws and Regulations

STATE OF TENNESSEE STATUTES
Title 12, Chapter 3, Section 1201 <i>et. seq.</i>
SHELBY COUNTY GOVERNMENT PURCHASING POLICY RULES AND REGULATIONS
Policy No. P-010 Purchasing Policy Policy No. P-030 Bid Requirements Policy No. P-060 Cooperative / Piggy Back Purchasing Policy No. P-070 Emergency Purchases Policy No. P-120 Professional Services Policy No. P-220 Sole or Single Source Procurement Policy No. RR-060 Bids – Informal Bid Policy No. RR-200 Purchases – Emergency Policy No. RR-280 Small Purchases Program Policy No. RR-290 Purchases – Single / Sole Source Policy No. RR-370 Vendor – Qualifications, E.O.C. Certification, Business License, Contractor's License, Etc. Policy No. RR-380 Procurement Card Policy and Procedures
LOCALLY OWNED SMALL BUSINESS ORDINANCE
Ordinance No. 324

A. Tennessee Statutes

1. Title 4, Chapter 56

Title 12, Chapter 3 of the Tennessee Statutes, operating under the State of Tennessee Code, governs the construction and improvement of public property and publicly owned buildings, and the procurement of goods and services by local governments. This section establishes standards for the procurement of contracts for public construction works, goods and services. Additionally, this section requires that local governments employ competitive solicitation processes to award contracts to an appropriately licensed contractor for each project that falls within its jurisdiction.²¹²



²¹² Tenn Code Ann. Tit. 12 ch. 3§ 1201 (2011).

B. *Shelby County Government Purchasing Policies and Rules*

1. Policy No. P-010 Purchasing Policy

Policy No. P-010 of the Shelby County Government Purchasing Policy Rules and Regulations establishes that purchasing authority for the department and offices of the County are centralized under the Purchasing Department with an Administrator of Purchasing (County Purchasing Agent) appointed by the County Mayor.²¹³

2. Policy No. P-030 Bid Requirements

Policy No. P-030 of the Shelby County Government Purchasing Policy Rules and Regulations provides policy pertaining to the requirements for competitive bids. This policy applies to purchases, sales, contracts for services, and competitive bids.²¹⁴

3. Policy No. P-060 Cooperative / Piggy Back Purchasing

Policy No. P-060 of the Shelby County Government Purchasing Policy Rules and Regulations provides policy pertaining to the County's participation in cooperative or "joint" procurement with other governmental entities or "piggyback purchasing" off another governmental entity's contracts. This policy applies to all purchases of and contracts for purchases of supplies, materials, and equipment for the departments, offices, boards, and agencies of the County.²¹⁵

4. Policy No. P-070 Emergency Purchases

Policy No. P-070 of the Shelby County Government Purchasing Policy Rules and Regulations provides policy for the purchase of supplies, materials, and equipment on an emergency basis. This policy applies to all departments, offices, boards, and agencies of the County.²¹⁶

5. Policy No. P-120 Professional Services

Policy No. P-120 of the Shelby County Government Purchasing Policy Rules and Regulations provides policy regarding the process for the selection of providers of professional services for County contracts. This policy applies to professional services contracts for all departments, offices, boards, and agencies of the County.

²¹³ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-010 § IV(A) (Feb. 22, 2010).

²¹⁴ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-030 § V-VI (Feb. 22, 2010).

²¹⁵ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-060 § IV (Feb. 22, 2010).

²¹⁶ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-070 § IV(A)-(B) (Feb. 22, 2010).



This Policy establishes a Consultant Review Committee for the purpose of reviewing and screening the selection of professional architects, engineers, appraisers, and other types of consultants interested in performing work on public projects in Shelby County. The committee is comprised of the Director of Public Works, Administrator of Purchasing, County Engineer, Director of Administration and Finance, and a “floating” representative from the division, agency, or office of an elected official within whose jurisdiction a project is being constructed.²¹⁷

6. Policy No. P-220 Sole / Single Source Procurement

Policy No. P-220 of the Shelby County Government Purchasing Policy Rules and Regulations provides policy for purchases made on a Sole source basis. This policy applies to purchases of and contracts for supplies, materials, and equipment on a Sole source basis for any departments, offices, boards, and agencies of the County.²¹⁸

7. Policy No. RR-060 Bids – Informal Bid

Policy No. RR-060 of the Shelby County Government Purchasing Policy Rules and Regulations defines procedures to be used in the preparation and processing of informal bids. This procedure applies to all purchases and sales where the amount of the expenditure or sale is less than \$50,000.²¹⁹

8. Policy No. RR-200 Purchases - Emergency

Policy No. RR-200 of the Shelby County Government Purchasing Policy Rules and Regulations provides procedures for the purchase of supplies, materials, and equipment on an emergency basis. This policy applies to all administrative departments, offices, boards, and agencies of the County. While emergencies are exempt from bid requirements, they are not exempt from other requirements, such as Board of Commissioners approval on expenditures \$100,000 and over.²²⁰

9. Policy No. RR-280 Small Purchases Program

Policy No. RR-280 of the Shelby County Government Purchasing Policy Rules and Regulations provides procedures for the purchase of small purchases valued less than \$200. This procedure applies to all Administrative Departments, Elected Offices, Boards, and Agencies of the County. The Small Purchase Program requires that purchases of items valued less than \$200 be purchased with Petty Cash or a Procurement Card whenever possible. The items purchased under the Small

²¹⁷ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-120 § IV(A)-(B) (Feb. 22, 2010). (subsequent to the study period, the Board of Commissioners reduced the approval requirement from \$100,000 to \$50,000. Currently, emergency procurements valued \$50,000 and over must obtain approval from the Board of Commissioners).

²¹⁸ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-220 § IV(A) (Feb. 22, 2010).

²¹⁹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RRP-060 § III (Feb. 22, 2010).

²²⁰ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-200 § III (Feb. 22, 2010).



Purchase Program must not be of repetitive and routine nature, nor can they be available on an authorized systems contract.²²¹

10. Policy No. RR-290 Purchases – Single / Sole Source

Policy No. RR-290 of the Shelby County Government Purchasing Policy Rules and Regulations provides the procedures implemented for purchase orders issued, contract renewals, and the approval process required relating to purchases acquired through the sole source method of procurement.²²² This section defines the review process that occurs with single/sole source purchases. First, the Administrator of Purchasing certifies in writing to the County Mayor that the items are considered single/sole source items and the basis for that determination for purchases greater than \$25,000. Then the Administrator of Purchasing requests the Mayor's approval to open negotiations and award the purchase order or contract.²²³

11. Policy No. RR-370 Vendor Qualifications, E.O.C. Certification, Business License, Contractor's License, Etc.

Policy No. RR-370 of the Shelby County Government Purchasing Policy Rules and Regulations identifies the qualification rules and regulations for vendors to bid on or be awarded a purchase order or contract from the County. This section applies to all vendors for the purchase of or contracting for construction, professional services, and commodities and services. This section further designates the qualification procedures and requirements regarding Equal Opportunity Compliance Eligibility Number prequalification, Shelby County Business licensing procedures, State of Tennessee Contractor's licensing procedures, and miscellaneous bonding requirements.

12. Policy No. RR-380 Procurement Card Policy and Procedures

Policy No. RR-380 of the Shelby County Government Purchasing Policy Rules and Regulations incorporates the Shelby County Government Procurement Card Policy and Procedure Manual by reference. This Manual provides the rules and regulations for the use and administration of the Procurement Card Program. The Manual was issued in accordance with the Purchasing Policy Rules and Regulations, and applies to all divisions, departments, offices and elected officials of the County.



²²¹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-280 § IV (Feb. 22, 2010).

²²² Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-290 (Feb. 22, 2010).

²²³ *Id.*

C. Locally Owned Small Business Ordinance

1. Ordinance No. 324

Ordinance No. 324, approved by the Board of Commissioners on March 26, 2007, established a Locally Owned Small Business purchasing program (LOSB).²²⁴ The program was enacted for the purpose of promoting the utilization of locally-owned small businesses, which represent a major part of the County's business community. A locally-owned small business must be headquartered in the County, have an average three-year gross annual sales of \$5 million or less, and a Shelby County resident must own, operate, and control at least fifty-one percent of the business.²²⁵ In order to qualify for consideration as a supplier or contractor for any portion of the construction and commodities and services contracts awarded under the Program, the LOSB must maintain EOC certification.²²⁶

The Program was authorized to set goals of not less than 20 percent for purchases from locally-owned small businesses. The County also has the authority to negotiate with any contractor, before contract award, for the inclusion of locally-owned small businesses as necessary to achieve the goal, solicitations may be unbundled into smaller bid packages. Compliance reports of the dollars awarded to locally-owned small businesses must be submitted to the Mayor and the Board of Commissioners on a quarterly basis.

a) Goals

The LOSB annual utilization goal applies to the procurement of all County contracts.²²⁷ There are special provisions in the Ordinance which allow the Administrator of Purchasing and the Administrator of the Equal Opportunity Commission (EOC) to identify goods and service contracts to be set aside for the locally-owned small business special purchase procedures.²²⁸ Goods and services can be set aside for the special purchase procedures. For construction contracts \$250,000 and greater, contracts worth ten percent or more of the construction costs can be set aside for awards to locally-owned small businesses.²²⁹ The construction contract goal can be applied as a subcontract requirement or through separate bids issued by the County for subcontracts that would be assigned to a specific prime contract.²³⁰

²²⁴ SHELBY COUNTY, TENN., ORD. NO. 324 (2007).

²²⁵ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(A)-(B) (2007) (A business or professional entity includes, but is not limited to, a sole proprietorship, corporation, partnership, joint venture, or any other classification of business or professional entity).

²²⁶ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(C) (2007).

²²⁷ SHELBY COUNTY, TENN., ORD. NO. 324 § 1 (2007).

²²⁸ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(B)(i) (2007); SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(1) (2010).

²²⁹ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(B)(iii) (2007); SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(3) (2010).

²³⁰ *Id.*



For purchases under \$15,000, which do not require formal competitive bidding, the Administrator of Purchasing can solicit quotes directly from a locally-owned small business that offers the product or service being solicited.²³¹ Minimally if one or more LOSB offers the product or service, then the County must include at least one eligible LOSB in the pool of vendors provided notice of the request for quote.²³²

b) Preferences

A locally-owned small business preference can be applied to construction prime contract bids when the bidder is located in the County and the bid includes locally-owned small businesses.²³³ Preferences up to 5 percent can be assigned in the bid evaluation process. The preference is awarded, during the bid evaluation, on a sliding scale in the following manner:

- Up to five percent for contracts under \$500,000,²³⁴
- Up to three and one-half percent for contracts under \$750,000.²³⁵
- Two and one-half percent for contracts under \$1,000,000.²³⁶
- Two percent for contracts \$1,000,000 and over.²³⁷

For construction projects over \$2,000,000 a two percent preference can be applied if the prime contractor(s) is a locally-owned small business and locally-owned small businesses collectively perform 50 percent of all total work in the bid.²³⁸

²³¹ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(B)(viii) (2007); SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(8) (2010).

²³² *Id.*

²³³ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(B)(ix)(a)-(e) (2007); SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(9)(a)-(e) (2010).

²³⁴ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(B)(ix)(a) (2007); SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(9)(a) (2010).

²³⁵ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(B)(ix)(b) (2007); SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(9)(b) (2010).

²³⁶ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(B)(ix)(c) (2007); SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(9)(c) (2010).

²³⁷ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(B)(ix)(d) (2007); SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(9)(d) (2010).

²³⁸ SHELBY COUNTY, TENN., ORD. NO. 324 § 1(B)(ix)(e) (2007); SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-224(b)(9)(e) (2010).



III. Procurement Categories

Construction: The process of building, altering, repairing, improving, or demolishing any public structure or building or any other public improvement to public real property.²³⁹

Commodities and Services: Commodities Are Transportable Articles Of Trade Or Commerce That Can Be Bartered Or Sold.²⁴⁰ Services Include The Furnishing Of Labor, Time, Or Effort By A Contractor Not Involving The Delivery Of A Specific Product Other Than Reports Which Are Merely Incidental To The Required Performance.²⁴¹

Professional Services: Professional architects, engineers, appraisers, and other types of consultants.²⁴²

IV. Procurement Process Overview

Table 2.2 illustrates the County's procurement process.

Table 2.2: Shelby County Procurement Process

PROCUREMENT CATEGORY	DOLLAR THRESHOLD	ADVERTISING REQUIREMENT	SOLICITATION METHOD	SELECTION PROCESS	PROCUREMENT APPROVAL
Informal Solicitation					
Commodities and Services ²⁴³	Under \$5,000	None	Non-competitive	None	Purchasing Agent ²⁴⁴
Commodities and Services ²⁴⁵	\$5,000 to \$14,999	None	At Least Three Informal Bids	Lowest and Best Bid	Purchasing Agent

²³⁹ Shelby County, Tn., Purchasing Policy Rules and Regulations, § V, Appendix A (Feb. 22, 2010).

²⁴⁰ Shelby County, Tn., Purchasing Policy Rules and Regulations, § V, Appendix A (Feb. 22, 2010).

²⁴¹ *Id.*

²⁴² Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-120 § IV(A) (Feb. 22, 2010).

²⁴³ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(1) (Feb. 22, 2010).; Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-280 (Feb. 22, 2010).

²⁴⁴ Tenn. Procurement Procedures Manual of the Central Procurement Office, § 10.8 (May 28, 2013). (The P-card is the primary method of payment for purchases made pursuant to an agency's local purchase authority; such local authority is allowable for procurements costing less than \$5,000).

²⁴⁵ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-060 § III(B)(2) (Feb. 22, 2010).; Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-210 § (Feb. 22, 2010). (All purchases of fixed assets – defined as any stand-alone item of equipment that costs more than \$5,000.00 and has a useful life of three (3) or more years – shall first be approved by the Department Head and his or her respective Division Director prior to submittal of the requisition to the Purchasing Department); RR-240 (all office



PROCUREMENT CATEGORY	DOLLAR THRESHOLD	ADVERTISING REQUIREMENT	SOLICITATION METHOD	SELECTION PROCESS	PROCUREMENT APPROVAL
Commodities and Services ²⁴⁶	\$15,000 to \$49,999	None	Request for Bid	Lowest and Best Bid	Purchasing Agent
Construction ²⁴⁷	Under \$5,000	None	Non-competitive	None	Purchasing Agent
Construction ²⁴⁸	\$5,000 to \$14,999	None	At Least Three Informal Bids	Lowest and Best Bid	Purchasing Agent
Construction ²⁴⁹	\$15,000 to \$49,999	None	Request for Bid	Lowest and Best Bid	Purchasing Agent
Professional Services ²⁵⁰	Under \$5,000	None	Non-competitive	None	Purchasing Agent
Professional Services ²⁵¹	\$5,000 to \$14,999	None	At Least Three Informal Bids	Lowest and Best Bid	Purchasing Agent
Professional Services ²⁵²	\$15,000 to \$49,999	None	Request for Bid	Lowest and Best Bid	Purchasing Agent
Competitive Solicitation					

furniture, including workstations and office machines costing more than \$5,000.00, are considered fixed assets and must be charged to the appropriate 7000 series line item account number).

²⁴⁶ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(3) (Feb. 22, 2010).

²⁴⁷ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(1) (Feb. 22, 2010).

²⁴⁸ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(2) (Feb. 22, 2010).

²⁴⁹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(3) (Feb. 22, 2010).

²⁵⁰ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(1) (Feb. 22, 2010).

²⁵¹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(2) (Feb. 22, 2010).

²⁵² Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(3) (Feb. 22, 2010).



PROCUREMENT CATEGORY	DOLLAR THRESHOLD	ADVERTISING REQUIREMENT	SOLICITATION METHOD	SELECTION PROCESS	PROCUREMENT APPROVAL
Commodities and Services ²⁵³	\$50,000 to \$100,000	Public Notice Inserted at Least Two Times in a Newspaper of General Circulation	Formal Sealed Bids	Lowest and Best Bid	Purchasing Agent ²⁵⁴
Commodities and Services ²⁵⁵	Over \$100,000	Public Notice Inserted at Least Two Times in a Newspaper of General Circulation	Formal Sealed Bids	Lowest and Best Bid	Board of Commissioners ²⁵⁶
Construction ²⁵⁷	\$50,000 to \$100,000	Public Notice Inserted at Least Two Times in a Newspaper of General Circulation	Formal Sealed Bids	Lowest and Best Bid	Purchasing Agent ²⁵⁸
Construction ²⁵⁹	Over \$100,000	Public Notice Inserted at Least Two Times in a Newspaper of General Circulation	Formal Sealed Bids	Lowest and Best Bid	Board of Commissioners and County Mayor ²⁶⁰

²⁵³ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-030 § V(A) (Feb. 22, 2010).; Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-080 § III(A),(C) (Feb. 22, 2010). (Sealed bids must be solicited for all purchases and sales in excess of \$50,000.00...sealed bids procedures require public notice inserted at least two times in a newspaper of general circulation, a public opening and public reading of the bids except in the case of e-bids posted in the mercury commerce system).

²⁵⁴ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(4) (Feb. 22, 2010). (subsequent to the study period, the Board of Commissioners reduced the approval requirement from \$100,000 to \$50,000. Currently, procurements of commodities and services contracts valued \$50,000 and over must obtain approval from the Board of Commissioners).

²⁵⁵ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-030 § V(A) (Feb. 22, 2010).

²⁵⁶ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(5) (Feb. 22, 2010).

²⁵⁷ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-030 § V(A) (Feb. 22, 2010).

²⁵⁸ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(4) (Feb. 22, 2010). (subsequent to the study period, the Board of Commissioners reduced the approval requirement from \$100,000 to \$50,000. Currently, procurements of construction contracts valued \$50,000 and over must obtain approval from the Board of Commissioners).

²⁵⁹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-030 § V(A) (Feb. 22, 2010).

²⁶⁰ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(5) (Feb. 22, 2010).



PROCUREMENT CATEGORY	DOLLAR THRESHOLD	ADVERTISING REQUIREMENT	SOLICITATION METHOD	SELECTION PROCESS	PROCUREMENT APPROVAL
Professional Services ²⁶¹	\$50,000 to \$100,000	Public Notice Inserted at Least Two Times in a Newspaper of General Circulation	Formal Sealed Bids	Lowest and Best Bid	Purchasing Agent and County Mayor ²⁶²
Professional Services ²⁶³	Over \$100,000	Public Notice Inserted at Least Two Times in a Newspaper of General Circulation	Formal Sealed Bids	Lowest and Best Bid	Board of Commissioners ²⁶⁴
Competitive Solicitation Exempt					
Emergency Purchases ²⁶⁵	Under \$100,000	None	Non-competitive	None	Purchasing Agent with Approval of Mayor ²⁶⁶
Emergency Purchases ²⁶⁷	\$100,000 and Over	None	Non-competitive	None	Board of Commissioners ²⁶⁸
Sole Source ²⁶⁹	Under \$5,000	None	Non-competitive	Negotiate on the Best Terms and Conditions with Only One Source; Generally When an Item is So	Purchasing Department

²⁶¹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-030 § V(A) (Feb. 22, 2010).

²⁶² Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(4) (Feb. 22, 2010). (subsequent to the study period, the Board of Commissioners reduced the approval requirement from \$100,000 to \$50,000. Currently, procurements of professional services contracts valued \$50,000 and over must obtain approval from the Board of Commissioners).

²⁶³ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-030 § V(A) (Feb. 22, 2010).

²⁶⁴ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-060 § III(B)(5) (Feb. 22, 2010).; SHELBY COUNTY, TENN., CODE OF ORDINANCES, ch. 2, div. 3, ORD. NO. 387 § 2-223 (2010) (Authority to enter into contracts).

²⁶⁵ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-070 § IV(B) (Feb. 22, 2010).

²⁶⁶ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-200 § IV(C)(3) (Feb. 22, 2010).

²⁶⁷ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-070 § IV(B) (Feb. 22, 2010).

²⁶⁸ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-200 § IV(C)(3) (Feb. 22, 2010).

²⁶⁹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-290 § IV(A)(1)(3)(c) (Feb. 22, 2010). (This method is generally utilized because of the relevant technology or uniqueness of the contract).



PROCUREMENT CATEGORY	DOLLAR THRESHOLD	ADVERTISING REQUIREMENT	SOLICITATION METHOD	SELECTION PROCESS	PROCUREMENT APPROVAL
				Exclusive That it is Limited to and Held Exclusively by One Supplier, or When No Commercially Available Substitute for an Item Exists	
Sole Source ²⁷⁰	\$5,000 to \$25,000	None	Non-Competitive	Negotiate on the Best Terms and Conditions with Only One Source; Generally When an Item is So Exclusive That it is Limited to and Held Exclusively by One Supplier, or When No Commercially Available Substitute for an Item Exists ²⁷¹	Purchasing Agent
Sole Source ²⁷²	Over \$25,000	None	Non-Competitive	Negotiate on the Best Terms and Conditions with Only One Source; Generally When an Item is So Exclusive That it is Limited to and Held Exclusively by One Supplier, or When No	County Mayor

²⁷⁰ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-220 § IV(D) (Feb. 22, 2010).

²⁷¹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Section V, Appendix A (Feb. 22, 2010).; Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-220 (Feb. 22, 2010).

²⁷² Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-220 § IV(F)(4) (Feb. 22, 2010).



PROCUREMENT CATEGORY	DOLLAR THRESHOLD	ADVERTISING REQUIREMENT	SOLICITATION METHOD	SELECTION PROCESS	PROCUREMENT APPROVAL
				Commercially Available Substitute for an Item Exists ²⁷³	
Piggyback Purchase ²⁷⁴	\$14,999 and Under	None	Non-Competitive; One Government Entity Purchases Commodities or Services Through Another Larger Government Entity's Existing Contract ²⁷⁵	None	User Department
Piggyback Purchase ²⁷⁶	\$15,000 to \$999,999	None	Non-Competitive; One Government Entity Purchases Commodities or Services Through Another Larger Government Entity's Existing Contract ²⁷⁷	None	Purchasing Agent

²⁷³ Shelby County, Tn., Purchasing Policy Rules and Regulations, Section V, Appendix A (Feb. 22, 2010).; Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-220 (Feb. 22, 2010).

²⁷⁴ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-170 § IV(A)(4)(e) (Feb. 22, 2010). (This method becomes available when a larger jurisdiction, such as the State of Tennessee, stipulates in its bid invitations that participating jurisdictions within the state will have the option to purchase items in the bid at the same price and under the same terms and conditions available to the larger jurisdiction).

²⁷⁵ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-170 § III(B) (Feb. 22, 2010).

²⁷⁶ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-170 § III(B) (Feb. 22, 2010).

²⁷⁷ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-170 § III(B) (Feb. 22, 2010).



PROCUREMENT CATEGORY	DOLLAR THRESHOLD	ADVERTISING REQUIREMENT	SOLICITATION METHOD	SELECTION PROCESS	PROCUREMENT APPROVAL
Piggyback Purchase ²⁷⁸	\$100,000 and Over	None	Non-Competitive; One Government Entity Purchases Commodities or Services Through Another Larger Government Entity's Existing Contract ²⁷⁹	None	Board of Commissioners
Cooperative Purchases ²⁸⁰	\$100,000 and Under	None	Non-competitive; Joint Purchasing of Common or Similar Commodities by Two or More Jurisdictions ²⁸¹	None	Purchasing Agent ²⁸²
Cooperative Purchases ²⁸³	Over \$100,000	None	Non-competitive; Joint Purchasing of Common or Similar Commodities by Two or More Jurisdictions ²⁸⁴	None	Board of Commissioners

²⁷⁸ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-170 § IV(A)(1)(4)(f) (Feb. 22, 2010). (This method becomes available when a larger jurisdiction, such as the State of Tennessee, stipulates in its bid invitations that participating jurisdictions within the state will have the option to purchase items in the bid at the same price and under the same terms and conditions available to the larger jurisdiction).

²⁷⁹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-170 § III(B) (Feb. 22, 2010).

²⁸⁰ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-060 § IV(B)(3) (Feb. 22, 2010). (A cooperative purchase requires that both jurisdictions agree on contract specifications and contract terms and conditions for the items involved, combine their usage requirements for these items, and issue a single request for competitive sealed bids).

²⁸¹ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-170 § III(C) (Feb. 22, 2010).

²⁸² Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-010 § IV(A) (Feb. 22, 2010). (subsequent to the study period, the Board of Commissioners reduced the approval requirement from \$100,000 to \$50,000. Currently, cooperative purchases valued \$50,000 and over must obtain approval from the Board of Commissioners).

²⁸³ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-160 § IV(B)(3) (Feb. 22, 2010).

²⁸⁴ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. RR-170 § III(C) (Feb. 22, 2010).



CHAPTER 3: Prime Contractor Utilization Analysis

I. Introduction

This chapter documents Shelby County's (County) utilization of Minority and Woman Business Enterprises, hereinafter referred to as Minority and Caucasian Female Business Enterprise (M/WBE), prime contractors, by ethnicity and gender during the January 1, 2012, to December 31, 2014, study period. The analysis of the County's expenditures during the study period focuses on three industries—construction, professional services, including architecture and engineering (hereinafter referred to as professional services), and commodities and services.

Construction includes services to build, alter, repair, improve, or demolish any public structure, building, or any other public improvement to public real property.²⁸⁵ Professional services includes professional architects, engineers, appraisers, and other types of consultants.²⁸⁶ Commodities and services includes transportable articles of trade or commerce that can be bartered or sold, and the furnishing of labor, time, or effort by a contractor not involving the delivery of a specific product other than reports which are merely incidental to the required performance.²⁸⁷ The data in the *Shelby County Legal Analysis and Disparity Study* (Study) is disaggregated into six ethnic and gender groups. The six groups are listed in Table 3.1.

Table 3.1: Business Ethnic and Gender Groups

Ethnicity and Gender Category	Definition
African Americans	Businesses owned by male and female African Americans
Asian Americans	Businesses owned by male and female Asian Americans
Hispanic Americans	Businesses owned by male and female Hispanic Americans



²⁸⁵ Shelby County, Tn., Purchasing Policy Rules and Regulations, § V, Appendix A (Feb. 22, 2010).

²⁸⁶ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-120 § IV(A) (Feb. 22, 2010).

²⁸⁷ Shelby County, Tn., Purchasing Policy Rules and Regulations, § V, Appendix A (Feb. 22, 2010).

Ethnicity and Gender Category	Definition
Native Americans	Businesses owned by male and female Native Americans
Caucasian Female Business Enterprises (WBEs)	Businesses owned by Caucasian females
Non-minority Male Business Enterprises (non-M/WBEs)	Businesses owned by Caucasian males, and businesses that could not be identified as minority- or Caucasian female-owned ²⁸⁸

II. Prime Contract Data Sources

The prime contract data consists of contract records extracted from the County's financial system. The contracts were issued during the study period. Contracts were grouped by either a contract number or purchase order number. Each contract was classified into one of the three industries. The industry classifications were reviewed and approved by the County.

To verify the prime contractors' ethnicity and gender, research was performed. The prime contractor names were cross-referenced with certification lists, chamber of commerce directories, and trade organization membership directories. Prime contractors' websites were also reviewed for the ethnicity and gender of the business owner. Prime contractors whose ethnicity and gender could not be verified through published sources were surveyed. Once the ethnicity and gender research was completed, the utilization analysis was performed.

III. Prime Contract Utilization Thresholds

Contracts within each of the three industries were analyzed at three dollar thresholds. One threshold included all prime contracts regardless of award amount. A second threshold included prime contracts valued under \$500,000. The third threshold included informal prime contracts valued under \$5,000.

IV. Prime Contractor Utilization

A. All Prime Contractors

As depicted in Table 3.2, the County issued 8,771 prime contracts during the study period. The 8,771 prime contracts included 1,991 for construction, 1,547 for professional services, and 5,233 for commodities and services.



²⁸⁸ See Section II: Prime Contract Data Sources for the methodology employed to identify the ethnicity and gender of the County's utilized prime contractors.

The payments made by the County during the study period for all 8,771 prime contracts totaled \$190,511,207. Payments included \$80,948,750 for construction, \$50,574,727 for professional services, and \$58,987,731 for commodities and services.

**Table 3.2: Total Prime Contracts and Dollars Expended:
All Industries, January 1, 2012, to December 31, 2014**

Industry	Total Number of Contracts	Total Dollars Expended
Construction	1,991	\$80,948,750
Professional Services	1,547	\$50,574,727
Commodities and services	5,233	\$58,987,731
Total Expenditures	8,771	\$190,511,207*

*Totals are rounded to the nearest dollar.

B. Highly Used Prime Contractors

The County awarded a total of 8,771 construction, professional services, and commodities and services prime contracts during the study period. As depicted in Table 3.3, the County's 8,771 prime contracts were received by 998 unique vendors. An analysis was performed to determine which prime vendors were highly used by the County.

Table 3.3: Total Prime Contracts

Total Prime Contracts	8,771
Total Utilized Vendors	998
Total Expenditures	\$190,511,207

Table 3.4 presents the distribution of the County's prime contracts by the number of vendors. Forty-seven of the 998 vendors received \$133,217,524 or 70% of the total prime contract dollars. The findings illustrate that a small group of prime contractors received the majority of contract dollars spent by the County.



Table 3.4: All Prime Contracts by Number of Vendors

Vendors	Total Dollars	Percent of Dollars ²⁸⁹	Number of Contracts	Percent of Contracts ²⁹⁰
47 Highly Used Vendors	\$133,217,524	70%	1,644	19%
951 Vendors	\$57,293,683	30%	7,127	81%
998 Total Vendors	\$190,511,207	100%	8,771	100%

Table 3.5 presents the ethnicity and gender of the most highly used prime contractors who received approximately 50% of total prime contract dollars. Fourteen of the 47 most highly used prime contractors were African Americans and Non-minority Males. The contracts received by these 14 businesses ranged from \$54 to \$19,062,631.

Table 3.5: Top 14 Highly Used Prime Contractors

Ethnicity/ Gender ²⁹¹	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
African Americans	\$2,475,785	1.30%	89	1.01%
Non-minority Males	\$92,449,401	48.53%	175	2.00%

C. Highly Used Construction Prime Contractors

The County awarded a total of 1,991 construction contracts during the study period. As depicted in Table 3.6, the County's 1,991 construction prime contracts were received by 187 unique vendors.

Table 3.6: Construction Prime Contracts

Total Prime Contracts	1,991
Total Utilized Vendors	187
Total Expenditures	\$80,948,750

Table 3.7 presents the distribution of the County's construction prime contracts by the number of vendors. Six of the 187 vendors received \$55,489,330 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 County.



²⁸⁹ Percentages were rounded to the nearest whole number.

²⁹⁰ Percentages were rounded to the nearest whole number.

²⁹¹ Asian Americans, Hispanic Americans, Native Americans, and Caucasian Females were omitted from the table because they were not highly used.

Table 3.7: Construction Prime Contracts by Number of Vendors

Vendors	Total Dollars	Percent of Dollars ²⁹²	Number of Contracts	Percent of Contracts ²⁹³
6 Highly Used Vendors	\$55,489,330	69%	14	1%
181 Vendors	\$25,459,420	31%	1,977	99%
187 Total Vendors	\$80,948,750	100%	1,991	100%

Table 3.8 presents the ethnicity and gender of the most highly used construction prime contractors who received approximately 50% of total construction prime contract dollars. Two of the 6 most highly used prime contractors were Non-minority Males. The contracts received by these 2 businesses ranged from \$9,025,000 to \$19,062,631.

Table 3.8: Top 2 Highly Used Construction Prime Contractors

Ethnicity/Gender ²⁹⁴	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Non-minority Males	\$41,243,044	50.95%	3	0.15%

D. Highly Used Professional Services Prime Contractors

The County awarded a total of 1,547 professional services contracts during the study period. As depicted in Table 3.9, the County’s 1,547 professional services prime contracts were received by 370 unique vendors.

Table 3.9: Professional Services Prime Contracts

Total Prime Contracts	1,547
Total Utilized Vendors	370
Total Expenditures	\$50,574,727

Table 3.10 presents the distribution of the County’s professional services prime contracts by the number of vendors. Thirty-three of the 370 vendors received \$35,580,878 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 County.



²⁹² Percentages were rounded to the nearest whole number.

²⁹³ Percentages were rounded to the nearest whole number.

²⁹⁴ African Americans, Asian Americans, Hispanic Americans, Native Americans, and Caucasian Females were omitted from the table because they were not highly used.

Table 3.10: Professional Services Prime Contracts by Number of Vendors

Vendors	Total Dollars	Percent of Dollars ²⁹⁵	Number of Contracts	Percent of Contracts ²⁹⁶
33 Highly Used Vendors	\$35,580,878	70%	252	16%
337 Vendors	\$14,993,849	30%	1,295	84%
370 Total Vendors	\$50,574,727	100%	1,547	100%

Table 3.11 presents the ethnicity and gender of the most highly used professional services prime contractors who received approximately 50% of the professional services prime contract dollars. Thirteen of the most highly used prime contractors were Caucasian Females and Non-minority Males. The contracts received by these 13 businesses ranged from \$199 to \$2,211,008.

Table 3.11: Top 13 Highly Used Professional Services Prime Contractors

Ethnicity/ Gender ²⁹⁷	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Caucasian Females	\$984,740	1.95%	29	1.87%
Non-minority Males	\$24,438,365	48.32%	70	4.52%

E. Highly Used Commodities and Services Prime Contractors

The County awarded a total of 5,233 commodities and services contracts during the study period. As depicted in Table 3.12, the County's 5,233 commodities and services prime contracts were received by 618 unique vendors.

Table 3.12: Commodities and Services Prime Contracts

Total Prime Contracts	5,233
Total Utilized Vendors	618
Total Expenditures	\$58,987,731



²⁹⁵ Percentages were rounded to the nearest whole number.

²⁹⁶ Percentages were rounded to the nearest whole number.

²⁹⁷ African Americans, Asian Americans, Hispanic Americans, and Native Americans were omitted from the table because they were not highly used.

Table 3.13 presents the distribution of the County’s commodities and services prime contracts by the number of vendors. Thirty-seven of the 618 vendors received \$41,357,483 or 70% of the total commodities and services prime contract dollars. The findings illustrate that a small group of prime contractors received the majority of commodities and services prime contract dollars spent by the County.

Table 3.13: Commodities and Services Prime Contracts by Number of Vendors

Vendors	Total Dollars	Percent of Dollars ²⁹⁸	Number of Contracts	Percent of Contracts ²⁹⁹
37 Highly Used Vendors	\$41,357,483	70%	1,730	33%
581 Vendors	\$17,630,248	30%	3,503	67%
618 Total Vendors	\$58,987,731	100%	5,233	100%

Table 3.14 presents the ethnicity and gender of the most highly used commodities and services prime contractors who received approximately 50% of the commodities and services prime contract dollars. Ten of the 37 most highly used prime contractors were African Americans and Non-minority Males. The contracts received by these 10 businesses ranged from \$54 to \$4,386,980.

Table 3.14: Top 10 Highly Used Commodities and Services Prime Contractors

Ethnicity/ Gender ³⁰⁰	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
African Americans	\$1,903,434	3.23%	76	1.45%
Non-minority Males	\$27,420,339	46.48%	241	4.61%



²⁹⁸ Percentages were rounded to the nearest whole number.

²⁹⁹ Percentages were rounded to the nearest whole number.

³⁰⁰ Asian Americans, Hispanic Americans, Native Americans, and Caucasian Females were omitted from the table because they were not highly used.

F. All Prime Contracts, by Industry

1. Construction Prime Contractor Utilization: All Contracts

Table 3.15 summarizes all prime contract dollars expended by the County on construction prime contracts.

African Americans received 510 or 25.62% of all construction prime contracts awarded during the study period, representing \$4,098,861 or 5.06% of the construction prime contract dollars.

Asian Americans received 2 or 0.10% of all construction prime contracts awarded during the study period, representing \$6,380 or 0.01% of the construction prime contract dollars.

Hispanic Americans received 4 or 0.20% of all construction prime contracts awarded during the study period, representing \$10,500 or 0.01% of the construction prime contract dollars.

Native Americans received 0 or 0.00% of all construction prime contracts awarded during the study period, representing \$0 or 0.00% of the construction prime contract dollars.

Caucasian Females received 183 or 9.19% of all construction prime contracts awarded during the study period, representing \$2,814,392 or 3.48% of the construction prime contract dollars.

Non-minority Males received 1,292 or 64.89% of all construction prime contracts awarded during the study period, representing \$74,018,617 or 91.44% of the construction prime contract dollars.

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**Table 3.15: Construction Prime Contractor Utilization:
All Contracts, January 1, 2012, to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	510	25.62%	\$4,098,861	5.06%
Asian Americans	2	0.10%	\$6,380	0.01%
Hispanic Americans	4	0.20%	\$10,500	0.01%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	183	9.19%	\$2,814,392	3.48%
Non-minority Males	1,292	64.89%	\$74,018,617	91.44%
TOTAL	1,991	100.00%	\$80,948,750	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	202	10.15%	\$2,078,388	2.57%
African American Males	308	15.47%	\$2,020,473	2.50%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	2	0.10%	\$6,380	0.01%
Hispanic American Females	4	0.20%	\$10,500	0.01%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	183	9.19%	\$2,814,392	3.48%
Non-minority Males	1,292	64.89%	\$74,018,617	91.44%
TOTAL	1,991	100.00%	\$80,948,750	100.00%

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2. Professional Services Prime Contractor Utilization: All Contracts

Table 3.16 summarizes all contract dollars expended by the County on professional services prime contracts.

African Americans received 132 or 8.53% of all professional services prime contracts awarded during the study period, representing \$1,820,507 or 3.60% of the professional services prime contract dollars.

Asian Americans received 25 or 1.62% of all professional services prime contracts awarded during the study period, representing \$385,557 or 0.76% of the professional services prime contract dollars.

Hispanic Americans received 8 or 0.52% of all professional services prime contracts awarded during the study period, representing \$1,240 or less than 0.01% of the professional services prime contract dollars.

Native Americans received 19 or 1.23% of all professional services prime contracts awarded during the study period, representing \$431,025 or 0.85% of the professional services prime contract dollars.

Caucasian Females received 181 or 11.70% of all professional services prime contracts awarded during the study period, representing \$3,713,257 or 7.34% of the professional services prime contract dollars.

Non-minority Males received 1,182 or 76.41% of all professional services prime contracts awarded during the study period, representing \$44,223,140 or 87.44% of the professional services prime contract dollars.



**Table 3.16: Professional Services Prime Contractor Utilization:
All Contracts, January 1, 2012, to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	132	8.53%	\$1,820,507	3.60%
Asian Americans	25	1.62%	\$385,557	0.76%
Hispanic Americans	8	0.52%	\$1,240	0.00%
Native Americans	19	1.23%	\$431,025	0.85%
Caucasian Females	181	11.70%	\$3,713,257	7.34%
Non-minority Males	1,182	76.41%	\$44,223,140	87.44%
TOTAL	1,547	100.00%	\$50,574,727	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	28	1.81%	\$298,973	0.59%
African American Males	104	6.72%	\$1,521,534	3.01%
Asian American Females	4	0.26%	\$3,570	0.01%
Asian American Males	21	1.36%	\$381,987	0.76%
Hispanic American Females	3	0.19%	\$440	0.00%
Hispanic American Males	5	0.32%	\$800	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	19	1.23%	\$431,025	0.85%
Caucasian Females	181	11.70%	\$3,713,257	7.34%
Non-minority Males	1,182	76.41%	\$44,223,140	87.44%
TOTAL	1,547	100.00%	\$50,574,727	100.00%

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3. Commodities and Services Prime Contractor Utilization: All Contracts

Table 3.17 summarizes all contract dollars expended by the County on commodities and services prime contracts.

African Americans received 644 or 12.31% of all commodities and services prime contracts awarded during the study period, representing \$5,139,724 or 8.71% of the commodities and services prime contract dollars.

Asian Americans received 40 or 0.76% of all commodities and services prime contracts awarded during the study period, representing \$233,023 or 0.40% of the commodities and services prime contract dollars.

Hispanic Americans received 9 or 0.17% of all commodities and services prime contracts awarded during the study period, representing \$33,119 or 0.06% of the commodities and services prime contract dollars.

Native Americans received 15 or 0.29% of all commodities and services prime contracts awarded during the study period, representing \$282,275 or 0.48% of the commodities and services prime contract dollars.

Caucasian Females received 433 or 8.27% of all commodities and services prime contracts awarded during the study period, representing \$3,281,801 or 5.56% of the commodities and services prime contract dollars.

Non-minority Males received 4,092 or 78.20% of all commodities and services prime contracts awarded during the study period, representing \$50,017,789 or 84.79% of the commodities and services prime contract dollars.



**Table 3.17: Commodities and Services Prime Contractor Utilization:
All Contracts, January 1, 2012, to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	644	12.31%	\$5,139,724	8.71%
Asian Americans	40	0.76%	\$233,023	0.40%
Hispanic Americans	9	0.17%	\$33,119	0.06%
Native Americans	15	0.29%	\$282,275	0.48%
Caucasian Females	433	8.27%	\$3,281,801	5.56%
Non-minority Males	4,092	78.20%	\$50,017,789	84.79%
TOTAL	5,233	100.00%	\$58,987,731	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	170	3.25%	\$675,799	1.15%
African American Males	474	9.06%	\$4,463,925	7.57%
Asian American Females	3	0.06%	\$7,612	0.01%
Asian American Males	37	0.71%	\$225,411	0.38%
Hispanic American Females	5	0.10%	\$1,594	0.00%
Hispanic American Males	4	0.08%	\$31,525	0.05%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	15	0.29%	\$282,275	0.48%
Caucasian Females	433	8.27%	\$3,281,801	5.56%
Non-minority Males	4,092	78.20%	\$50,017,789	84.79%
TOTAL	5,233	100.00%	\$58,987,731	100.00%

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G. Prime Contracts Valued Under \$500,000, by Industry

1. Construction Prime Contractor Utilization: Prime Contracts Valued Under \$500,000

Table 3.18 summarizes all contract dollars expended by the County on construction prime contracts valued under \$500,000.

African Americans received 509 or 25.84% of the construction prime contracts valued under \$500,000 awarded during the study period, representing \$3,479,586 or 23.28% of the construction prime contract dollars.

Asian Americans received 2 or 0.10% of the construction prime contracts valued under \$500,000 awarded during the study period, representing \$6,380 or 0.04% of the construction prime contract dollars.

Hispanic Americans received 4 or 0.20% of the construction prime contracts valued under \$500,000 awarded during the study period, representing \$10,500 or 0.07% of the construction prime contract dollars.

Native Americans received 0 or 0.00% of the construction prime contracts valued under \$500,000 awarded during the study period, representing \$0 or 0.00% of the construction prime contract dollars.

Caucasian Females received 182 or 9.24% of the construction prime contracts valued under \$500,000 awarded during the study period, representing \$1,113,619 or 7.45% of the construction prime contract dollars.

Non-minority Males received 1,273 or 64.62% of the construction prime contracts valued under \$500,000 awarded during the study period, representing \$10,339,607 or 69.16% of the construction prime contract dollars.



**Table 3.18: Construction Prime Contractor Utilization:
Prime Contracts Valued Under \$500,000, January 1, 2012, to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	509	25.84%	\$3,479,586	23.28%
Asian Americans	2	0.10%	\$6,380	0.04%
Hispanic Americans	4	0.20%	\$10,500	0.07%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	182	9.24%	\$1,113,619	7.45%
Non-minority Males	1,273	64.62%	\$10,339,607	69.16%
TOTAL	1,970	100.00%	\$14,949,691	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	201	10.20%	\$1,459,113	9.76%
African American Males	308	15.63%	\$2,020,473	13.52%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	2	0.10%	\$6,380	0.04%
Hispanic American Females	4	0.20%	\$10,500	0.07%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	182	9.24%	\$1,113,619	7.45%
Non-minority Males	1,273	64.62%	\$10,339,607	69.16%
TOTAL	1,970	100.00%	\$14,949,691	100.00%

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2. Professional Services Prime Contractor Utilization: Prime Contracts Valued Under \$500,000

Table 3.19 summarizes all contract dollars expended by the County on professional services prime contracts valued under \$500,000.

African Americans received 132 or 8.63% of the professional services prime contracts valued under \$500,000 awarded during the study period, representing \$1,820,507 or 6.29% of the professional services prime contract dollars.

Asian Americans received 25 or 1.63% of the professional services prime contracts valued under \$500,000 awarded during the study period, representing \$385,557 or 1.33% of the professional services prime contract dollars.

Hispanic Americans received 8 or 0.52% of the professional services prime contracts valued under \$500,000 awarded during the study period, representing \$1,240 or 0.00% of the professional services prime contract dollars.

Native Americans received 19 or 1.24% of the professional services prime contracts valued under \$500,000 awarded during the study period, representing \$431,025 or 1.49% of the professional services prime contract dollars.

Caucasian Females received 181 or 11.83% of the professional services prime contracts valued under \$500,000 awarded during the study period, representing \$3,713,257 or 12.83% of the professional services prime contract dollars.

Non-minority Males received 1,165 or 76.14% of the professional services prime contracts valued under \$500,000 awarded during the study period, representing \$22,583,572 or 78.05% of the professional services prime contract dollars.



**Table 3.19: Professional Services Prime Contractor Utilization:
Prime Contracts Valued Under \$500,000, January 1, 2012, to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	132	8.63%	\$1,820,507	6.29%
Asian Americans	25	1.63%	\$385,557	1.33%
Hispanic Americans	8	0.52%	\$1,240	0.00%
Native Americans	19	1.24%	\$431,025	1.49%
Caucasian Females	181	11.83%	\$3,713,257	12.83%
Non-minority Males	1,165	76.14%	\$22,583,572	78.05%
TOTAL	1,530	100.00%	\$28,935,158	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	28	1.83%	\$298,973	1.03%
African American Males	104	6.80%	\$1,521,534	5.26%
Asian American Females	4	0.26%	\$3,570	0.01%
Asian American Males	21	1.37%	\$381,987	1.32%
Hispanic American Females	3	0.20%	\$440	0.00%
Hispanic American Males	5	0.33%	\$800	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	19	1.24%	\$431,025	1.49%
Caucasian Females	181	11.83%	\$3,713,257	12.83%
Non-minority Males	1,165	76.14%	\$22,583,572	78.05%
TOTAL	1,530	100.00%	\$28,935,158	100.00%

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3. Commodities and Services Prime Contractor Utilization: Prime Contracts Valued Under \$500,000

Table 3.20 summarizes all contract dollars expended by the County on commodities and services prime contracts valued under \$500,000.

African Americans received 644 or 12.33% of the commodities and services prime contracts valued under \$500,000 awarded during the study period, representing \$5,139,724 or 14.23% of the commodities and services prime contract dollars.

Asian Americans received 40 or 0.77% of the commodities and services prime contracts valued under \$500,000 awarded during the study period, representing \$233,023 or 0.65% of the commodities and services prime contract dollars.

Hispanic Americans received 9 or 0.17% of the commodities and services prime contracts valued under \$500,000 awarded during the study period, representing \$33,119 or 0.09% of the commodities and services prime contract dollars.

Native Americans received 15 or 0.29% of the commodities and services prime contracts valued under \$500,000 awarded during the study period, representing \$282,275 or 0.78% of the commodities and services prime contract dollars.

Caucasian Females received 433 or 8.29% of the commodities and services prime contracts valued under \$500,000 awarded during the study period, representing \$3,281,801 or 9.09% of the commodities and services prime contract dollars.

Non-minority Males received 4,081 or 78.15% of the commodities and services prime contracts valued under \$500,000 awarded during the study period, representing \$27,139,522 or 75.16% of the commodities and services prime contract dollars.



**Table 3.20: Commodities and Services Prime Contractor Utilization:
Prime Contracts Valued Under \$500,000, January 1, 2012, to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	644	12.33%	\$5,139,724	14.23%
Asian Americans	40	0.77%	\$233,023	0.65%
Hispanic Americans	9	0.17%	\$33,119	0.09%
Native Americans	15	0.29%	\$282,275	0.78%
Caucasian Females	433	8.29%	\$3,281,801	9.09%
Non-minority Males	4,081	78.15%	\$27,139,522	75.16%
TOTAL	5,222	100.00%	\$36,109,464	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	170	3.26%	\$675,799	1.87%
African American Males	474	9.08%	\$4,463,925	12.36%
Asian American Females	3	0.06%	\$7,612	0.02%
Asian American Males	37	0.71%	\$225,411	0.62%
Hispanic American Females	5	0.10%	\$1,594	0.00%
Hispanic American Males	4	0.08%	\$31,525	0.09%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	15	0.29%	\$282,275	0.78%
Caucasian Females	433	8.29%	\$3,281,801	9.09%
Non-minority Males	4,081	78.15%	\$27,139,522	75.16%
TOTAL	5,222	100.00%	\$36,109,464	100.00%

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H. Informal Prime Contracts Valued Under \$5,000, by Industry

1. Construction Prime Contractor Utilization: Informal Prime Contracts Valued Under \$5,000

Table 3.21 summarizes all contract dollars expended by the County on informal construction prime contracts valued under \$5,000.

African Americans received 332 or 23.04% of the informal construction prime contracts valued under \$5,000 awarded during the study period, representing \$733,889 or 25.71% of the informal construction prime contract dollars.

Asian Americans received 2 or 0.14% of the informal construction prime contracts valued under \$5,000 awarded during the study period, representing \$6,380 or 0.22% of the informal construction prime contract dollars.

Hispanic Americans received 4 or 0.28% of the informal construction prime contracts valued under \$5,000 awarded during the study period, representing \$10,500 or 0.37% of the informal construction prime contract dollars.

Native Americans received 0 or 0.00% of the informal construction prime contracts valued under \$5,000 awarded during the study period, representing \$0 or 0.00% of the informal construction prime contract dollars.

Caucasian Females received 141 or 9.78% of the informal construction prime contracts valued under \$5,000 awarded during the study period, representing \$276,658 or 9.69% of the informal construction prime contract dollars.

Non-minority Males received 962 or 66.76% of the informal construction prime contracts valued under \$5,000 awarded during the study period, representing \$1,827,046 or 64.01% of the informal construction prime contract dollars.



**Table 3.21: Construction Prime Contractor Utilization:
Informal Prime Contracts Valued Under \$5,000, January 1, 2012, to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	332	23.04%	\$733,889	25.71%
Asian Americans	2	0.14%	\$6,380	0.22%
Hispanic Americans	4	0.28%	\$10,500	0.37%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	141	9.78%	\$276,658	9.69%
Non-minority Males	962	66.76%	\$1,827,046	64.01%
TOTAL	1,441	100.00%	\$2,854,473	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	127	8.81%	\$277,115	9.71%
African American Males	205	14.23%	\$456,774	16.00%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	2	0.14%	\$6,380	0.22%
Hispanic American Females	4	0.28%	\$10,500	0.37%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	141	9.78%	\$276,658	9.69%
Non-minority Males	962	66.76%	\$1,827,046	64.01%
TOTAL	1,441	100.00%	\$2,854,473	100.00%

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2. Professional Services Prime Contractor Utilization: Informal Prime Contracts Valued Under \$5,000

Table 3.22 summarizes all contract dollars expended by the County on informal professional services prime contracts valued under \$5,000.

African Americans received 43 or 5.05% of the informal professional services prime contracts valued under \$5,000 awarded during the study period, representing \$92,993 or 7.35% of the informal professional services prime contract dollars.

Asian Americans received 16 or 1.88% of the informal professional services prime contracts valued under \$5,000 awarded during the study period, representing \$9,943 or 0.79% of the informal professional services prime contract dollars.

Hispanic Americans received 8 or 0.94% of the informal professional services prime contracts valued under \$5,000 awarded during the study period, representing \$1,240 or 0.10% of the informal professional services prime contract dollars.

Native Americans received 10 or 1.18% of the informal professional services prime contracts valued under \$5,000 awarded during the study period, representing \$5,556 or 0.44% of the informal professional services prime contract dollars.

Caucasian Females received 93 or 10.93% of the informal professional services prime contracts valued under \$5,000 awarded during the study period, representing \$167,783 or 13.27% of the informal professional services prime contract dollars.

Non-minority Males received 681 or 80.02% of the informal professional services prime contracts valued under \$5,000 awarded during the study period, representing \$987,280 or 78.06% of the informal professional services prime contract dollars.



**Table 3.22: Professional Services Prime Contractor Utilization:
Informal Prime Contracts Valued Under \$5,000, January 1, 2012, to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	43	5.05%	\$92,993	7.35%
Asian Americans	16	1.88%	\$9,943	0.79%
Hispanic Americans	8	0.94%	\$1,240	0.10%
Native Americans	10	1.18%	\$5,556	0.44%
Caucasian Females	93	10.93%	\$167,783	13.27%
Non-minority Males	681	80.02%	\$987,280	78.06%
TOTAL	851	100.00%	\$1,264,794	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	6	0.71%	\$16,310	1.29%
African American Males	37	4.35%	\$76,683	6.06%
Asian American Females	4	0.47%	\$3,570	0.28%
Asian American Males	12	1.41%	\$6,373	0.50%
Hispanic American Females	3	0.35%	\$440	0.03%
Hispanic American Males	5	0.59%	\$800	0.06%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	10	1.18%	\$5,556	0.44%
Caucasian Females	93	10.93%	\$167,783	13.27%
Non-minority Males	681	80.02%	\$987,280	78.06%
TOTAL	851	100.00%	\$1,264,794	100.00%

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3. Commodities and Services Prime Contractor Utilization: Informal Prime Contracts Valued Under \$5,000

Table 3.23 summarizes all contract dollars expended by the County on informal commodities and services prime contracts valued under \$5,000.

African Americans received 479 or 11.43% of the informal commodities and services prime contracts valued under \$5,000 awarded during the study period, representing \$555,799 or 9.35% of the informal commodities and services prime contract dollars.

Asian Americans received 31 or 0.74% of the informal commodities and services prime contracts valued under \$5,000 awarded during the study period, representing \$76,044 or 1.28% of the informal commodities and services prime contract dollars.

Hispanic Americans received 7 or 0.17% of the informal commodities and services prime contracts valued under \$5,000 awarded during the study period, representing \$9,119 or 0.15% of the informal commodities and services prime contract dollars.

Native Americans received 13 or 0.31% of the informal commodities and services prime contracts valued under \$5,000 awarded during the study period, representing \$8,047 or 0.14% of the informal commodities and services prime contract dollars.

Caucasian Females received 365 or 8.71% of the informal commodities and services prime contracts valued under \$5,000 awarded during the study period, representing \$594,394 or 10.00% of the informal commodities and services prime contract dollars.

Non-minority Males received 3,294 or 78.63% of the informal commodities and services prime contracts valued under \$5,000 awarded during the study period, representing \$4,700,851 or 79.08% of the informal commodities and services prime contract dollars.



**Table 3.23: Professional Services Prime Contractor Utilization:
Informal Prime Contracts Valued Under \$5,000, January 1, 2012, to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	479	11.43%	\$555,799	9.35%
Asian Americans	31	0.74%	\$76,044	1.28%
Hispanic Americans	7	0.17%	\$9,119	0.15%
Native Americans	13	0.31%	\$8,047	0.14%
Caucasian Females	365	8.71%	\$594,394	10.00%
Non-minority Males	3,294	78.63%	\$4,700,851	79.08%
TOTAL	4,189	100.00%	\$5,944,253	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	144	3.44%	\$224,542	3.78%
African American Males	335	8.00%	\$331,257	5.57%
Asian American Females	3	0.07%	\$7,612	0.13%
Asian American Males	28	0.67%	\$68,432	1.15%
Hispanic American Females	5	0.12%	\$1,594	0.03%
Hispanic American Males	2	0.05%	\$7,525	0.13%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	13	0.31%	\$8,047	0.14%
Caucasian Females	365	8.71%	\$594,394	10.00%
Non-minority Males	3,294	78.63%	\$4,700,851	79.08%
TOTAL	4,189	100.00%	\$5,944,253	100.00%

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V. Summary

The prime contractor utilization analysis examined the \$190,511,207 expended by the County on prime contracts awarded during the study period. The \$190,511,207 included \$80,948,750 for construction, \$50,574,727 for professional services, and \$58,987,731 for commodities and services. A total of 8,771 prime contracts were analyzed, which included 1,991 for construction, 1,547 for professional services, and 5,233 for commodities and services.

The utilization analysis was performed for prime contracts at three dollar thresholds for each industry: all prime contracts, prime contracts valued under \$500,000, and informal prime contracts valued under \$5,000. *Chapter 7: Prime Contract Disparity Analysis* presents the statistical analysis of disparity in each of the three industries.

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CHAPTER 4: Subcontractor Utilization Analysis

I. Introduction

As discussed in *Chapter 3: Prime Contractor Utilization Analysis*, a disparity study as required under *Croson*³⁰¹, documents Minority and Woman Business Enterprises, hereinafter referred to as Minority and Caucasian Female Business Enterprises (M/WBE), contracting history in Shelby County's (County) market area. The objective of this chapter is to determine the level of M/WBE and Non-minority Male Business Enterprise (Non-minority Males) subcontractor utilization by ethnicity and gender. In this Study, the construction, professional services, including architecture and engineering (hereinafter referred to as professional services), and commodities and services subcontracts issued by the County's prime contractors during January 1, 2012, to December 31, 2014 study period were analyzed.

II. Data Sources

Extensive research was undertaken to reconstruct the construction, professional services, and commodities and services subcontracts issued by the County's prime contractors. The subcontract data were compiled by the County in conjunction with Mason Tillman Associates, Ltd. (Mason Tillman). Project files were examined by the County's staff for awards, payments, and related documents that identified subcontractors, subconsultants, suppliers, and truckers. Prime contractors were also surveyed by Mason Tillman to secure their subcontractors, subconsultants, suppliers, and truckers' awards and payment data. All identified subcontractors, subconsultants, suppliers, and truckers were surveyed to verify their payments. Data verifying ethnicity and gender were compiled from certification lists, minority and woman business organization membership directories, Internet research, and telephone surveys. The organization sources used to verify contractor information are defined in Table 3.1 of *Chapter 3: Prime Contractor Utilization Analysis*.



³⁰¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

III. Subcontractor Utilization

A. All Subcontracts

As depicted in Table 4.1, 114 subcontracts were analyzed, which included 92 construction and 22 professional services subcontracts.

There were \$20,134,936 total subcontract dollars expended during the January 1, 2012 to December 31, 2014 study period. These dollars included \$18,027,464 for construction, and \$2,107,472 for professional services subcontracts.

Table 4.1: Total Subcontracts Awarded and Dollars Expended By Industry, January 1, 2012 to December 31, 2014

Industry	Total Number of Subcontracts	Total Amount Expended
Construction	92	\$18,027,464
Professional Services	22	\$2,107,472
Total	114	\$20,134,936



B. All Subcontracts by Industry

1. Construction Subcontracts

Table 4.2 depicts the identified construction subcontracts awarded by the County's prime contractors.

African Americans received 10 or 10.87% of the County's construction subcontracts during the study period, representing \$1,245,671 or 6.91% of the construction subcontract dollars.

Asian Americans received 0 or 0.00% of the County's construction subcontracts during the study period, representing \$0 or 0.00% of the construction subcontract dollars.

Hispanic Americans received 1 or 1.09% of the County's construction subcontracts during the study period, representing \$29,823 or 0.17% of the construction subcontract dollars.

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

Caucasian Females received 6 or 6.52% of the County's construction subcontracts during the study period, representing \$477,605 or 2.65% of the construction subcontract dollars.

Non-minority Males received 75 or 81.52% of the County's construction subcontracts during the study period, representing \$16,274,365 or 90.28% of the construction subcontract dollars.

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**Table 4.2: Construction Subcontractor Utilization,
January 1, 2012 to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	10	10.87%	\$1,245,671	6.91%
Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	1	1.09%	\$29,823	0.17%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	6	6.52%	\$477,605	2.65%
Non-minority Males	75	81.52%	\$16,274,365	90.28%
TOTAL	92	100.00%	\$18,027,464	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	1	1.09%	\$49,349	0.27%
African American Males	9	9.78%	\$1,196,322	6.64%
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	1	1.09%	\$29,823	0.17%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	6	6.52%	\$477,605	2.65%
Non-minority Males	75	81.52%	\$16,274,365	90.28%
TOTAL	92	100.00%	18,027,464	100.00%

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2. Professional Services Subcontracts

Table 4.3 depicts the professional services subcontracts issued by the County's prime contractors.

African Americans received 2 or 9.09% of the County's professional services subcontracts during the study period, representing \$111,286 or 5.28% of the professional services subcontract dollars.

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

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

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

Caucasian Females received 0 or 0.00% of the County's professional services subcontracts during the study period, representing \$0 or 0.00% of the professional services subcontract dollars.

Non-minority Males received 20 or 90.91% of the County's professional services subcontracts during the study period, representing \$1,996,186 or 94.72% of the professional services subcontract dollars.

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**Table 4.3: Professional Services Subcontractor Utilization,
January 1, 2012 to December 31, 2014**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	2	9.09%	\$111,286	5.28%
Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	0	0.00%	\$0	0.00%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	0	0.00%	\$0	0.00%
Non-minority Males	20	90.91%	\$1,996,186	94.72%
TOTAL	22	100.00%	\$2,107,472	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	1	4.55%	\$75,241	3.57%
African American Males	1	4.55%	\$36,045	1.71%
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	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	0	0.00%	\$0	0.00%
Non-minority Males	20	90.91%	\$1,996,186	94.72%
TOTAL	22	100.00%	\$2,107,472	100.00%

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IV. Summary

The County's subcontractor utilization analysis examined \$20,134,936 expended on subcontracts awarded by the County's prime contractors from January 1, 2012, to December 31, 2014. The \$20,134,936 expended included \$18,027,464 for construction and \$2,107,472 for professional services. A total of 114 subcontracts were analyzed, which included 92 for construction and 22 for professional services.

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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. (Croson)*³⁰² held that programs established by local governments to set goals for the participation of Minority Business Enterprises (MBE) must be supported by evidence of past discrimination in the award of 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 award of contracts. Instead, they relied on widely recognized societal patterns of discrimination.³⁰³ *Croson* established that a local government could not rely on society-wide discrimination as the basis for a race-conscious program. Instead, a local government was required to identify discrimination within its own contracting jurisdiction.³⁰⁴ 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 within 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 within 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,"³⁰⁵ and the "city's construction industry."³⁰⁶ These terms were

³⁰² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

³⁰³ *United Steelworkers v. Weber*, 433 U.S. 193, 198, n. 1 (1979).

³⁰⁴ *Croson*, 488 U.S. at 497.

³⁰⁵ *Croson*, 488 U.S. at 500.

³⁰⁶ *Id.* at 470.



used to define the proper scope for examining the existence of discrimination within the City. This interchangeable use of terms lends support to a definition of market area that coincides with the boundaries of a contracting jurisdiction.

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.³⁰⁷ In *Cone Corporation v. Hillsborough County*,³⁰⁸ the United States Eleventh Circuit Court of Appeals 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 element 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.”³⁰⁹

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII)*,³¹⁰ the United States Ninth Circuit Court of Appeals found the City and County of San Francisco, California’s MBE Program to have the factual predicate necessary to survive strict scrutiny. The San Francisco MBE Program was supported by a study that assessed the number of available MBE contractors within the City and County of San Francisco, California. The Court found it appropriate to use the City and County as the relevant market area within which to conduct a disparity study.³¹¹

In *Coral Construction v. King County*, the United States Ninth Circuit Court of Appeals held that “a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program.”³¹² 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.

³⁰⁷ See e.g., *Concrete Works of Colorado v. City of Denver, Colorado*, 36 F.3d 1513, 1528 (10th Cir. 1994) (“*Concrete Works*”).

³⁰⁸ *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

³⁰⁹ *Id.* at 915.

³¹⁰ *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991).

³¹¹ *AGCCII*, 950 F.2d at 1415.

³¹² *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).



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 also found that the data from entities within King County and from coterminous jurisdictions were relevant to discrimination in the County. They 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."³¹³ However, the Court did note that the "world of contracting does not conform itself neatly to jurisdictional boundaries."³¹⁴

There are other situations where 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)*,³¹⁵ the United States Tenth Circuit Court of Appeals 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 (MSA) to support its MBE program. Plaintiffs argued that the federal constitution prohibited consideration of evidence beyond jurisdictional boundaries. The Tenth Circuit 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 MSA. Another consideration was that the City and County of Denver's analysis was based on United States Census Bureau data, which was 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*,³¹⁶ 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."³¹⁷

³¹³ *Coral Construction*, 941 F.2d at 917.

³¹⁴ *Id.*

³¹⁵ *Concrete Works*, 36 F.3d at 1528.

³¹⁶ *AGCC II*, 950 F.2d at 1401.

³¹⁷ *Concrete Works*, 36 F.3d at 1528.



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.³¹⁸

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 minority business owners in the government’s marketplace.³¹⁹ 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 Shelby County's (County) jurisdiction, the Study’s market area is determined to be the geographical boundaries of Shelby County, Tennessee.

A. Summary of the Distribution of All Prime Contracts Awarded

The County awarded 8,771 prime contracts valued at \$190,511,207 from January 1, 2012, to December 31, 2014 (study period). The distribution of all prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area for the *Shelby County Legal Analysis and Disparity Study* is depicted in Table 5.1.

Table 5.1: Distribution of All Contracts Awarded

Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
SHELBY	\$85,952,652	5,117	45.12%	58.34%
DYER	\$22,180,413	2	11.64%	0.02%
FAYETTE	\$19,134,859	7	10.04%	0.08%
MADISON	\$2,670,558	6	1.40%	0.07%
DAVIDSON	\$1,679,577	109	0.88%	1.24%
TIPTON	\$1,080,122	51	0.57%	0.58%
WILLIAMSON	\$674,187	20	0.35%	0.23%
SULLIVAN	\$396,495	7	0.21%	0.08%

³¹⁸ *Opportunity Denied! New York State’s Study*, 26 Urban Lawyer No. 3, Summer 1994.

³¹⁹ *Croson*, 488 U.S. at 501.



Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
MCNAIRY	\$272,891	4	0.14%	0.05%
KNOX	\$252,162	25	0.13%	0.29%
ANDERSON	\$161,050	2	0.08%	0.02%
DICKSON	\$81,500	1	0.04%	0.01%
SUMNER	\$27,106	5	0.01%	0.06%
GIBSON	\$17,435	1	0.01%	0.01%
SEVIER	\$15,178	1	0.01%	0.01%
METRO NASHVILLE	\$13,959	4	0.01%	0.05%
MARSHALL	\$7,885	1	0.00%	0.01%
HAMILTON	\$7,689	1	0.00%	0.01%
LAWRENCE	\$3,348	4	0.00%	0.05%
WEAKLEY	\$3,306	4	0.00%	0.05%
HARDEMAN	\$2,450	1	0.00%	0.01%
OUT-OF-STATE	\$54,957,579	3,370	28.85%	38.42%
OUT-OF-COUNTRY	\$918,805	28	0.48%	0.32%
TOTAL	\$190,511,207	8,771	100.00%	100.00%

B. Distribution of Construction Prime Contracts

The County awarded 1,992 construction prime contracts valued at \$80,949,830 during the study period. Businesses located in the market area received 93.12% of the construction prime contracts and 40.20% 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 is depicted in Table 5.2.

Table 5.2: Distribution of Construction Prime Contracts

Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
SHELBY	\$32,545,790	1,855	40.20%	93.12%
DYER	\$22,180,413	2	27.40%	0.10%
FAYETTE	\$19,062,631	1	23.55%	0.05%
MADISON	\$2,655,728	1	3.28%	0.05%
TIPTON	\$637,882	49	0.79%	2.46%
MCNAIRY	\$272,891	4	0.34%	0.20%
DAVIDSON	\$66,846	2	0.08%	0.10%
KNOX	\$62,620	4	0.08%	0.20%
GIBSON	\$17,435	1	0.02%	0.05%
HAMILTON	\$7,689	1	0.01%	0.05%
OUT-OF-STATE	\$3,439,904	72	4.25%	3.61%
TOTAL	\$80,949,830	1,992	100.00%	100.00%



C. Distribution of Professional Services Prime Contracts

The County awarded 1,546 professional services, including architecture and engineering (hereinafter referred to as professional services), prime contracts valued at \$50,573,647 during the study period. Businesses located in the market area received 49.74% of the professional services prime contracts and 36.64% 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 is depicted below in Table 5.3.

Table 5.3: Distribution of Professional Services Prime Contracts

Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
SHELBY	\$18,529,838	769	36.64%	49.74%
DAVIDSON	\$574,870	15	1.14%	0.97%
WILLIAMSON	\$498,924	11	0.99%	0.71%
TIPTON	\$442,240	2	0.87%	0.13%
SULLIVAN	\$356,915	5	0.71%	0.32%
KNOX	\$86,391	12	0.17%	0.78%
SEVIER	\$15,178	1	0.03%	0.06%
MADISON	\$14,830	5	0.03%	0.32%
WEAKLEY	\$2,646	3	0.01%	0.19%
HARDEMAN	\$2,450	1	0.00%	0.06%
OUT-OF-STATE	\$29,830,951	710	58.99%	45.92%
OUT-OF-COUNTRY	\$218,414	12	0.43%	0.78%
TOTAL	\$50,573,647	1,546	100.00%	100.00%

D. Distribution of Commodities and Services Prime Contracts

The County awarded 5,233 commodities and services prime contracts valued at \$58,987,731 during the study period. Businesses located in the market area received 47.64% of the commodities and services prime contracts and 59.13% of the dollars. The distribution of the commodities and services prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area is depicted below in Table 5.4.



Table 5.4: Distribution of Commodities and Services Prime Contracts

Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
SHELBY	\$34,877,024	2,493	59.13%	47.64%
DAVIDSON	\$1,037,861	92	1.76%	1.76%
WILLIAMSON	\$175,263	9	0.30%	0.17%
ANDERSON	\$161,050	2	0.27%	0.04%
KNOX	\$103,151	9	0.17%	0.17%
DICKSON	\$81,500	1	0.14%	0.02%
FAYETTE	\$72,228	6	0.12%	0.11%
SULLIVAN	\$39,580	2	0.07%	0.04%
SUMNER	\$27,106	5	0.05%	0.10%
METRO NASHVILLE	\$13,959	4	0.02%	0.08%
MARSHALL	\$7,885	1	0.01%	0.02%
LAWRENCE	\$3,348	4	0.01%	0.08%
WEAKLEY	\$660	1	0.00%	0.02%
OUT-OF-STATE	\$21,686,724	2,588	36.76%	49.46%
OUT-OF-COUNTRY	\$700,392	16	1.19%	0.31%
TOTAL	\$58,987,731	5,233	100.00%	100.00%

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III. Summary

During the study period, the County awarded 8,771 construction, professional services, and commodities and services prime contracts valued at \$190,511,207. The County awarded 58.34% of prime contracts and 45.12% of prime contract dollars to businesses domiciled within the market area.

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

Construction Prime Contracts: 1,855 or 93.12% of construction prime contracts were awarded to market area businesses. Construction prime contracts in the market area accounted for \$32,545,790 or 40.20% of the total construction prime contract dollars.

Professional Services Prime Contracts: 769 or 49.74% of professional services prime contracts were awarded to market area businesses. Professional services prime contracts in the market area accounted for \$18,529,838 or 36.64% of the total professional services prime contract dollars.

Commodities and Services Prime Contracts: 2,493 or 47.64% of commodities and services prime contracts were awarded to market area businesses. Commodities and services prime contracts in the market area accounted for \$34,877,024 or 59.13% of the total commodities and services prime contract dollars.

Table 5.5: County Contract Distribution

Geographic Area	Total Dollars	Number of Contracts	Percent of Contracts	Percent of Dollars
Combined Industries				
Shelby County	\$85,952,652	5,117	45.12%	58.34%
Outside Market Area	\$104,558,555	3,654	54.88%	41.66%
TOTAL	\$190,511,207	8,771	100.00%	100.00%
Construction				
Shelby County	\$32,545,790	1,855	40.20%	93.12%
Outside Market Area	\$48,404,039	137	59.80%	6.88%
TOTAL	\$80,949,830	1,992	100.00%	100.00%
Professional Services Including Architecture and Engineering				
Shelby County	\$18,529,838	769	77.70%	79.10%
Outside Market Area	\$32,043,809	777	22.30%	20.90%
TOTAL	\$50,573,647	1,546	100.00%	100.00%
Commodities and Services				
Shelby County	\$34,877,024	2,493	59.13%	47.64%
Outside Market Area	\$24,110,707	2,740	40.87%	52.36%
TOTAL	\$58,987,731	5,233	100.00%	100.00%



CHAPTER 6: Prime Contractor and Subcontractor Availability Analysis

I. Introduction

Availability is defined, according to *Croson*, as the number of qualified businesses in the jurisdiction's market area that are willing and able to provide goods or services.³²⁰ To determine availability, Minority and Woman Business Enterprises, hereinafter referred to as Minority and Caucasian Female Business Enterprises (M/WBEs), and Non-minority Male Business Enterprises (non-M/WBEs) within the jurisdiction's market area that are ready, willing, and able to provide the goods and services must be enumerated. The market area for the three industries – construction, professional services, including architecture and engineering (hereinafter referred to as professional services), and commodities and services as defined in *Chapter 5: Market Area Analysis* – is Shelby County, Tennessee.

When considering sources for determining the number of willing and able M/WBEs and non-M/WBEs 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's interest in contracting with the jurisdiction, as implied by the term "willing." The other is the business's ability or capacity to provide a service or good, as implied by the term "able."

II. Prime Contractor Availability Data Sources

A. Identification of Willing Businesses within the Market Area

Mason Tillman used four types of sources to identify businesses in the market area that provide the goods and services that Shelby County (County) procures. One source was the County's records, including vendor and bidder lists. The second source was government certification directories. The third source was business association membership lists. The fourth source was the business community meeting. Only businesses determined to be willing were added to the availability list. Any business identified as "willing" from more than one source was counted only once in an industry. A business that was willing to provide goods or services in more than one industry was listed uniquely in each relevant industry's availability list.



³²⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The four sources were ranked, with the highest rank assigned to the utilized businesses, bidders, and vendors. Government certification lists ranked second, business association membership lists ranked third, and the business community meeting ranked fourth. Therefore, the first document used to build the availability list was the County's utilized businesses. Bidder and vendor lists were then appended. Businesses identified from federal and local government certification agencies were thereafter appended. The local certification lists included M/WBEs and Locally Owned Small Businesses (LOSBs). Businesses identified from association membership lists, which affirmed their willingness through a survey of business association members, were also appended. The business associations included trade organizations, professional organizations, and chambers of commerce. Finally, businesses that affirmed their willingness at the business community meeting were appended.

Extensive targeted outreach to business associations in the market area was performed to identify and secure business membership directories. From the 42 sources listed in Table 6.1, 1,193 unique market area businesses that provided goods or services in one or more of the three industries were identified. An accounting of the willing businesses derived by source is listed below:

1. County Records

There were 541 unique market area businesses identified from the County records.

2. Government Certification Lists

There were 485 unique market area businesses identified from government certification lists.

3. Business Association Membership Lists

There were 1,118 unique market area businesses identified from business association membership lists. Of the 1,118 businesses, 1,047 had phone numbers and were surveyed to determine their willingness to contract with the County. Of the 1,047 surveyed businesses, 156 refused to participate, 635 did not respond, 80 telephone numbers were disconnected, and 176 businesses completed the survey. Of the 176 businesses that completed the survey, 157 were deemed willing and added to the availability database.

4. Business Community Meeting

There were 10 unique market area businesses identified from the business community meeting.



B. Prime Contractor Sources

Table 6.1 lists the sources from which the list of willing businesses was compiled.

Table 6.1: Prime Contractor Availability Data Sources

Source	Type of Information
County Records	
Shelby County's Utilized Prime Contractors	M/WBEs and non-M/WBEs
Shelby County's Vendor Lists	M/WBEs and non-M/WBEs
Government Certification Directories	
Governor's Office of Diversity Business Enterprise	DBEs ³²¹
Memphis Shelby County Airport Authority Airport Concessions Disadvantaged Business Enterprise	DBEs
Memphis Shelby County Airport Authority Disadvantaged Business Enterprise	DBEs
Memphis Shelby County Airport Authority Small Business Enterprise	SBEs
Shelby County Small Business Administration 8(a)	DBEs
Shelby County Small Business Administration HUBZone	SBEs
Shelby County Small Business Administration Small Disadvantaged Businesses	DBEs
Shelby County Small Business Administration Service-Disabled Veteran-Owned Businesses	DBEs
Shelby County Small Business Administration Women-Owned Small-Business	WBEs
Tennessee Uniform Certification Program Disadvantaged Business Enterprise Directory	DBEs
Locally Owned Small Business Directory	SBEs
Business and Trade Association Membership Lists	
American Society of Landscape Architects West Tennessee Section	M/WBEs and non-M/WBEs
Arlington Chamber of Commerce	M/WBEs and non-M/WBEs
Bartlett Area Chamber of Commerce	M/WBEs and non-M/WBEs
Greater Memphis Chamber of Commerce	M/WBEs and non-M/WBEs
Mid-South Independent Electrical Contractors	M/WBEs and non-M/WBEs
Mason Contractors Association of America in Tennessee	M/WBEs and non-M/WBEs
Mechanical Contractors Association of Memphis	M/WBEs and non-M/WBEs
Mechanical Contractors Association of Tennessee	M/WBEs and non-M/WBEs
National Electrical Contractors Association, Incorporated Memphis Chapter	M/WBEs and non-M/WBEs
Memphis Area Minority Contractors Association	MBEs
Millington Area Chamber of Commerce	M/WBEs and non-M/WBEs



³²¹ Disadvantaged Business Enterprise is abbreviated as DBE.

Source	Type of Information
National Association of Professional Women Local Chapter Greater Memphis	WBEs
National Association of Professional Women Local Chapter Greater Memphis	WBEs
Tennessee Association of Construction Counsel, Inc.	M/WBEs and non-M/WBEs
Tennessee Association of Roofing Contractors	M/WBEs and non-M/WBEs
Tennessee Christian Chamber of Commerce	M/WBEs and non-M/WBEs
Tennessee Concrete Association	M/WBEs and non-M/WBEs
Tennessee Fire Sprinkler Contractors Association	M/WBEs and non-M/WBEs
Tennessee Chinese Chamber of Commerce	MBEs
Collierville Chamber of Commerce	M/WBEs and non-M/WBEs
Tennessee District of Precision Metalforming Association	M/WBEs and non-M/WBEs
Tennessee Veterans Business Association	DBEs
Tennessee Association of Professional Surveyors Southwest Chapter	M/WBEs and non-M/WBEs
Associated General Contractors of Tennessee	M/WBEs and non-M/WBEs
Germantown Area Chamber of Commerce	M/WBEs and non-M/WBEs
Black Business Association of Memphis	MBEs
Tennessee Trucking Association	M/WBEs and non-M/WBEs
West Tennessee Associated Builders & Contractors Membership	M/WBEs and non-M/WBEs
American Council of Engineering Companies	M/WBEs and non-M/WBEs

C. Determination of Willingness

All businesses included in the availability analysis were determined to be willing to contract with the County. “Willingness” is defined in *Croson* and its progeny as a business’s interest in contracting with the government. To be classified as willing, each business either bid on a government contract, secured government certification, or was listed on a business organization’s membership list and affirmed an interest in contracting with the County through the willingness survey. Businesses identified from the sources listed in Table 6.1 demonstrated their willingness to perform on public contracts.

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

Table 6.2 to Table 6.5 present the distribution of willing prime contractors by source. The highest ranked source was the list of prime contractors utilized by the County. Each ranked business is counted only once. For example, a utilized prime contractor counted in the prime contractor utilization source was not counted a second time as a bidder, certified business, or company identified from a business association list.



As noted in Table 6.2, 86.16% of the businesses on the unique list of available prime contractors were obtained from the County's records, other government agencies' records, and government certification lists. Willing businesses identified through the business association membership lists and the business community meeting represent 13.84% of the available businesses.

Table 6.2: Distribution of Prime Contractor Availability Data Sources, All Industries

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	38.46%	50.99%	45.39%
Certification Lists	48.59%	34.45%	40.77%
Subtotal	87.05%	85.43%	86.16%
Community Meeting Attendees	1.69%	0.15%	0.84%
Willingness Survey	11.26%	14.42%	13.00%
Subtotal	12.95%	14.57%	13.84%
Grand Total*	100.00%	100.00%	100.00%

*The percentages may not total 100 percent due to rounding

A distribution of available businesses by source was also calculated for each industry. As noted in Table 6.3, 88.38% of the construction businesses identified were derived from the County's records, other government agencies' records, and government certification lists. Companies identified through the business association membership lists and the business community meeting represent 11.62% of the willing businesses.

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Table 6.3: Distribution of Prime Contractor Availability Data Sources, Construction

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	38.51%	44.98%	42.16%
Certification Lists	52.17%	41.63%	46.22%
Subtotal	90.68%	86.60%	88.38%
Community Meeting Attendees	0.62%	0.48%	0.54%
Willingness Survey	8.70%	12.92%	11.08%
Subtotal	9.32%	13.40%	11.62%
Grand Total*	100.00%	100.00%	100.00%

*The percentages may not total 100 percent due to rounding

Table 6.4 depicts the data sources for the available professional services prime contractors. As noted, 85.82% of the professional services businesses identified were derived from the County's records, other government agencies' records, and government certification lists. Companies identified through the business association membership lists and the business community meeting represent 14.18% of the willing businesses.

Table 6.4: Distribution of Prime Contractor Availability Data Sources, Professional Services

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	31.82%	53.43%	42.79%
Certification Lists	54.04%	32.35%	43.03%
Subtotal	85.86%	85.78%	85.82%
Community Meeting Attendees	2.53%	0.00%	1.24%
Willingness Survey	11.62%	14.22%	12.94%
Subtotal	14.14%	14.22%	14.18%
Grand Total*	100.00%	100.00%	100.00%

*The percentages may not total 100 percent due to rounding

Table 6.5 depicts the data sources for the available commodities and services prime contractors. As noted, 88.32% of the commodities and services businesses identified were derived from the County's records, other government agencies' records, and government certification lists.



Companies identified through the business association membership lists and the business community meeting represent 11.68% of the willing businesses.

Table 6.5: Distribution of Prime Contractor Availability Data Sources, Commodities and Services

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	45.23%	62.04%	54.87%
Certification Lists	43.57%	25.93%	33.45%
Subtotal	88.80%	87.96%	88.32%
Community Meeting Attendees	1.66%	0.00%	0.71%
Willingness Survey	9.54%	12.04%	10.97%
Subtotal	11.20%	12.04%	11.68%
Grand Total*	100.00%	100.00%	100.00%

*The percentages may not total 100 percent due to rounding

III. Capacity

The second component of the availability requirement set forth in *Croson* is the capacity or ability of a business to perform the contracts the jurisdiction awards.³²² However, capacity requirements are not delineated in *Croson*. In those cases where capacity has been considered, the matter has involved large, competitively bid construction prime contracts. Nevertheless the capacity of willing market area businesses to contract with the County was assessed. Two measures were used.

- The size of all prime contracts awarded by the County was analyzed to determine the capacity needed to perform the average awarded contract.
- The largest contracts awarded to M/WBEs were identified to determine a demonstrated ability to win large, competitively bid contracts.

A. Size of Contracts Analyzed

The County's construction, professional services, and commodities and services contracts were analyzed to determine the size of awarded contracts in order to gauge the capacity required to perform on the County's contracts.



³²² *Croson*, 488 U.S. at 469.

For the size analysis, the County's contracts were grouped into nine dollar ranges.³²³ Each industry was analyzed to determine the number and percentage of contracts that fell within the nine size categories. The size distribution of contracts awarded to Non-minority Male businesses was then compared to the size distribution of contracts awarded to Caucasian Female businesses, minority female businesses, and minority male businesses.

1. All Industries Contracts by Size

Table 6.6 depicts all contracts awarded within the nine dollar ranges. Contracts valued under \$15,000 were 87.06%. Those valued under \$50,000 were 95.88%. Those valued under \$100,000 were 98.34% and those valued under \$500,000 were 99.43%.

2. Construction Contracts by Size

Table 6.7 depicts the construction contracts awarded within the nine dollar ranges. Contracts valued under \$15,000 were 88.60%. Those valued under \$50,000 were 97.39%. Those valued under \$100,000 were 98.34% and those valued under \$500,000 were 98.94%.

3. Professional Services Contracts by Size

Table 6.8 depicts professional services contracts within the nine dollar ranges. Contracts valued under \$15,000 were 73.76%. Those valued under \$50,000 were 90.05%. Those valued under \$100,000 were 95.67% and those valued under \$500,000 were 98.90%.

4. Commodities and Services Contracts by Size

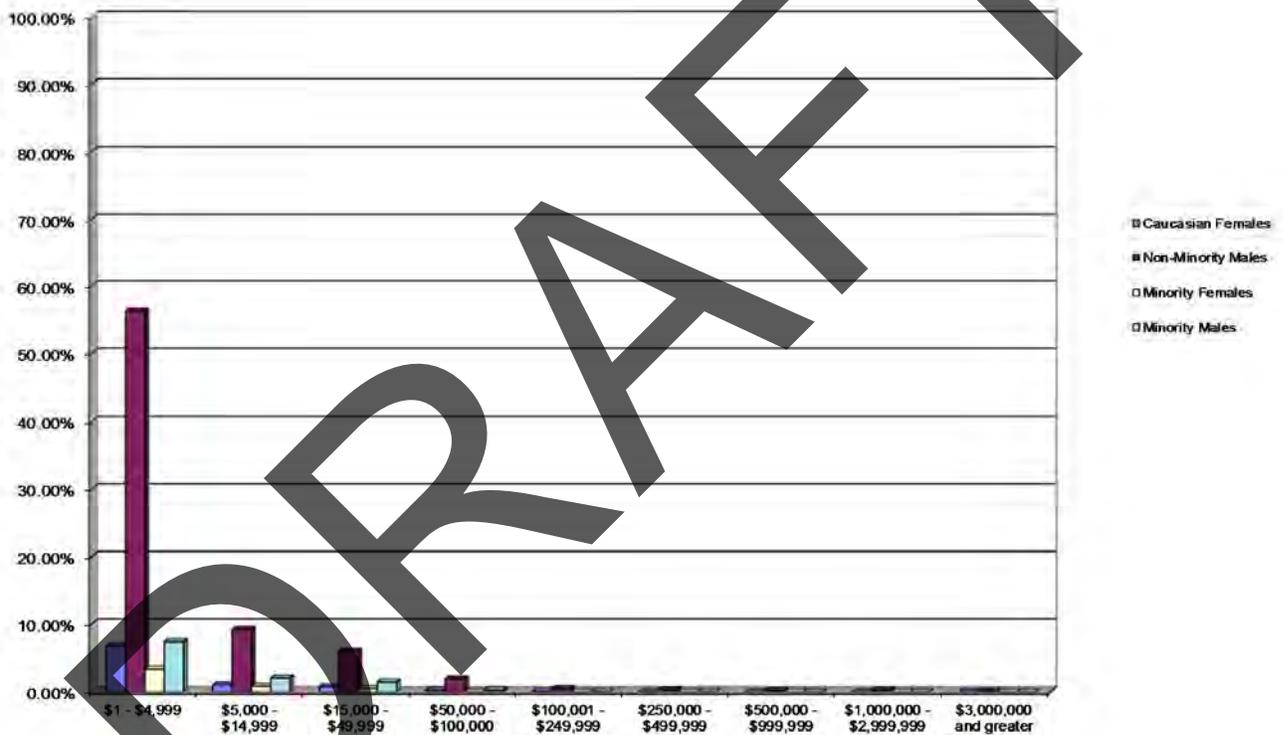
Table 6.9 depicts commodities and services contracts within the nine dollar ranges. Contracts valued under \$15,000 were 90.41%. Those valued under \$50,000 were 97.04%. Those valued under \$100,000 were 99.14% and those valued under \$500,000 were 99.79%.



³²³ The nine dollar ranges are \$1 - \$4,999, \$5,000 - \$14,999, \$15,000 - \$49,999, \$50,000 - \$100,000, \$100,001 - \$249,999, \$250,000 - \$499,999, \$500,000 - \$999,999, \$1,000,000 - \$2,999,999, and \$3,000,000 and greater.

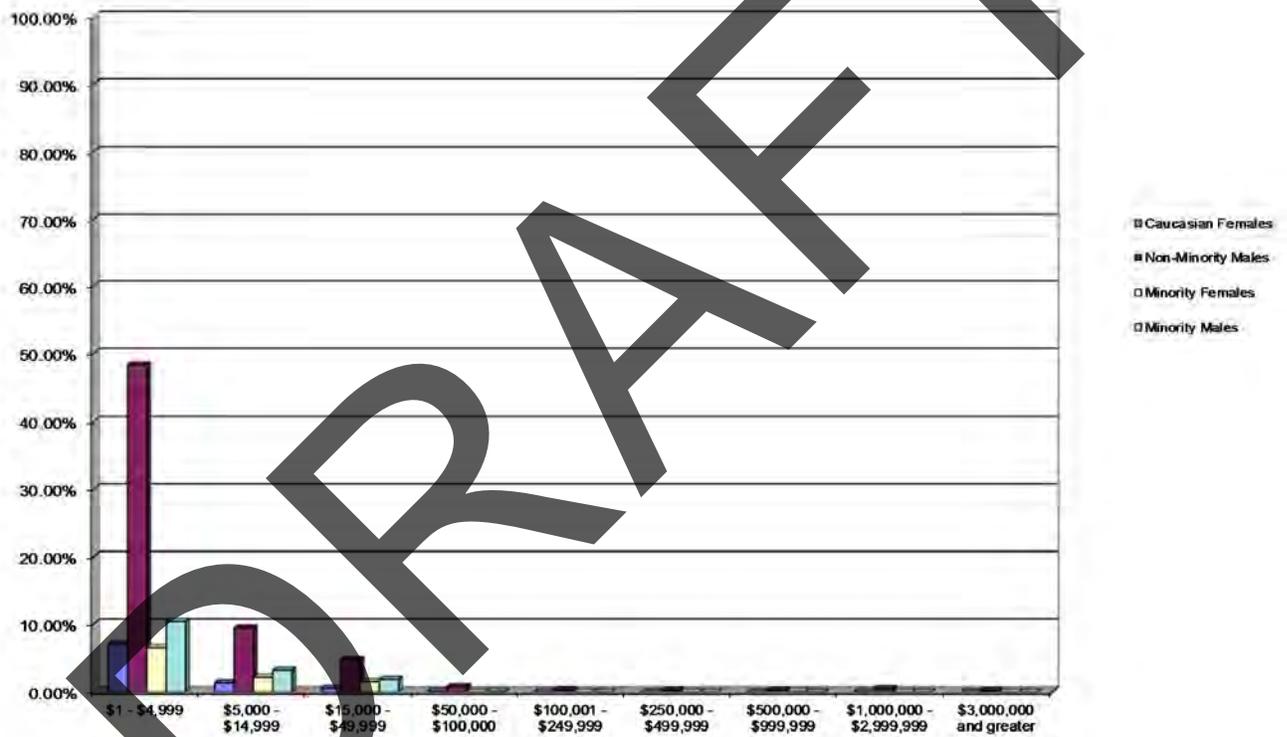
**Table 6.6: All Industry Contracts by Size,
January 1, 2012, to December 31, 2014**

Size	Non-minority				Minority				Total	
	Females		Males		Females		Males			
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
\$1 - \$4,999	599	6.83%	4,937	56.29%	296	3.37%	649	7.40%	6,481	73.89%
\$5,000 - \$14,999	92	1.05%	806	9.19%	76	0.87%	181	2.06%	1,155	13.17%
\$15,000 - \$49,999	69	0.79%	531	6.05%	45	0.51%	129	1.47%	774	8.82%
\$50,000 - \$100,000	23	0.26%	170	1.94%	0	0.00%	23	0.26%	216	2.46%
\$100,001 - \$249,999	9	0.10%	44	0.50%	1	0.01%	5	0.06%	59	0.67%
\$250,000 - \$499,999	4	0.05%	31	0.35%	0	0.00%	2	0.02%	37	0.42%
\$500,000 - \$999,999	0	0.00%	15	0.17%	1	0.01%	0	0.00%	16	0.18%
\$1,000,000 - \$2,999,999	1	0.01%	24	0.27%	0	0.00%	0	0.00%	25	0.29%
\$3,000,000 and greater	0	0.00%	8	0.09%	0	0.00%	0	0.00%	8	0.09%
Total	797	9.09%	6,566	74.86%	419	4.78%	989	11.28%	8,771	100.00%



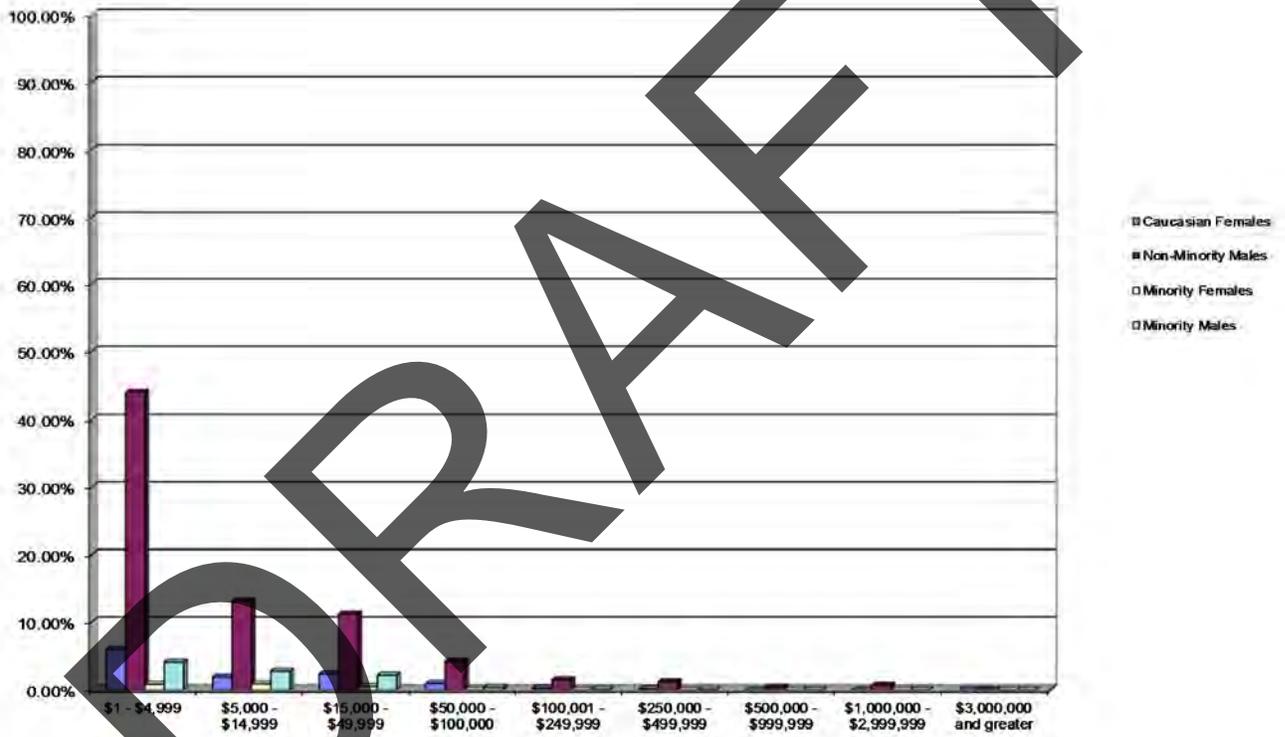
**Table 6.7: Construction Contracts by Size,
January 1, 2012, to December 31, 2014**

Size	Non-minority				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$4,999	141	7.08%	962	48.32%	131	6.58%	207	10.40%	1,441	72.38%
\$5,000 - \$14,999	27	1.36%	188	9.44%	43	2.16%	65	3.26%	323	16.22%
\$15,000 - \$49,999	11	0.55%	96	4.82%	31	1.56%	37	1.86%	175	8.79%
\$50,000 - \$100,000	2	0.10%	16	0.80%	0	0.00%	1	0.05%	19	0.95%
\$100,001 - \$249,999	1	0.05%	6	0.30%	0	0.00%	0	0.00%	7	0.35%
\$250,000 - \$499,999	0	0.00%	5	0.25%	0	0.00%	0	0.00%	5	0.25%
\$500,000 - \$999,999	0	0.00%	5	0.25%	1	0.05%	0	0.00%	6	0.30%
\$1,000,000 - \$2,999,999	1	0.05%	10	0.50%	0	0.00%	0	0.00%	11	0.55%
\$3,000,000 and greater	0	0.00%	4	0.20%	0	0.00%	0	0.00%	4	0.20%
Total	183	9.19%	1,292	64.89%	206	10.35%	310	15.57%	1,991	100.00%



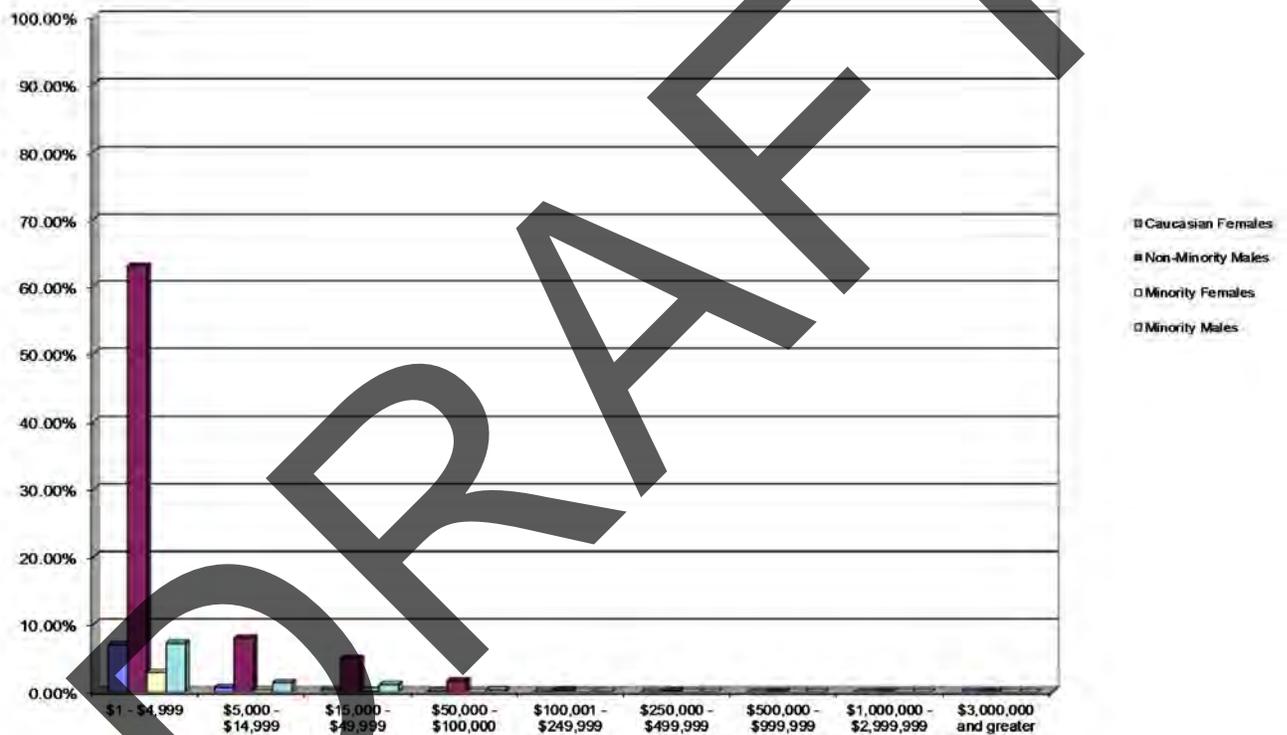
**Table 6.8: Professional Services Contracts by Size,
January 1, 2012, to December 31, 2014**

Size	Non-minority				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$4,999	93	6.01%	681	44.02%	13	0.84%	64	4.14%	851	55.01%
\$5,000 - \$14,999	30	1.94%	203	13.12%	14	0.90%	43	2.78%	290	18.75%
\$15,000 - \$49,999	37	2.39%	173	11.18%	8	0.52%	34	2.20%	252	16.29%
\$50,000 - \$100,000	15	0.97%	66	4.27%	0	0.00%	6	0.39%	87	5.62%
\$100,001 - \$249,999	4	0.26%	23	1.49%	0	0.00%	1	0.06%	28	1.81%
\$250,000 - \$499,999	2	0.13%	19	1.23%	0	0.00%	1	0.06%	22	1.42%
\$500,000 - \$999,999	0	0.00%	6	0.39%	0	0.00%	0	0.00%	6	0.39%
\$1,000,000 - \$2,999,999	0	0.00%	11	0.71%	0	0.00%	0	0.00%	11	0.71%
\$3,000,000 and greater	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Total	181	11.70%	1,182	76.41%	35	2.26%	149	9.63%	1,547	100.00%



**Table 6.9: Commodities and Services Contracts by Size,
January 1, 2012, to December 31, 2014**

Size	Non-minority				Minority				Total	
	Females		Males		Females		Males			
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
\$1 - \$4,999	365	6.97%	3,294	62.95%	152	2.90%	378	7.22%	4,189	80.05%
\$5,000 - \$14,999	35	0.67%	415	7.93%	19	0.36%	73	1.39%	542	10.36%
\$15,000 - \$49,999	21	0.40%	262	5.01%	6	0.11%	58	1.11%	347	6.63%
\$50,000 - \$100,000	6	0.11%	88	1.68%	0	0.00%	16	0.31%	110	2.10%
\$100,001 - \$249,999	4	0.08%	15	0.29%	1	0.02%	4	0.08%	24	0.46%
\$250,000 - \$499,999	2	0.04%	7	0.13%	0	0.00%	1	0.02%	10	0.19%
\$500,000 - \$999,999	0	0.00%	4	0.08%	0	0.00%	0	0.00%	4	0.08%
\$1,000,000 - \$2,999,999	0	0.00%	3	0.06%	0	0.00%	0	0.00%	3	0.06%
\$3,000,000 and greater	0	0.00%	4	0.08%	0	0.00%	0	0.00%	4	0.08%
Total	433	8.27%	4,092	78.20%	178	3.40%	530	10.13%	5,233	100.00%



B. Business Capacity Esurvey

Neither Croson nor its progeny have given guidance on how to determine if a business is qualified or able to perform public contracting. Consequently, there are no clear methods to define measures of business capacity. A firm's revenue, business size, number of employees, bonding levels, and bidding history are factors that can be used as indicators of capacity. Although these indicators are subject to the effects of marketplace discrimination, the presence of discrimination in the County's marketplace is documented in *Chapter 7: Prime Contract Disparity Analysis*, *Chapter 8: Subcontract Disparity Analysis*, *Chapter 9: Anecdotal Analysis*, and *Chapter 10: Regression Analysis*.

To determine the relative capacity of the M/WBEs and non-M/WBEs enumerated in the availability analysis, an eSurvey was administered. The analysis of business capacity considered annual gross revenue as a proxy for business capacity. Revenue was selected because it is a reflection of a business's contracting activity. This analysis found that minority male and minority female business revenue and contracting opportunities were limited even when minority males and females and similarly situated Caucasian Males and Caucasian Females bid on contracts at the same frequency. None of the economic indicators that were assessed accounted for the disproportionate award of contracts to Caucasian Males as documented in *Chapter 7: Prime Contract Disparity Analysis*, and *Chapter 8: Subcontract Disparity Analysis*.

1. Methodology

a) Data Sample

Inferences about the capacity of businesses identified in the Study were made from a stratified sample of businesses included in the disparity analysis. The stratified sample of M/WBEs and non-M/WBEs willing to contract with the County was drawn from the businesses in the availability and utilization databases. The sample was stratified by ethnicity, gender and industry.

b) Data Analysis

An ordered logistic regression analysis and an analysis of cumulative frequencies were used to analyze the survey data. A statistically significant finding indicates that there is a non-random relationship between the dependent variable and the independent variable. The cumulative frequencies illustrate the distribution of responses by ethnicity, gender, and, in some cases, industry. A Chi-square test of independence was conducted to determine if there was a statistically significant difference in the frequency of responses by ethnicity and gender.

- ***In the regression coefficient tables***, a finding of statistical significance is denoted by an asterisk (*) when the independent variable is significant at or above the 95% confidence



level. Tables of regression results indicate the sign of each variable’s coefficient from the regression output. If the coefficient sign is positive, it indicates that there is a positive relationship between the dependent variable and that independent variable. If the coefficient sign for the independent variable is negative, this implies an inverse relationship between the dependent variable and that independent variable. When the correlation coefficient is close to zero, it indicates that no linear relationship exists.

- *In the cumulative frequency summary tables*, a finding of statistical significance is denoted by the p-value. If the p-value is equal to or less than 0.05, the difference is statistically significant at the 95% confidence level.

2. Profile of Respondents

The business capacity survey was completed by 158 unique businesses – 43.42% were African American-owned, 5.92% were Asian American-owned, 2.63% were Hispanic American-owned, 0.66% were Native American-owned, and 47.37% were Caucasian American-owned. Of the 158 surveys, 47.37% were completed by females of all ethnicities and 52.63% were completed by males of all ethnicities.

Due to the limited number of responses, ethnic groups were combined and were analyzed aggregately as “minority males” and “minority females” in the cumulative frequency tables. Regression coefficient tables are presented by industry, MBEs (which includes minority males and minority females), non-M/WBEs (which denotes Caucasian Males), and WBEs (which denotes Caucasian Females).

Table 6.10: Ethnicity and Gender of Businesses

Response	African American	Asian American	Caucasian American	Hispanic American	Native American	Total
Female	19.74%	1.97%	25.00%	0.66%	0.00%	47.37%
Male	23.68%	3.95%	22.37%	1.97%	0.66%	52.63%
Total	43.42%	5.92%	47.37%	2.63%	0.66%	100.00%

$\chi^2=3.3559$, $df=4$, $p\text{-value}=0.5001$

As shown in Table 6.11, 21.71% of businesses provided construction; 42.11% of businesses provided professional services; and 36.18% of businesses provided commodities and services.



Table 6.11: Primary Industry

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Construction	4.61%	5.26%	5.92%	5.92%	21.71%
Professional Services	9.21%	12.50%	11.18%	9.21%	42.11%
Commodities and Services	8.55%	12.50%	7.89%	7.24%	36.18%
Total Percent	22.37%	30.26%	25.00%	22.37%	100.00%
Total Number	34	46	38	34	152

$\chi^2=1.6549$, $df=6$, $p\text{-value}=0.9485$

3. Capacity Analysis

a) Introduction

Several independent economic indicators were examined to determine the effect of M/WBEs and non-M/WBEs' business characteristics on their reported annual gross revenue. Discrimination can depress an M/WBE's revenue, contracting activity, and number of employees. This analysis will show that contracting opportunities and revenue for M/WBEs are limited even when M/WBEs are similarly situated and bid on the County's contracts at the same frequency as Caucasian Males. With the metrics considered in this analysis, non-M/WBEs are not awarded contracts more frequently because of any single measure of capacity or a combination of the capacity measures.

4. Business Annual Gross Revenue by Industry

Business annual gross revenue regression coefficient tables were prepared by industry for construction, professional services, and commodities and services.

As shown in Table 6.12, 14.97% of businesses earned \$50,000 and under; 8.16% of businesses earned \$50,001 to \$100,000; 17.01% of businesses earned \$100,001 to \$300,000; 6.12% of businesses earned \$300,001 to \$500,000; 16.33% of businesses earned \$500,001 to \$1,000,000; 17.01% of businesses earned \$1,000,001 to \$3,000,000; 7.48% of businesses earned \$3,000,001 to \$5,000,000; 7.48% of businesses earned \$5,000,001 to \$10,000,000; and 5.44% of businesses earned over \$10 million. Also, 15.15% of Caucasian Males and 5.56% of Caucasian Females earned over \$10 million dollars, whereas only 2.22% of minority males and 0.00% of minority females earned over \$10 million.



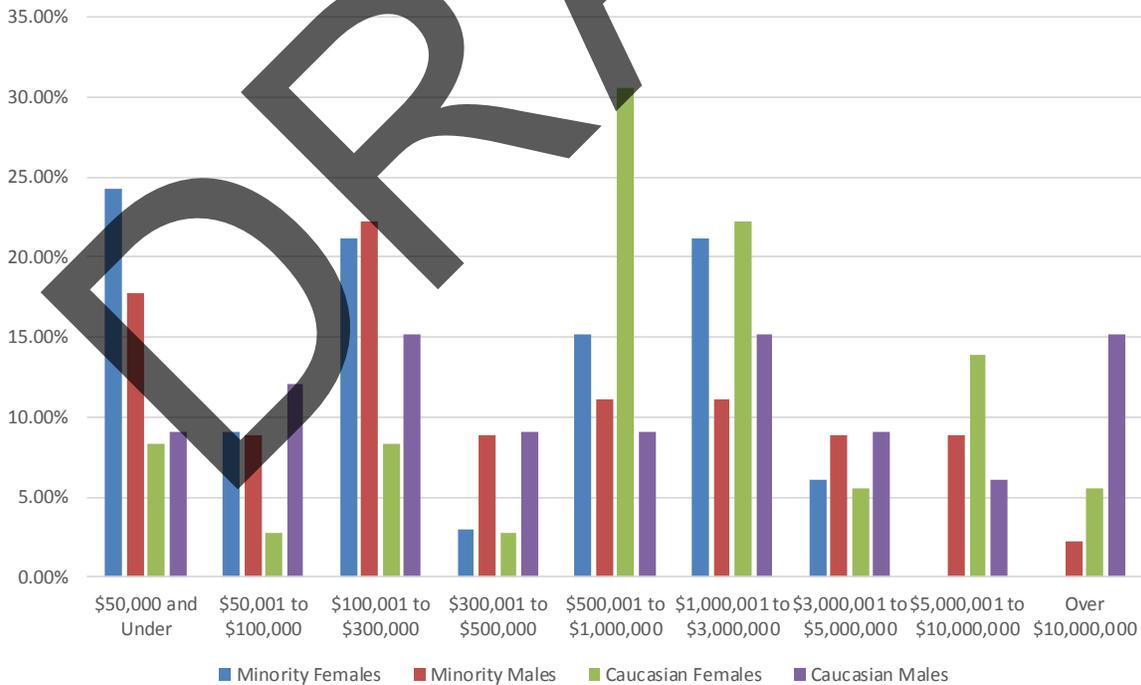
Table 6.12: Annual Gross Revenue

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
\$50,000 and Under	24.24%	17.78%	8.33%	9.09%	14.97%
\$50,001 to \$100,000	9.09%	8.89%	2.78%	12.12%	8.16%
\$100,001 to \$300,000	21.21%	22.22%	8.33%	15.15%	17.01%
\$300,001 to \$500,000	3.03%	8.89%	2.78%	9.09%	6.12%
\$500,001 to \$1,000,000	15.15%	11.11%	30.56%	9.09%	16.33%
\$1,000,001 to \$3,000,000	21.21%	11.11%	22.22%	15.15%	17.01%
\$3,000,001 to \$5,000,000	6.06%	8.89%	5.56%	9.09%	7.48%
\$5,000,001 to \$10,000,000	0.00%	8.89%	13.89%	6.06%	7.48%
Over \$10,000,000	0.00%	2.22%	5.56%	15.15%	5.44%
Total Percent	100.00%	100.00%	100.00%	100.00%	100.00%
Total Number	33	45	36	33	147

$\chi^2=34.2796$, $df=24$, $p\text{-value}=0.0798$

Chart 6.1 further illustrates that minority males and minority females earn less annually than Caucasian Males and Caucasian Females. The revenue of minority females is more likely to be in the \$100,001 to \$300,000 range and while the revenue of Caucasian Females is more likely to be in the \$500,001 to \$1,000,000 range and the revenue of Caucasian Males is more likely to be in the over \$10,000,000 range.

Chart 6.1: Annual Gross Revenue



a) **Business Annual Gross Revenue: Construction**

Table 6.13 presents the results of the ordered logistic regression conducted to determine how annual gross revenue of a business in the construction industry is impacted by independent business characteristics.

Table 6.13: Annual Gross Revenue Ordered Logistic Regression: Construction

Annual Gross Revenue	Coefficient	Significance	Standard Error	Z-score	P> z
Number of Contracts	-0.492450		0.477853	-1.03	0.303
Years of Operation	0.491558		0.535462	0.92	0.359
Number of Employees	3.075982	*	0.948717	3.24	0.001
Bonding Amount	0.400261		0.397012	1.01	0.313
Private Sector Revenue	0.011106		0.015521	0.72	0.474
Associate's Degree (a)	-4.316913	*	2.009335	-2.15	0.032
Bachelor's Degree	2.156273		1.536522	1.40	0.161
Advanced Degree	0.424379		1.523275	0.28	0.781
Caucasian Female (b)	3.417983	*	1.456030	2.35	0.019
Minority	-2.164033		1.215926	-1.78	0.075

(a) For the degree variables, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(P>|z|) of 0.05 and less denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

- Businesses in the construction industry that have more current employees have statistically significant higher annual gross revenue
- Businesses in the construction industry that are owned by associate's degree holders have statistically significant lower annual gross revenue
- Businesses in the construction that are owned by bachelor's degree holders and advanced degree holders are more likely to have higher annual gross revenue, but not at a statistically significant level
- Businesses in the construction industry that are owned by Caucasian Females have statistically significant higher annual gross revenue
- Businesses in the construction industry that are owned by minorities are more likely to have lower annual gross revenue, but not at a statistically significant level



b) Business Annual Gross Revenue: Professional Services

Table 6.14: Annual Gross Revenue Ordered Logistic Regression: Professional Services

Annual Gross Revenue	Coefficient	Significance	Standard Error	Z-score	P> z
Number of Contracts	0.823158	*	0.219920	3.74	0.000
Years of Operation	0.269488		0.259045	1.04	0.298
Number of Employees	3.730900	*	0.709904	5.26	0.000
Bonding Amount	-0.122978		0.192423	-0.64	0.523
Private Sector Revenue	-0.015924		0.009241	-1.72	0.085
Associate's Degree (a)	-0.396775		1.344535	-0.30	0.768
Bachelor's Degree	-0.272431		0.903781	-0.30	0.763
Advanced Degree	-0.666518		0.963617	-0.69	0.489
Caucasian Female (b)	0.815020		0.875569	0.93	0.352
Minority	0.786023		0.733955	1.07	0.284

(a) For the degree variables, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(P>|z|) of 0.05 and less denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

- Businesses in the professional services industry whose annual gross revenue is derived from more individual contracts have statistically significant higher annual gross revenue
- Businesses in the professional services industry that have more current employees have statistically significant higher annual gross revenue
- Businesses in the professional services industry that are owned by Caucasian Females are more likely to have higher annual gross revenue, but not at a statistically significant level
- Businesses in the professional services industry that are owned by minorities are more likely to have higher annual gross revenue, but not at a statistically significant level

c) Business Annual Gross Revenue: Commodities and Services

Table 6.15 presents the results of the ordered logistic regression conducted to determine how annual gross revenue of a business in the commodities and services industry is impacted by independent business characteristics.



Table 6.15: Annual Gross Revenue Ordered Logistic Regression: Commodities and Services

Annual Gross Revenue	Coefficient	Significance	Standard Error	Z-score	P> z
Number of Contracts	-0.028588		0.225368	-0.13	0.899
Years of Operation	1.993081	*	0.463250	4.30	0.000
Number of Employees	1.884301	*	0.427147	4.41	0.000
Bonding Amount	0.275676		0.210842	1.31	0.191
Private Sector Revenue	-0.001605		0.009899	-0.16	0.871
Associate's Degree (a)	0.637322		0.980687	0.65	0.516
Bachelor's Degree	0.451859		0.856861	0.53	0.598
Advanced Degree	2.237128	*	1.020230	2.19	0.028
Caucasian Female (b)	5.474710	*	1.607145	3.41	0.001
Minority	1.531236		1.169431	1.31	0.190

(a) For the degree variables, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(P>|z|) of 0.05 and less denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

- Businesses in the commodities and services industry that have been in operation longer have statistically significant higher annual gross revenue
- Businesses in the commodities and services industry that have more current employees have statistically significant higher annual gross revenue
- Businesses in the commodities and services that are owned by associate's degree holders and bachelor's degree holders are more likely to have higher annual gross revenue, but not at a statistically significant level
- Businesses in the commodities and services that are owned by advanced degree holders have statistically significant higher annual gross revenue
- Businesses in the commodities and services industry that are owned by Caucasian Females have statistically significant higher annual gross revenue
- Businesses in the commodities and services industry that are owned by minorities are more likely to have higher annual gross revenue, but not at a statistically significant level

5. Business Annual Gross Revenue by Business Classification

The business annual gross revenue of was analyzed for Non-M/WBEs,³²⁴ WBEs,³²⁵ and MBEs³²⁶.



³²⁴ Non-M/WBEs are businesses owned by Caucasian Males.

³²⁵ WBEs are businesses owned by Caucasian Females.

³²⁶ MBEs are businesses owned by African American, Asian American, Hispanic American, and Native American males and females.

a) **Business Annual Gross Revenue: Non-M/WBEs, All Industries**

Table 6.16 illustrates how the annual gross revenue of businesses owned by Caucasian Males is impacted by independent business characteristics.

Table 6.16: Annual Gross Revenue Ordered Logistic Regression: Non-M/WBEs

Annual Gross Revenue	Coefficient	Significance	Standard Error	Z-score	P> z
Number of Contracts	-0.06742		0.277000	-0.24	0.808
Years of Operation	0.66974		0.360271	1.86	0.063
Number of Employees	2.00151	*	0.547280	3.66	0.000
Bonding Amount	0.37481		0.258005	1.45	0.146
Private Sector Revenue	0.02079		0.017031	1.22	0.222
Associate's Degree (a)	-2.58028		1.903224	-1.36	0.175
Bachelor's Degree	0.15097		0.979179	0.15	0.877
Advanced Degree	0.80384		1.119495	0.72	0.473

(a) For the degree variables, the baseline variable is no degree.

(P>|z|) of 0.05 and less denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

- Non-MBEs that have been in operation longer are more likely to have higher annual gross revenue, but not at a statistically significant level
- Non-MBEs that have more current employees have statistically significant higher annual gross revenue
- Non-MBEs owned by bachelor's degree holders and advanced degree holders are more likely to have higher annual gross revenue, but not at a statistically significant level

b) **Business Annual Gross Revenue: WBEs, All Industries**

Table 6.17 illustrates how the annual gross revenue of businesses owned by Caucasian Females is impacted by independent business characteristics.



Table 6.17: Annual Gross Revenue Ordered Logistic Regression: WBEs

Annual Gross Revenue	Coefficient	Significance	Standard Error	Z-score	P> z
Number of Contracts	-0.272557		0.339175	-0.80	0.422
Years of Operation	1.189933	*	0.477585	2.49	0.013
Number of Employees	2.929143	*	0.790411	3.71	0.000
Bonding Amount	0.421781		0.310620	1.36	0.175
Private Sector Revenue	-0.002935		0.013081	-0.22	0.822
Associate's Degree (a)	-1.003944		1.192998	-0.84	0.400
Bachelor's Degree	-1.291815		1.124832	-1.15	0.251
Advanced Degree	-0.530586		1.623256	-0.33	0.744

(a) For the degree variables, the baseline variable is no degree.

(P>|z|) of 0.05 and less denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

- WBEs that have been in operation longer have statistically significant higher annual gross revenue
- WBEs that have more current employees have statistically significant higher annual gross revenue

c) Business Annual Gross Revenue: MBEs, All Industries

Table 6.18 illustrates how the annual gross revenue of businesses owned by minority males and minority females is impacted by independent business characteristics³²⁷.

Table 6.18: Annual Gross Revenue Ordered Logistic Regression: MBEs

Annual Gross Revenue	Coefficient	Significance	Standard Error	Z-score	P> z
Number of Contracts	0.652061	*	0.192006	3.40	0.001
Years of Operation	0.393682		0.260196	1.51	0.130
Number of Employees	2.104245	*	0.345391	6.09	0.000
Bonding Amount	-0.020227		0.131994	-0.15	0.878
Private Sector Revenue	-0.010402		0.007282	-1.43	0.153
Associate's Degree (a)	-0.491560		1.030091	-0.48	0.633
Bachelor's Degree	1.672637	*	0.662617	2.52	0.012
Advanced Degree	0.982181		0.698442	1.41	0.160

(a) For the degree variables, the baseline variable is no degree.

(P>|z|) of 0.05 and less denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

- MBEs whose annual gross revenue is derived from more individual contracts have statistically significant higher annual gross revenue



³²⁷ Minority denotes African Americans, Asian Americans, Hispanic Americans, and Native Americans.

- MBEs that have been in operation longer are more likely to have higher annual gross revenue, but not at a statistically significant level
- MBEs that have more current employees have statistically significant higher annual gross revenue
- MBEs owned by bachelor's degree holders have statistically significant higher annual gross revenue
- MBEs owned by advanced degree holders are more likely to have higher annual gross revenue, but not at a statistically significant level

6. Current Employees by Ethnicity, All Industries

Because the number of employees had a positive correlation with annual gross revenue for all businesses, the following tables are presented.

As shown in Table 6.19, 46.36% of business had less than five employees; 16.56% had 6 to 10 employees; 13.25% had 11 to 20 employees; 13.91% had 21 to 50 employees; and 9.93% had more than 50 employees. 20.59% of Caucasian Males and 8.11% of Caucasian Females have over 50 employees whereas only 8.70% of minority males and 2.94% of minority females have over 50 employees.

Table 6.19: Current Number of Employees

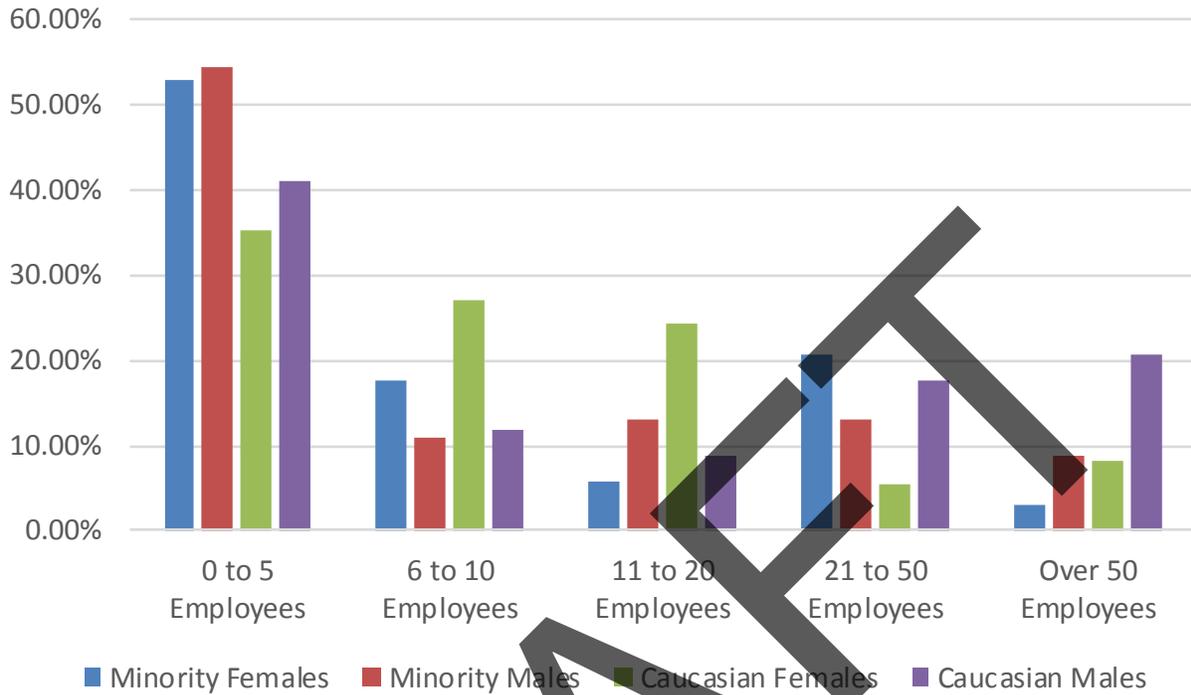
Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
0 to 5 Employees	52.94%	54.35%	35.14%	41.18%	46.36%
6 to 10 Employees	17.65%	10.87%	27.03%	11.76%	16.56%
11 to 20 Employees	5.88%	18.04%	24.32%	8.82%	13.25%
21 to 50 Employees	20.59%	13.04%	5.41%	17.65%	13.91%
Over 50 Employees	2.94%	8.70%	8.11%	20.59%	9.93%
Total Percent	100.00%	100.00%	100.00%	100.00%	100.00%
Total Number	34	46	37	34	151

$\chi^2=20.4568$, $df=12$, $p\text{-value}=0.0589$

Chart 6.2 illustrates that MBEs and Caucasian Females have fewer employees than Caucasian Males. MBEs are more likely to have 0 to 5 employees than Caucasian Males and Caucasian Females.



Chart 6.2: Current Number of Employees



7. Number of Contracts and Frequency of Bidding, All Industries

This finding is also demonstrated in *Chapter 3: Prime Contractor Utilization Analysis*, in which Non-M/WBEs are awarded more contracts than M/WBEs.

Aside from the greater number of workers employed by Caucasian Males and Caucasian Females, which has been acknowledged by the court to be an unreliable indicator of capacity, none of the factors considered accounts for non-MBEs’ disproportionate award of contracts. Table 6.20 illustrates that 53.33% of Caucasian Males and 51.43% of Caucasian Females were awarded over 20 contracts, compared to 35.56% of minority males and 18.18% of minority females.



Table 6.20: Number of Annual Contracts

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
0 Contract	3.03%	11.11%	11.43%	10.00%	9.09%
1 Contract	12.12%	6.67%	5.71%	0.00%	6.29%
2 to 5 Contracts	39.39%	24.44%	8.57%	13.33%	21.68%
6 to 10 Contracts	15.15%	11.11%	14.29%	6.67%	11.89%
11 to 20 Contracts	12.12%	11.11%	8.57%	16.67%	11.89%
Over 20 Contracts	18.18%	35.56%	51.43%	53.33%	39.16%
Total Percent	100.00%	100.00%	100.00%	100.00%	100.00%
Total Number	33	45	35	30	143

$\chi^2=22.9861$, $df=15$, $p\text{-value}=0.0844$

Table 6.21 illustrates that 80.00% of minority males submitted bids or qualifications to the County within the past year; 70.59% of minority females submitted bids or qualifications to the County within the past year; 60.53% of Caucasian Females submitted bids or qualifications to the County within the past year; and 81.82% of Caucasian Males submitted bids or qualifications to the County within the past year.

Table 6.21: Submitted a Bid or Qualifications to the County

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Yes	70.59%	80.00%	60.53%	81.82%	73.33%
No	29.41%	17.78%	28.95%	18.18%	23.33%
Not Applicable	0.00%	2.22%	10.53%	0.00%	3.33%
Total Percent	100.00%	100.00%	100.00%	100.00%	100.00%
Total Number	34	45	38	33	150

$\chi^2=11.802$, $df=6$, $p\text{-value}=0.0665$

8. Conclusion

The analysis shows that the number of employees have statistically significant relationships with the business's annual gross revenue in construction, professional services, and commodities and services for all ethnic and gender groups. This finding supports an inference that all businesses, regardless of ethnicity or gender, witness an increase in revenue and workers when they have more employees.



Because Caucasian Males and Caucasian Females employ more people, these results may also lead to an assumption that Caucasian Males' and Caucasian Females' capacity is increased due to their greater number of employees. However, in *North Shore Concrete & Association v. City of New York*, the court stated in reference to construction contractors that the "firm size is not a reliable

indicator of the kind of work a firm can perform.”³²⁸ The court further stated that “it is relatively easy to obtain ‘qualifications’ by hiring additional employees.” Although this court’s opinion specifically references the construction industry, the same elasticity characterizes the professional services industry. In the presence of contracting opportunities, professional services firms have the elasticity to expand their capacity to perform more and larger contracts through subcontracting, joint ventures, and staff augmentation. Therefore, the number of employees is not a reliable indicator of business capacity for either industry.

C. Largest M/WBE Contract Awarded by Industry

M/WBEs were awarded large contracts in each industry. The distribution of the largest contracts the County awarded to M/WBEs is depicted in Table 6.22. The utilization analysis shows that M/WBEs demonstrated the capacity to successfully compete for contracts as large as \$1,700,773 in construction, \$437,807 in professional services, and \$339,500 in commodities and services.

Table 6.22: Largest M/WBE Contracts Awarded by the County

Ethnic/Gender Group	Construction	Professional Services	Commodities and Services
African American Female	\$619,275	\$25,900	\$134,300
African American Male	\$99,340	\$437,807	\$259,992
Asian American Female	---	\$2,450	\$3,396
Asian American Male	\$3,480	\$93,600	\$33,856
Hispanic American Female	\$4,674	\$180	\$655
Hispanic American Male	---	\$160	\$13,950
Native American Female	---	---	---
Native American Male	---	\$101,770	\$238,609
Caucasian Female	\$1,700,773	\$325,000	\$339,500
Largest Dollar Amounts MBEs	\$619,275	\$437,807	\$259,992
Largest Dollar Amounts WBEs	\$1,700,773	\$325,000	\$339,500

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



³²⁸ *N. Shore Concrete & Assoc. v. City of New York*, No. 94-cv-4017, 1998 U.S. Dist. LEXIS 6785 * 25 (E.D.N.Y. Apr. 12, 1998).

IV. Prime Contractor Availability Analysis

The majority of the County's contracts are small, requiring limited capacity to perform. Furthermore, the awards the County has made to M/WBEs demonstrate that the capacity of the available businesses is considerably greater than needed to bid on the majority of the contracts awarded in the three industries studied. Nevertheless, as noted in *Chapter 3: Prime Contractor Utilization Analysis*, the decision was made to limit the prime contracts subject to the disparity analysis to those valued under \$500,000. The prime contractor availability findings for the County's market areas are outlined below.

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A. All Industry Prime Contractor Availability

The distribution of available prime contractors for all industries is summarized in Table 6.23 below.

African Americans account for 26.85% of all industry prime contractors in the County's market area.

Asian Americans account for 2.18% of all industry prime contractors in the County's market area.

Hispanic Americans account for 1.01% of all industry prime contractors in the County's market area.

Native Americans account for 0.76% of all industry prime contractors in the County's market area.

Caucasian Females account for 12.92% of all industry prime contractors in the County's market area.

Non-minority Males account for 56.29% of all industry prime contractors in the County's market area.

**Table 6.23: Available All Industry Prime Contractors
January 1, 2012, to December 31, 2014**

Ethnicity	Percent of Businesses
African Americans	26.85%
Asian Americans	2.18%
Hispanic Americans	1.01%
Native Americans	0.76%
Caucasian Females	12.92%
Non-minority Males	56.29%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	7.89%
African American Males	18.96%
Asian American Females	0.92%
Asian American Males	1.26%
Hispanic American Females	0.34%
Hispanic American Males	0.67%
Native American Females	0.17%
Native American Males	0.59%
Caucasian Females	12.92%
Non-minority Males	56.29%
TOTAL	100.00%



B. Construction Prime Contractor Availability

The distribution of available construction prime contractors is summarized in Table 6.24 below.

African Americans account for 30.54% of the construction prime contractors in the County's market area.

Asian Americans account for 1.08% of the construction prime contractors in the County's market area.

Hispanic Americans account for 0.81% of the construction prime contractors in the County's market area.

Native Americans account for 0.81% of the construction prime contractors in the County's market area.

Caucasian Females account for 9.19% of the construction prime contractors in the County's market area.

Non-minority Males account for 57.57% of the construction prime contractors in the County's market area.

**Table 6.24: Available Construction Prime Contractors
January 1, 2012, to December 31, 2014**

Ethnicity	Percent of Businesses
African Americans	30.54%
Asian Americans	1.08%
Hispanic Americans	0.81%
Native Americans	0.81%
Caucasian Females	9.19%
Non-minority Males	57.57%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	6.76%
African American Males	23.78%
Asian American Females	0.81%
Asian American Males	0.27%
Hispanic American Females	0.00%
Hispanic American Males	0.81%
Native American Females	0.27%
Native American Males	0.54%
Caucasian Females	9.19%
Non-minority Males	57.57%
TOTAL	100.00%



C. Professional Services Prime Contractor Availability

The distribution of available professional services prime contractors is summarized in Table 6.25 below.

African Americans account for 26.37% of the professional services prime contractors in the County's market area.

Asian Americans account for 4.98% of the professional services prime contractors in the County's market area.

Hispanic Americans account for 1.49% of the professional services prime contractors in the County's market area.

Native Americans account for 1.49% of the professional services prime contractors in the County's market area.

Caucasian Females account for 13.93% of the professional services prime contractors in the County's market area.

Non-minority Males account for 51.74% of the professional services prime contractors in the County's market area.

**Table 6.25: Available Professional Services Prime Contractors
January 1, 2012, to December 31, 2014**

Ethnicity	Percent of Businesses
African Americans	26.37%
Asian Americans	4.98%
Hispanic Americans	1.49%
Native Americans	1.49%
Caucasian Females	13.93%
Non-minority Males	51.74%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	9.95%
African American Males	16.42%
Asian American Females	1.99%
Asian American Males	2.99%
Hispanic American Females	0.75%
Hispanic American Males	0.75%
Native American Females	0.25%
Native American Males	1.24%
Caucasian Females	13.93%
Non-minority Males	51.74%
TOTAL	100.00%



D. Commodities and Services Prime Contractor Availability

The distribution of available commodities and services prime contractors is summarized in Table 6.26 below.

African Americans account for 26.19% of the commodities and services prime contractors in the County's market area.

Asian Americans account for 0.53% of the commodities and services prime contractors in the County's market area.

Hispanic Americans account for 0.88% of the commodities and services prime contractors in the County's market area.

Native Americans account for 0.53% of the commodities and services prime contractors in the County's market area.

Caucasian Females account for 13.81% of the commodities and services prime contractors in the County's market area.

Non-minority Males account for 58.05% of the commodities and services prime contractors in the County's market area.

**Table 6.26: Available Commodities and Services Prime Contractors
January 1, 2012, to December 31, 2014**

Ethnicity	Percent of Businesses
African Americans	26.19%
Asian Americans	0.53%
Hispanic Americans	0.88%
Native Americans	0.53%
Caucasian Females	13.81%
Non-minority Males	58.05%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	7.08%
African American Males	19.12%
Asian American Females	0.00%
Asian American Males	0.53%
Hispanic American Females	0.18%
Hispanic American Males	0.71%
Native American Females	0.00%
Native American Males	0.53%
Caucasian Females	13.81%
Non-minority Males	58.05%
TOTAL	100.00%



V. Subcontractor Availability Analysis

A. Source of Potentially Willing and Able Subcontractors

All available prime contractors were included in the calculation of subcontractor availability. Additional subcontractors in the County's market area were identified using the source listed in Table 6.27.

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

Table 6.27: Unique Subcontractor Availability Data Source

Type Record	Type Information
Subcontract awards provided by the County	M/WBEs and non-M/WBEs
Prime expenditure survey	M/WBEs and non-M/WBEs
Data collection	M/WBEs and non-M/WBEs

B. Determination of Willingness and Capacity

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



C. Construction Subcontractor Availability

The distribution of available construction subcontractors is summarized in Table 6.28 below.

African Americans account for 28.13% of the construction subcontractors in the County's market area.

Asian Americans account for 0.96% of the construction subcontractors in the County's market area.

Hispanic Americans account for 0.96% of the construction subcontractors in the County's market area.

Native Americans account for 0.72% of the construction subcontractors in the County's market area.

Caucasian Females account for 9.62% of the construction subcontractors in the County's market area.

Non-minority Males account for 59.62% of the construction subcontractors in the County's market area.

**Table 6.28: Available Construction Subcontractors
January 1, 2012, to December 31, 2014**

Ethnicity	Percent of Businesses
African Americans	28.13%
Asian Americans	0.96%
Hispanic Americans	0.96%
Native Americans	0.72%
Caucasian Females	9.62%
Non-minority Males	59.62%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	6.25%
African American Males	21.88%
Asian American Females	0.72%
Asian American Males	0.24%
Hispanic American Females	0.00%
Hispanic American Males	0.96%
Native American Females	0.24%
Native American Males	0.48%
Caucasian Females	9.62%
Non-minority Males	59.62%
TOTAL	100.00%



D. Professional Services Subcontractor Availability

The distribution of available professional services subcontractors is summarized in Table 6.29 below.

African Americans account for 26.23% of the professional services subcontractors in the County's market area.

Asian Americans account for 5.15% of the professional services subcontractors in the County's market area.

Hispanic Americans account for 1.47% of the professional services subcontractors in the County's market area.

Native Americans account for 1.47% of the professional services subcontractors in the County's market area.

Caucasian Females account for 13.97% of the professional services subcontractors in the County's market area.

Non-minority Males account for 51.72% of the professional services subcontractors in the County's market area.

**Table 6.29: Available Professional Services Subcontractors
January 1, 2012, to December 31, 2014**

Ethnicity	Percent of Businesses
African Americans	26.23%
Asian Americans	5.15%
Hispanic Americans	1.47%
Native Americans	1.47%
Caucasian Females	13.97%
Non-minority Males	51.72%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	10.05%
African American Males	16.18%
Asian American Females	1.96%
Asian American Males	3.19%
Hispanic American Females	0.74%
Hispanic American Males	0.74%
Native American Females	0.25%
Native American Males	1.23%
Caucasian Females	13.97%
Non-minority Males	51.72%
TOTAL	100.00%



VI. Summary

This chapter provided the availability analysis for the County's market area. A total of 1,193 unique businesses that provided goods and services during the January 1, 2012, to December 31, 2014, study period in one or more of the three industries were identified. Businesses were identified from the County's records, government certification lists, business association membership lists, and the business community meeting. A total of 45.39% of these businesses were identified from prime contractor utilization, 40.77% were identified from certification lists, 13.00% were identified from the willingness survey, and 0.84% were identified from the business community meeting.

Contracts were also analyzed by size. A total of 87.06% were valued under \$15,000, 95.88% were valued under \$50,000, 98.35% were valued under \$100,000, and 99.44% were valued under \$500,000. Prime contractor and subcontractor availability were analyzed by ethnicity and gender. African Americans account for 26.85% of all industry prime contractors, Asian Americans account for 2.18% of all industry prime contractors, Hispanic Americans account for 1.01% of all industry prime contractors, Native Americans account for 0.76% of all industry prime contractors, Caucasian Females account for 12.92% of all industry prime contractors, and Non-minority Males account for 56.29% of all industry prime contractors.

African Americans account for 27.19% of all industry subcontractors, Asian Americans account for 3.18% of all industry subcontractors, Hispanic Americans account for 1.27% of all industry subcontractors, Native Americans account for 1.14% of all industry subcontractors, Caucasian females account for 11.56% of all industry subcontractors, and Non-minority males account for 55.65% of all industry subcontractors.

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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, hereinafter referred to as Minority and Caucasian Female Business Enterprises (M/WBEs), are utilized on Shelby County (County) prime contracts. Under a fair and equitable system of awarding prime contracts, the proportion of prime contract dollars awarded to M/WBEs should be relatively close to the corresponding proportion of available M/WBEs in the relevant market area.³²⁹ If the ratio of utilized M/WBE prime contractors to available M/WBE prime contractors 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. This analysis assumes a fair and equitable system.³³⁰ *City of Richmond v. J.A. Croson Co. (Croson)*³³¹ states that an inference of discrimination can be made *prima facie* if the disparity is statistically significant. Under the *Croson* model, Non-minority Male Business Enterprises (non-M/WBEs) are not subjected to a statistical test of underutilization.

The first step in conducting the statistical test is to calculate the contract dollars 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.

In practice, a disparity ratio of less than 0.80 indicates a relevant degree of disparity. To test the significance of a disparity ratio, a P-value must be calculated.³³² All disparity ratios less than one

³²⁹ 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.

³³⁰ 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.

³³¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

³³² P-value is a measure of statistical significance.



are subject to a statistical test of significance. The three methods employed to calculate statistical significance are a parametric analysis,³³³ a non-parametric analysis,³³⁴ and a simulation analysis.

A parametric analysis is most commonly used when the number of contracts is sufficiently large and the variation of the contract dollar amounts is not too large. When the variation in contract dollar amounts is large, a disparity may not be detectable using a parametric analysis. Therefore, a non-parametric analysis would be employed to analyze the contracts ranked by dollar amount. Both parametric and non-parametric analyses are effective due to the central limit theorem, which is strongest when the number of contracts is large and the data are not skewed. When there are too few contracts³³⁵ or the contract dollar data are skewed, a simulation analysis is employed. The utility of the simulation analysis is also dependent on the severity of the disparity when there are too few contracts. The simulation analysis utilizes randomization to simulate a distribution for the contracts.³³⁶ By conducting multiple trials in the simulation, the empirical data can be used to test the distribution of contract awards for significance.

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.³³⁷ 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.

Our statistical model employs all three methods simultaneously for 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.

³³³ Parametric analysis is a statistical examination based on the actual values of the variable. In this case, the parametric analysis consists of the actual dollar values of the contracts.

³³⁴ Non-parametric analysis is a method to make data more suitable for statistical testing by allowing one variable to be replaced with a new variable that maintains the essential characteristics of the original one. In this case, the contracts are ranked from the smallest to the largest. The dollar value of each contract is replaced with its rank order number.

³³⁵ Note: a relatively small availability population size decreases the reliability of the statistical results. Therefore, any availability percentage less than one percent cannot be labeled as statistically significant.

³³⁶ The simulation analysis can be conducted using contract dollar amounts or contract rankings.

³³⁷ A statistical test is not performed for the underutilization of Non-minority Males or when the ratio of utilized to available is greater than one for M/WBEs.



II. Disparity Analysis

A prime contract disparity analysis was performed for construction, professional services, including architecture and engineering (hereinafter referred to as professional services), and commodities and services during the January 1, 2012, to December 31, 2014, study period. As demonstrated in *Chapter 6: Prime Contractor and Subcontractor Availability Analysis*, the majority of the County's contracts were small. Construction prime contracts valued under \$5,000 constituted 72.38% of all construction prime contracts. Professional services prime contracts valued under \$5,000 constituted 55.01% of all professional services prime contracts. Commodities and services prime contracts valued under \$5,000 constituted 80.05% of all commodities and services prime contracts.

The threshold levels for the disparity analysis were set to ensure that there was a documented capacity to perform the contracts analyzed within the pool of willing businesses. The informal contract analysis was performed at the threshold stipulated in the County's procurement policy, which is contracts valued under \$5,000.

The findings from the three methods employed to calculate statistical significance, as discussed on pages 7-1 and 7-2, 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 the statistical outcomes in the disparity tables is presented below in Table 7.1.

Table 7.1: Statistical Outcome Descriptions

P-Value Outcome	Definition of P-Value Outcome
< .05 *	The underutilization is statistically significant.
not significant	The underutilization is not statistically significant.
---	There are two few available firms to test statistical significance.
**	The statistical test is not performed for the overutilization of M/WBEs or the underutilization of Non-minority Males.
< .05 †	The overutilization is statistically significant.



A. Disparity Analysis: All Prime Contracts, by Industry

1. All Construction Prime Contracts

The disparity analysis of construction prime contracts is described below and depicted in Table 7.2 and Chart 7.1.

African Americans represent 30.54% of the available construction businesses and received 5.06% of the construction prime contract dollars. This underutilization is statistically significant.

Asian Americans represent 1.08% of the available construction businesses and received 0.01% of the construction prime contract dollars. This underutilization is statistically significant.

Hispanic Americans represent 0.81% of the available construction businesses and received 0.01% of the construction prime contract dollars. There were too few available firms to test the statistical significance of this underutilization.

Native Americans represent 0.81% of the available construction businesses and received 0.00% of the construction prime contract dollars. There were too few available firms to test the statistical significance of this underutilization.

Caucasian Females represent 9.19% of the available construction businesses and received 3.48% of the construction prime contract dollars. This underutilization is not statistically significant.

Non-minority Males represent 57.57% of the available construction businesses and received 91.44% of the construction prime contract dollars. This overutilization is statistically significant.



**Table 7.2: Disparity Analysis: All Construction Prime Contracts,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$4,098,861	5.06%	30.54%	\$24,722,186	-\$20,623,325	0.17	< .05 *
Asian Americans	\$6,380	0.01%	1.08%	\$875,122	-\$868,742	0.01	< .05 *
Hispanic Americans	\$10,500	0.01%	0.81%	\$656,341	-\$645,841	0.02	----
Native Americans	\$0	0.00%	0.81%	\$656,341	-\$656,341	0.00	----
Caucasian Females	\$2,814,392	3.48%	9.19%	\$7,438,534	-\$4,624,142	0.38	not significant
Non-minority Males	\$74,018,617	91.44%	57.57%	\$46,600,226	\$27,418,391	1.59	< .05 †
TOTAL	\$80,948,750	100.00%	100.00%	\$80,948,750			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$2,078,388	2.57%	6.76%	\$5,469,510	-\$3,391,122	0.38	not significant
African American Males	\$2,020,473	2.50%	23.78%	\$19,252,676	-\$17,232,203	0.10	< .05 *
Asian American Females	\$0	0.00%	0.81%	\$656,341	-\$656,341	0.00	----
Asian American Males	\$6,380	0.01%	0.27%	\$218,780	-\$212,400	0.03	----
Hispanic American Females	\$10,500	0.01%	0.00%	\$0	\$10,500	----	**
Hispanic American Males	\$0	0.00%	0.81%	\$656,341	-\$656,341	0.00	----
Native American Females	\$0	0.00%	0.27%	\$218,780	-\$218,780	0.00	----
Native American Males	\$0	0.00%	0.54%	\$437,561	-\$437,561	0.00	----
Caucasian Females	\$2,814,392	3.48%	9.19%	\$7,438,534	-\$4,624,142	0.38	not significant
Non-minority Males	\$74,018,617	91.44%	57.57%	\$46,600,226	\$27,418,391	1.59	< .05 †
TOTAL	\$80,948,750	100.00%	100.00%	\$80,948,750			

(*) denotes a statistically significant underutilization.

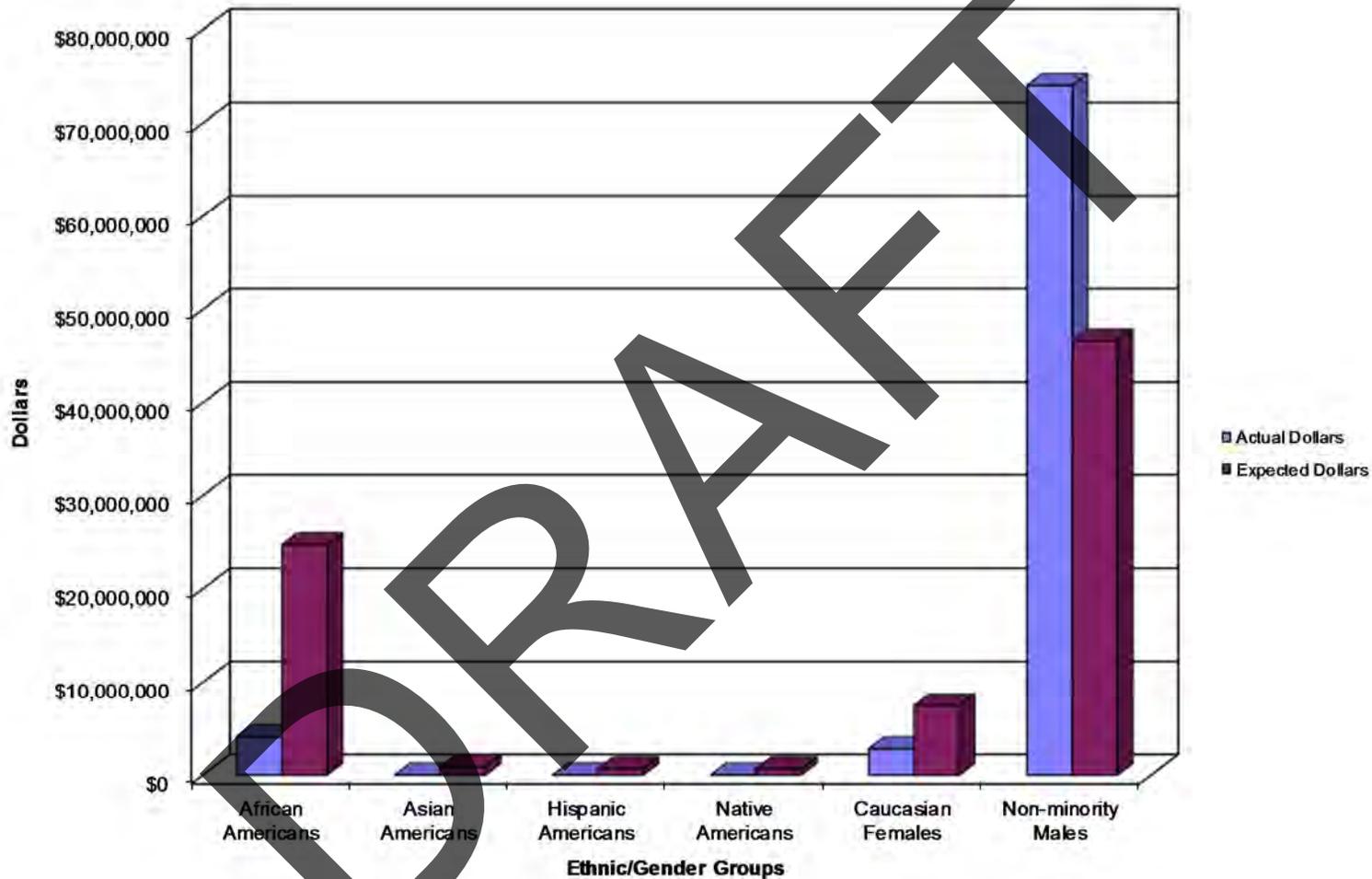
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs 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: All Construction Prime Contracts,
January 1, 2012, to December 31, 2014**



2. All Professional Services Prime Contracts

The disparity analysis of professional services prime contracts is described below and depicted in Table 7.3 and Chart 7.2.

African Americans represent 26.37% of the available professional services businesses and received 3.60% of the professional services prime contract dollars. This underutilization is statistically significant.

Asian Americans represent 4.98% of the available professional services businesses and received 0.76% of the professional services prime contract dollars. This underutilization is statistically significant.

Hispanic Americans represent 1.49% of the available professional services businesses and received 0.00% of the professional services prime contract dollars. This underutilization is statistically significant.

Native Americans represent 1.49% of the available professional services businesses and received 0.85% of the professional services prime contract dollars. This underutilization is not statistically significant.

Caucasian Females represent 13.93% of the available professional services businesses and received 7.34% of the professional services prime contract dollars. This underutilization is not statistically significant.

Non-minority Males represent 51.74% of the available professional services businesses and received 87.44% of the professional services prime contract dollars. This overutilization is statistically significant.



**Table 7.3: Disparity Analysis: All Professional Services Prime Contracts,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$1,820,507	3.60%	26.37%	\$13,335,624	-\$11,515,118	0.14	< .05 *
Asian Americans	\$385,557	0.76%	4.98%	\$2,516,156	-\$2,130,599	0.15	< .05 *
Hispanic Americans	\$1,240	0.00%	1.49%	\$754,847	-\$753,607	0.00	< .05 *
Native Americans	\$431,025	0.85%	1.49%	\$754,847	-\$323,821	0.57	not significant
Caucasian Females	\$3,713,257	7.34%	13.93%	\$7,045,236	-\$3,331,979	0.53	not significant
Non-minority Males	\$44,223,140	87.44%	51.74%	\$26,168,018	\$18,055,123	1.69	< .05 †
TOTAL	\$50,574,727	100.00%	100.00%	\$50,574,727			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$298,973	0.59%	9.95%	\$5,032,311	-\$4,733,338	0.06	< .05 *
African American Males	\$1,521,534	3.01%	16.42%	\$8,303,313	-\$6,781,779	0.18	< .05 *
Asian American Females	\$3,570	0.01%	1.99%	\$1,006,462	-\$1,002,892	0.00	< .05 *
Asian American Males	\$381,987	0.76%	2.99%	\$1,509,693	-\$1,127,706	0.25	< .05 *
Hispanic American Females	\$440	0.00%	0.75%	\$377,423	-\$376,983	0.00	----
Hispanic American Males	\$800	0.00%	0.75%	\$377,423	-\$376,623	0.00	----
Native American Females	\$0	0.00%	0.25%	\$125,808	-\$125,808	0.00	----
Native American Males	\$431,025	0.85%	1.24%	\$629,039	-\$198,013	0.69	not significant
Caucasian Females	\$3,713,257	7.34%	13.93%	\$7,045,236	-\$3,331,979	0.53	not significant
Non-minority Males	\$44,223,140	87.44%	51.74%	\$26,168,018	\$18,055,123	1.69	< .05 †
TOTAL	\$50,574,727	100.00%	100.00%	\$50,574,727			

(*) denotes a statistically significant underutilization.

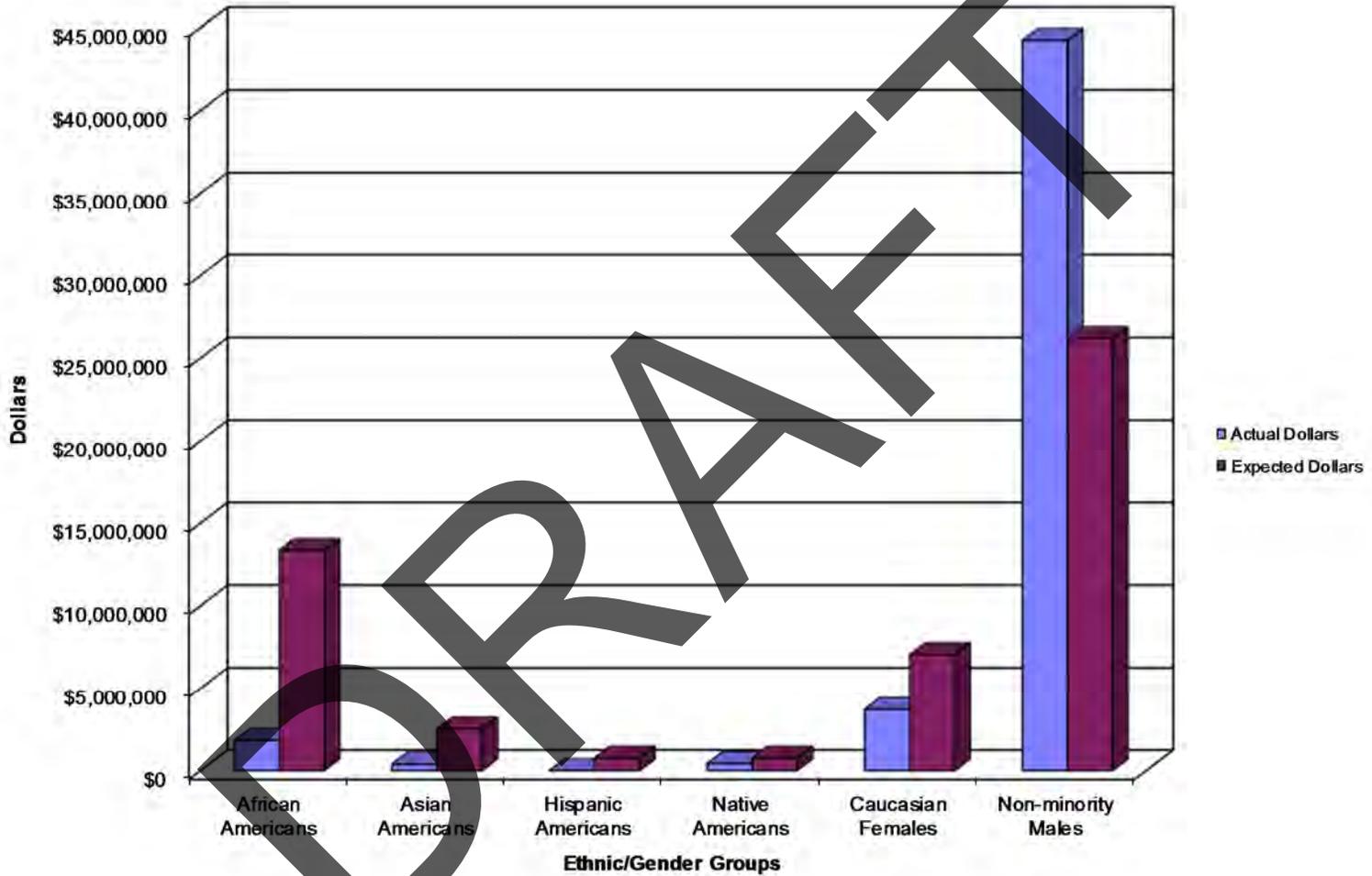
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs 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: All Professional Services Prime Contracts,
January 1, 2012, to December 31, 2014**



3. All Commodities and Services Prime Contracts

The disparity analysis of commodities and services prime contracts is described below and depicted in Table 7.4 and Chart 7.3.

African Americans represent 26.19% of the available commodities and services businesses and received 8.71% of the commodities and services prime contract dollars. This underutilization is statistically significant.

Asian Americans represent 0.53% of the available commodities and services businesses and received 0.40% of the commodities and services prime contract dollars. There were too few available firms to test the statistical significance of this underutilization.

Hispanic Americans represent 0.88% of the available commodities and services businesses and received 0.06% of the commodities and services prime contract dollars. There were too few available firms to test the statistical significance of this underutilization.

Native Americans represent 0.53% of the available commodities and services businesses and received 0.48% of the commodities and services prime contract dollars. There were too few available firms to test the statistical significance of this underutilization.

Caucasian Females represent 13.81% of the available commodities and services businesses and received 5.56% of the commodities and services prime contract dollars. This underutilization is statistically significant.

Non-minority Males represent 58.05% of the available commodities and services businesses and received 84.79% of the commodities and services prime contract dollars. This overutilization is statistically significant.



**Table 7.4: Disparity Analysis: All Commodities and Services Prime Contracts,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$5,139,724	8.71%	26.19%	\$15,451,653	-\$10,311,929	0.33	< .05 *
Asian Americans	\$233,023	0.40%	0.53%	\$313,209	-\$80,186	0.74	----
Hispanic Americans	\$33,119	0.06%	0.88%	\$522,015	-\$488,897	0.06	----
Native Americans	\$282,275	0.48%	0.53%	\$313,209	-\$30,934	0.90	----
Caucasian Females	\$3,281,801	5.56%	13.81%	\$8,143,439	-\$4,861,638	0.40	< .05 *
Non-minority Males	\$50,017,789	84.79%	58.05%	\$34,244,205	\$15,773,584	1.46	< .05 †
TOTAL	\$58,987,731	100.00%	100.00%	\$58,987,731			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$675,799	1.15%	7.08%	\$4,176,123	-\$3,500,324	0.16	< .05 *
African American Males	\$4,463,925	7.57%	19.12%	\$11,275,531	-\$6,811,605	0.40	< .05 *
Asian American Females	\$7,612	0.01%	0.00%	\$0	\$7,612	----	**
Asian American Males	\$225,411	0.38%	0.53%	\$313,209	-\$87,799	0.72	----
Hispanic American Females	\$1,594	0.00%	0.18%	\$104,403	-\$102,809	0.02	----
Hispanic American Males	\$31,525	0.05%	0.71%	\$417,612	-\$386,087	0.08	----
Native American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Native American Males	\$282,275	0.48%	0.53%	\$313,209	-\$30,934	0.90	----
Caucasian Females	\$3,281,801	5.56%	13.81%	\$8,143,439	-\$4,861,638	0.40	< .05 *
Non-minority Males	\$50,017,789	84.79%	58.05%	\$34,244,205	\$15,773,584	1.46	< .05 †
TOTAL	\$58,987,731	100.00%	100.00%	\$58,987,731			

(*) denotes a statistically significant underutilization.

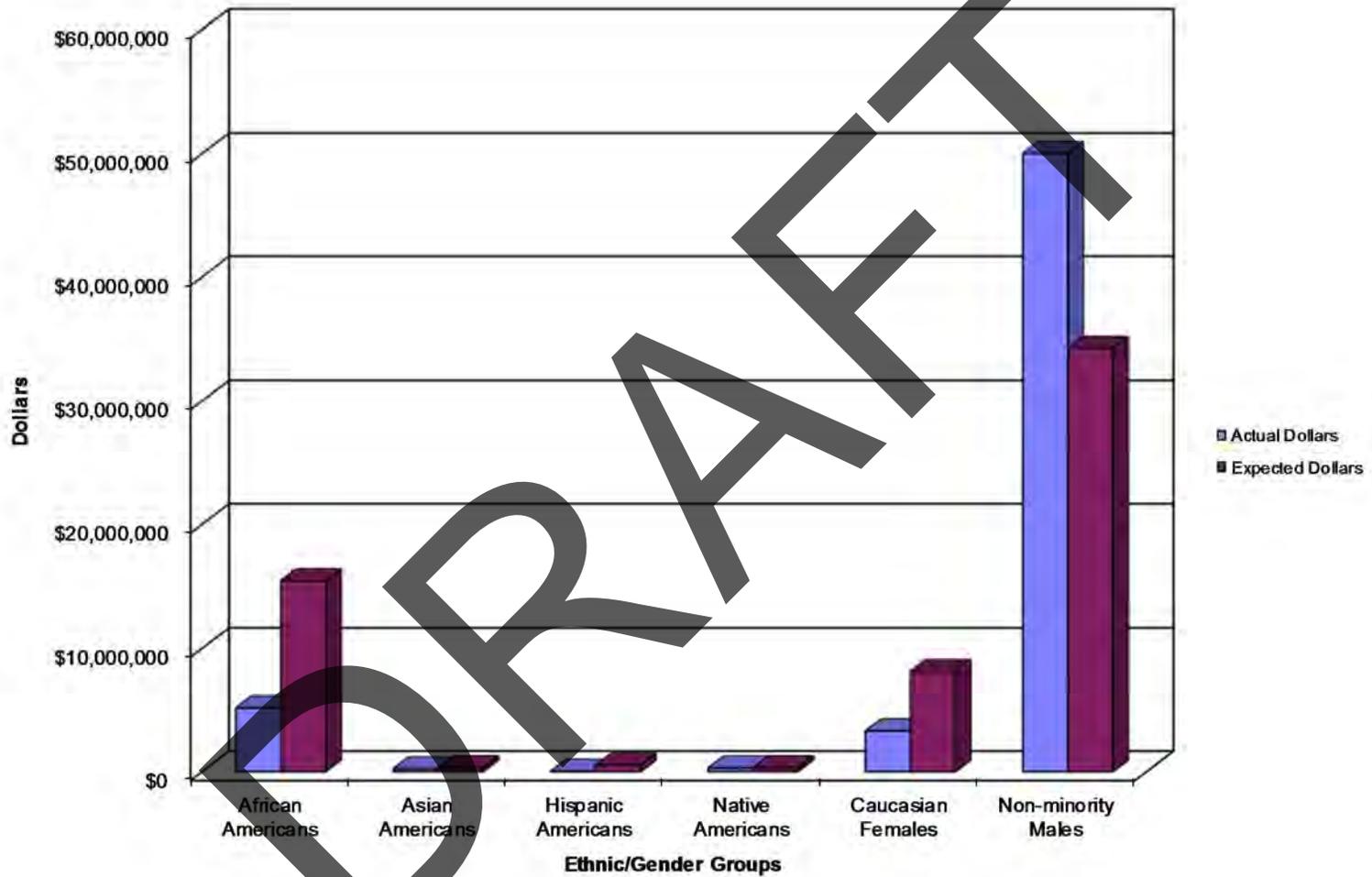
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs 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: All Commodities and Services Prime Contracts, January 1, 2012, to December 31, 2014



B. Disparity Analysis: All Prime Contracts Valued Under \$500,000, by Industry

1. Construction Prime Contracts Valued Under \$500,000

The disparity analysis of construction prime contracts valued under \$500,000 is described below and depicted in Table 7.5 and Chart 7.4.

African Americans represent 30.54% of the available construction businesses and received 23.28% of the dollars on construction prime contracts valued under \$500,000. This underutilization is statistically significant.

Asian Americans represent 1.08% of the available construction businesses and received 0.04% of the dollars on construction prime contracts valued under \$500,000. This underutilization is statistically significant.

Hispanic Americans represent 0.81% of the available construction businesses and received 0.07% of the dollars on construction prime contracts valued under \$500,000. There were too few available firms to test the statistical significance of this underutilization.

Native Americans represent 0.81% of the available construction businesses and received 0.00% of the dollars on construction prime contracts valued under \$500,000. There were too few available firms to test the statistical significance of this underutilization.

Caucasian Females represent 9.19% of the available construction businesses and received 7.45% of the dollars on construction prime contracts valued under \$500,000. This underutilization is not statistically significant.

Non-minority Males represent 57.57% of the available construction businesses and received 69.16% of dollars on construction prime contracts valued under \$500,000. This overutilization is statistically significant.



**Table 7.5: Disparity Analysis: Construction Prime Contracts Valued Under \$500,000,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$3,479,586	23.28%	30.54%	\$4,565,717	-\$1,086,131	0.76	< .05 *
Asian Americans	\$6,380	0.04%	1.08%	\$161,618	-\$155,238	0.04	< .05 *
Hispanic Americans	\$10,500	0.07%	0.81%	\$121,214	-\$110,714	0.09	----
Native Americans	\$0	0.00%	0.81%	\$121,214	-\$121,214	0.00	----
Caucasian Females	\$1,113,619	7.45%	9.19%	\$1,373,755	-\$260,136	0.81	not significant
Non-minority Males	\$10,339,607	69.16%	57.57%	\$8,606,174	\$1,733,433	1.20	< .05 †
TOTAL	\$14,949,691	100.00%	100.00%	\$14,949,691			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$1,459,113	9.76%	6.76%	\$1,010,114	\$448,998	1.44	**
African American Males	\$2,020,473	13.52%	23.78%	\$3,555,602	-\$1,535,129	0.57	< .05 *
Asian American Females	\$0	0.00%	0.81%	\$121,214	-\$121,214	0.00	----
Asian American Males	\$6,380	0.04%	0.27%	\$40,405	-\$34,025	0.16	----
Hispanic American Females	\$10,500	0.07%	0.00%	\$0	\$10,500	----	**
Hispanic American Males	\$0	0.00%	0.81%	\$121,214	-\$121,214	0.00	----
Native American Females	\$0	0.00%	0.27%	\$40,405	-\$40,405	0.00	----
Native American Males	\$0	0.00%	0.54%	\$80,809	-\$80,809	0.00	----
Caucasian Females	\$1,113,619	7.45%	9.19%	\$1,373,755	-\$260,136	0.81	not significant
Non-minority Males	\$10,339,607	69.16%	57.57%	\$8,606,174	\$1,733,433	1.20	< .05 †
TOTAL	\$14,949,691	100.00%	100.00%	\$14,949,691			

(*) denotes a statistically significant underutilization.

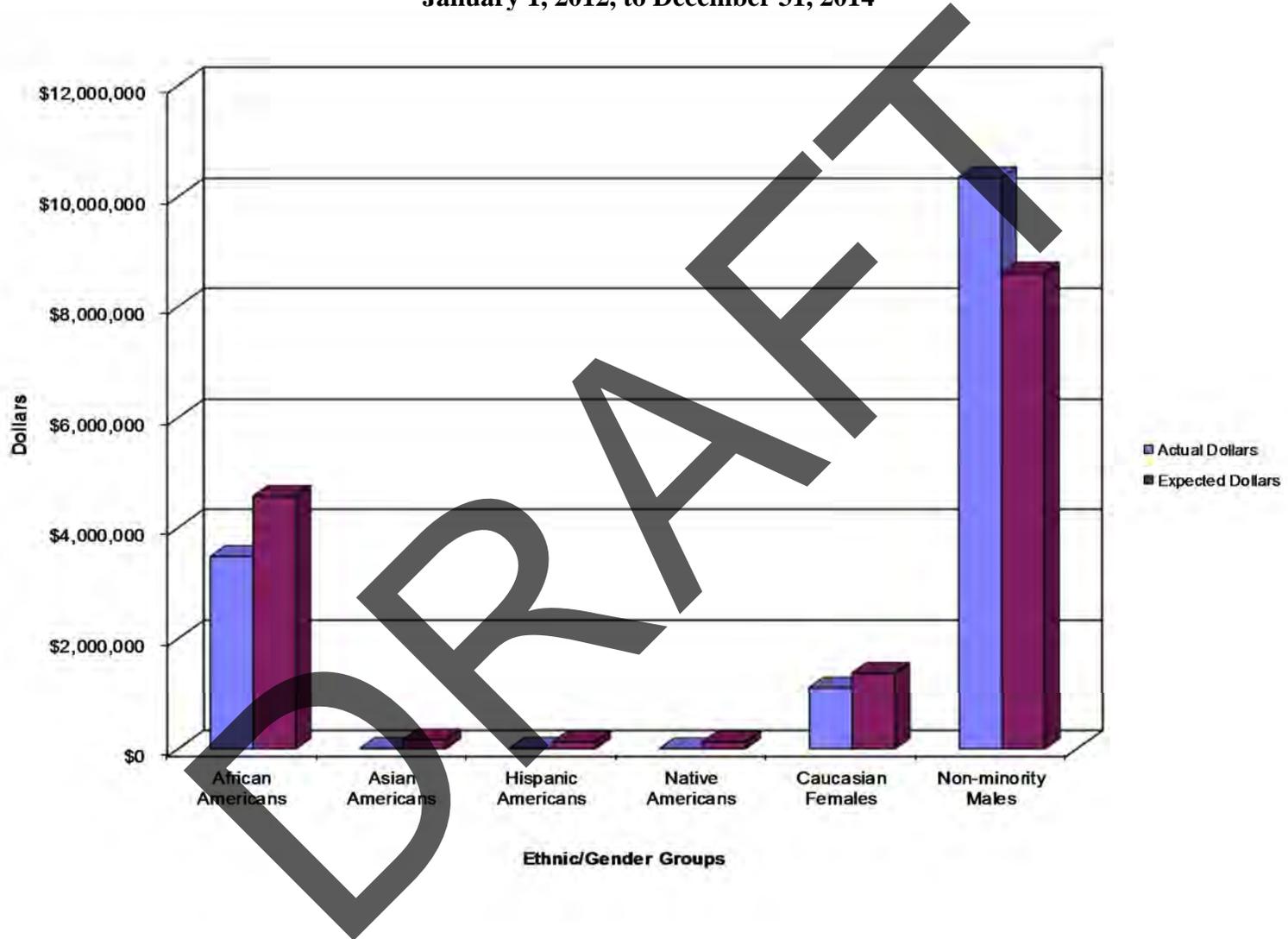
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs 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 Under \$500,000,
January 1, 2012, to December 31, 2014**



2. Professional Services Prime Contracts Valued Under \$500,000

The disparity analysis of professional services prime contracts valued under \$500,000 is described below and depicted in Table 7.6 and Chart 7.5.

African Americans represent 26.37% of the available professional services businesses and received 6.29% of the dollars on professional services prime contracts valued under \$500,000. This underutilization is statistically significant.

Asian Americans represent 4.98% of the available professional services businesses and received 1.33% of the dollars on professional services prime contracts valued under \$500,000. This underutilization is statistically significant.

Hispanic Americans represent 1.49% of the available professional services businesses and received 0.00% of the dollars on professional services prime contracts valued under \$500,000. This underutilization is statistically significant.

Native Americans represent 1.49% of the available professional services businesses and received 1.49% of the dollars on professional services prime contracts valued under \$500,000. This underutilization is not statistically significant.

Caucasian Females represent 13.93% of the available professional services businesses and received 12.83% of the dollars on professional services prime contracts valued under \$500,000. This underutilization is not statistically significant.

Non-minority Males represent 51.74% of the available professional services businesses and received 78.05% of dollars on professional services prime contracts valued under \$500,000. This overutilization is statistically significant.



**Table 7.6: Disparity Analysis: Professional Services Prime Contracts Valued Under \$500,000,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$1,820,507	6.29%	26.37%	\$7,629,669	-\$5,809,162	0.24	< .05 *
Asian Americans	\$385,557	1.33%	4.98%	\$1,439,560	-\$1,054,003	0.27	< .05 *
Hispanic Americans	\$1,240	0.00%	1.49%	\$431,868	-\$430,628	0.00	< .05 *
Native Americans	\$431,025	1.49%	1.49%	\$431,868	-\$843	1.00	not significant
Caucasian Females	\$3,713,257	12.83%	13.93%	\$4,030,768	-\$317,511	0.92	not significant
Non-minority Males	\$22,583,572	78.05%	51.74%	\$14,971,425	\$7,612,147	1.51	< .05 †
TOTAL	\$28,935,158	100.00%	100.00%	\$28,935,158			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$298,973	1.03%	9.95%	\$2,879,120	-\$2,580,147	0.10	< .05 *
African American Males	\$1,521,534	5.26%	16.42%	\$4,750,548	-\$3,229,014	0.32	< .05 *
Asian American Females	\$3,570	0.01%	1.99%	\$575,824	-\$572,254	0.01	< .05 *
Asian American Males	\$381,987	1.32%	2.99%	\$863,736	-\$481,749	0.44	< .05 *
Hispanic American Females	\$440	0.00%	0.75%	\$215,934	-\$215,494	0.00	----
Hispanic American Males	\$800	0.00%	0.75%	\$215,934	-\$215,134	0.00	----
Native American Females	\$0	0.00%	0.25%	\$71,978	-\$71,978	0.00	----
Native American Males	\$431,025	1.49%	1.24%	\$359,890	\$71,135	1.20	**
Caucasian Females	\$3,713,257	12.83%	13.93%	\$4,030,768	-\$317,511	0.92	not significant
Non-minority Males	\$22,583,572	78.05%	51.74%	\$14,971,425	\$7,612,147	1.51	< .05 †
TOTAL	\$28,935,158	100.00%	100.00%	\$28,935,158			

(*) denotes a statistically significant underutilization.

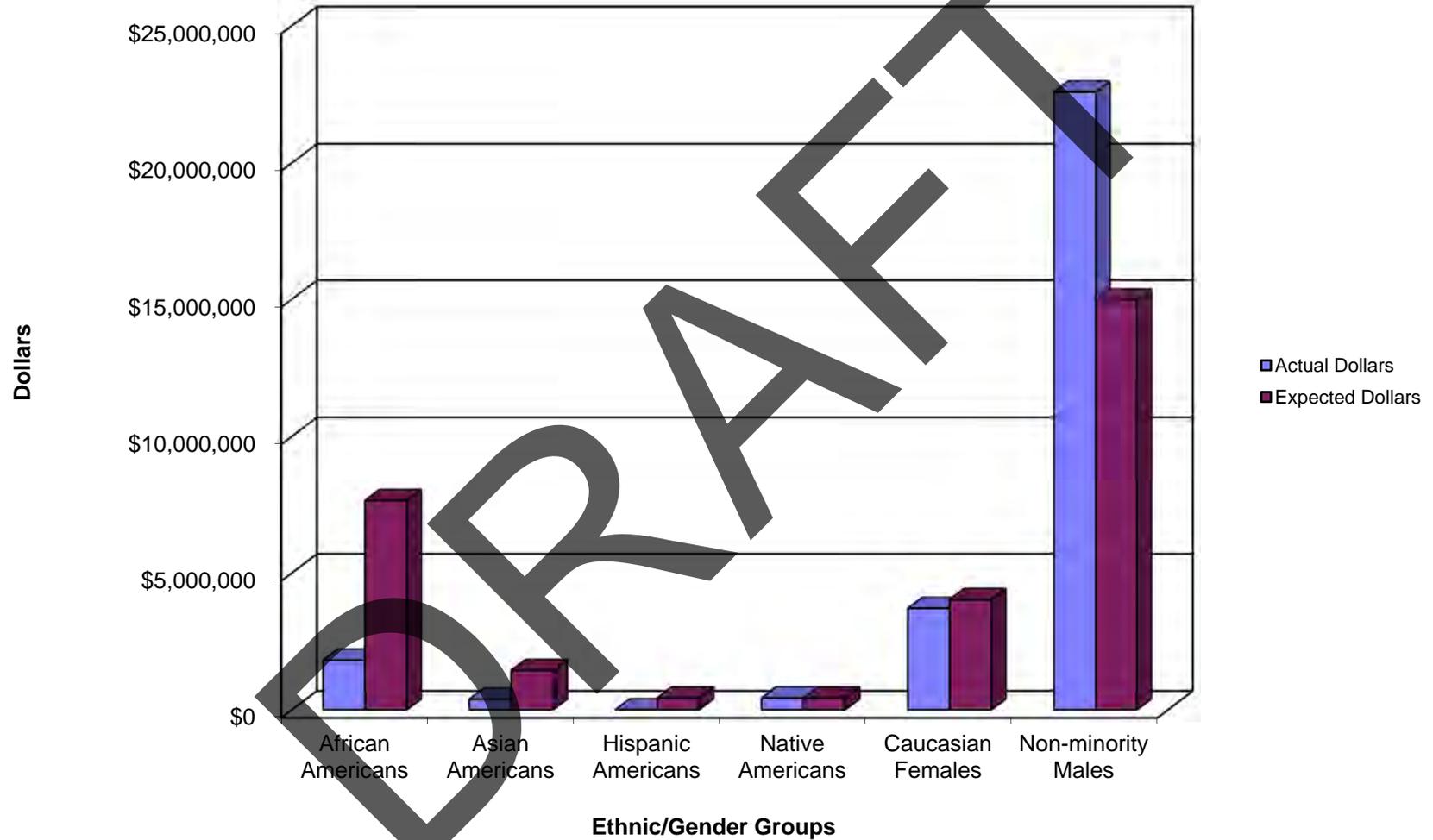
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs 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 Under \$500,000,
January 1, 2012, to December 31, 2014**



3. Commodities and Services Prime Contracts Valued Under \$500,000

The disparity analysis of commodities and services prime contracts valued under \$500,000 is described below and depicted in Table 7.7 and Chart 7.6.

African Americans represent 26.19% of the available commodities and services businesses and received 14.23% of the dollars on commodities and services prime contracts valued under \$500,000. This underutilization is statistically significant.

Asian Americans represent 0.53% of the available commodities and services businesses and received 0.65% of the dollars on commodities and services prime contracts valued under \$500,000. This study does not test statistically the overutilization of Asian Americans.

Hispanic Americans represent 0.88% of the available commodities and services businesses and received 0.09% of the dollars on commodities and services prime contracts valued under \$500,000. There were too few available firms to test the statistical significance of this underutilization.

Native Americans represent 0.53% of the available commodities and services businesses and received 0.78% of the dollars on commodities and services prime contracts valued under \$500,000. This study does not test statistically the overutilization of Native Americans.

Caucasian Females represent 13.81% of the available commodities and services businesses and received 9.09% of the dollars on commodities and services prime contracts valued under \$500,000. This underutilization is statistically significant.

Non-minority Males represent 58.05% of the available commodities and services businesses and received 75.16% of the dollars on commodities and services prime contracts valued under \$500,000. This overutilization is statistically significant.



**Table 7.7: Disparity Analysis: Commodities and Services Prime Contracts Valued Under \$500,000,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$5,139,724	14.23%	26.19%	\$9,458,762	-\$4,319,038	0.54	< .05 *
Asian Americans	\$233,023	0.65%	0.53%	\$191,732	\$41,291	1.22	**
Hispanic Americans	\$33,119	0.09%	0.88%	\$319,553	-\$286,434	0.10	----
Native Americans	\$282,275	0.78%	0.53%	\$191,732	\$90,544	1.47	**
Caucasian Females	\$3,281,801	9.09%	13.81%	\$4,985,023	-\$1,703,222	0.66	< .05 *
Non-minority Males	\$27,139,522	75.16%	58.05%	\$20,962,662	\$6,176,860	1.29	< .05 †
TOTAL	\$36,109,464	100.00%	100.00%	\$36,109,464			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$675,799	1.87%	7.08%	\$2,556,422	-\$1,880,623	0.26	< .05 *
African American Males	\$4,463,925	12.36%	19.12%	\$6,902,340	-\$2,438,415	0.65	< .05 *
Asian American Females	\$7,612	0.02%	0.00%	\$0	\$7,612	----	**
Asian American Males	\$225,411	0.62%	0.53%	\$191,732	\$33,679	1.18	**
Hispanic American Females	\$1,594	0.00%	0.18%	\$63,911	-\$62,317	0.02	----
Hispanic American Males	\$31,525	0.09%	0.71%	\$255,642	-\$224,117	0.12	----
Native American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Native American Males	\$282,275	0.78%	0.53%	\$191,732	\$90,544	1.47	**
Caucasian Females	\$3,281,801	9.09%	13.81%	\$4,985,023	-\$1,703,222	0.66	< .05 *
Non-minority Males	\$27,139,522	75.16%	58.05%	\$20,962,662	\$6,176,860	1.29	< .05 †
TOTAL	\$36,109,464	100.00%	100.00%	\$36,109,464			

(*) denotes a statistically significant underutilization.

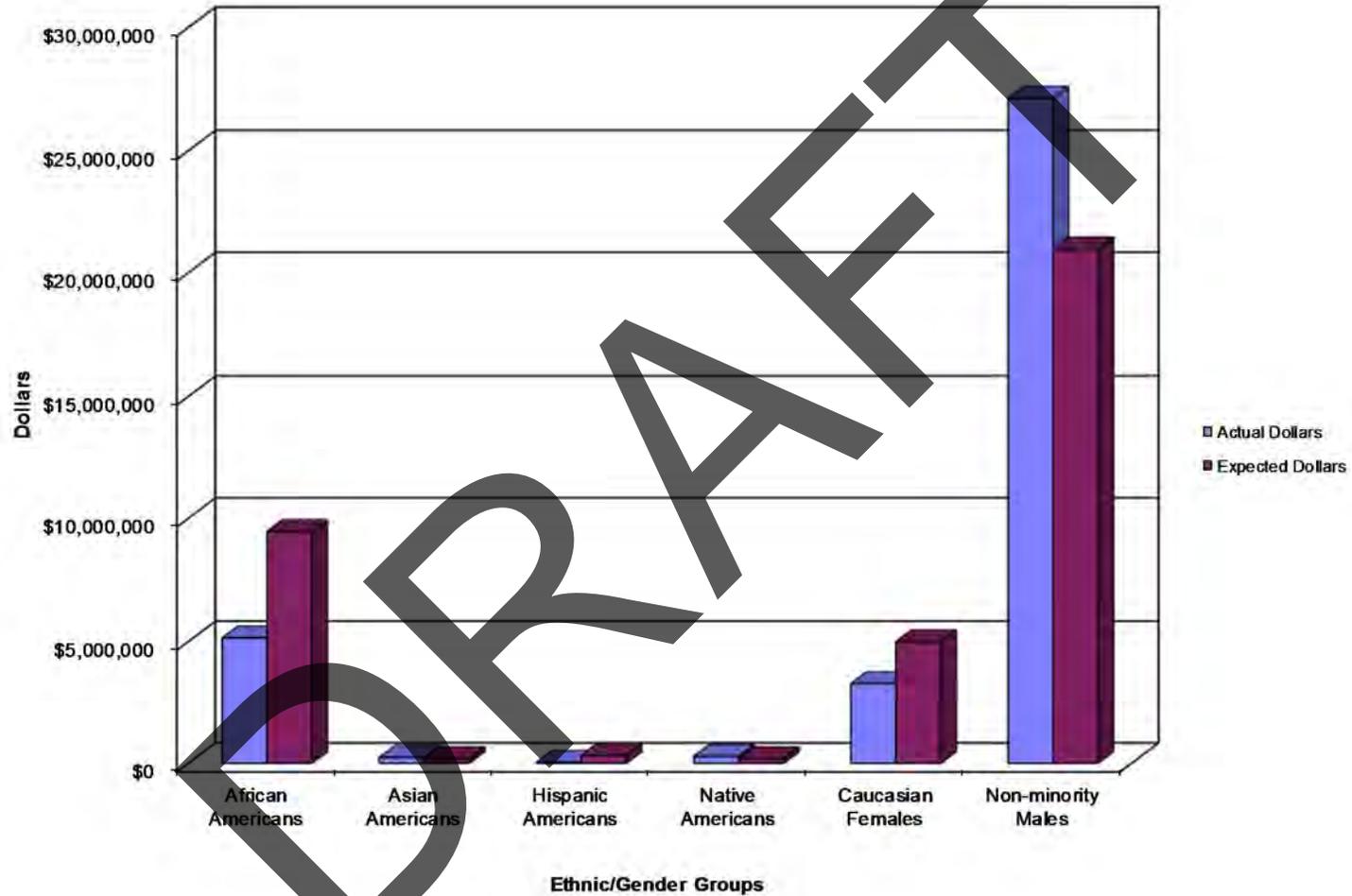
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs 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: Commodities and Services Prime Contracts Valued Under \$500,000, January 1, 2012, to December 31, 2014



C. Disparity Analysis: All Informal Prime Contracts Valued Under \$5,000, by Industry

1. Informal Construction Prime Contracts Valued Under \$5,000

The disparity analysis of informal construction prime contracts valued under \$5,000 is described below and depicted in Table 7.8 and Chart 7.7.

African Americans represent 30.54% of the available construction businesses and received 25.71% of the dollars on informal construction prime contracts valued under \$5,000. This underutilization is statistically significant.

Asian Americans represent 1.08% of the available construction businesses and received 0.22% of the dollars on informal construction prime contracts valued under \$5,000. This underutilization is statistically significant.

Hispanic Americans represent 0.81% of the available construction businesses and received 0.37% of the dollars on informal construction prime contracts valued under \$5,000. There were too few available firms to test the statistical significance of this underutilization.

Native Americans represent 0.81% of the available construction businesses and received 0.00% of the dollars on informal construction prime contracts valued under \$5,000. There were too few available firms to test the statistical significance of this underutilization.

Caucasian Females represent 9.19% of the available construction businesses and received 9.69% of the dollars on informal construction prime contracts valued under \$5,000. This study does not test statistically the overutilization of Caucasian Females.

Non-minority Males represent 57.57% of the available construction businesses and received 64.01% of the dollars on informal construction prime contracts valued under \$5,000. This overutilization is statistically significant.



**Table 7.8: Disparity Analysis: Informal Construction Prime Contracts Valued Under \$5,000,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$733,889	25.71%	30.54%	\$871,772	-\$137,883	0.84	< .05 *
Asian Americans	\$6,380	0.22%	1.08%	\$30,859	-\$24,479	0.21	< .05 *
Hispanic Americans	\$10,500	0.37%	0.81%	\$23,144	-\$12,644	0.45	----
Native Americans	\$0	0.00%	0.81%	\$23,144	-\$23,144	0.00	----
Caucasian Females	\$276,658	9.69%	9.19%	\$262,303	\$14,355	1.05	**
Non-minority Males	\$1,827,046	64.01%	57.57%	\$1,643,251	\$183,795	1.11	< .05 †
TOTAL	\$2,854,473	100.00%	100.00%	\$2,854,473			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$277,115	9.71%	6.76%	\$192,870	\$84,245	1.44	**
African American Males	\$456,774	16.00%	23.78%	\$678,902	-\$222,128	0.67	< .05 *
Asian American Females	\$0	0.00%	0.81%	\$23,144	-\$23,144	0.00	----
Asian American Males	\$6,380	0.22%	0.27%	\$7,715	-\$1,335	0.83	----
Hispanic American Females	\$10,500	0.37%	0.00%	\$0	\$10,500	----	**
Hispanic American Males	\$0	0.00%	0.81%	\$23,144	-\$23,144	0.00	----
Native American Females	\$0	0.00%	0.27%	\$7,715	-\$7,715	0.00	----
Native American Males	\$0	0.00%	0.54%	\$15,430	-\$15,430	0.00	----
Caucasian Females	\$276,658	9.69%	9.19%	\$262,303	\$14,355	1.05	**
Non-minority Males	\$1,827,046	64.01%	57.57%	\$1,643,251	\$183,795	1.11	< .05 †
TOTAL	\$2,854,473	100.00%	100.00%	\$2,854,473			

(*) denotes a statistically significant underutilization.

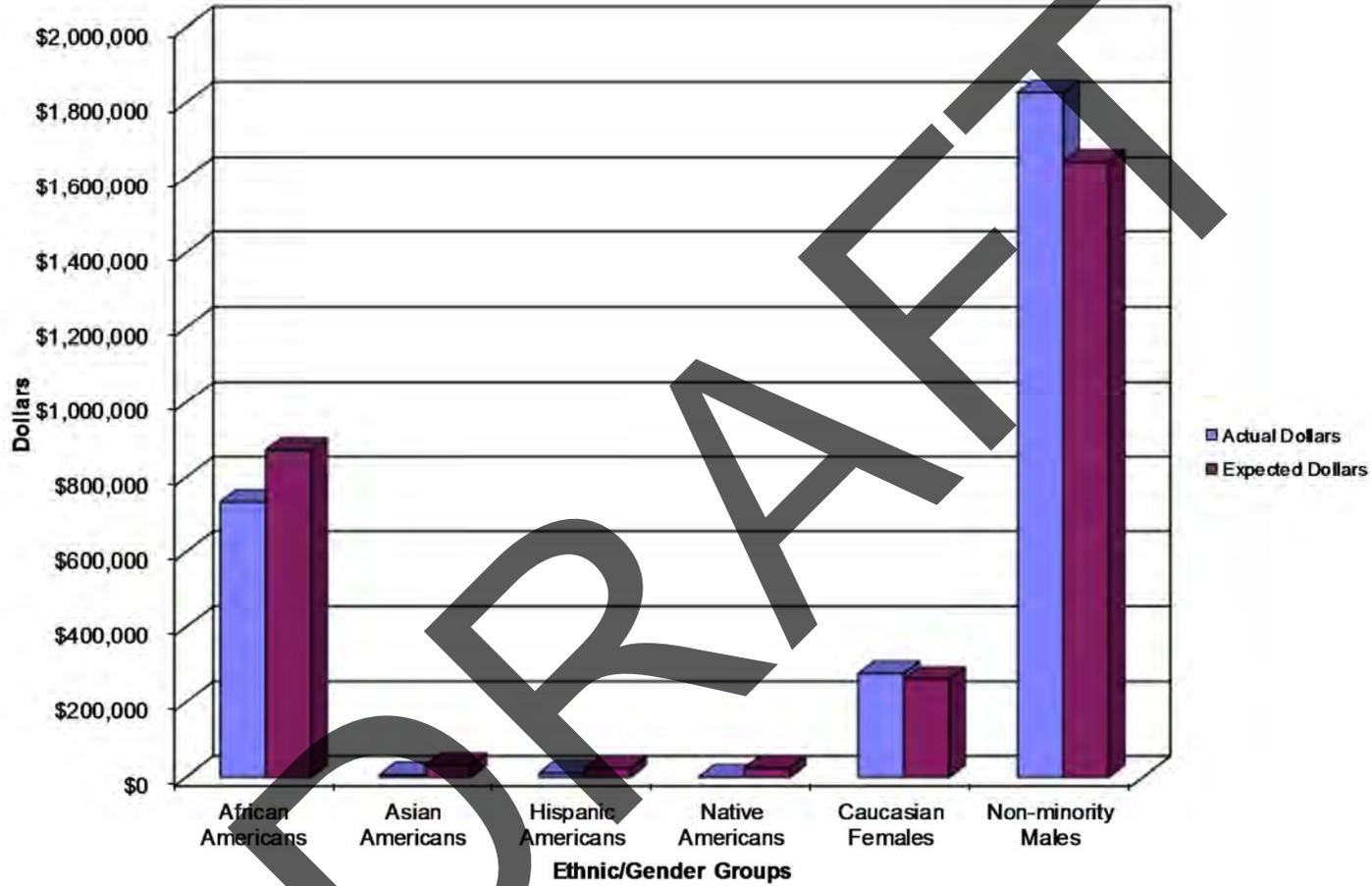
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of MWBEs or the underutilization of Non-minority Males.

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



**Chart 7.7: Disparity Analysis: Informal Construction Prime Contracts Valued Under \$5,000,
January 1, 2012, to December 31, 2014**



2. Informal Professional Services Prime Contracts Valued Under \$5,000

The disparity analysis of professional services prime contracts valued under \$5,000 is described below and depicted in Table 7.9 and Chart 7.8.

African Americans represent 26.37% of the available professional services businesses and received 7.35% of the dollars on informal professional services prime contracts valued under \$5,000. This underutilization is statistically significant.

Asian Americans represent 4.98% of the available professional services businesses and received 0.79% of the dollars on informal professional services prime contracts valued under \$5,000. This underutilization is statistically significant.

Hispanic Americans represent 1.49% of the available professional services businesses and received 0.10% of the dollars on informal professional services prime contracts valued under \$5,000. This underutilization is statistically significant.

Native Americans represent 1.49% of the available professional services businesses and received 0.44% of the dollars on informal professional services prime contracts valued under \$5,000. This underutilization is statistically significant.

Caucasian Females represent 13.93% of the available professional services businesses and received 13.27% of the dollars on informal professional services prime contracts valued under \$5,000. This underutilization is not statistically significant.

Non-minority Males represent 51.74% of the available professional services businesses and received 78.06% of the dollars on informal professional services prime contracts valued under \$5,000. This overutilization is statistically significant.



**Table 7.9: Disparity Analysis: Informal Professional Services Prime Contracts Valued Under \$5,000,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$92,993	7.35%	26.37%	\$333,503	-\$240,510	0.28	< .05 *
Asian Americans	\$9,943	0.79%	4.98%	\$62,925	-\$52,982	0.16	< .05 *
Hispanic Americans	\$1,240	0.10%	1.49%	\$18,878	-\$17,638	0.07	< .05 *
Native Americans	\$5,556	0.44%	1.49%	\$18,878	-\$13,322	0.29	< .05 *
Caucasian Females	\$167,783	13.27%	13.93%	\$176,190	-\$8,408	0.95	not significant
Non-minority Males	\$987,280	78.06%	51.74%	\$654,421	\$332,859	1.51	< .05 †
TOTAL	\$1,264,794	100.00%	100.00%	\$1,264,794			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$16,310	1.29%	9.95%	\$125,850	-\$109,540	0.13	< .05 *
African American Males	\$76,683	6.06%	16.42%	\$207,653	-\$130,970	0.37	< .05 *
Asian American Females	\$3,570	0.28%	1.99%	\$25,170	-\$21,600	0.14	< .05 *
Asian American Males	\$6,373	0.50%	2.99%	\$37,755	-\$31,382	0.17	< .05 *
Hispanic American Females	\$440	0.03%	0.75%	\$9,439	-\$8,999	0.05	----
Hispanic American Males	\$800	0.06%	0.75%	\$9,439	-\$8,639	0.08	----
Native American Females	\$0	0.00%	0.25%	\$3,146	-\$3,146	0.00	----
Native American Males	\$5,556	0.44%	1.24%	\$15,731	-\$10,176	0.35	not significant
Caucasian Females	\$167,783	13.27%	13.93%	\$176,190	-\$8,408	0.95	not significant
Non-minority Males	\$987,280	78.06%	51.74%	\$654,421	\$332,859	1.51	< .05 †
TOTAL	\$1,264,794	100.00%	100.00%	\$1,264,794			

(*) denotes a statistically significant underutilization.

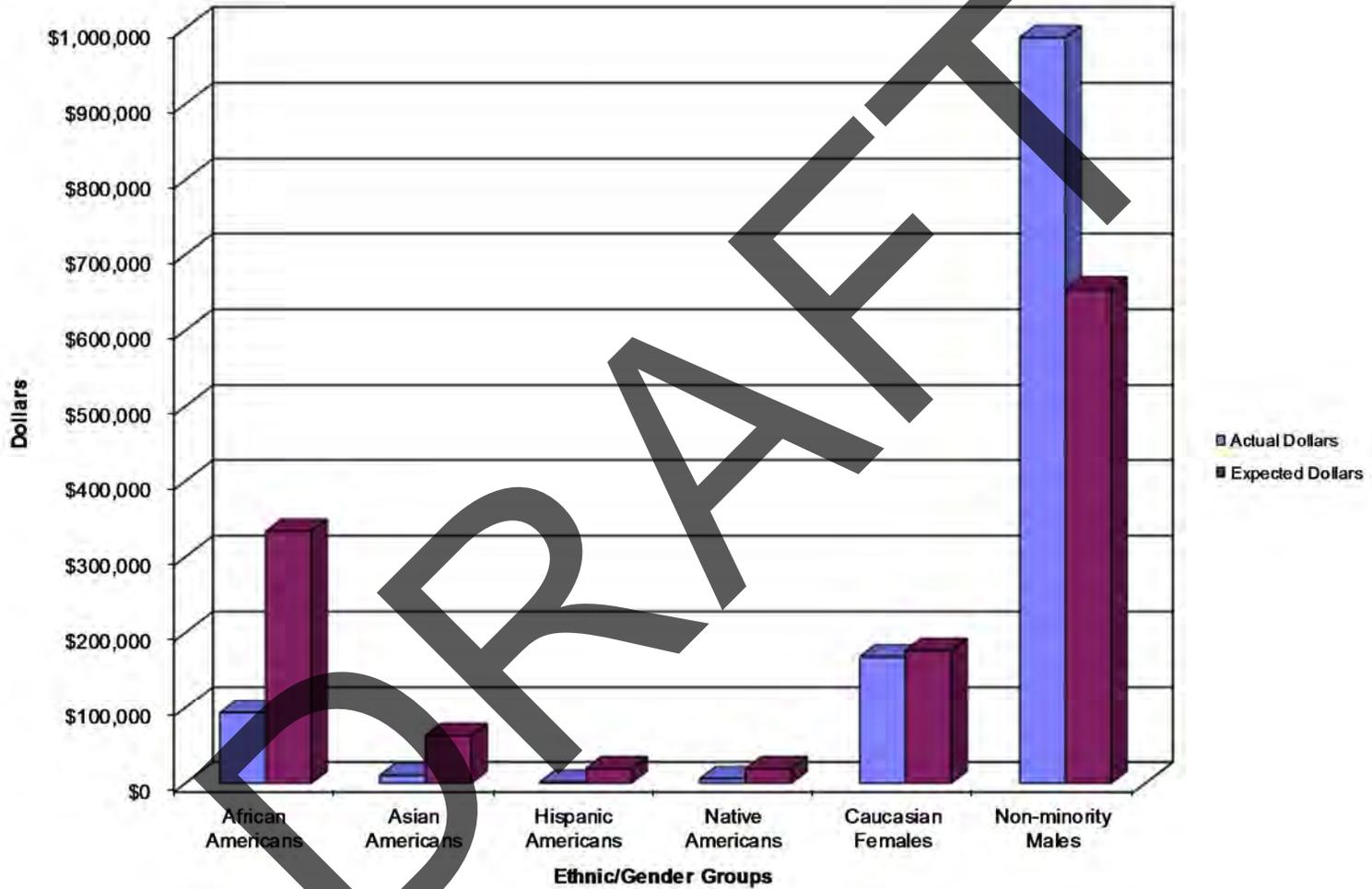
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of Non-minority Males.

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



**Chart 7.8: Disparity Analysis: Informal Professional Services Prime Contracts Valued Under \$5,000,
January 1, 2012, to December 31, 2014**



3. Informal Commodities and Services Prime Contracts Valued Under \$5,000

The disparity analysis of informal commodities and services prime contracts valued under \$5,000 is described below and depicted in Table 7.10 and Chart 7.9.

African Americans represent 26.19% of the available commodities and services businesses and received 9.35% of the dollars on informal commodities and services prime contracts valued under \$5,000. This underutilization is statistically significant.

Asian Americans represent 0.53% of the available commodities and services businesses and received 1.28% of the dollars on informal commodities and services prime contracts valued under \$5,000. This study does not test statistically the overutilization of Asian Americans.

Hispanic Americans represent 0.88% of the available commodities and services businesses and received 0.15% of the dollars on informal commodities and services prime contracts valued under \$5,000. There were too few available firms to test the statistical significance of this underutilization.

Native Americans represent 0.53% of the available commodities and services businesses and received 0.14% of the dollars on informal commodities and services prime contracts valued under \$5,000. There were too few available firms to test the statistical significance of this underutilization.

Caucasian Females represent 13.81% of the available commodities and services businesses and received 10.00% of the dollars on informal commodities and services prime contracts valued under \$5,000. This underutilization is statistically significant.

Non-minority Males represent 58.05% of the available commodities and services businesses and received 79.08% of the dollars on informal commodities and services prime contracts valued under \$5,000. This overutilization is statistically significant.



**Table 7.10: Disparity Analysis: Informal Commodities and Services Prime Contracts Valued Under \$5,000,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$555,799	9.35%	26.19%	\$1,557,079	-\$1,001,280	0.36	< .05 *
Asian Americans	\$76,044	1.28%	0.53%	\$31,562	\$44,482	2.41	**
Hispanic Americans	\$9,119	0.15%	0.88%	\$52,604	-\$43,485	0.17	----
Native Americans	\$8,047	0.14%	0.53%	\$31,562	-\$23,516	0.25	----
Caucasian Females	\$594,394	10.00%	13.81%	\$820,623	-\$226,228	0.72	< .05 *
Non-minority Males	\$4,700,851	79.08%	58.05%	\$3,450,823	\$1,250,028	1.36	< .05 †
TOTAL	\$5,944,253	100.00%	100.00%	\$5,944,253			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$224,542	3.78%	7.08%	\$420,832	-\$196,290	0.53	< .05 *
African American Males	\$331,257	5.57%	19.12%	\$1,136,247	-\$804,990	0.29	< .05 *
Asian American Females	\$7,612	0.13%	0.00%	\$0	\$7,612	----	**
Asian American Males	\$68,432	1.15%	0.53%	\$31,562	\$36,870	2.17	**
Hispanic American Females	\$1,594	0.03%	0.18%	\$10,521	-\$8,927	0.15	----
Hispanic American Males	\$7,525	0.13%	0.71%	\$42,083	-\$34,558	0.18	----
Native American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Native American Males	\$8,047	0.14%	0.53%	\$31,562	-\$23,516	0.25	----
Caucasian Females	\$594,394	10.00%	13.81%	\$820,623	-\$226,228	0.72	< .05 *
Non-minority Males	\$4,700,851	79.08%	58.05%	\$3,450,823	\$1,250,028	1.36	< .05 †
TOTAL	\$5,944,253	100.00%	100.00%	\$5,944,253			

(*) denotes a statistically significant underutilization.

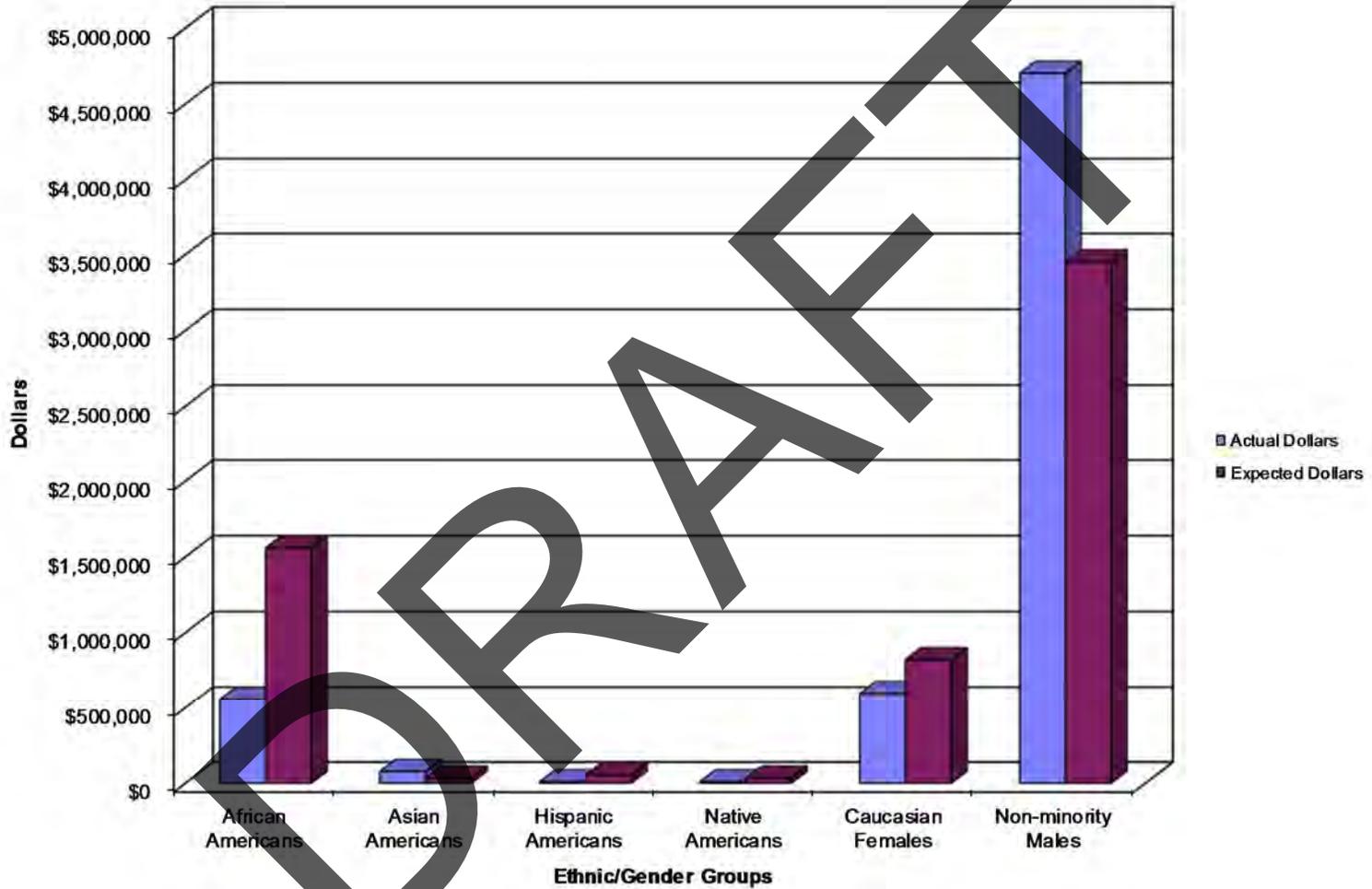
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of Non-minority Males.

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



Chart 7.9: Disparity Analysis: Informal Commodities and Services Prime Contracts Valued Under \$5,000, January 1, 2012, to December 31, 2014



III. Disparity Analysis Summary

A. Construction Prime Contracts

As indicated in Table 7.11 below, disparity was found for African American and Asian American prime contractors on all construction contracts regardless of contract value, African American and Asian American prime contractors on construction prime contracts valued under \$500,000, and African American and Asian American prime contractors on informal construction prime contracts valued under \$5,000.

**Table 7.11: Disparity Summary: Construction Prime Contract Dollars
January 1, 2012, to December 31, 2014**

Ethnicity/Gender	Construction		
	All Contracts	Contracts Valued Under \$500,000	Informal Contracts Valued Under \$5,000
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Hispanic Americans	No Disparity	No Disparity	No Disparity
Native Americans	No Disparity	No Disparity	No Disparity
Caucasian Females	No Disparity	No Disparity	No Disparity



B. Professional Services Prime Contracts

As indicated in Table 7.12 below, disparity was found for African American, Asian American, and Hispanic American prime contractors on all professional services contracts regardless of contract value, African American, Asian American, and Hispanic American prime contractors on professional services prime contracts valued under \$500,000, and African American, Asian American, Hispanic American, and Native American prime contractors on informal professional services prime contracts valued under \$5,000.

Table 7.12: Disparity Summary: Professional Services Prime Contract Dollars, January 1, 2012, to December 31, 2014

Ethnicity/Gender	Professional Services		
	All Contracts	Contracts Valued Under \$500,000	Informal Contracts Valued Under \$5,000
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Native Americans	No Disparity	No Disparity	<i>Disparity</i>
Caucasian Females	No Disparity	No Disparity	No Disparity



C. Commodities and Services Prime Contracts

As indicated in Table 7.13 below, disparity was found for African American and Caucasian Female prime contractors on all commodities and services contracts regardless of contract value, African American and Caucasian Female prime contractors on commodities and services prime contracts valued under \$500,000, and African American and Caucasian Female prime contractors on informal commodities and services prime contracts valued under \$5,000.

Table 7.13: Disparity Summary: Commodities and Services Prime Contract Dollars, January 1, 2012, to December 31, 2014

Ethnicity/Gender	Commodities and Services		
	All Contracts	Contracts Valued Under \$500,000	Informal Contracts Valued Under \$5,000
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	No Disparity	No Disparity	No Disparity
Hispanic Americans	No Disparity	No Disparity	No Disparity
Native Americans	No Disparity	No Disparity	No Disparity
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>

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CHAPTER 8: Subcontract Disparity Analysis

I. Introduction

The objective of this chapter is to determine if there was any underutilization of Minority and Woman Business Enterprises, hereinafter referred to as Minority and Caucasian Female Business Enterprises (M/WBE) subcontractors on Shelby County's contracts during the January 1, 2012 to December 31, 2014 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 M/WBE subcontractors should be relatively close to the proportion of available M/WBE subcontractors in Shelby County'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 M/WBE subcontractors to available M/WBE 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.³³⁸ *City of Richmond v. J.A. Croson Co. (Croson)*³³⁹ states that an inference of discrimination can be made *prima facie* if the observed disparity is statistically significant. Under the *Croson* model, Non-minority Male Business Enterprises are not subjected to a statistical test.

³³⁸ 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 statistical standards 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.

³³⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).



II. Disparity Analysis

As detailed in *Chapter 4: Subcontractor Utilization Analysis*, extensive efforts were undertaken to obtain subcontractor records for Shelby County's construction and professional services contracts. The disparity analysis was performed on subcontracts issued from January 1, 2012, to December 31, 2014.

The subcontract disparity findings in the two industries under consideration are summarized below. 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 below in Table 8.1.

Table 8.1: Statistical Outcome Descriptions

P-Value Outcome	Definition of P-Value Outcome
< .05 *	The underutilization is statistically significant.
not significant	The analysis is not statistically significant.
----	There are two few available firms to test statistical significance.
**	The statistical test is not performed for the overutilization of M/WBEs or the underutilization of Non-minority Males.
< .05 †	The overutilization is statistically significant.

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III. Disparity Analysis: All Subcontracts, By Industry

A. Construction Subcontracts

The disparity analysis of construction subcontracts is described below and depicted in Table 8.2 and Chart 8.1.

African Americans represent 28.13% of the available construction businesses and received 6.91% of the construction subcontract dollars. This underutilization is statistically significant.

Asian Americans represent 0.96% of the available construction businesses and received 0.00% of the construction subcontract dollars. There were too few available firms to test the statistical significance of this underutilization.

Hispanic Americans represent 0.96% of the available construction businesses and received 0.17% of the construction subcontract dollars. There were too few available firms to test the statistical significance of this underutilization.

Native Americans represent 0.72% of the available construction businesses and received 0.00% of the construction subcontract dollars. There were too few available firms to test the statistical significance of this underutilization.

Caucasian Females represent 9.62% of the available construction businesses and received 2.65% of the construction subcontract dollars. This underutilization is not statistically significant.

Non-minority Males represent 59.62% of the available construction businesses and received 90.28% of the construction subcontract dollars. This overutilization is statistically significant.



**Table 8.2: Disparity Analysis: Construction Subcontracts,
January 1, 2012, to December 31, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$1,245,671	6.91%	28.13%	\$5,070,224	-\$3,824,553	0.25	< .05 *
Asian Americans	\$0	0.00%	0.96%	\$173,341	-\$173,341	0.00	----
Hispanic Americans	\$29,823	0.17%	0.96%	\$173,341	-\$143,518	0.17	----
Native Americans	\$0	0.00%	0.72%	\$130,006	-\$130,006	0.00	----
Caucasian Females	\$477,605	2.65%	9.62%	\$1,733,410	-\$1,255,805	0.28	not significant
Non-minority Males	\$16,274,365	90.28%	59.62%	\$10,747,142	\$5,527,223	1.51	< .05 †
TOTAL	\$18,027,464	100.00%	100.00%	\$18,027,464			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$49,349	0.27%	6.25%	\$1,126,717	-\$1,077,367	0.04	< .05 *
African American Males	\$1,196,322	6.64%	21.88%	\$3,943,508	-\$2,747,186	0.30	< .05 *
Asian American Females	\$0	0.00%	0.72%	\$130,006	-\$130,006	0.00	----
Asian American Males	\$0	0.00%	0.24%	\$43,335	-\$43,335	0.00	----
Hispanic American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Hispanic American Males	\$29,823	0.17%	0.96%	\$173,341	-\$143,518	0.17	----
Native American Females	\$0	0.00%	0.24%	\$43,335	-\$43,335	0.00	----
Native American Males	\$0	0.00%	0.48%	\$86,671	-\$86,671	0.00	----
Caucasian Females	\$477,605	2.65%	9.62%	\$1,733,410	-\$1,255,805	0.28	not significant
Non-minority Males	\$16,274,365	90.28%	59.62%	\$10,747,142	\$5,527,223	1.51	< .05 †
TOTAL	\$18,027,464	100.00%	100.00%	\$18,027,464			

(*) denotes a statistically significant underutilization.

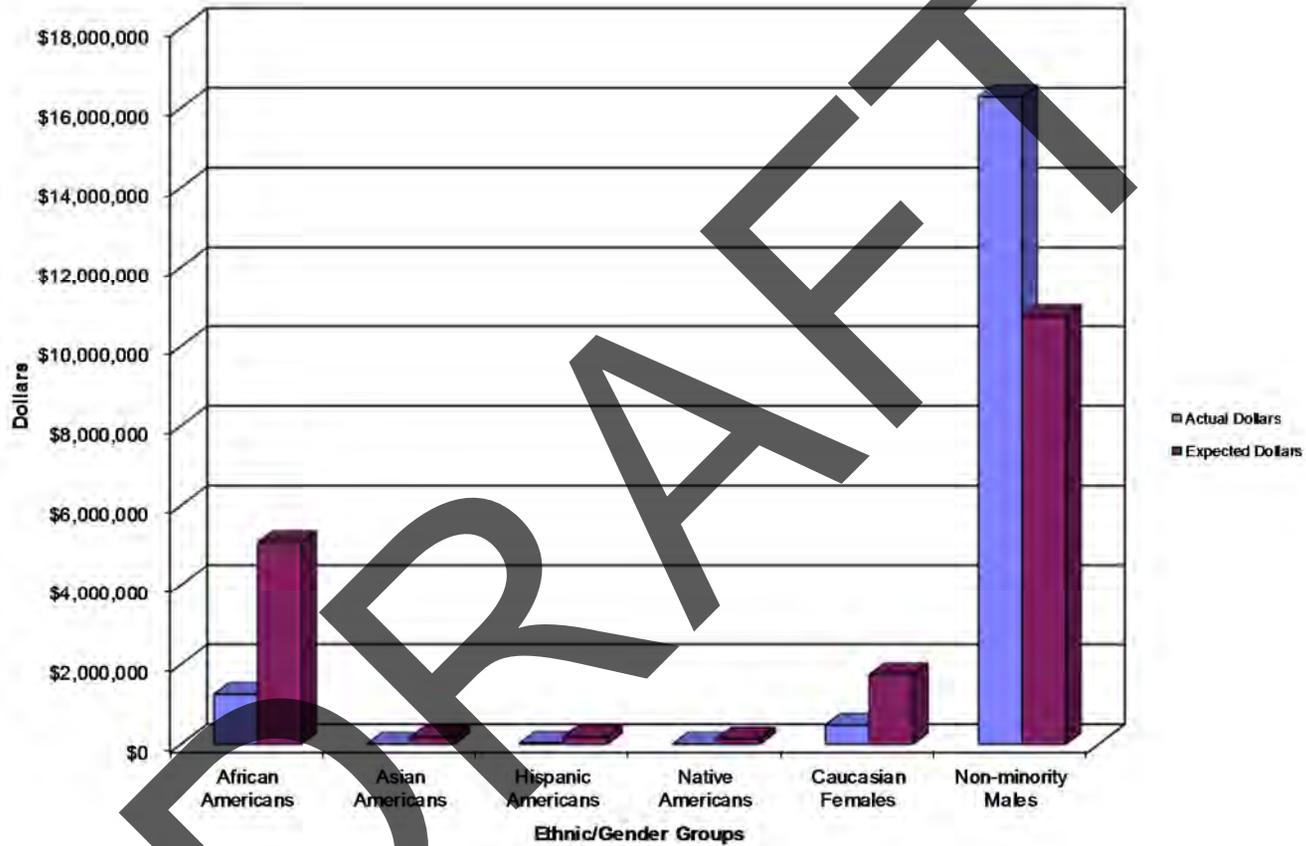
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of M/WBEs 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, 2014**



B. Professional Services Subcontracts

The disparity analysis of professional services subcontracts is described below and depicted in Table 8.3 and Chart 8.2.

African Americans represent 26.23% of the available professional services businesses and received 5.28% of the professional services subcontract dollars. This underutilization is statistically significant.

Asian Americans represent 5.15% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. This underutilization is not statistically significant.

Hispanic Americans represent 1.47% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. This underutilization is not statistically significant.

Native Americans represent 1.47% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. This underutilization is not statistically significant.

Caucasian Females represent 13.97% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. This underutilization is statistically significant.

Non-minority Males represent 51.72% of the available professional services businesses and received 94.72% 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, 2014**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$111,286	5.28%	26.23%	\$552,695	-\$441,409	0.20	< .05 *
Asian Americans	\$0	0.00%	5.15%	\$108,473	-\$108,473	0.00	not significant
Hispanic Americans	\$0	0.00%	1.47%	\$30,992	-\$30,992	0.00	not significant
Native Americans	\$0	0.00%	1.47%	\$30,992	-\$30,992	0.00	not significant
Caucasian Females	\$0	0.00%	13.97%	\$294,426	-\$294,426	0.00	< .05 *
Non-minority Males	\$1,996,186	94.72%	51.72%	\$1,089,894	\$906,292	1.83	< .05 †
TOTAL	\$2,107,472	100.00%	100.00%	\$2,107,472			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$75,241	3.57%	10.05%	\$211,780	-\$136,539	0.36	not significant
African American Males	\$36,045	1.71%	16.18%	\$340,915	-\$304,870	0.11	not significant
Asian American Females	\$0	0.00%	1.96%	\$41,323	-\$41,323	0.00	not significant
Asian American Males	\$0	0.00%	3.19%	\$67,150	-\$67,150	0.00	not significant
Hispanic American Females	\$0	0.00%	0.74%	\$15,496	-\$15,496	0.00	----
Hispanic American Males	\$0	0.00%	0.74%	\$15,496	-\$15,496	0.00	----
Native American Females	\$0	0.00%	0.25%	\$5,165	-\$5,165	0.00	----
Native American Males	\$0	0.00%	1.23%	\$25,827	-\$25,827	0.00	not significant
Caucasian Females	\$0	0.00%	13.97%	\$294,426	-\$294,426	0.00	< .05 *
Non-minority Males	\$1,996,186	94.72%	51.72%	\$1,089,894	\$906,292	1.83	< .05 †
TOTAL	\$2,107,472	100.00%	100.00%	\$2,107,472			

(*) denotes a statistically significant underutilization.

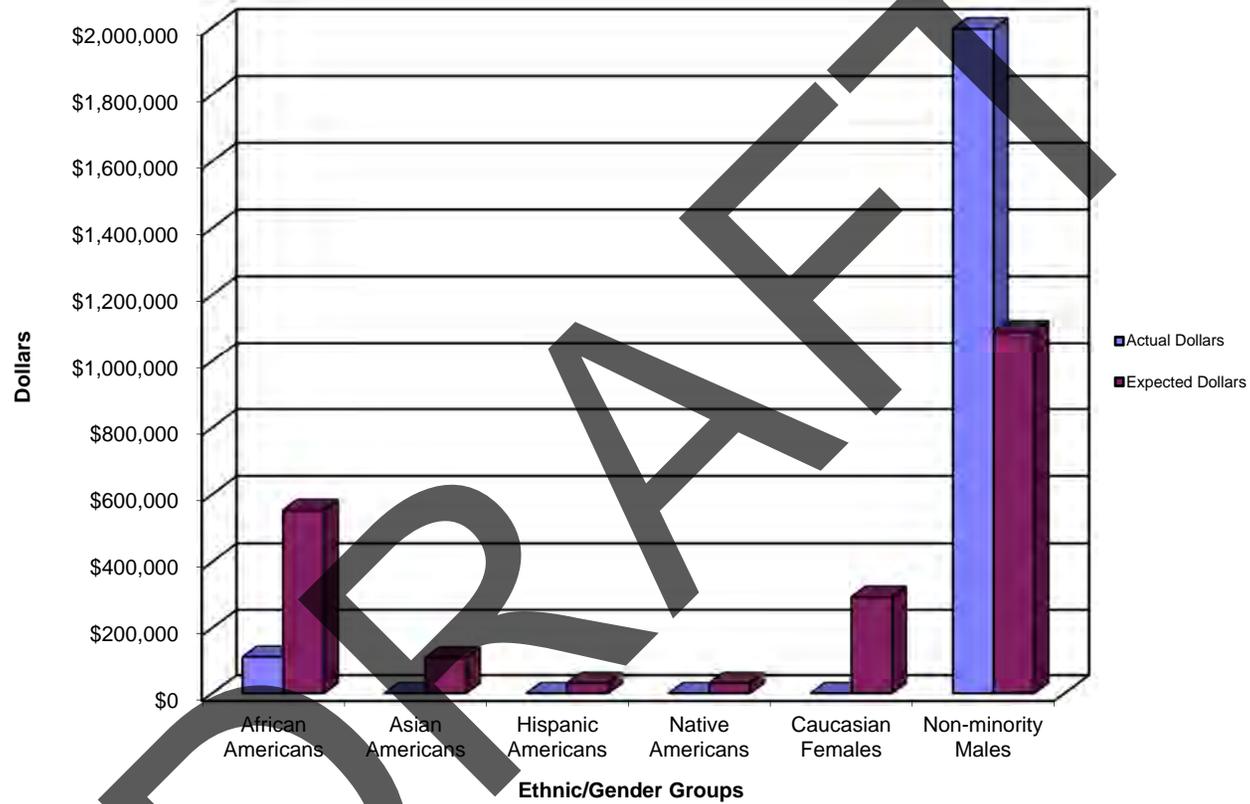
(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of M/WBEs 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, 2014



IV. Subcontract Disparity Summary

As indicated in Table 8.4, disparity was found for African American construction subcontractors and African American and Caucasian Female professional services subcontractors.

**Table 8.4: Subcontract Disparity Summary,
January 1, 2012, to December 31, 2014**

Ethnicity / Gender	Construction	Professional Services
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	No Disparity	No Disparity
Hispanic Americans	No Disparity	No Disparity
Native Americans	No Disparity	No Disparity
Caucasian Females	No Disparity	<i>Disparity</i>



CHAPTER 9: Anecdotal Analysis

I. Introduction

This chapter presents anecdotal evidence that was gathered and analyzed to supplement the statistical findings and disclose any active or passive discriminatory or race-neutral barriers that might affect M/WBE access to Shelby County (County) contracts. The anecdotal evidence was gathered in a fair and equitable manner through in-depth, one-on-one interviews and information gathered from a business community meeting.

II. Legal Standard

The importance of anecdotal testimony in assessing the presence of discrimination in a geographic market was identified in the landmark case of *Croson*.³⁴⁰ The United States Supreme Court, in its 1989 *Croson* decision, specified the use of anecdotal testimony as a means to determine whether remedial, race-conscious relief may be justified in a local government's market area. The court stated that a pattern of individual discriminatory acts can offer an explanation of the findings of disparity.³⁴¹ However, the discriminatory acts cannot be used to determine the presence of discrimination in an M/WBE's access to a government entity's contracting opportunities.

However, anecdotal testimony of individual discriminatory acts can document the routine practices affecting M/WBE access to contracting opportunities within a given market area. While the statistical data must be used to measure the existence of discriminatory practices, anecdotal testimony provides the human context through which the numbers can be understood. Anecdotal testimony from business owners provides information on the barriers businesses perceive in a government's market area. This type of information can be used to define best management practices that could improve M/WBE access to the government's contract opportunities.

A. Evidence of Active or Passive Participation

Croson authorizes anecdotal inquiries along two lines. The first approach investigates active government discrimination or acts of exclusion committed by representatives of a governmental entity. The purpose of this examination is to determine whether the government has committed acts that have prevented M/WBEs from obtaining contracts.



³⁴⁰ *City of Richmond V. J.A. Croson Co.*, 488 U.S. 469 (1989).

³⁴¹ *Id.*

The second line of inquiry examines the government's passive support of discriminatory practices in the market area where its funds are infused. Passive exclusion occurs when government contracts are awarded to companies that discriminate against M/WBEs, or when government fails to take corrective measures to prevent discrimination by prime contractors.³⁴²

Although anecdotal evidence of discrimination is entitled to less evidentiary weight than statistical evidence, when paired with appropriate statistical data, anecdotal evidence of either active or passive discrimination can support the imposition of a race or gender-conscious remedial program.³⁴³

As a result, anecdotal testimony used in combination with statistical data to support a race or gender-conscious program has value in the Croson framework. As Croson notes, 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."³⁴⁴ These narratives, according to Croson, can identify practices that should be enhanced or eliminated in order to increase contracting opportunities for M/WBEs.

B. Anecdotal Interview Process

The method used in gathering anecdotal testimony afforded the researcher an opportunity to garner eyewitness accounts and perceptions of the effects of exclusionary practices. Allowing interviewees to describe the barriers they have experienced in conducting business informs an understanding of how barriers occur, who creates them, and their effect on business development. Thus, the information obtained can offer the County vital insights on the need for an M/WBE program or policy changes to its Locally-owned Small Business Program (LOS B).

1. In-depth Interviews

The objective of the anecdotal analysis was to interview 40 businesses domiciled in Shelby County. The anecdotal questions asked of business owners elicited descriptions of barriers encountered working with or seeking work from the County, positive experiences working with the County and its prime contractors, knowledge of the County's LOS B Program, and recommendations to enhance the program.

The business owners that provided the one-on-one interviews were identified from contract and certification records, the business community meeting, and outreach. Potential interviewees were pre-screened to determine if they operated within the market area and were willing to commit to the interview process.

³⁴² *Croson*, 488 U.S. at 491-93, 509.

³⁴³ *Croson*, 488 U.S. at 509.

³⁴⁴ *Croson*, 488 U.S. at 509.



2. Business Community Meeting

The outreach efforts for the business community meeting targeted firms from the construction, professional services (including architecture and engineering), and commodities and services industries. The meeting was held to inform the business community on the purpose of the Disparity Study and to allow the participants an opportunity to provide information about their experiences working with or seeking work from the County.

The community meeting was held in the County Commission Chambers on April 7, 2015 at 11:30 a.m. The meeting was attended by Shelby County Commissioners, government staff, and business representatives. A total of 92 individuals pre-registered for the meeting, and 70 business owners attended. The meeting was recorded and transcribed. The public comment session was incorporated in this chapter.

C. Excerpts from the Anecdotal Interviews

The practices identified by the interviewees are grouped into the following seven categories:

1. Comments about the Locally-owned Small Business Program
2. Difficulty breaking into the contracting community
 - Race and gender-based discrimination
 - Preferred contractors
 - Good old boy network
3. Difficulty navigating the bid process
 - Unfair bidding practices
 - Unreasonable solicitation requirements
 - Failure to communicate to unsuccessful bidders
4. Late payments by the County
5. Experiences working in the public and private sectors
6. Exemplary business practices
7. Recommendations from business owners

Excerpts from the interviewee accounts illustrate a pattern of practices that have adversely affected M/WBE participation in the County's contracting opportunities.



III. Anecdotal Findings

A. Comments about the Locally-Owned Small Business Program

Business owners familiar with the County's LOSB Program shared their experiences and provided comments on the program's benefits to small businesses.

A Caucasian male owner of a construction company supports the LOSB Program but believes it needs stricter monitoring:

I participated in the LOSB Program, but it was not valuable for my business. It's hard for small businesses to penetrate the contracting market in Shelby County. It is hard, expensive, and time-consuming to seek work from the County. We stopped pursuing contracts with Shelby County. I do not feel they are adequately monitoring the LOSB Program.

This same business owner reluctantly supports the County implementing an M/WBE program:

I am a big believer that we are all one race. It's called the human race. Contractors should get work based on their performance or education opposed to whether they are a woman or minority. I believe an M/WBE program will not help that community. I don't know if it'll actually hurt, but I don't believe it'll help small businesses. If it is determined that they are underutilized, I would support an M/WBE program. But only if it's highly justified, because these guys should not work when they have poor past performance. But there are extremely qualified folks that are not being allowed to do work simply because of being bumped out by the good-old-boy system. There should be goals for those contractors.

A Caucasian male owner of a construction company reported that he has experienced difficulty finding qualified subcontractors to meet the LOSB goals:

I'm familiar with Shelby County's LOSB Program. The program has a list of contractors. But there is not a lot of contractors on that list that perform the work that we would need from a subcontractor. There are very few contractors that can do road and supplemental bridge type construction, and all the ancillary work that would go with road and bridge work. Recently, the County has expanded a little bit and are doing construction work other than roads and bridges. And we



have been effective in utilizing some landscape subcontractors as part of the LOSB Program. But it is not easy finding qualified subcontractors to do the percentage of work that the County is requiring. There is a shortage of LOSB contractors within our industry. The list is thin, at best. Quite often, the goals set can only be met by using what I would call, sole source subcontractors. There might be only one subcontractor within a specified type of work, whether that be landscaping, asphalt striping, or painting of a bridge. And so we're at their mercy. If they choose not to bid we won't meet the goal, and thus our bid could be rejected. We wouldn't apply for a waiver because if we don't meet the goal, we won't get the job. I believe that the LOSB Program is valuable and it's sincere. I believe that its intent is to nurture and to help spur development within the local small business community. However, just establishing goals doesn't incubate small businesses and make them successful. There has to be more time from a growth standpoint. I believe the problem with LOSB Program is the lack of development of successful contractors in their specific trades. Dumping them into the job and onto the general contractor is a recipe for higher prices and fewer general and subcontractors bidding the work.

This same business owner explained in detail why he is opposed to the County implementing an M/WBE program:

My experience with M/WBE programs are even worse. The goals seem to be higher and more unattainable. The list of certified M/WBEs seems to be shorter. The contractors on those lists are less qualified in the M/WBE programs. Although the LOSB Program has its problems, it is not nearly as bad as M/WBE programs. You can either bid the work, or you can't. You can either perform the work, or you can't. And you can either pay your bills, or you can't. Those are the main tenets of being in the construction business. A lot of times established companies that qualify for the LOSB Program have chosen to stay a very small company, but they can perform the work and thus grow their business, if they would like. It's up to them, but it's our history in getting these projects, that the LOSB Program has more subcontractors to choose from and M/WBEs are less qualified. I'm telling Mason Tillman Associates what I think they can do to improve the process. Is it another disparity study? I don't think that'll help. If you do one, and the County implements an M/WBE program, all it's going to do is make shorter lists of qualified subcontractors, and it's



going to cause higher bid prices. And it's going to be fewer general contractors getting work because fewer of us will be able to make the M/WBE goals.

A minority female owner of a professional services company explained why she has not made an effort to become certified as an LOSB:

I have not gone through the certification process with Shelby County. Simply because the way business is done in Shelby County government. You have to be in a network to do business with them. And when I say network, I consider it pretty much an insider network. It's nice to be certified with Shelby County but what does that mean if you're not actually getting any true business from them? I would be happy to become certified with the County if they were truly interested in working with me. I'm not going to go through a certification process that is part of a smoke screen to be on file and not get any true business. If you listen to the people that sat in that business community meeting for the disparity study, they were very disgruntled because they have been certified and recertified every year for a number of years, but they can't get business.

A minority male owner of a construction company reported that he has not been able to obtain any work through the County's LOSB Program:

Shelby County combined their programs and eliminated their minority program. It was just for minority and women businesses, but now it includes everybody. I have not been able to win work with the locally-owned program. I never won anything so I just gave up on them.

A minority female owner of a construction company reported that prime contractors are allowed to waive the LOSB goals without providing documentation that they made a good faith effort. She also believes the County should implement an M/WBE program:

We found out that the prime contractors were not above board. Some prime contractors will say they made a good faith effort, but no one verified if they in fact made a good faith effort. What we have found to be our experience is that you can almost say anything to the County, and they will go with it. On a bid we submitted, they chose another company that they had a relationship with who claimed they made a good faith effort. I think the LOSB Program could be valuable. But, I



don't think that it is now. The County should implement minority and women business enterprise goals because we are looked over in most industries. The only time we get called for work is when they want to show that they made a good faith effort on a LOSB project.

A minority male owner of a commodities and services business believes an M/WBE program will provide an avenue for minorities to gain access to the County's contracts:

I believe an M/WBE program would provide more access for minorities. They would get more opportunities. I don't think the contracts are being awarded fairly in my industry. There are some good minority businesses in Shelby County that are honest and can do as good a job as any other company. But they are not given an opportunity because of their color. If the goals went away, minority businesses would probably go away too.

A minority male owner of a professional services company reported that his company has benefitted from the LOSB Program and supports the implementation of an M/WBE program:

The LOSB Program has benefitted our company because the goal is met with local firms. That is the reason in recent years that we have won a few contracts from the County. They should also start an M/WBE program because the LOSB Program deals with everybody, white and black. There needs to be something that deals with black companies. We're 65 percent of the population here, and we're the ones that are behind the eight ball. When they first implemented the LOSB Program years ago, I knew of white men that made their wives a 51 percent owner of the company. An M/WBE program would level the playing field. The LOSB Program leveled the playing field a little bit because it protects us against out of town companies winning the bids. But the LOSB Program needs to be overhauled. It's an outdated program.

A Caucasian female owner of a professional services company explained why the County's LOSB Program has benefitted her company:

Every locally owned architecture firm in the County qualifies for the LOSB Program. So, it doesn't help me. There are only a few architecture firms in our community that are not considered small businesses. So, we're all small business.



This same business owner supports the implementation of an M/WBE program:

The County should not just implement an M/WBE program but hire people to manage it. I really think there should be some projects set aside for locally owned small, minority, and women businesses.

A minority male owner of a construction company supports an M/WBE program with separate goals for women and minorities:

There should be an M/WBE program with separate goals for women and minorities. Because a white woman married to a white man doesn't have the same struggles as a minority company.

A minority female owner of a professional services company reported that the LOSB Program has not been valuable to her business because she is unclear how to market and do business with the County:

I have not found any value in the LOSB Program because I have not been able to understand what's going on at the County. How do we market to them? How do we do business with them? We just recently learned about a year ago that they we have to be in their vendor database, but we were not notified of the changes. The County needs to put teeth in their program like Memphis Lights Gas and Water (MLGW). When I say put teeth in the program, I mean mandated goals. I've watched MLGW put teeth in their program, and they monitor their program to make sure the goals are met.

This same business owner supports an M/WBE program and unbundling contracts to create contracting opportunities for women and minorities:

I think that unless they put an M/WBE program in place we will never get any work. And until they unbundle some of this work nothing is going to happen. At least 94 percent of the County's business is not going to minority businesses, and that's a sad state of affairs. So, Shelby County should implement an M/WBE program with strict monitoring.



A minority male owner of a commodities and services company believes the LOSB Program would be beneficial to his firm if strict monitoring was enforced:

No, the LOSB Program has not benefitted me. I'm certified, but for what? Nothing happens, the certification hasn't really done anything but put my name on a list. The program would work if there were policies in place to make sure the goals are met. There were no mandates in place for the LOSB Program. They need a contract compliance office that is serious about the program. The office need to have an administration that implements the program's policies and procedures.

A minority male owner of a construction company supports the County implementing an M/WBE program:

Well, I think an M/WBE program would be helpful if the program provides contracting opportunities on Shelby County contracts. I would love to see that come to pass. There would be no more fingers we could point to say that their contracting practices are not fair.

A minority male owner of a construction company explained why he did not certify as an LOSB:

If I'm making up to five million a year, I'm still small. That is too broad and includes everyone. That is the reason I don't bother getting certified for that program. It's a waste of money to pay for recertification every year.

A minority female owner of a professional services company is not optimistic that an M/WBE program will provide additional work for minorities and women:

I lived in Shelby County for a very long time, and in years to come we will be talking about the same thing, minorities and women not getting any work. I don't believe that Shelby County is really serious about doing business with women-owned or diverse businesses. I don't believe the study or goals are going to change things in Shelby County. I think the study will collect dust on a shelf. It's nice to say that they have allocated the dollars for the study to get elected into office. But five years from now, do I think the minority participation numbers will go up? Absolutely not.



A minority male owner of a professional services company explained why he believes the County should implement an M/WBE program:

We are a certified small business with the County. In Shelby County minorities are about 65 or 70 percent of the population, and we scuffle to receive less than five percent of the business. Something is wrong with that picture. The County should implement an M/WBE program which represents the majority of the population in the County.

A minority female owner of a professional services company supports an M/WBE program if the data reveals a disparity on the County's contracts:

I think that the County should implement an MWBE program if a disparity is determined. That's the only way some firms are ever going to get work from the County. We don't want to play in the baby pool. We want to play on the playing field.

A minority male owner of a construction company reported on the pros and cons of being a certified LOSB:

Being certified as a LOSB has been helpful to me in some ways and a hindrance in other ways. If you're a minority-owned business, they assume that a black man doesn't know how to do the work anyway, and he doesn't know the business. I think an M/WBE program would be effective if they monitored it for compliance. They must closely monitor it.

This same business owner is reluctant to support an M/WBE program because non-minority-owned companies will create fronts in order to be included in the program:

The only problem I have with the implementation of an M/WBE program is white male-owned companies would then put a woman in a leadership role as a front to make it a woman-owned business. They will put a woman or their wife in place and say, now we're a minority.

B. Difficulty Breaking into the Contracting Community



Many of the interviewees reported difficulty securing prime contracts with the County. The interviewees believe that a majority of the County's contracts are awarded to a few contractors. The prime contractor utilization analysis determined that 47 vendors received 70 percent of the County's total prime contract dollars. The 47 vendors represented 4.71 percent of the 998 total

vendors. The findings confirm that a small group of prime contractors received the majority of contracting dollars spent by the County.

1. Discrimination and Sexism

A minority female owner of a professional services company believes that she is unable to obtain work from the County because of her ethnicity:

The County discriminates. It's not mean or evil, but if you're a minority firm, they're not letting you play on the right field. If you can never play on that field, you will never be on the field. We can't afford to get the resources to compete because we are not being paid to do what we are able to do. I'm not saying this because I deserve work because I'm black. I'm saying it because I'm qualified. So that has been our frustration because I have to jump through hoops, tell my life story, give up every stock I own to get work. A white majority firm doesn't have to do any of that. There's no benefit that comes to us.

A minority male owner of a professional services company believes that non-minority businesses receive the majority of the County's contracts:

The numbers will reveal that minority business owners are being treated differently. We are being treated differently because over 94 percent of the County's business is being done with non-minority businesses, and that's not good. They need to do something different. This is especially true for construction as a whole because the work is bundled, and we can't get bonding.

A minority female owner of a professional services company believes that the statistics will reveal that the majority of the County's contracts are awarded to non-minority businesses:

We see opportunities where the County announces upcoming contracts. And the same people get it over and over again. And they don't look like us. Then, I find out how much money the County is spending with people who look like me and that tells me that I'm being treated differently. This is based on the fact that I see who's getting the contracts consistently. I mean you don't have to really draw a lot of conclusion. The facts are there for me. I know I'm being treated differently. A study will not change anything. It just points out data and information that validates what we all know is true.



A minority male owner of a construction company believes that certain prequalification requirements are used to screen out minority contractors:

My wife said it always seems like we have to go through hoops, the bonding requirements get higher, and that kind of stuff. It's a red flag to deny us work. Those requirements are used to eliminate us because of race. A lot of times they have a hidden agenda and will not just come out and say we don't want to work with you because you are African-American.

A minority male owner of a construction company reported that minority contractors are relegated to competing for very small contracts:

We fight for crumbs. Small minority businesses compete for \$5,000 to \$10,000 jobs. I'm sure there is more work than the \$3,000 to \$10,000 jobs that we are fighting for.

A Caucasian female owner of a professional services company reported that her work is unfairly criticized because she is a woman:

It's still a man's world. Most of the decision makers are men. Women don't get the same attention or respect. I feel like my work product is usually discounted by Shelby County. It's hard to be successful when you are constantly criticized. I feel like I've been discriminated against because I am a woman. There are very few women in my profession. I think the County should look at their policies with regards to hiring women as decision makers for their procurement solicitations.

A minority female owner of a construction firm reported that woman-owned business owners are stereotyped as incompetent:

In my opinion, as a woman, companies feel that we are not qualified and they do not give us a fair shake. This is true if you're a minority or not. But there are male-owned companies that are not able to produce the work once they are given a particular project. But women continue to be stereotyped in my opinion.



2. Preferred Contractors

A Caucasian female owner of a professional services company believes that Shelby County prefers to work with larger established firms instead of smaller local companies:

Shelby County is a closed environment. I'm frustrated because unless you're a large firm, they don't think you can do the work. But I deal in intellectual work and smarter is better than more. We thought we were the best qualified, so we protested and we submitted a second time but we still did not win. There were things said to my partner during the pre-proposal conference that indicated that they knew that we were the firm that protested. They weren't going to pick us. So, it was a lesson in futility. We were the most qualified to do the work, and the company was selected had a one-page web proposal. They were actually a design-build firm. The County already knew who they wanted and it was not us. The company chosen was [company name withheld], and it was a 100 percent LOSB contract. That was another reason why this one was so upsetting. The firm that got it was about the same size as us but was not local. I could not understand why we didn't even qualify for an interview.

A Caucasian male owner of a construction company reported that preferred contractors are used by the County on construction projects:

There is a well-established group of contractors that work with the County. Ultimately, it was too expensive for me as a small business to continue to go after work that I would not get. We are not provided the opportunity to do the marketing and sales strategy to speak with the decision makers to educate them on the services we provide.

A minority female owner of a construction company believes that political connections are needed to win projects from the County:

From our perspective getting prime work from the County has been political, and therefore we are only utilized as a subcontractor if there are goals set for small businesses. We don't get anything unless there are goals. In my opinion it has a lot to do with the connections that you have, the inner circles are closely held. By the time the bid comes out, they've already identified who they want to do the job. It's almost handed, in my opinion, to certain people. It is not a fair process. But I know we're just as qualified as other prime contractors. So, a lot of



times we don't get the work, but when we do get it, they nickel and dime us to death. And we wind up doing a \$3,000 job when we thought it was going to be \$150,000 job.

A minority male owner of a commodities and services company reported that he was unable to secure work from the County despite repeated bid submittals:

I've bid jobs with the County, but I was not successful. They said it was because of pricing. Even though the County has an open bid system, you can bid and bid and never get anything. So, we decided we're not going to waste our time. We had to move on to where we can get some work in. I really think that the opportunities that are available at the County are not as available to someone like me because it takes so much time to research each department and find out contracting opportunities.

A minority female owner of a professional services company reported that although she was mentored by a majority firm, she was unable to break into the contracting community in Shelby County:

I have received mentoring from some large companies on several bidding opportunities. But they partnered with us because there was a program in place. I was running behind Shelby County and the City of Memphis hoping that they would open the door and talk to us, only to find out that we were spinning our wheels.

A minority male owner of a construction company believes that the County does not fairly distribute the work in his industry:

There are several firms that bid on demolition jobs, but a lot of them who year after year submitted bids have stopped bidding on County jobs because it wasn't worth it. I suggest they change the administration and make bidding a fair practice. It could be fair if the work was distributed equally according to a contractor's qualification and their ability to do the work.

A minority female owner of a professional services company reported that she has been unable to secure prime contracting opportunities from the County:

It's frustrating for us because we're never allowed to be the lead consultant on a County project. So we don't really get any prime



opportunities. This creates a level of frustration that I can't explain. I do my best not to be upset because I can't control it.

A Caucasian male owner of a construction company explained that he understands why certain contractors are preferred over others:

I know that certain contractors get most of the work. It happens when a contractor bids on a high number of contracts, gets the work, and makes all the money. He does it again and again. Any contractor that performs, pays his bills, and bids the work accordingly is going to get repeat business. Thus, he's going to pretty quickly outpace the competition, especially if the competition doesn't do any of those things successfully. We use the same subcontractors over and over because they perform.

3. Good Old Boy Network

The interviewees reported anecdotes concerning behaviors of established business and contracting networks, otherwise known as the “good old boy network,” that prevent new and small contractors from working as prime contractors on public contracts.

A minority male owner of a construction company believes certain prime contractors are not genuinely interested in working with minority contractors:

The same old big contractors keep on weeding us out; it's that good old boy system. There are certain majority companies that make sure that they get the job. They may say, "I want a minority to be a part of the project," but they streamline you and feed us baloney. That kind of stuff needs to stop. The County needs a program where they would be advocates for minorities.

A minority female owner of a construction company believes that the good old boy network has negatively impacted his ability to obtain work from the County:

The good old boy network exists in my industry. It affects my business because we are not in those circles. It is hard to market to them because we have never worked with them before.



A minority male owner of a commodities and services company reported that the County's practice of negotiated contracts supports the good old boy network:

I think that the opportunities are not available to minority businesses. There are negotiated contracts that are never offered to minorities. We're not given an opportunity to sit at the table and negotiate a contract. I was told by several people that the County has the authority to award a contract if it's below a certain amount without bidding it out. It's a good old boy network.

A minority female owner of a professional services company believes that the good old boy network exists because minorities and women receive less than 10 percent of the contracts:

I have been denied opportunities because of the good old boy network. It's about who you know. They are an old boys' network because they receive about 90 percent of the work. Statistics don't lie. Less than 5 percent or 10 percent of the business goes to minorities or women.

A minority male owner of a construction company believes that the good old boy network continues to be a barrier to minority businesses on the County's contracts:

The good old boy network is a system where a couple of people are in a position to get the work that prevents a minority like me to get a piece of the pie. And the County keeps using their own little set of people. They will make it appear that the bidding process is fair, but it's not. And that would be considered the good old boy network. Race is the number one factor that keeps the black man from getting contracting opportunity, and the good old boy network supports this. We are tired of being guinea pigs in a sense. We are tired of being told, "You guys are not doing what you are supposed to do." We don't want to hear that language anymore. We want to hear, "yes, you got the job." We don't mind working for money.

A Caucasian male owner of a construction company reported that he was forced to work with minority subcontractors to receive contracts from the County:

I'm a Caucasian male, and I've been told this more than once from the ethnic organizations that although I was getting business, I am the wrong color. If you want to do business in Memphis and you're not either a Latino or African American, you are going to have a very difficult time getting business with the County. In order to get business



you need to find a minority contractor and subcontract with them. Otherwise, I wouldn't stand a chance. We have been told basically by employees at the County that we need to find a minority subcontractor. It doesn't have much to do with ethnicity as it has to do with the generational regimes that have been in charge politically. We can't afford the expense to break into an already existing network of contractors that is already getting the work.

C. Difficulty Navigating the Bid Process

The interviewees provided anecdotes concerning the County's bidding process. Some business owners reported unfair bidding practices and failure to communicate with unsuccessful bidders.

1. Unfair Bidding Practices

A minority male owner of a construction company reported that although he won contracts through the County's Weatherization Program,³⁴⁵ he was unfairly put on a suspension list because he was not able to complete the project within an unreasonable tight deadline:

I have won jobs from the Shelby County Weatherization Program. But they wait until the last minute to give you the jobs to do within a month. And it typically is too much to do within a month. They have changed that whole staff. But the prior staff was getting paid on the side by other contractors to help them win contracts under that program. And that's why they got rid of the first staff because they were getting paid on the side. The prior staff was helping their friends and certain contractors to win so they could get the money from them.

This same business owner further elaborated:

It was a mess. I went to the person that was handling those contracts during that time and asked, "Why do you guys wait to the last minute to have the work done?" I was told, "We're giving you three to four weeks to get it done." I could never understand that last minute thing. And if you don't get it done in time, they put you on a suspension list for contractors that promised to do the work and could not do it. They know we are a small minority business and some things you can't do



³⁴⁵ The Weatherization Assistance Program provides funds to states to assist with the weatherization of the homes of low-income elderly and disabled adults and families. The program is administered through contracts with local governments, including Shelby County, to provide weatherization services. The weatherization services include insulation, storm windows, caulking, and other related activities to reduce home energy costs and increase home energy efficiency.

in a short turnaround, but they refused to give us enough time to get the work done.

A minority male owner of a commodities and services company also reported that he did not receive a response from the County as to why he was not awarded the contract despite being the lowest bidder:

About three years ago, my company bid on work for the County, and we were not awarded the bid. After about two and a half weeks of getting stalled on why we weren't awarded the bid, we were given an opportunity to review all the bids that were submitted including us and other companies. It turned out that we were the lowest bidder, yet we were not awarded the bid. I was promised that I was going to get an explanation. Two years later, I'm still waiting on that explanation.

A Caucasian male owner of a construction company believes that the County uses low bid solicitations to allow preferred contractors to get repeat work:

We were on a vendor list. I think it was for heating, ventilation, and air conditioning (HVAC) bids via the web. But receiving the bid and then having the ability to actually compete on those bids are two different things. The low bid system allows companies to low bid and then turn around and get change orders after the bid is won. It is because of 15 to 20 years of embedded leadership issues that makes it very difficult for entrepreneurs to penetrate the system.

A minority female owner of a construction company reported that she has missed contracting opportunities because of inadequate time to respond to a bid:

We will receive a call from a general contractor informing us that they have a project and will require a response within two days. Sometimes we get a five-day turnaround, but generally it's a short time frame to submit a bid. We are put at a disadvantage because there's not enough time to meet the qualifications. We may be working on another job and we don't have enough time because we are already working with limited resources. Therefore, we frequently don't respond.



A Caucasian female owner of a professional services company explained why she believes the County purposefully provides a short turnaround time to respond to Request for Qualifications:

When they advertise Request for Qualifications, a longer period of time is needed to respond. It seems like they have already negotiated the contract with someone else. It prevents us from protesting because they already started down the road of negotiating the contract. We don't want to protest after they have already started negotiating. I'm glad they are doing this study, it's long overdue. The people in the audience at the community meeting were pretty pissed off.

A minority male owner of a construction company reported that he had knowledge of some women-owned businesses posing as fronts:

There was a company that had the wife get the street light jobs for them. The only way they got the work was the wife acting as a front for them. They do not have any minority or black-owned business doing major work.

A minority female owner of the professional services company reported that she was offered money not to perform work as a subcontractor to meet the County's LOSB goal:

We are registered with Shelby County's LOSB Program. They do not have a minority participation goal. They just have a locally owned small business goal. A lot of times these companies come in town and want to use your name. Then they do the work and never give you any business. They use our name to say we are going to do business with a small business, but they never do. Alternatively, they will also try to pass the work through our business and give us next to nothing. They say, I'm going to use you and pay you \$2,000. It might be a million dollar job, and they will offer \$2,000 so that it appears that we have gotten the business. I don't particularly care for that. I want to perform.

A minority female owner of a construction company reported that a prime contractor submitted a letter of good faith although it did not contact her company for subcontract quote:

I am aware of a bid where the prime contractor submitted a letter of good faith. But I, in turn, wrote a letter stating that no one had contacted us from that company. We had not received any solicitations from that company to do business. So my question is, does the County verify the actual good faith efforts?



A minority female owner of a professional services company reported on a practice where companies sold fraudulent bonds:

There are companies called bond daddies, they were legendary. We call them bond daddies because they drive around selling fraudulent bonds to people. They only did the underwriting. I believe new laws came out stopping these companies.

2. Unreasonable Solicitation Requirements

A Caucasian male owner of a construction company explained that he has difficulty finding qualified minority contractors as required in bid solicitations:

We have run across some minority subcontractors that could not meet our prequalification requirements on Shelby County projects. We are afraid to use them for numerous reasons. Failure to perform on previous jobs preclude them from being considered on a current job that we were bidding on. And when I say perform, maybe they could perform a certain activity of work but it turned out they didn't have the equipment, manpower, or the knowledge to do it. Or they failed to pay their vendors who provided them with materials, and we had to pay it for them. So, those are classic reasons why general contractors would preclude firms that say they qualify, but we know from past experience, they don't.

A minority male owner of a goods and other services company reported that the County's brand name requirements have prevented him from continuing his work with the County:

We have had a lot of tremendous success with the County, but there have been some major bumps and not on our part. We've always been able to deliver until they started requiring a certain brand named computer. Previously, their technology specifications were written with open technology, meaning that they were never brand specific. Then they started requiring brand specific computers, i.e. Dell. Once they switched to Dell, a direct-owned company, which eliminated all local companies from selling computers to the County, we were completely cut off. They then started hiring these out-of-state companies. I was told point blank: we don't see the benefit of spending money locally.



3. Failure to Communicate with Unsuccessful Contractors

A Caucasian female owner of a professional services company reported that her firm spent a considerable amount of money on preparing a proposal in response to a County solicitation but was unable to learn the name of the successful proposer:

I called [County employee name withheld] three or four times to find out who won the award. They brushed me off. They told me to write a letter, which we did and never received a response. They said if you're on our vendor list, you should have been notified. But I didn't get a notification that it was awarded. And even more poignant than that, I spent \$10,000 to \$20,000 putting together the proposal plus six copies. My name and my address was all over it. Why couldn't he have written me a letter?

A minority male owner of a construction company reported that the County only notifies the successful bidder of contract awards:

The only way to find out if you won a bid from the County is if they give it to you. If not, you won't know if you won or not.

A minority female owner of a professional services company reported that she never received feedback from the County after submitting several proposals:

The only problem we've had with the County is that we never hear who won the award, if there was an award, or why it was pulled back. They never send us anything although we submitted bids. They don't publish the awards on their website. They should tell the consultants that submitted a proposal the status of the award. I've not been able to market to them effectively.

A minority male owner of a commodities and services company has experienced difficulty obtaining instructions on submitting bids on contracts in his industry:

I've been a vendor for Shelby County for approximately four or five years. We only gotten two or three calls, and I don't know if there is a process for supervisors or workers within Shelby County that have a list for commodities and services procurements. We get recertified every year, and we are still unclear as to how to get business from the County.



D. Late Payments by the County

Some interviewees reported on their experiences receiving late payments. In one instance a business owner waited a year to be paid from the County. A minority female owner of a professional services company waited a year to receive payment for services she rendered to the County:

I was a prime contractor for the County, and received payment a year later. It was only after I threatened them before they gave me my money. I was willing to take a hit, too.

A minority male owner of a construction company reported that he waited up to 90 days to receive payment from the County, which negatively impacted his small business:

There have been times when I turned in my paperwork and did not receive payment after 60 to 90 days which cut into my profits. That is just another unfair practice that the County is doing. Some companies get paid every two weeks and others have a 30 to 45 day turnaround, which is ridiculous. I usually have to make calls to the Purchasing Department to run down my check, then I'll eventually get paid. It's like you have to shake and stir things up to get something done. It doesn't take a rocket scientist from NASA to get paid before the invoice is 60 days overdue. But we have dump receipts and labor that we are footing out of our own pocket. After we wait over 60 days to get paid were essentially making less than minimum wage.

A minority male owner of a construction company reported that he had to make a formal complaint to receive payment on his invoice that was 30 days overdue:

I did a small job, and it was not much of a check. I called and they gave me the run around for over thirty days. So, I went down to the office and they told me to call back the next day. I called and they never called me back. They never pick up the phone. When I realized that they were passing the buck, I went back to the person who is supposed to be in charge. I was then told that, "oh, it's my mistake." I eventually had to make a complaint to get my check. I had to pay my workers during that time. I'm a small business and I don't keep that much money active in my bank account. I could only pay them partially. But I couldn't come up with the other part of their check.



A minority male owner of a construction company explained the impact of late payments on his business:

We have received late payments from the County, and it put us in a bind. It also hurt our business because we did not have money to buy materials for other jobs. It seems like if you are a black contractor, you are not going to be paid on time. And, we do not have financing or a bankroll to pay our workers.

E. Public versus Private Sector Experiences

Business owners compared their experiences working in the public and private sectors.

A minority male owner of a professional services company explained why he received the majority of his revenues from the public sector:

In the public sector, we have received about 60 percent of our revenue. In the private sector, that's where your racism is probably more prevalent. They don't do business with us, and usually they don't have to tell us why. I have been told by white buddies that the private sector is set up to do business with white males. The only way you're going to get substantial business is to partner with one of them. It's not overt discrimination, but we don't get the business. Most of us are in business because some majority firms left the government sector because it wasn't that lucrative.

A minority male owner of a construction company explained why he believes minority business owners seek work from the public sector:

In the private sector they ask minority businesses for outrageous qualifications, insurance, and other stuff to get work. Then you get nothing from the private sector without being known. They say we'll call you back, but don't. Once I went to check on a bid at a private company, and they asked me for even more additional insurance. While I was there, a white male named [name withheld] came in, and they didn't ask him for any credentials or documentation like they asked me. I knew him and after I left I called him. He said they did not ask him for the paperwork that they asked me and that they gave him a bid packet and told him to just give them a price. I'm like man, they asked me for insurance and everything. I never heard anything



else from that company. So, that's why a lot of times minority contractors turn to the government for work.

A minority male owner of a construction company reported that working in the private sector is less stressful than the public sector:

The private sector is way better than the public sector. It's less stress and headache. We negotiate the contract, sign it, and do the job. It's different than dealing with government sector. The government can put you through a lot of hassle, and it's not worth it.

A minority male owner of a professional services company reported that his experiences working in both the private and public sectors are similar:

There is no major difference working in the public or private sector. We have to fight for every inch of business that we get.

A minority male owner of a construction company does not like working in the public sector because prime contractors use his certification without giving him any work:

Well, on the public jobs prime contractors will use us for our certification and then not give us any work. On private sector jobs the prime contractor is not using us for a certification. So, they work with whoever they want to.

F. Exemplary Practices by the County

Interviewees lauded County managers for their assistance when seeking work and performing their projects.

A Caucasian male owner of a construction company described a County project where he received helpful assistance from a County engineer:

We provided rails to a project called [project name withheld] with the County. It was fairly difficult because it required some complicated bridge locaters and rotten wood. The engineer of record, [name withheld], worked closely with us to get the job done. It could have been really bad, but we proposed solutions regarding the structural repairs of an old railroad trestle and they worked hand-in-hand with us on repairing that bridge. I was very pleased with the County engineer, and it was a pleasure getting that project done. It was a very



difficult project, but when we had a recommendation, the engineer tweaked it slightly to make sure the project was done well.

A Caucasian female owner of a professional services company reported that she was offered additional work because of the good service her firm provided:

We worked for the Shelby County Sheriff's Department, and they wanted to give us additional work because they liked our style and we met the budget. We were very responsive.

A minority female owner of a professional services company reported on a positive relationship she developed with a County director:

I like working with the people at the County, they're nice people. I have a good relationship with the Director of Finance.

G. Business Owners' Recommendations to Improve Contracting with Small, Minority, and Women-owned Businesses

Recommendations were offered to improve access to County contracts for small, minority, and women-owned businesses.

A minority female owner of a professional services company recommended that the County engage in a serious effort to contract with minorities and women:

I think it is time for the County to get aggressive regarding spending money with minority and women-owned businesses and just stop talking the same talk. Somebody has to do something different in this County for things to change. We got to go beyond these studies, committees, and certifying folks. So, it is time for someone to step forward and say, "Look, enough is enough."

A minority male owner of a construction company recommended better communication to unsuccessful bidders:

The County does not communicate with us. There needs to be some type of requirement that once you have submitted a bid, they at least should inform us that we were not the low bidder, or we awarded it to XYZ. They should let us know that you did not waste your time and explain what we could do better in the future. That would help us get a fair shot at work.



The same business owner also suggested stricter monitoring on contracts with LOSB goals:

When there are goals assigned on a project, they should verify that the subcontractor that's doing the work is the same subcontractor that was actually awarded the work in the beginning. They should do follow-up calls to find out if they met the goal or confirm if they sent a good faith letter. Require specific documentation in their good faith letter. Contact those initial subcontractors to see if they were contacted to be at the job site. There also needs to be more outreach before the projects actually go out for bid to get to minority businesses. They should make sure all businesses are aware of upcoming projects.

A minority male owner of a commodities and services company recommended more lead time to respond to bids:

When they put out a bid, a little more time is needed to respond because as a small business, our resources are limited. We can get a notice today, and there's a pre-bid meeting by Friday. That's pretty difficult for small businesses. So, if they could lengthen the time to respond, it would really help us in our planning.

A Caucasian male owner of a construction company recommended financial assistance for small businesses:

We can't afford to try and penetrate the good old boy network. Assistance with lending institutions would be helpful. Currently, financial barriers block us out. So, we have to go after the path of least resistance which is small purchase orders. Oftentimes we have to borrow money until we get receive payment. The financial barriers can be a crushing weight on a small business.

A minority male owner of a professional services company recommends that the County's senior leadership require all departments to meet the LOSB goals:

A decision has to be made at the top that the goals will be mandated throughout all County departments. All contracting or purchasing managers should be required to meet the goals. With Shelby County government they do not have any mandates so nothing happens and we do not get any work. That's why I say the mandate has to come from the top. Then, it will permeate throughout each department. Also the manager's job performance should be looked at on a yearly basis



to determine if they are meeting the program objectives and goals. That's how you make a change in Shelby County government.

A Caucasian male owner of a construction company recommended seeking input from prime contractors before setting LOSB goals:

My suggestion would be that prior to goals being written into the bid documents, that industry experts be consulted as to what is the possible achievable goal for the particular project. I would suggest that they ask some of the contractors that are bidding on the job, what the goal should be on the project. And you'll get real answers. Otherwise, at the pre-bid meeting it will already be written into the bid solicitation. At that point it's almost too late to revise the goal because it is written into the document.

A minority male owner of a construction company recommended a 30-day turnaround on approved invoices:

I suggest that they turn around invoices quicker. It should not take more than 30 days to get paid, otherwise it causes a problem.

A minority male owner of a construction company recommended a quicker turnaround on invoices for services rendered:

The County shouldn't wait so long to pay their contractors. You can almost get buried in paperwork.

A minority male owner of a commodities and services company recommended a sheltered market and mentor-protégé programs:

The County should implement a shelter market program so locally-owned small businesses or minority firms can compete on particular products or services. The County should also create a mentoring program to force larger companies to establish a relationship with us.



A minority male owner of a construction company recommended mentoring and bonding assistance for minority businesses:

General contractors that win the job should mentor small minority businesses. They could teach them how to estimate and manage the project. The average minority contractor cannot get bonding. I know one contractor that couldn't get bonding here in Tennessee and had to go to New York to get bonding. Bonding assistance should be provided by the County.

DRAFT



CHAPTER 10: Regression Analysis

I. Introduction

The regression analysis was undertaken to examine the economic conditions of M/WBEs in Shelby County's private sector marketplace utilizing the data produced by the United States Census Bureau Public Use Microdata Sample (PUMS) and the Federal Reserve Board's Survey of Small Business Finances (SSBF). Since the federal court has ruled that economic conditions can be indicators of marketplace discrimination, the PUMS data was reviewed to determine if there were race and gender disparities in business ownership and business earnings within Shelby County.³⁴⁶

This Chapter judiciously details the appropriate legal parameters that the courts have ruled as appropriate economic indicators. Specifically, the analysis uses three regression models to assess the impact of economic indicators on the formation and growth on M/WBEs in Shelby County. The models examined the effect of race and gender on business ownership, business earnings, and loan approval rates.

The regression models measured each of the three economic indicators by comparing Minority group members and Caucasian Females to Caucasian Males while controlling for race and gender neutral explanatory variables, such as age, education, marital status, and access to capital. The analysis of the PUMS data evidenced race and gender disparities in the loan approval rates and the rates of business ownership.

While these findings of private sector discrimination cannot be used to adjust the statistical findings derived from the disparity analysis they can inform the race and gender neutral recommendations presented in *Chapter 11, Recommendations*. The prime and subcontractor disparity analyses revealed a statistically significant disparity in the award of the County's prime and subcontracts. The private sector indicators of discrimination could further substantiate the presence of economic discrimination in the marketplace where Shelby County has infused its funds. The findings from the private sector analysis would also inform and justify the race neutral programs that Shelby County could enact to remedy discrimination in its marketplace.



³⁴⁶ *Concrete Works of Colo., Inc. v. Denver*, 86 F. Supp. 2d 1042, 1057-61 (D. Colo. 2000), *rev'd on other grounds*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003) ("*Concrete Works III*").

II. Legal Analysis

A. Passive Discrimination

The controlling legal precedent set forth in the 1989 *City of Richmond v. J.A. Croson Co (Croson)*³⁴⁷ decision authorized state and local governments to remedy discrimination in the award of subcontracts by its prime contractors on the grounds that the government is a “passive participant” in such discrimination. In January 2003, *Concrete Works IV*³⁴⁸ and *City of Chicago*³⁴⁹ extended the private sector analysis to the investigation of discriminatory barriers that M/WBEs encountered in the formation and development of businesses and the consequence for state and local remedial programs. *Concrete Works IV* set forth a framework for considering such private sector discrimination as a passive participant model for analysis. However, the obligation of presenting an appropriate nexus between the government remedy and the private sector discrimination was first addressed in *City of Chicago*.

The Tenth Circuit Court decided in *Concrete Works IV* that business activities conducted in the private sector, if within the government’s market area, are also appropriate areas to explore the issue of passive participation.³⁵⁰ However, the appropriateness of the City’s remedy, given the finding of private sector discrimination, was not at issue before the court. The question before the court was whether sufficient facts existed to determine if the private sector business practices under consideration constituted discrimination. For technical legal reasons,³⁵¹ the court did not examine whether a consequent public sector remedy, involving a goal requirement on the City of Denver’s contracts, was “narrowly tailored” or otherwise supported by the City’s private sector findings of discrimination.

B. Narrow Tailoring

The question of whether a particular public sector remedy is narrowly tailored when it is based solely on business practices within the private sector was at issue in *City of Chicago*. Decided ten months after *Concrete Works IV*, *City of Chicago* found that certain private sector business practices constituted discrimination against minorities in the Chicago, Illinois market area. However, the district court did not find the City of Chicago’s M/WBE subcontracting goal to be a “narrowly tailored” remedy to address the documented private sector discriminatory business practices that had been discovered within the City’s market area.³⁵² The court explicitly stated that certain discriminatory business practices documented by regression analyses constituted private

³⁴⁷ 488 U.S. 469 (1989).

³⁴⁸ *Concrete Works of Colo., Inc. v. Denver*, 321 F.3d 950, 965-69 (10th Cir. 2003) (“*Concrete Works IV*”).

³⁴⁹ *City of Chicago*, 298 F. Supp. 2d at 738-39.

³⁵⁰ *Concrete Works IV*, 321 F.3d at 966-67.

³⁵¹ Plaintiff had not preserved the issue on appeal. Therefore, it was no longer part of the case.

³⁵² *City of Chicago*, 298 F. Supp. 2d at 739.



sector discrimination.³⁵³ It is also notable that the documented discriminatory business practices reviewed by the court in *City of Chicago* were similar to those reviewed in *Concrete Works IV*. Notwithstanding the fact that discrimination in the City's market area was documented, the *City of Chicago* determined that the evidence was insufficient to support the city's race-based subcontracting goals.³⁵⁴ The court ordered an injunction to invalidate the City's race-based program.³⁵⁵

The following statements from that opinion are noteworthy:

Racial preferences are, by their nature, highly suspect, and they cannot be used to benefit one group that, by definition, is not either individually or collectively the present victim of discrimination . . . There may well also be (and the evidence suggests that there are) minorities and women who do not enter the industry because they perceive barriers to entry. If there is none, and their perception is in error, that false perception cannot be used to provide additional opportunities to M/WBEs already in the market to the detriment of other firms who, again by definition, neither individually nor collectively, are engaged in discriminatory practices.³⁵⁶

Given these distortions of the market and these barriers, is the City's program narrowly tailored as a remedy? It is here that I believe the program fails. There is no "meaningful individualized review" of M/WBEs. *Gratz v. Bollinger*, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S.Ct. 2411, 2431 (2003) (Justice O'Connor concurring). Chicago's program is more expansive and more rigid than plans that have been sustained in the courts. It has no termination date, nor has it any means for determining a termination date. The "graduation" revenue amount is very high, \$27,500,000, and very few have graduated. There is no net worth threshold. A third-generation Japanese-American from a wealthy family, with a graduate degree from MIT, qualifies (and an Iraqi immigrant does not). Waivers are rarely or never granted on construction contracts, but "regarding flexibility, 'the availability of waivers' is of particular importance . . . a 'rigid numerical quota' particularly disserves the cause of narrow tailoring." *Adarand Constructors v. Slater*, *supra*, at 1177. The City's program is a "rigid numerical quota," a quota not related to the number of available, willing, and able firms but to concepts of how many of those firms there should be. Formalistic points did not survive strict scrutiny in *Gratz v. Bollinger*, *supra*, and formalistic percentages cannot survive scrutiny.³⁵⁷

As established in *City of Chicago*, private sector discrimination cannot be used as the factual basis for a government-sponsored, race-based M/WBE program without a nexus to the government's actions. Therefore, the discrimination that might be revealed in this regression analysis will not be sufficient factual predicate for the County to establish a race-based M/WBE program since a nexus cannot be established between the County and this private sector data. The economic indicators revealed in this regression analysis, albeit not a measure of passive discrimination, are illustrative of private sector discrimination and can support the County sponsored, race-neutral programs.

³⁵³ *City of Chicago*, 298 F. Supp. 2d at 731-32.

³⁵⁴ *Id.* at 742.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 734-35.

³⁵⁷ *City of Chicago*, 298 F.Supp.2d at 739-40.



III. Regression Analysis Methodology

The three regression analyses focus on the industries combined, construction, professional services, including architecture and engineering (hereinafter referred to as professional services), and commodities and services. The datasets used for the regression analyses did not allow for an exact match of the industries used in the County's Legal Analysis and Disparity Study (Study). Therefore, the three industries were selected to most closely mirror the industries used in the County's Study. There was an analysis of the three industries combined.

As noted, three separate regression analyses were conducted. They are the Business Ownership Analysis, the Business Earnings Analysis, and the Loan Approval Analysis. These analyses take into consideration race- and gender-neutral factors, such as age, education, and creditworthiness, in assessing whether the explanatory factors examined are disproportionately affecting minorities and Caucasian Females when compared to similarly situated Caucasian Males.

IV. Datasets Analyzed

The 2012 to 2013 PUMS dataset produced by the United States Census Bureau was used to analyze business ownership and business earnings within Shelby County, Tennessee. The 2011 to 2013 PUMS dataset represented the most recent data that most closely matched the January 1, 2012, to December 31, 2014 study period. To further match the dataset and the study period, all records from the year 2011 were scrubbed from the PUMS dataset. The data for Shelby County, Tennessee were identified using Public Use Microdata Areas (PUMA), a variable within the PUMS dataset that reports data for segmented areas within counties and states. The dataset includes information on personal profile, industry, work characteristics, and family structure. The PUMS data allowed for an analysis by an individual's race and gender.

The 2003 SSBF data were considered to examine business loan approval rates. These data represent the most recent information available on access to credit and contain observations for business and business owner characteristics, including the business owner's credit and resources and the business's credit and financial health. The SSBF records the geographic location of the business by its Census Division, instead of city, county, or state. While the SSBF data are available by Census Division, data for the East South Central Division containing Shelby County, Tennessee lacked sufficient M/WBE information to perform a statistically valid regression analysis by minority status, gender, and industry. Therefore, data for the South Region, which consists of the East South Central Division, West South Central Division, and South Atlantic Division, were utilized. It should be noted that the ethnicity and gender of the responding businesses were categorized based upon the ethnicity and gender of the majority owner. Table 10.1 depicts the percentage of Caucasian Males and M/WBEs by industry and their response to whether they were always, sometimes, or never approved for a business loan.



Table 10.1: Caucasian Males and M/WBE Loan Approval

Loan Variable	Caucasian Male	Caucasian Female	Minority
South Region, All Industries			
Always Denied	4.08%	8.11%	31.43%
Sometimes Denied/Sometimes Approved	0.45%	2.70%	8.57%
Always Approved	95.46%	89.19%	60.00%
South Region, Construction			
Always Denied	3.17%	10.00%	16.67%
Sometimes Denied/Sometimes Approved	0.00%	10.00%	0.00%
Always Approved	96.83%	80.00%	83.33%
South Region, Professional Services			
Always Denied	5.81%	0.00%	27.27%
Sometimes Denied/Sometimes Approved	0.00%	0.00%	4.55%
Always Approved	94.19%	100.00%	68.18%
South Region, Commodities and Services			
Always Denied	2.80%	15.38%	57.14%
Sometimes Denied/Sometimes Approved	1.40%	0.00%	28.57%
Always Approved	95.80%	84.62%	14.29%

In all industries, 89.19% of Caucasian Females and 60.00% of minorities were always approved for a loan, while 8.11% of Caucasian Females and 31.43% of minorities were always denied a loan, and 2.70% of Caucasian Females and 8.57% of minorities were sometimes approved for a loan.

Likewise, in the construction industry, 80.00% of Caucasian Females and 83.33% of minorities were always approved for a loan, while 10.00% of Caucasian Females and 16.67% of minorities were always denied a loan, and 10.00% of Caucasian Females and 0.00% of minorities were sometimes approved for a loan.

In the professional services industry, all Caucasian Females and 68.18% of minorities were always approved for a loan, while no Caucasian Females and 27.27% of minorities were always denied a loan, and 0.00% of Caucasian Females and 4.55% of minorities were sometimes approved for a loan.

In the commodities and services industry, 84.62% of Caucasian Females and 14.29% of minorities were always approved for a loan, while 15.38% of Caucasian Females and 57.14% of minorities were always denied a loan, and 0.00% of Caucasian Females and 28.57% of minorities were sometimes approved for a loan.



V. Regression Models Defined

A. Business Ownership Analysis

The Business Ownership Analysis examines the relationship between the likelihood of being a business owner and independent socioeconomic variables. Business ownership, the dependent variable, includes business owners of incorporated and unincorporated firms. The business ownership variable utilizes two values. A value of “1” indicates that a person is a business owner, whereas a value of “0” indicates that a person is not a business owner. When the dependent variable is defined this way, it is called a binary variable. In this case, a logistic regression model is utilized to predict the likelihood of business ownership using independent socioeconomic variables. Three logistic models were run to predict the probability of business ownership in each of the three industries examined in the County’s Study. Categories of the independent variables analyzed include educational level, citizenship status, personal characteristics, and race/gender.

In Tables 10.5 to 10.8, a finding of disparity is denoted by an asterisk (*) when the independent variable is significant at or above the 95-percent confidence level. A finding of disparity indicates that there is a non-random relationship between the probability of owning a business and the independent variable. The tables of regression results indicate the sign of each variable’s coefficient from the regression output. If the coefficient sign is positive, it indicates that there is a positive relationship between the dependent and independent variables. For example, having an advanced degree is positively related to the likelihood of being a business owner, holding all other variables constant. If the coefficient sign for the independent variable is negative, this implies an inverse relationship between the dependent and independent variables. For instance, an individual with children under the age of six has a lower likelihood of owning a business, holding all other variables constant.

For each of the three industries, the logistic regression is used to identify the likelihood that an individual owns a business given his or her background, including race, gender, and race- and gender-neutral factors. The dependent variables in all regressions are binary variables coded as “1” for individuals who are self-employed and “0” for individuals who are not self-employed.³⁵⁸ Table 10.2 presents the independent variables used for the Business Ownership Analysis.



³⁵⁸ Note: The terms “business owner” and “self-employed” are used interchangeably throughout this chapter.

Table 10.2: Independent Variables Used for the Business Ownership Analysis

Personal Characteristics	Educational Attainment	Ethnicity	Gender
Age	Bachelor's Degree	Caucasian American	Female
Age-squared	Advanced Degree	African American	
Home Ownership		Asian American	
Home Value		Hispanic American	
Monthly Mortgage Payment		Native American	
Interest and Dividends		Other Minority*	
Language Spoken at Home			
A Child Under the Age of Six in the Household			
Marital Status			

(*) Other Minority includes individuals who belong to two or more racial groups.

B. Business Earnings Analysis

The Business Earnings Analysis examines the relationship between the annual self-employment income and independent socioeconomic variables. “Wages” are defined as the individual’s total dollar income earned in the previous 12 months. Categories of independent socioeconomic variables analyzed include educational level, citizenship status, personal characteristics, business characteristics, and race/gender.

All of the independent variables are regressed against wages in an OLS regression model. The OLS model estimates a linear relationship between the independent variables and the dependent variable. This multivariate regression model estimates a line similar to the standard $y = mx+b$ format, but with additional independent variables. The mathematical purpose of a regression analysis is to estimate a best-fit line for the model and assess which findings are statistically significant.

In Tables 10.10 to 10.13, a finding of disparity is denoted by an asterisk (*) when an independent variable is significant at or above the 95-percent confidence level. A finding of disparity indicates that there is a non-random relationship between wages and the independent variable. Tables of regression results indicate the sign of each variable’s coefficient from the regression output. If the coefficient sign is positive, it means there is a positive relationship between the dependent and independent variables. For example, if age is positively related to wages, this implies that older business owners tend to have higher business earnings, holding all other variables constant. If the coefficient sign for the independent variable is negative, this implies an inverse relationship between the dependent and independent variables. For example, if the coefficient for having a child under the age of six is negative, this implies that business owners with children under the age of six tend to have lower business earnings.



An OLS regression analysis is used to assess the presence of business earning disparities. OLS regressions have been conducted separately for each industry. Table 10.3 presents the independent variables used for the Business Earnings Analysis.³⁵⁹

Table 10.3: Independent Variables Used for the Business Earnings Analysis

Personal Characteristics	Educational Attainment	Ethnicity	Gender
Age	Bachelor's Degree	Caucasian American	Female
Age-squared	Advanced Degree	African American	
Incorporated Business		Asian American	
Home Ownership		Hispanic American	
Home Value		Native American	
Monthly Mortgage Payment		Other Minority*	
Interest and Dividends			
Language Spoken at Home			
A Child Under the Age of Six in the Household			
Marital Status			

(*) Other Minority includes individuals who belong to two or more racial groups.

C. Loan Approval Analysis

The Loan Approval Analysis examines the relationship between the probability of obtaining a business loan and variables related to socioeconomic factors and business characteristics. The model is an Ordered Logistic model where the dependent variable is the reported probability of obtaining a business loan.

The SSBF data was collected by the United States Federal Reserve. The SSBF collects information on small businesses (fewer than 500 employees) in the United States, such as owner characteristics, firm size, use of financial services, and the income and balance sheets of the firm. The 2003 SSBF data is the most recently released dataset.

In Tables 10.15 to 10.18, a finding of disparity is denoted by an asterisk (*) when the independent variable is significant at or above the 95-percent confidence level. A finding of disparity indicates that there is a non-random relationship between obtaining a business loan and each independent variable. The tables containing the regression results also indicate the sign of each variable's coefficient from the regression output. If the coefficient sign is positive, it means there is a positive relationship between the dependent and independent variables. For example, if having a bachelor's degree has a positive coefficient, the business owners with a bachelor's degree are more probable to obtain a business loan, holding all other variables constant. If the coefficient for the independent



³⁵⁹ If an independent variable is a binary variable, it will be coded as "1" or "0" if the individual has that variable present (i.e. for the Hispanic American variable, it is coded as "1" if the individual is Hispanic American and "0" if not). If an independent variable is a continuous variable, that variable will be used (i.e. one's age can be labeled as 35).

variable is negative, this implies an inverse relationship between the dependent and independent variables. For instance, if having equipment loans has a negative coefficient, this implies an indirect relationship between having an equipment loan and obtaining a business loan. Therefore, a firm that has equipment loans has a decreased probability of obtaining a business loan (or a higher probability of being denied a business loan).

An Ordered Logistic regression is used to examine the factors that might explain loan approvals for the business owners. The dependent variable is a categorical variable where “2” denotes always being approved a business loan, “1” denotes sometimes being denied a business loan, and “0” signifies always being denied a business loan.³⁶⁰ The independent variables describe the sets of factors below:

- Business’s credit and financial health
- Business owner’s credit and resources
- Business owner’s ethnicity and gender group classification

Table 10.4 presents the independent variables used for the Loan Approval Analysis.³⁶¹

Table 10.4: Independent Variables Used for the Loan Approval Analysis

Firm's Credit and Financial Health	Owner's Credit and Resources	Ethnicity	Gender
Age of Firm in Years	Use of Owner's Personal Credit	Caucasian American	Female
Organization Type	Card for Business Expenses	African American	
Location	Bachelor's Degree	Asian American	
Capital Leases	Advanced Degree	Hispanic American	
Vehicle Loans		Native American	
Equipment Loans		Other Minority*	
Stockholder Loans			
Total Mortgage Principal Owed			
D&B Credit Score			

(*) Other Minority includes individuals who belong to two or more racial groups.



³⁶⁰ An Ordered Logistic model could be used differently for this model by assessing the numbers: 1= always denied a loan, 2= sometimes denied a loan, and 3= never denied a loan.

³⁶¹ If an independent variable is a binary variable, it will be coded as “1” if the individual has that variable present and “0” if otherwise (i.e. for the Hispanic American variable, it is coded as “1” if the individual is Hispanic American and “0” if otherwise). If an independent variable is a continuous variable, a value will be used (i.e. one’s age can be labeled as 35).

VI. Findings

A. Business Ownership Analysis

The business ownership variable is defined by the number of self-employed individuals in each of the three industries: construction, professional services, commodities and services, and all industries. The analysis considered incorporated and unincorporated businesses. The data in this section come from Shelby County, Tennessee, which was specified using a PUMA.³⁶² As noted in *Section IV*, because each PUMA is determined by the United States Census the region analyzed in the regression analyses could be limited to Shelby County, Tennessee.

Previous studies have shown that many non-discriminatory factors, such as education, age, and marital status, are associated with self-employment. In this analysis, race- and gender-neutral factors are combined with race- and gender-specific factors in a logistic regression model to determine whether observed race or gender disparities are independent of the race- and gender-neutral factors known to be associated with self-employment. It must be noted that many of these variables, such as having an advanced degree, while seeming to be race- and gender-neutral, may in fact be correlated with race and gender. For example, if Caucasian Females are less likely to have advanced degrees and the regression results show that individuals with advanced degrees are significantly more likely to own a business, Caucasian Females may be disadvantaged in multiple ways. First, Caucasian Females may have statistically significant lower business ownership rates, so they face a direct disadvantage as a group. Second, they are indirectly disadvantaged as fewer of them tend to have advanced degrees, which significantly increase one's chances of owning a business.

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³⁶² The PUMS data were collected by the United States Census Bureau from a five-percent sample of United States households. The observations were weighted to preserve the representative nature of the sample in relation to the population as a whole.

1. Logistic Model Results for All Industries Business Ownership

Table 10.5 presents the logistic regression results for the likelihood of owning a business in all industries based on the 18 variables analyzed in this model.

Table 10.5: All Industries Logistic Model

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.125	*	0.037	3.390	0.001
Age-squared	-0.001	*	0.000	-2.630	0.008
Bachelor's Degree (a)	-0.069		0.278	-0.250	0.803
Advanced Degree	0.485		0.370	1.310	0.189
Home Owner	-0.341		0.258	-1.320	0.186
Home Value	0.000		0.000	-0.950	0.340
Monthly Mortgage Payment	0.000		0.000	-0.700	0.482
Interest and Dividends	0.000		0.000	-0.050	0.958
Speaks English at Home	0.173		0.454	0.380	0.703
Has a Child under the Age of Six	-0.465		0.621	-0.750	0.454
Married	0.158		0.229	0.690	0.489
Caucasian Female (b)	-0.943	*	0.304	-3.110	0.002
African American	-0.723	*	0.254	-2.840	0.004
Asian American	-0.250		0.859	-0.290	0.771
Hispanic American	-0.762		0.522	-1.460	0.144
Native American	-		-	-	-
Other Minority	-1.621		1.070	-1.510	0.130
Year 2013 (c)	-0.073		1.017	-0.070	0.943

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(c) For the variable year 2013, the baseline variable is year 2012.

(P>|z|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

(-) denotes a variable with too few available data to determine statistical significance.



The logistic regression for all industries results indicate the following:³⁶³

- The likelihood of business ownership for all industries is positively associated with increased age. Older individuals are more likely to be business owners in all industries at a significant level.³⁶⁴ However, as individuals age the likelihood of being a business owner decreases.
- Caucasian Females are significantly less likely to be business owners in all industries than Caucasian Males.
- African Americans are significantly less likely to be business owners in all industries than Caucasian Males.
- Asian Americans, Hispanic Americans, and Other Minorities are less likely to be business owners than Caucasian Males in all industries, but not at a significant level.

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³⁶³ For the Business Ownership Analysis, the results are presented for the age, education, race, and gender variables only.

³⁶⁴ Throughout this chapter, significance refers to statistical significance.

2. Logistic Model Results for Construction Business Ownership

Table 10.6 presents the logistic regression results for the likelihood of owning a business in the construction industry based on the 18 variables analyzed in this model.

Table 10.6: Construction Industry Logistic Model

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.245	*	0.094	2.610	0.009
Age-squared	-0.002	*	0.001	-2.310	0.021
Bachelor's Degree (a)	-0.118		0.568	-0.210	0.836
Advanced Degree	-0.267		1.255	-0.210	0.831
Home Owner	-0.254		0.478	-0.530	0.595
Home Value	0.000		0.000	0.410	0.682
Monthly Mortgage Payment	-0.001	*	0.000	-1.990	0.046
Interest and Dividends	0.000	*	0.000	2.560	0.010
Speaks English at Home	0.446		1.160	0.380	0.701
Has a Child under the Age of Six	-		-	-	-
Married	0.801		0.445	1.800	0.072
Caucasian Female (b)	-2.790		1.878	-1.490	0.137
African American	0.120		0.460	0.260	0.794
Asian American	-		-	-	-
Hispanic American	-1.454		1.162	-1.250	0.211
Native American	-		-	-	-
Other Minority	-		-	-	-
Year 2013 (c)	1.923		1.234	1.560	0.119

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(c) For the variable year 2013, the baseline variable is year 2012.

(P>|z|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

(-) denotes a variable with too few available data to determine statistical significance.



The construction industry logistic regression results indicate the following:³⁶⁵

- The likelihood of construction business ownership is positively associated with increased age. Older individuals are more likely to be business owners in the construction industry, but not at a significant level. However, as individuals age the likelihood of being a business owner decreases.
- Caucasian Females and Hispanic Americans are less likely to be business owners in the construction industry than Caucasian Males, but not at a significant level.
- African Americans are more likely to be business owners than Caucasian Males in the construction industry, but not at a significant level.

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³⁶⁵ For the Business Ownership Analysis, the results are presented for the age, education, race, and gender variables only.

3. Logistic Model Results for Professional Services Business Ownership

Table 10.7 presents the logistic regression results for the likelihood of owning a business in the professional services industry based on the 18 variables analyzed in this model.

Table 10.7: Professional Services Industry Logistic Model

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.096		0.067	1.420	0.156
Age-squared	-0.001		0.001	-0.870	0.385
Bachelor's Degree (a)	1.015	*	0.479	2.120	0.034
Advanced Degree	1.399	*	0.499	2.800	0.005
Home Owner	-0.423		0.460	-0.920	0.358
Home Value	0.000		0.000	-0.050	0.961
Monthly Mortgage Payment	0.000		0.000	0.740	0.461
Interest and Dividends	0.000		0.000	0.650	0.518
Speaks English at Home	0.708		0.803	0.880	0.379
Has a Child under the Age of Six	0.433		0.838	0.520	0.605
Married	-0.512		0.456	-1.120	0.262
Caucasian Female (b)	-0.540		0.430	-1.250	0.210
African American	-1.348	*	0.675	-2.000	0.046
Asian American	-0.187		1.455	-0.130	0.898
Hispanic American	1.307		0.836	1.560	0.118
Native American	-		-	-	-
Other Minority	0.321		1.379	0.230	0.816
Year 2013 (c)	-		-	-	-

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(c) For the variable year 2013, the baseline variable is year 2012.

(P>|z|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

(-) denotes a variable with too few available data to determine statistical significance.



The professional services industry logistic regression results indicate the following:

- Having a bachelor's degree or an advanced degree significantly increases the likelihood of being a business owner in the professional services industry.
- African Americans are significantly less likely to be business owners in the professional services industry than Caucasian Males.
- Caucasian Females and Asian Americans are less likely to be business owners in the professional services industry than Caucasian Males, but not at a significant level.
- Hispanic Americans and Other Minorities are more likely to be business owners than Caucasian Males in the professional services industry, but not at a significant level.

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4. Logistic Model Results for Commodities and Services Business Ownership

Table 10.8 presents the logistic regression results for the likelihood of owning a business in the commodities and services industry based on the 18 variables analyzed in this model.

Table 10.8: Commodities and Services Industry Logistic Model

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.129		0.071	1.820	0.068
Age-squared	-0.001		0.001	-1.270	0.202
Bachelor's Degree (a)	-0.864		0.578	-1.500	0.135
Advanced Degree	0.858		1.468	0.580	0.559
Home Owner	-0.734		0.497	-1.480	0.140
Home Value	0.000		0.000	1.120	0.263
Monthly Mortgage Payment	0.000		0.000	-0.480	0.633
Interest and Dividends	0.000		0.000	-1.090	0.276
Speaks English at Home	-1.327		0.866	-1.530	0.125
Has a Child under the Age of Six	-		-	-	-
Married	0.260		0.414	0.630	0.530
Caucasian Female (b)	-1.069		0.671	-1.590	0.111
African American	-0.666		0.444	-1.500	0.134
Asian American	1.135		1.185	0.960	0.338
Hispanic American	-2.455	*	1.185	-2.070	0.038
Native American	-		-	-	-
Other Minority	-		-	-	-
Year 2013 (c)	-		-	-	-

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(c) For the variable year 2013, the baseline variable is year 2012.

(P>|z|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

(-) denotes a variable with too few available data to determine statistical significance.



The commodities and services industry logistic regression results indicate the following:

- Hispanic Americans are significantly less likely to be business owners in the commodities and services industry than Caucasian Males.
- Caucasian Females and African Americans are less likely to be business owners in the commodities and services industry than Caucasian Males, but not at a significant level.
- Asian Americans are more likely to be business owners than Caucasian Males in the commodities and services industry, but not at a significant level.

B. Business Ownership Analysis Summary

The Business Ownership Analysis examined the different explanatory variables’ impact on an individual’s likelihood of owning a business in all industries, construction, professional services, and commodities and services. Controlling for race- and gender-neutral factors, the Business Ownership Analysis results show that statistically significant disparities in the likelihood of owning a business exist for minorities and Caucasian Females when compared to similarly situated Caucasian Males.

African Americans experience the greatest disparity, because they are significantly less likely to own a business in all industries and the construction industry than similarly situated Caucasian Males. Caucasian Females are also significantly less likely to own a business in all industries. Hispanic Americans are significantly less likely to own a business in the commodities and services industry. Table 10.9 depicts the business ownership regression analysis results by ethnicity, gender, and industry.

Table 10.9: Statistically Significant Business Ownership Disparities

Ethnicity/Gender	All Industries	Construction	Professional Services	Commodities and Services
Caucasian Female	Disparity	No Disparity	No Disparity	No Disparity
African American	Disparity	No Disparity	Disparity	No Disparity
Asian American	No Disparity	No Disparity	No Disparity	No Disparity
Hispanic American	No Disparity	No Disparity	No Disparity	Disparity
Native American	No Disparity	No Disparity	No Disparity	No Disparity
Other Minority	No Disparity	No Disparity	No Disparity	No Disparity



C. Business Earnings Analysis

The business earnings variable is identified by self-employment income³⁶⁶ from 2012 to 2013 for the three industries: construction, professional services, commodities and services, and all industries. The analysis considered incorporated businesses.

Previous studies have shown that many non-discriminatory factors, such as education, age, and marital status, are associated with self-employment income. In this analysis, race- and gender-neutral factors are combined with race and gender groups in an OLS regression model to determine whether observed race or gender disparities were independent of the race- and gender-neutral factors known to be associated with self-employment income.

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³⁶⁶ The terms “business earnings” and “self-employment income” are used interchangeably.

1. OLS Regression Results in All Industries

Table 10.10 depicts the results of the OLS regression for business earnings in all industries based on the 19 variables analyzed in this model.

Table 10.10: All Industries OLS Regression

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	3209.373	*	462.027	6.950	0.000
Age-squared	-33.600	*	5.229	-6.430	0.000
Incorporated Business	13720.050		9888.843	1.390	0.166
Bachelor's Degree (a)	19658.970	*	4099.303	4.800	0.000
Advanced Degree	29142.130	*	7626.859	3.820	0.000
Home Owner	1718.523		2699.908	0.640	0.525
Home Value	0.026	*	0.012	2.200	0.028
Monthly Mortgage Payment	16.995	*	3.596	4.730	0.000
Interest and Dividends	0.000		0.016	0.020	0.985
Speaks English at Home	5575.681		9053.101	0.620	0.538
Has a Child under the Age of Six	-9135.126		6148.181	-1.490	0.138
Married	3807.248		2924.418	1.300	0.193
Caucasian Female (b)	-16464.980	*	4764.602	-3.460	0.001
African American	-9508.286	*	3207.230	-2.960	0.003
Asian American	21188.350		18787.550	1.130	0.260
Hispanic American	-6278.428		9059.175	-0.690	0.488
Native American	-13242.470		9178.053	-1.440	0.149
Other Minority	-8550.518		16357.130	-0.520	0.601
Year 2013 (c)	4009.106		8200.885	0.490	0.625

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(c) For the variable year 2013, the baseline variable is year 2012.

(P>|t|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.



The OLS regression results for business earnings in all industries indicate the following:³⁶⁷

- Older business owners have significantly higher business earnings in all industries. However, as business owners age they have significantly lower business earnings in all industries.
- Business owners with larger home values have significantly higher business earnings in all industries.
- Business owners paying higher monthly mortgages have significantly higher business earnings in all industries.
- Business owners with a bachelor's degree or an advanced degree have significantly higher business earnings in all industries.
- Caucasian Female and African American business owners have significantly lower business earnings than Caucasian Males in all industries.
- Hispanic American, Native American, and Other Minority business owners have lower business earnings than Caucasian Males in all industries, but not at a significant level.
- Asian American business owners have higher business earnings than Caucasian Males in all industries, but not at a significant level.

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³⁶⁷ For the Earnings Disparity Model, the results are presented for the age, education, race, and gender variables only.

2. OLS Regression Results in the Construction Industry

Table 10.11 depicts the results of the OLS regression for business earnings in the construction industry based on the 19 variables analyzed in this model.

Table 10.11: Construction Industry OLS Regression

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	2335.963		1366.772	1.710	0.089
Age-squared	-25.379		16.180	-1.570	0.118
Incorporated Business	20368.240		13714.060	1.490	0.139
Bachelor's Degree (a)	18675.860	*	7535.478	2.480	0.014
Advanced Degree	8756.022		32120.380	0.270	0.785
Home Owner	10486.340		5465.363	1.920	0.057
Home Value	0.005		0.020	0.270	0.791
Monthly Mortgage Payment	13.856		8.950	1.550	0.123
Interest and Dividends	-0.021		0.169	-0.120	0.902
Speaks English at Home	9073.391		11889.980	0.760	0.446
Has a Child under the Age of Six	-6823.951		5863.353	-1.160	0.246
Married	4489.813		7615.288	0.590	0.556
Caucasian Female (b)	3524.601		19973.110	0.180	0.860
African American	-1012.999		6299.354	-0.160	0.872
Asian American	85897.810	*	8876.675	9.680	0.000
Hispanic American	6317.775		10514.110	0.600	0.549
Native American			-	-	-
Other Minority	-17667.050		32444.860	-0.540	0.587
Year 2013 (c)	25815.760	*	12876.290	2.000	0.046

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(c) For the variable year 2013, the baseline variable is year 2012.

(P>|t|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

(-) denotes a variable with too few available data to determine statistical significance.



The OLS regression results for business earnings in the construction industry indicate the following.³⁶⁸

- Business owners with a bachelor's degree have significantly higher business earnings in the construction industry. Business owners with an advanced degree have higher business earnings in the construction industry, but not at a significant level.
- Asian American business owners have significantly higher business earnings than Caucasian Males in the construction industry.
- African American and Other Minority business owners have lower business earnings than Caucasian Males in the construction industry, but not at a significant level.
- Caucasian American and Hispanic American business owners have higher business earnings than Caucasian Males in the construction industry, but not at a significant level.
- Business owners have significantly higher adjusted business earnings in 2013 than in 2012 in the construction industry.

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³⁶⁸ For the Earnings Disparity Model, the results are presented for the age, education, race, and gender variables only.

3. OLS Regression Results in the Professional Services Industry

Table 10.12 depicts the results of the OLS regression for business earnings in the professional services industry based on the 19 variables analyzed in this model.

Table 10.12: Professional Services Industry OLS Regression

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	4439.587	*	873.150	5.080	0.000
Age-squared	-43.452	*	8.754	-4.960	0.000
Incorporated Business	38841.190		34220.680	1.140	0.257
Bachelor's Degree (a)	17020.220	*	6816.453	2.500	0.013
Advanced Degree	30130.000	*	8558.471	3.520	0.000
Home Owner	-597.159		4545.464	-0.130	0.896
Home Value	0.017		0.017	1.010	0.311
Monthly Mortgage Payment	19.680	*	5.288	3.720	0.000
Interest and Dividends	0.037		0.063	0.590	0.555
Speaks English at Home	7606.002		9594.524	0.790	0.428
Has a Child under the Age of Six	-2295.202		8397.525	-0.270	0.785
Married	-1599.222		4594.524	-0.350	0.728
Caucasian Female (b)	-30153.040	*	7706.353	-3.910	0.000
African American	-27032.940	*	6539.363	-4.130	0.000
Asian American	-9337.761		18831.970	-0.500	0.620
Hispanic American	-11996.610		10059.940	-1.190	0.234
Native American	-14585.180		13751.630	-1.060	0.290
Other Minority	10665.090		50241.470	0.210	0.832
Year 2013 (c)	-3421.797		9143.882	-0.370	0.708

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(c) For the variable year 2013, the baseline variable is year 2012.

(P>|t|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.



The OLS regression results for business earnings in the professional services industry indicate the following.³⁶⁹

- Older business owners have significantly higher business earnings in the professional services industry. However, as business owners age, they have significantly lower business earnings in the professional services industry.
- Business owners with a bachelor's degree or an advanced degree have significantly higher business earnings in the professional services industry.
- Business owners paying higher monthly mortgages have significantly higher business earnings in the professional services industry.
- Caucasian Female and African American business owners have significantly lower business earnings than Caucasian Males in the professional services industry.
- Asian American, Hispanic American, and Native American business owners have lower business earnings than Caucasian Males in the professional services industry, but not at a significant level.
- Other Minority business owners have lower business earnings than Caucasian Males in the professional services industry, but not at a significant level.

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³⁶⁹ For the Earnings Disparity Model, the results are presented for the age, education, race, and gender variables only.

4. OLS Regression Results in the Commodities and Services Industry

Table 10.13 depicts the results of the OLS regression for business earnings in the commodities and services industry based on the 19 variables analyzed in this model.

Table 10.13: Commodities and Services Industry OLS Regression

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	3700.709	*	697.937	5.300	0.000
Age-squared	-42.588	*	8.711	-4.890	0.000
Incorporated Business	-6309.948		11451.190	-0.550	0.582
Bachelor's Degree (a)	21850.050	*	5562.909	3.930	0.000
Advanced Degree	40762.380	*	16411.380	2.480	0.014
Home Owner	-3518.669		6164.588	-0.570	0.569
Home Value	0.085		0.054	1.560	0.120
Monthly Mortgage Payment	7.589		5.131	1.480	0.140
Interest and Dividends	-0.005		0.021	-0.250	0.800
Speaks English at Home	-9090.387		24519.360	-0.370	0.711
Has a Child under the Age of Six	-14854.520		8986.381	-1.650	0.099
Married	4600.297		3489.630	1.320	0.188
Caucasian Female (b)	-10909.730		6966.696	-1.570	0.118
African American	-4730.886		4442.423	-1.060	0.288
Asian American	61232.100		53200.790	1.150	0.251
Hispanic American	-23510.690		24645.710	-0.950	0.341
Native American	-		-	-	-
Other Minority	-9630.150		13976.890	-0.690	0.491
Year 2013 (c)	3363.813		14038.850	0.240	0.811

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(b) For the ethnicity variables, the baseline variable is Caucasian Male.

(c) For the variable year 2013, the baseline variable is year 2012.

(P>|t|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.

(-) denotes a variable with too few available data to determine statistical significance.



The OLS regression results for business earnings in the commodities and services industry indicate the following:³⁷⁰

- Older business owners have significantly higher business earnings in the commodities and services industry. However, as business owners age, they have significantly lower business earnings in the commodities and services industry.
- Business owners with a bachelor’s degree or an advanced degree have significantly higher business earnings in the commodities and services industry.
- Caucasian Female, African American, Hispanic American, and Other Minority business owners have lower business earnings than Caucasian Males in the commodities and services industry, but not at a significant level.
- Asian American business owners have higher business earnings than Caucasian Males in the commodities and services industry, but not at a significant level.

D. Business Earnings Analysis Summary

Controlling for race- and gender-neutral factors, the Business Earnings Analysis documented statistically significant disparities in business earnings for minorities and Caucasian Females when compared to similarly situated Caucasian Males. Caucasian Females have significantly lower business earnings in all industries and the professional services. African Americans have significantly lower business earnings in all industries and professional services. Table 10.14 depicts the earnings disparity regression results by ethnicity, gender, and industry.

Table 10.14: Statistically Significant Business Earnings Disparities

Ethnicity/Gender	All Industries	Construction	Professional Services	Commodities and Services
Caucasian Female	<i>Disparity</i>	No Disparity	<i>Disparity</i>	No Disparity
African American	<i>Disparity</i>	No Disparity	<i>Disparity</i>	No Disparity
Asian American	No Disparity	No Disparity	No Disparity	No Disparity
Hispanic American	No Disparity	No Disparity	No Disparity	No Disparity
Native American	No Disparity	No Disparity	No Disparity	No Disparity
Other Minority	No Disparity	No Disparity	No Disparity	No Disparity

E. Loan Approval Analysis



Access to business capital in the form of loans is measured by the Loan Approval Analysis. The probability of loan approval variable is a score that reflects the reported probability of experiencing loan approval. The data in this section comes from the 2003 SSBF dataset. Previous studies have

³⁷⁰ For the Earnings Disparity Model, the results are presented for the age, education, race, and gender variables only.

shown that many non-discriminatory factors, such as education, experience of the business owner, and firm characteristics, could lead to differences in a business owner's loan approval rate. In this analysis race- and gender-neutral factors are combined with race and gender groups in an ordered logistic regression model to determine whether observed race or gender disparities were independent of the race- and gender-neutral factors known to be associated with business loan approval.

Access to business capital in the form of loans is measured by the probability of obtaining a business loan in three industries: construction, professional services, commodities and services, and all industries. The dataset does not contain sufficient information on all ethnic groups to allow for a separate examination of each group. Therefore, results are provided for all minority males and females combined and for Caucasian Females, referred to as Minority Business Enterprises (MBEs) and Woman Business Enterprises (WBEs), or collectively as M/WBEs. The SSBF records the geographic location of the firm by the Census Division instead of city, county, or state. Due to insufficient data in the construction, professional services, and commodities and services industries, the sampling region was expanded to the South Region as defined by the Census. This region includes: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Virginia, Tennessee, Texas, and West Virginia.

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1. Ordered Logistic Regression Results in All Industries

Table 10.15 depicts the results of the ordered logistic regression for business loan approval in all industries based on the 14 variables analyzed in this model.

Table 10.15: All Industries Ordered Logistic Regression

Loan Approval Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age of Firm in Years	0.039	*	0.012	3.250	0.001
Corporation	-0.322		0.267	-1.210	0.227
Located in MSA (a)	0.771	*	0.258	2.990	0.003
Has Capital Leases	0.471		0.352	1.340	0.181
Has Vehicle Loans	-0.193		0.216	-0.890	0.373
Has Equipment Loans	0.131		0.309	0.430	0.671
Has Stockholder Loans	-0.250		0.264	-0.950	0.344
Total Mortgage Principal Owed	0.398	*	0.166	2.390	0.017
D&B Credit Score	-1.599	*	0.226	-7.070	0.000
Use of Owner's Personal Credit Card for Business Expenses	-0.509	*	0.221	-2.300	0.022
Bachelor's Degree (b)	0.973	*	0.244	3.990	0.000
Advanced Degree	1.759	*	0.472	3.730	0.000
Caucasian Female (c)	-0.565		0.316	-1.790	0.074
Minority	-2.312	*	0.265	-8.720	0.000

(a) MSA denotes a business domiciled in a Metropolitan Statistical Area, rather than one domiciled in a rural area.

(b) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(c) For the Caucasian Female and minority variables, the baseline variable is Caucasian Male.

(P>|z|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.



The ordered logistic regression results for business loan approval in all industries indicate the following.³⁷¹

- Older businesses have a significantly higher probability of obtaining a business loan in all industries.
- Businesses located in an MSA have a significantly higher probability of obtaining a business loan in all industries.
- Businesses with a low Dunn and Bradstreet (D&B) credit score have a significantly lower probability of obtaining a business loan in all industries.
- Businesses that use the owner's personal credit card for business expenses have a significantly lower probability of obtaining a business loan in all industries.
- Business owners with a bachelor's degree or an advanced degree have a significantly higher probability of obtaining a business loan in all industries.
- Minorities have a significantly lower probability of obtaining a business loan than Caucasian Males in all industries.
- Caucasian Females have a lower probability of obtaining a business loan than Caucasian Males in all industries, but not at a significant level.

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³⁷¹ For the Earnings Disparity Model, the results are presented for the age, education, race, and gender variables only.

2. Ordered Logistic Regression Results in the Construction Industry

Table 10.16 depicts the results of the ordered logistic regression for business loan approval in the construction industry based on the 14 variables analyzed in this model.

Table 10.16: Construction Ordered Logistic Regression

Loan Approval Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age of Firm in Years	0.133	*	0.022	5.910	0.000
Corporation	0.405		0.683	0.590	0.553
Located in MSA (a)	-0.555		0.624	-0.890	0.374
Has Capital Leases	-3.361	*	0.733	-4.580	0.000
Has Vehicle Loans	-1.262		0.786	-1.610	0.108
Has Equipment Loans	0.430		0.815	0.530	0.598
Has Stockholder Loans	0.860		0.454	1.890	0.058
Total Mortgage Principal Owed	-0.094	*	0.044	-2.130	0.033
D&B Credit Score	-1.917	*	0.697	-2.750	0.006
Use of Owner's Personal Credit Card for Business Expenses	0.948		0.701	1.350	0.177
Bachelor's Degree (b)	2.478	*	0.686	3.610	0.000
Advanced Degree	13.820	*	1.012	13.660	0.000
Caucasian Female (c)	-0.705		0.454	-1.550	0.121
Minority	-0.055		1.266	-0.040	0.965

(a) MSA denotes a business domiciled in a Metropolitan Statistical Area, rather than one domiciled in a rural area.

(b) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(c) For the Caucasian Female and minority variables, the baseline variable is Caucasian Male.

(P>|z|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.



The ordered logistic regression results for business loan approval in the construction industry indicate the following:³⁷²

- Older businesses have a significantly higher probability of obtaining a business loan in the construction industry.
- Businesses with existing capital leases have a significantly lower probability of obtaining a business loan in the construction industry.
- Businesses with large mortgages have a significantly lower probability of obtaining a business loan in the construction industry.
- Businesses with low D&B credit scores have a significantly lower probability of obtaining a business loan in the construction industry.
- Business owners with a bachelor's degree or an advanced degree have a significantly higher probability of obtaining a business loan in the construction industry.
- Caucasian Females and minorities have a lower probability of obtaining a business loan than Caucasian Males in the construction industry, but not at a significant level.

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³⁷² For the Earnings Disparity Model, the results are presented for the age, education, race, and gender variables only.

3. Ordered Logistic Regression Results in the Professional Services Industry

Table 10.17 depicts the results of the ordered logistic regression for business loan approval in the professional services industry based on the 14 variables analyzed in this model.

Table 10.17: Professional Services Ordered Logistic Regression

Loan Approval Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age of Firm in Years	0.028		0.022	1.280	0.200
Corporation	1.146	*	0.481	2.380	0.017
Located in MSA (a)	1.478	*	0.506	2.920	0.003
Has Capital Leases	0.763		0.673	1.130	0.257
Has Vehicle Loans	-0.560		0.309	-1.810	0.070
Has Equipment Loans	-1.669	*	0.613	-2.720	0.006
Has Stockholder Loans	-1.482	*	0.421	-3.520	0.000
Total Mortgage Principal Owed	22.389	*	5.164	4.340	0.000
D&B Credit Score	-2.679	*	0.447	-6.000	0.000
Use of Owner's Personal Credit Card for Business Expenses	-0.004		0.432	-0.010	0.992
Bachelor's Degree (b)	1.741	*	0.419	4.160	0.000
Advanced Degree	2.992	*	0.683	4.380	0.000
Caucasian Female (c)	16.250	*	0.554	29.320	0.000
Minority	-2.227	*	0.433	-5.140	0.000

(a) MSA denotes a business domiciled in a Metropolitan Statistical Area, rather than one domiciled in a rural area.

(b) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(c) For the Caucasian Female and minority variables, the baseline variable is Caucasian Male.

(P>|z|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.



The ordered logistic regression results for business loan approval in the professional services industry indicate the following:³⁷³

- Business established as a corporation have a significantly higher probability of obtaining a business loan in the professional services industry.
- Businesses located in an MSA have a significantly higher probability of obtaining a business loan in the professional services industry.
- Businesses with equipment loans have a significantly lower probability of obtaining a business loan in the professional services industry.
- Businesses with stockholder loans have a significantly lower probability of obtaining a business loan in the professional services industry.
- Businesses with low D&B credit scores have a significantly lower probability of obtaining a business loan in the professional services industry.
- Business owners with a bachelor's degree or an advanced degree have a significantly higher probability of obtaining a business loan in the professional services industry.
- Caucasian Females and minorities have a significantly lower probability of obtaining a business loan than Caucasian Males in the professional services industry.

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³⁷³ For the Earnings Disparity Model, the results are presented for the age, education, race, and gender variables only.

4. Ordered Logistic Regression Results in the Commodities and Services Industry

Table 10.18 depicts the results of the ordered logistic regression for business loan approval in the commodities and services industry based on the 14 variables analyzed in this model.

Table 10.18: Commodities and Services Ordered Logistic Regression

Loan Approval Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age of Firm in Years	0.039	*	0.012	3.250	0.001
Corporation	-0.322		0.267	-1.210	0.227
Located in MSA (a)	0.771	*	0.258	2.990	0.003
Has Capital Leases	0.471		0.352	1.340	0.181
Has Vehicle Loans	-0.193		0.216	-0.890	0.373
Has Equipment Loans	0.131		0.309	0.430	0.671
Has Stockholder Loans	-0.250		0.264	-0.950	0.344
Total Mortgage Principal Owed	0.398	*	0.166	2.390	0.017
D&B Credit Score	-1.599	*	0.226	-7.070	0.000
Use of Owner's Personal Credit Card for Business Expenses	-0.509	*	0.221	-2.300	0.022
Bachelor's Degree (b)	0.973	*	0.244	3.990	0.000
Advanced Degree	1.759	*	0.472	3.730	0.000
Caucasian Female (c)	-0.565		0.316	-1.790	0.074
Minority	-2.312	*	0.265	-8.720	0.000

(a) MSA denotes a business domiciled in a Metropolitan Statistical Area, rather than one domiciled in a rural area.

(b) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

(c) For the Caucasian Female and minority variables, the baseline variable is Caucasian Male.

(P>|z|) of less than 0.05 denotes findings of statistical significance.

(*) denotes a statistically significant variable with 95% confidence.



The ordered logistic regression results for business loan approval in the commodities and services industry indicate the following:³⁷⁴

- Older businesses have a significantly higher probability of obtaining a business loan in the commodities and services industry.
- Businesses located in an MSA have a significantly higher probability of obtaining a business loan in the commodities and services industry.
- Businesses with low D&B credit scores have a significantly lower probability of obtaining a business loan in the commodities and services industry.
- Businesses that use the owner's personal credit card for business expenses have a significantly lower probability of obtaining a business loan in the commodities and services industry.
- Business owners with a bachelor's degree or an advanced degree have a significantly higher probability of obtaining a business loan in the commodities and services industry.
- Minorities have a significantly lower probability of obtaining a business loan than Caucasian Males in the commodities and services industry.
- Caucasian Females have a lower probability of obtaining a business loan than Caucasian Males in the commodities and services industry, but not at a significant level.

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³⁷⁴ For the Earnings Disparity Model, the results are presented for the age, education, race, and gender variables only.

F. Loan Approval Analysis Summary

Controlling for race- and gender-neutral factors, the Loan Approval Analysis documented statistically significant disparities in business loan approval rates for Caucasian Females and minorities when compared to similarly situated Caucasian Males. Caucasian Females have a significantly lower probability of obtaining a business loan in the professional services and the commodities and services industries. Minorities have a significantly lower probability of obtaining a business loan in all industries, professional services, and the commodities and services. Table 10.19 depicts the loan approval disparity regression results by ethnicity, gender, and industry.

Table 10.19: Statistically Significant Loan Approval Disparities

Ethnicity/Gender	All Industries	Construction	Professional Services	Commodities and Services
Caucasian Female	No Disparity	No Disparity	Disparity	Disparity
Minority	Disparity	No Disparity	Disparity	Disparity

VII. Conclusion

Three regression analyses were conducted to determine whether there were factors in the private sector that might help explain the current levels of M/WBE availability and any statistical disparities between M/WBE availability and utilization identified in the Study. The analyses examined the following outcome variables: business ownership, business earnings, and loan approval rates.

These analyses were performed for the three industries—construction, professional services, and commodities and services—included in the County’s Study. And there was also an analysis of the three industries combined.

The regression analyses examined the effect of race and gender on the three outcome variables. The Business Ownership Analysis and the Earnings Disparity Analysis used data from the 2012 to 2013 PUMS datasets for Shelby County, Tennessee and compared business ownership rates and earnings for M/WBEs to those of similarly situated Caucasian Males. The Loan Approval Analysis used the 2003 SSBF dataset for the South Region and compared business loan approval rates for M/WBEs to those of similarly situated Caucasian Males.

The analyses of the three outcome variables document disparities that could adversely affect the formation and growth of M/WBEs within construction, professional services, and commodities and services. These outcomes are consistent with the findings presented in the disparity analyses which documented a statistically significant disparity in the award of the County’s prime contracts and subcontracts for construction, professional services, and commodities and services. Thus the outcomes of the regression analyses can serve as an explanation for the statistical disparities between M/WBE availability and utilization identified in the Disparity Study.



In the absence of a race- and gender-neutral explanation for the disparities, the regression findings point to racial and gender discrimination that depressed business ownership, business earnings, and loan approval. Such discrimination is a manifestation of economic conditions in the private sector that impede minorities' and Caucasian Females' efforts to own, expand, and sustain businesses. It can reasonably be inferred that these private sector conditions are manifested in the current M/WBEs' experiences and likely contributed to lower levels of willing and able M/WBEs.

It is important to note that there are limitations to using the regression findings in order to access disparity between the utilization and availability of businesses. No matter how discriminatory the private sector is, the findings cannot be used as the factual basis for a local government-sponsored, race-conscious M/WBE program. Therefore, caution must be exercised in the interpretation and application of the regression findings in a legally sound disparity study. The findings' greatest utility is in the formulation of race-neutral recommendations for the Study.

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CHAPTER 11: Recommendations

I. Introduction

The Shelby County Board of Commissioners (County Commission) is committed to providing equal business opportunities to all entities seeking to do business with Shelby County (County). In 1996, the County Commission adopted a Local Minority and Woman-owned Business (LMWBE) program. The LMWBE program was suspended as a result of a lawsuit. Ordinance No. 324 (Ordinance) was approved in April 2007 to implement the Locally-owned Small Business (LOSB) Program. The LOSB program requires that at least 20 percent of the dollars the County spends for goods and services be awarded to local businesses.

In 2015, the County Commission authorized the Legal Analysis and Disparity Study (Study) to determine if a legal basis exists to promulgate a race and gender-conscious program. The Study has documented statistical disparities in the award of the County's prime contracts and subcontracts in the three industries reviewed. The findings from the statistical analysis provides the factual predicate required to implement a minority and women-owned business enterprise (M/WBE) program.

This chapter describes both race and gender-conscious and race and gender-neutral recommendations proposed to address the disparity the Study documented. The presentation of the recommendations is organized into five sections. The first section is this Introduction. Section two, Disparity Analysis Findings, presents the statistical findings of disparity. Race and Gender-Conscious Recommendations are presented in the third section. The Locally Owned Business Program Analysis, which provides an assessment of the effectiveness of the County's LOSB Program, is presented in the fourth section. Race and Gender-Neutral Recommendations, contained in section five, include administrative, data management, and website enhancement recommendations.

II. Disparity Analysis Findings

The prime contract and subcontract findings were calculated in compliance with the constitutional parameters set forth in *City of Richmond v. J.A. Croson*. (*Croson*),³⁷⁵ and its progeny. The race and gender-conscious recommendations based on these statistically significant findings are intended to address the documented disparity in the award of prime and subcontracts to available minority and woman-owned market area businesses.



³⁷⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The prime contract disparity was analyzed at three different dollar thresholds, all contracts, and the formal and informal contracts levels set forth in the County’s procurement standards. A summary of the disparity findings are presented herein by ethnicity and gender and at both the formal and informal contract threshold within each industry.

A. Prime Contracts

As depicted in Table 11.1, the County issued 8,771 prime contracts during the January 1, 2012, to December 31, 2014 study period. The 8,771 prime contracts included 1,991 for construction, 1,547 for professional services including architecture and engineering (hereinafter referred to as professional services), and 5,233 for commodities and services.

The payments made by the County during the study period totaled \$190,511,208 for all 8,771 prime contracts. Payments included \$80,948,750 for construction, \$50,574,727 for professional services, and \$58,987,731 for commodities and services contracts.

**Table 11.1: Total Prime Contracts and Dollars Expended:
All Industries, January 1, 2012, to December 31, 2014**

Industry	Total Number of Contracts	Total Dollars Expended
Construction	1,991	\$80,948,750
Professional Services	1,547	\$50,574,727
Commodities and Services	5,233	\$58,987,731
Total Expenditures	8,771	\$190,511,208

B. Subcontracts

As depicted in Table 11.2, 114 subcontracts were analyzed. The analyzed subcontracts included 92 construction and 22 professional services. The subcontract dollars expended during the study period totaled \$20,134,936. These included \$18,027,464 for construction subcontracts and \$2,107,472 for professional services subcontracts.



Table 11.2: Total Subcontracts Awarded and Dollars Expended: All Industries, January 1, 2012, to December 31, 2014

Industry	Total Number of Subcontracts	Total Amount Expended
Construction	92	\$18,027,464
Professional Services	22	\$2,107,472
Total	114	\$20,134,936

C. Prime Contractor Disparity Findings

1. Construction Contracts

Table 11.3 depicts the construction prime contract disparity found at three different thresholds: all prime contracts, formal contracts, and informal contracts. Disparity was found for African American and Asian American Business Enterprises on all prime contracts. Disparity was also found for African American and Asian American Business Enterprises on formal prime contracts valued under \$500,000. On informal prime contracts valued under \$5,000, which did not require a solicitation process, disparity was found for African American and Asian American Business Enterprises.

Table 11.3: Disparity Summary: Construction Prime Contract Dollars, January 1, 2012, to December 31, 2014

Ethnicity/Gender	Construction		
	All Contracts	Formal Contracts Under \$500,000	Informal Contracts Under \$5,000
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Hispanic Americans	No Disparity	No Disparity	No Disparity
Native Americans	No Disparity	No Disparity	No Disparity
Caucasian Females	No Disparity	No Disparity	No Disparity

2. Professional Services Prime Contracts

Table 11.4 depicts the disparity found as a result of the professional services prime contract analysis at three different thresholds: all prime contracts, all formal contracts, and all informal



contracts. Disparity was found for African American, Asian American, and Hispanic American Business Enterprises on all prime contracts. Disparity was also found for Asian American and Hispanic American Business Enterprises on formal prime contracts valued under \$500,000. On informal contracts valued under \$5,000 which did not require a solicitation process disparity was found for African American, Asian American, Hispanic American, and Native American Business Enterprises.

Table 11.4: Disparity Summary: Professional Services Prime Contract Dollars, January 1, 2012, to December 31, 2014

Ethnicity/Gender	Professional Services		
	All Contracts	Formal Contracts Under \$500,000	Informal Contracts Under \$5,000
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Native Americans	No Disparity	No Disparity	<i>Disparity</i>
Caucasian Females	No Disparity	No Disparity	No Disparity

3. Commodities and Services Prime Contracts

Table 11.5 depicts the disparity found as a result of the analysis at three different thresholds: all prime contracts, all formal contracts, and all informal contracts. Disparity was found for African American and Caucasian Female Business Enterprises on all prime contracts. Disparity was found for African American and Caucasian Female Business Enterprises on all formal prime contracts valued under \$500,000. On all informal contracts valued under \$5,000 which did not require a solicitation process disparity was found for African American and Caucasian Female Business Enterprises.

Table 11.5: Disparity Summary: Commodities and Services Prime Contract Dollars, January 1, 2012, to December 31, 2014

Ethnicity/Gender	Commodities and Services		
	All Contracts	Formal Contracts Under \$500,000	Informal Contracts Under \$5,000
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	No Disparity	No Disparity	No Disparity
Hispanic Americans	No Disparity	No Disparity	No Disparity
Native Americans	No Disparity	No Disparity	No Disparity
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>



D. Subcontractor Disparity Findings

Extensive efforts were undertaken to obtain subcontracting records for the construction and professional services contracts the County's prime contractors awarded. The disparity findings for the subcontracts awarded in the two industries are summarized below.

1. Construction Contracts

As indicated in Table 11.6, disparity was found in the award of construction subcontracts to African American Business Enterprises.

Table 11.6: Subcontractor Disparity Summary: Construction, January 1, 2012, to December 31, 2014

Ethnicity/Gender	Construction
African Americans	<i>Disparity</i>
Asian Americans	No Disparity
Hispanic Americans	No Disparity
Native Americans	No Disparity
Caucasian Females	No Disparity



2. Professional Services Prime Contracts

As indicated in Table 11.7, disparity was found in the award of professional services subcontracts to African American and Caucasian Female Business Enterprises.

Table 11.7: Subcontractor Disparity Summary: Professional Services, January 1, 2012, to December 31, 2014

Ethnicity/Gender	Professional Services
African Americans	<i>Disparity</i>
Asian Americans	No Disparity
Hispanic Americans	No Disparity
Native Americans	No Disparity
Caucasian Females	<i>Disparity</i>

III. Race and Gender Conscious-Recommendations

The documented findings of statistically significant underutilization of ethnic and gender groups on the County's prime and subcontracts are the predicate for the recommended M/WBE program. The statistical findings of disparity are detailed in *Chapter 7: Prime Contract Disparity Analysis* and *Chapter 8: Subcontract Disparity Analysis*.

The County Commission should promulgate an Ordinance to establish an M/WBE Program to implement the recommended race and gender-conscious remedies presented below. The recommendations should be narrowly tailored to address the documented ethnic and gender disparity.

The M/WBE Program should have a sunset provision. The M/WBE Program should sunset within five (5) years of its inception. An updated disparity study should be conducted prior to the sunset date.



A. Prime Contract Race and Gender Remedies: Construction

Race and gender-conscious prime contract remedies should apply to contracts in the construction industry under the \$500,000 threshold.

1. Apply Bid Discount to Construction Prime Contracts

The County should apply a 10% bid discount for evaluation purposes on low bid construction prime contracts. The bid discount, when applied, would reduce the bidder's price by 10% for evaluation purposes. Listed in Table 11.8 are the groups that had a documented disparity and would be eligible for the bid discount.

Table 11.8: Groups Eligible for Construction Bid Discounts

Ethnicity/Gender	Construction		
	All Contracts	Formal Contracts Under \$500,000	Informal Contracts Under \$5,000
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>

2. Revise Informal Bid Process for Construction Contracts

Listed in Table 11.9 are the groups that had a documented disparity on informal contracts under \$5,000. The County should limit the solicitation of quotes for contracts under \$5,000 to these groups. Quotes for informal contracts under \$5,000 should be solicited from a rotation list. Eligible businesses would be placed on the rotation list according to their certification. Businesses with the same certification date and construction specialty are placed on the list alphabetically according to their name. Whenever a new business is appended to the eligibility list, its placement should follow the same procedures. After a business in the rotation receives a contract, it should be placed at the end of the eligibility list. On a regular schedule, there should be an open enrollment period for eligible contractors to be placed on the list. There should be separate contract rotation lists for each construction specialty.



Listed in Table 11.9 are the groups that had a documented disparity informal construction contracts.

Table 11.9: Disparity Summary: Construction Services for Informal Contracts, January 1, 2012, to December 31, 2014

Ethnicity/Gender	Construction
	Informal Contracts Under \$5,000
African Americans	<i>Disparity</i>
Asian Americans	<i>Disparity</i>
Hispanic Americans	No Disparity
Native Americans	No Disparity
Caucasian Females	No Disparity

Informal construction contracts under \$5,000 awarded to a non-M/WBE should be approved by the M/WBE Program manager. The award should also be reported to the County Commission with an explanation for the decision to award to a non-M/WBE.

B. Prime Contract Remedies: Professional Services

Race and gender-conscious prime contract remedies should apply to contracts in the professional services industry under the \$500,000 threshold.

1. Assign Evaluation Points to Mitigate Prime Contractor Disparity

Given the finding of statistically significant disparity in the award of professional service prime contracts, evaluation points should be assigned during the selection process to the ethnic groups with a disparity in order to mitigate the documented discrimination. The prime contractors eligible for the evaluation points are depicted in Table 11.10. The points should be assigned during the evaluation of the proposals and statements of qualification. The assignment should be 15-20 percent of the available evaluation points.



Table 11.10: Disparity Summary: Professional Services Prime Contract Dollars, January 1, 2012 to December 31, 2014

Ethnicity/Gender	Professional Services		
	All Contracts	Formal Contracts Under \$500,000	Informal Contracts Under \$5,000
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>

The request for proposals and statements of qualification should clearly delineate the evaluation criteria, and the assigned evaluation points for each criterion. The recommendation for award should include a narrative report explaining the assignment of points for each proposer. A signed copy of each evaluator’s scores and comments should be attached to the narrative report. The evaluation scores should reflect the points assigned for each criteria.

C. Prime Contract Remedies: Commodities and Services

Race and gender-conscious prime contract remedies should apply to contracts in the commodities and services industries under the \$500,000 threshold.

1. Apply Bid Discount to Commodities and Services Prime Contracts

The County should apply a 10% bid discount for evaluation purposes on low bid commodities and services prime contracts. The bid discount, when applied, would reduce the bidder’s price by 10% for evaluation purposes. The maximum bid discount would be \$50,000. Listed in Table 11.11 are the groups that had a documented disparity and would therefore be eligible for the bid discount.

Table 11.11: Groups Eligible for Commodities and Services Bid Discounts

Ethnicity/Gender	Commodities and Services		
	All Contracts	Formal Contracts Under \$500,000	Informal Contracts Under \$5,000
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>



2. Conduct Targeted Outreach to Minority and Woman-owned Business Enterprises for All Prime Contracts

When soliciting proposals and statements of qualifications, the County should 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 commodities and service prime contracts
- Request lists of potential prime contractors from the Equal Opportunity Compliance Office
- Perform community outreach to the identified M/WBEs before the solicitation is released to notify them of the upcoming opportunity
- Email the notice of the opportunity to the identified businesses
- Encourage, where economically and technically feasible, the formation of joint ventures, partnerships, and other similar arrangements among the ethnic and gender groups with a disparity
- Post the solicitations on the County's website on a regular basis and on the same day(s) each month

D. Subcontract Remedies: Construction

Race and gender-conscious remedies should apply to subcontracts awarded in the construction and professional service industries.

1. Construction Subcontract Goals

African American and Caucasian Female Business Enterprises had a statistically significant disparity on the construction subcontracts awarded by the County's prime contractors. An MBE and WBE subcontract goal should be set to eliminate the documented disparity. The MBE goal should apply to African American Business Enterprises while the WBE goal should apply to Caucasian and African American Woman-owned Business Enterprises.

To meet the narrowly tailored standard the subcontract goals should be based on the availability levels of the groups that had a statistically significant disparity. Table 11.12 below depicts the construction subcontractor availability documented in the Study for the groups with a statistically significant disparity.



Table 11.12: M/WBE Subcontractor Construction Availability

M/WBE Construction Subcontractor Availability	
Ethnicity/Gender	Construction
African Americans	28.13%
Caucasian Females	9.62%

2. Professional Services Subcontract Goals

African American and Caucasian Female Business Enterprises had a statistically significant disparity on the professional services subcontracts awarded by the County’s prime contractors. An MBE and WBE subcontract goal should be set to eliminate the documented disparity. The MBE goal should apply to African American Business Enterprises while the WBE goal should apply to Caucasian and African American Woman-owned Business Enterprises.

To meet the narrowly tailored standard, the subcontract goals should be based on the group’s availability levels. Table 11.13 below depicts the professional services subcontractor availability documented in the Study for the groups with a statistically significant disparity.

Table 11.13: M/WBE Professional Services Subcontractor Availability

M/WBE Professional Services Subcontractor Availability	
Ethnicity/Gender	Professional Services
African Americans	26.23%
Caucasian Females	13.97%

3. Quantify Good Faith Effort Criteria

“We found out that the prime contractors were not above board. Some prime contractor will say they made a good faith effort, but no one verified if they in fact made a good faith effort.”

A contractor that fails to meet the contract goal with a certified African American and a certified Woman-owned Business Enterprise must document that a good faith effort was made to meet the goals. Bidders should submit documentation of a good faith effort with the bid. The County should determine whether the prime contractor has complied with all requirements of the solicitation documents and made the required good faith effort.



The County should assign a value to each good faith effort element, thus quantifying the good faith effort analysis. The maximum score should be 100 points. A prime contractor should achieve a minimum score of 80 points to demonstrate a bona fide good faith effort. The following are examples of good faith elements and recommended point assignments:

a. Advertising (5 points)

Effort: Contractors should advertise opportunities for M/WBEs in three (3) print or digital media outlets during the three (3) weeks prior to the bid opening. Contractors should be required to publish these opportunities in the general circulation media, minority-focused media, trade association publications, or trade-related publications at least twice unless the County waives this requirement due to time constraints.

Documentation: The advertisement should include the project name, name of the bidder, areas of work available for subcontracting, contact person's name and phone number, information on the availability of plans and specifications, date that the subcontractor's written bid is due to the prime contractor, and bidder's assistance available to subcontractors, suppliers, and vendors in obtaining bonds, financing, and/or insurance.

b. Bidders Outreach to Identify M/WBEs (15 points)

Effort: Contractors should communicate with M/WBEs through personal, frequent, and persistent contact. The contractor should also be required to promptly return telephone calls, facsimiles, and emails.

Documentation: Correspondence logs should list the names of the businesses, the representatives who have been contacted, and the dates of contact. Copies of correspondence provided to the contacted businesses and the responses received should be provided. Documentation can also include facsimile transmittal confirmation slips and written confirmation of receipt via email with the date of the transmission. The contractor should contact at least three businesses. However, the number should be sufficient to reasonably result in a viable subcontract.

c. Attend the Pre-bid Meeting (5 points)

Effort: Attendance at the pre-bid meeting(s) should be mandatory to comply with the good faith effort requirement.

Documentation: The contractor's name on the pre-bid meeting sign-in sheet can serve as documentation.



d. Provide Timely Written Notification (20 points)

Effort: Contractors should solicit subcontract bids and material quotes from relevant eligible businesses in writing at least two (2) weeks prior to the bid opening. Relevant businesses are those that could feasibly provide the goods or services required for completing the scope of services provided in the County’s solicitation. In soliciting bids, quotes, and proposals, the contractor should furnish: project name, bidder name, subcontract items, prime contact person’s name and phone number, information on the availability of plans and specifications, date that the subcontractor’s written bid is due to the prime contractor, and bidder’s assistance available to subcontractors, suppliers, and vendors in obtaining bonds, financing, and/or insurance.

Documentation: Written notification should include verification of the transmission date, the recipient’s name, and the company name. Documentation can also include facsimile transmittal confirmation slips and written confirmation of receipt via email with the date of the transmission.

e. Contact Follow-up (15 points)

Effort: Contractors should return telephone calls, facsimiles, and emails promptly after the initial solicitation. The follow-up should take the form of a telephone call, facsimile, or email during normal business hours and must occur at least two (2) weeks prior to the bid opening. The contact should be within a reasonable amount of time to allow the prospective subcontractor an opportunity to submit a competitive sub-bid, but not less than two (2) weeks prior to the bid opening.

Documentation: Correspondence logs should contain the list of subcontractors who were contacted, including results of that contact, and should be documented with a telephone log, email print-out, or facsimile transmittal confirmation slip. The list should also include names of the eligible businesses, telephone numbers, contact persons, dates of contact, and note the outcome of the contact. The record should also identify the scope of work each contacted subcontractor was asked to bid.

f. Identify Items of Work (15 points)

Effort: Subcontracts should be broken down into discrete items or packages that M/WBEs may find economically feasible to perform. Smaller portions or quantities of work should be identified in order to maximize M/WBE participation.

Documentation: The documentation should include a list with description of the specific items of work, which were solicited from eligible businesses. Documentation can include notices and advertisements targeting M/WBE subcontractors.



g. Negotiate in Good Faith (15 points)

Effort: Contractors should negotiate fairly with interested M/WBEs even if the selection of an M/WBE would increase costs or the contractor could self-perform the work. A contractor should not unjustifiably reject sub-bids, quotes, or proposals prepared by eligible businesses based on the subcontractor's standing within its industry, membership in a specific group, organization, or association, and political or social affiliation.

Documentation: A written statement with the 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 and the results, and document the bids received from the businesses that could provide a commercially useful function.

h. Offer Assistance in Securing Financing, Bonding, Insurance, or Competitive Supplier Pricing (10 points)

Effort: Contractors must provide M/WBEs with technical assistance regarding plans, specifications, and requirements of the contract in a timely manner in order to respond to a solicitation. Contractors should not deny a subcontract solely because a necessary and certified M/WBE cannot obtain a bond. In addition, the contractor should also advise and make efforts to assist interested businesses in obtaining bonds, financing, and insurance required by the County, as well as providing competitive pricing.

Documentation: The contractor should provide a written description of the type of assistance, the name, contact person, and telephone number of the agency, the name of the person who provided the assistance, and the supplier that offered competitive pricing.

E. Administrative Recommendations

In addition to the bid discounts, evaluation credits, and contract goals, there are several administrative recommendations offered to eliminate the disparity documented in the three industries.

1. Establish a Minority and Woman-owned Business Enterprise Office

The M/WBE Program should be managed by the Equal Opportunity Compliance Office. The Office should have the resources to ensure that the M/WBE Program's objectives and policies are implemented and all County departments are in compliance. The number of staff in the Equal Opportunity Compliance Office should be expanded to provide adequate personnel with requisite skills, knowledge and ability to fulfill the objectives and responsibilities of the M/WBE Program.



2. Adopt M/WBE Program Certification Standards

a. Ethnic Group Definitions

The ethnic groups should be defined in accordance with the ethnic categories in the United States Department of Commerce Small Business Administration (SBA) standards, as set forth in CFR 124.103. The ethnic categories defined by the SBA are African American, Hispanic American, Asian American, and Native American male and female business owners. According to the SBA standard, an eligible ethnic business must be a for-profit enterprise that is 51 percent or more owned and controlled by one or more minority individuals. In addition, the business must be authorized to do business under the laws of the State of Tennessee, and eligible to do business in the County.

b. Women-Owned Business Definition

A woman-owned business should also be defined in accordance with the SBA standard. The business must be at least 51 percent owned and controlled by one or more women and authorized to do business in the State of Tennessee, and eligible to do business in the County.

c. Eligibility Standards

The County should establish eligibility standards in accordance with the current LOSB program. To be eligible, a locally-owned small business should be headquartered in the County, have an average three-year gross annual sales of \$5 million or less, and a Shelby County resident must own, operate, and control at least fifty-one percent of the business.³⁷⁶ A business must be owned and controlled by an ethnic group member or woman. A certified M/WBE LOSB must submit an annual application for re-certification.

The County should establish reciprocal certification with the following government agencies that use similar certification standards:

- City of Memphis Office of Contract Compliance
- Memphis Light, Gas and Water
- State of Tennessee Department of Transportation Small Business Development
- Memphis-Shelby County Airport Authority

A reciprocal certification policy would reduce redundancy in the certification applications that a business must complete. It should increase the number of eligible businesses available to contract with the County without an increase in the cost to certify the additional vendors. The cost for an eligible business to certify with more than one agency would also be significantly reduced.



³⁷⁶ Shelby County, Tenn., Ord. No. 324 § 1(A)-(B) (2007) (A business or professional entity includes, but is not limited to, a sole proprietorship, corporation, partnership, joint venture, or any other classification of business or professional entity).

3. Maintain an M/WBE Directory

The County should maintain an electronic listing of certified M/WBEs. The M/WBE certification status should be incorporated in the existing LOSB certification list. Currently, the LOSB certification directory is organized by "commodity" description, business name, and contact person.

The current LOSB directory should be modified to indicate M/WBE certification status. The listing should also include the business address, telephone number, email address, website address, and industry classification. The directory should be updated monthly and report newly certified businesses and revocations of certification status. The directory should be posted on the County's website and an electronic copy should be available upon request. The webpage file should be searchable and downloadable in Excel format.

4. Implement an Oversight Committee

The County should create an Oversight Committee to serve within an advisory capacity to the County Commission with responsibility for reviewing the attainment of the M/WBE goals. The Oversight Committee should be comprised of representatives from the Equal Opportunity Compliance Office, the M/WBE community, and trade and business organizations. The Oversight Committee should submit a Monthly Utilization Report to the County Commission, including the M/WBE goal attainment on the County's construction and professional services prime contracts. Prime contracts awarded to M/WBEs in the three industries should also be reported quarterly.

5. Establish a Designated Professional Services Selection Committee for Professional Services Prime Contracts

The Professional Services Selection Committee should evaluate design professionals' proposals and responses to the request for qualifications and make the recommendation for award. The Committee should reflect the County'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. The manager of the Equal Opportunity Compliance Office should also be an appointed member of the Committee. All panel members should be required to sign a conflict of interest statement to foster transparency in the County's procurement process. The Committee members should not be actively engaged in professional consulting or employed by a design consulting firm.



The Committee's recommendations should be based upon the published criteria which should include M/WBE participation on the proposed team. The panel should also consider the number of previous awards to the proposers to avoid repeated awards to highly used prime contractors. All panel members should be charged with the responsibility of increasing diversity on the County's design professional services contracts. The Committee's recommendations should be reviewed annually by the Equal Opportunity Compliance Office and the County Commission to monitor the level of diversity in its selections.

IV. Locally Owned Small Business Program Assessment

A. Program Summary

The Locally Owned Small Business Program (LOSB), enacted for the purpose of promoting the utilization of local small, minority and woman-owned businesses, established eligibility criteria for small business certification. An eligible small business must be headquartered in the County, have an average three-year gross annual sales of \$5 million or less, and a Shelby County resident must own, operate, and control at least 51% of the business.³⁷⁷ Compliance reports of the dollars awarded to locally-owned small businesses must be submitted to the Mayor and the Board of Commissioners on a quarterly basis.

The Ordinance set a goal to award to LOSBs not less than 20 percent for all County purchases. Specific numeric goals were set for construction contracts \$250,000 and over, and all goods and service contracts under \$15,000. Under the LOSB program the County also has the authority to negotiate with any contractor to achieve the goal. Furthermore, solicitations may be unbundled into smaller bid packages to achieve small business participation.

1. Utilization Goals

Under the LOSB Ordinance a 20 percent annual utilization goal applies to the procurement of all County contracts.³⁷⁸ For construction contracts \$250,000 and greater, the LOSB goal can be applied through subcontracts worth ten percent or more of the construction costs. These subcontracts shall be set aside for awards to LOSBs.³⁷⁹ The construction contract goal can also be applied through separate subcontract bids issued by the County that can be assigned to a specific prime contract.³⁸⁰

³⁷⁷ Shelby County, Tenn., Ord. No. 324 § 1(A)-(B) (2007) (A business or professional entity includes, but is not limited to, a sole proprietorship, corporation, partnership, joint venture, or any other classification of business or professional entity).

³⁷⁸ Shelby County, Tenn., Ord. No. 324 § 1 (2007).

³⁷⁹ Shelby County, Tenn., Ord. No. 324 § 1(B) (iii) (2007); Shelby County, Tenn., Code of Ordinances, ch. 2, div. 3, Ord. No. 387 § 2-224(b) (3) (2010).

³⁸⁰ *Id.*



For purchases under \$15,000, which do not require formal competitive bidding, the Administrator of Purchasing can solicit quotes directly from an LOSB that offers the product or service being solicited.³⁸¹ Minimally, if one or more LOSB offers the product or service, the County must include at least one eligible LOSB in the pool of vendors provided notice of the request for quote.³⁸²

There are also special provisions in the Ordinance which allow the Administrator of Purchasing and the Administrator of the Equal Opportunity Compliance Office (EOC) to identify goods and service contracts to be set aside for the locally-owned small business special purchase procedures.³⁸³

2. Preferences

A locally-owned small business preference can be applied to construction prime contract bids when the bidder is located in the County and the bid includes locally-owned small businesses.³⁸⁴ Preferences up to 5 percent can be assigned in the bid evaluation process. The preference is awarded, during the bid evaluation, on a sliding scale in the following manner:

- Up to five percent for contracts \$500,000 and under³⁸⁵
- Up to three and one-half percent for contracts greater than \$500,000 and under \$750,000³⁸⁶
- Two and one-half percent for contracts greater than \$750,000 and under \$1,000,000³⁸⁷
- Two percent for contracts over \$1,000,000³⁸⁸

For construction projects over \$2,000,000, a two percent preference can be applied if the prime contractor(s) is a locally-owned small business and locally-owned small businesses collectively perform 50 percent of all total work in the bid.³⁸⁹

³⁸¹ Shelby County, Tenn., Ord. No. 324 § 1(B) (viii) (2007); Shelby County, Tenn., Code of Ordinances, ch. 2, div. 3, Ord. No. 387 § 2-224(b) (8) (2010).

³⁸² *Id.*

³⁸³ Shelby County, Tenn., Ord. No. 324 § 1(B) (i) (2007); Shelby County, Tenn., Code of Ordinances, ch. 2, div. 3, Ord. No. 387 § 2-224(b) (1) (2010).

³⁸⁴ Shelby County, Tenn., Ord. No. 324 § 1(B) (ix) (a)-(e) (2007); Shelby County, Tenn., Code of Ordinances, ch. 2, div. 3, Ord. No. 387 § 2-224(b) (9) (a)-(e) (2010).

³⁸⁵ Shelby County, Tenn., Ord. No. 324 § 1(B) (ix) (a) (2007); Shelby County, Tenn., Code of Ordinances, ch. 2, div. 3, Ord. No. 387 § 2-224(b) (9) (a) (2010).

³⁸⁶ Shelby County, Tenn., Ord. No. 324 § 1(B) (ix) (b) (2007); Shelby County, Tenn., Code of Ordinances, ch. 2, div. 3, Ord. No. 387 § 2-224(b) (9) (b) (2010).

³⁸⁷ Shelby County, Tenn., Ord. No. 324 § 1(B) (ix) (c) (2007); Shelby County, Tenn., Code of Ordinances, ch. 2, div. 3, Ord. No. 387 § 2-224(b) (9) (c) (2010).

³⁸⁸ Shelby County, Tenn., Ord. No. 324 § 1(B) (ix) (d) (2007); Shelby County, Tenn., Code of Ordinances, ch. 2, div. 3, Ord. No. 387 § 2-224(b)(9)(d) (2010)

³⁸⁹ Shelby County, Tenn., Ord. No. 324 § 1(B) (ix) (e) (2007); Shelby County, Tenn., Code of Ordinances, ch. 2, div. 3, Ord. No. 387 § 2-224(b) (9) (e) (2010).



The effectiveness of the LOSB program has been assessed to determine if the 20 percent overall program goal was achieved during the study period. The assessment also examines the LOSB participation achieved in the award of construction contracts over \$250,000 and contracts for all goods and services under \$15,000.

B. Assessment of the LOSB Program Effectiveness

This assessment reviews the effectiveness of the LOSB Program based on the attainment of the 20% overall utilization of LOSBs on all County contracts. In addition the assessment includes LOSB prime contractor and subcontractor participation on all construction contracts valued \$250,000 and over, and all contracts valued under \$15,000. A summary of the County’s LOSB contracting goal is detailed below in Table 11.14.

Table 11.14: Contracting Goals

Construction \$250,000 and Over	Goods and Services Under \$15,000
Subcontracts worth 10% or more of the construction costs can be set aside for LOSBs	Quotes for all goods and services can be solicited directly from LOSBs

1. LOSB Overall Utilization: All Industries

Table 11.15 details the County’s utilization of LOSB and non-LOSB prime contractors during the study period. Despite the County’s LOSB Ordinance, the County fell short of their 20% overall utilization on all contracts. LOSBs received 8.64% of all contract dollars and non-LOSBS received 91.36% of all contract dollars. The total amount of dollars that LOSBs lost was \$21,640,337.

Table 11.15: LOSB Overall Utilization Attainment

LOSB Firms		Non-LOSB Firms	
Certified Dollars	Percent of Total Dollars	Non-Certified Dollars	Percent of Total Dollars
16,461,904	8.64%	174,049,303	91.36%

2. Construction Prime Contracts Valued \$250,000 and Over



Table 11.16 details the use of LOSB prime and subcontractors on prime construction contracts valued \$250,000 and over. On construction prime contracts with an LOSB prime contractor and a LOSB subcontractor only the prime contract value was included in the calculation. LOSBs received 2.36% of dollars on construction contracts valued \$250,000 and over and non-LOSBS

received 97.64% of dollars on construction contracts valued \$250,000 and over. The total amount of dollars that LOSBs lost was \$11,978,629.

Table 11.16: LOSB Utilization Goal Attainment, Construction Contracts \$250,000 and Over

Contract Size	LOS B Firms		Non-LOS B Firms	
	Total Certified Dollars	Percent of Total Dollars	Total Non-Certified Dollars	Percent of Total Dollars
\$250,000 and greater	\$1,605,966	2.36%	\$66,317,011	97.64%

The utilization of LOSB prime and subcontracts on constructions contracts valued \$250,000 and over by ethnicity are summarized below and in Table 11.17.

African American-owned LOSBs received 0.91% of construction contracts valued \$250,000 and over.

Asian American-owned LOSBs received 0.00% of construction contracts valued \$250,000 and over.

Hispanic American-owned LOSBs received 0.00% of construction contracts valued \$250,000 and over.

Native American-owned LOSBs received 0.00% of construction contracts valued \$250,000 and over.

Caucasian-owned LOSBs received 1.45% of construction contracts valued \$250,000 and over.

Table 11.17: LOSB Utilization Goal Attainment, Construction Contracts \$250,000 and Over by Ethnicity

Ethnicity	LOS B Firms		Non-LOS B Firms	
	Certified Dollars	Percent of Total Dollars	Non-certified Dollars	Percent of Total Dollars
African American	\$619,275	0.91%	\$0	0.00%
Asian American	\$0	0.00%	\$0	0.00%
Hispanic American	\$0	0.00%	\$0	0.00%
Native American	\$0	0.00%	\$0	0.00%
Caucasian	\$986,691	1.45%	\$66,317,011	97.64%
TOTAL	\$1,605,966	2.36%	\$66,317,011	97.64%



3. All Industries: Prime Contracts Valued under \$15,000

Table 11.18 details the use of LOSB prime contractors on all contracts valued under \$15,000. LOSBs received 24.48% of dollars on contracts valued under \$15,000 and non-LOSBs received 75.52% of dollars on contracts valued under \$15,000.

Table 11.18: LOSB Utilization Goal Attainment, All Industries, Under \$15,000

LOS B Firms		Non-LOS B Firms	
Total Certified Dollars	Percent of Total Dollars	Total Non-Certified Dollars	Percent of Total Dollars
\$4,914,016	24.48%	\$15,156,923	75.52%

The utilization of LOSB prime contractors on all contracts valued under \$15,000 by ethnicity are summarized below and in Table 11.19.

African American-owned LOSBs received 12.64% of all contracts valued under \$15,000.

Asian American-owned LOSBs received 0.00% of all contracts valued under \$15,000.

Hispanic American-owned LOSBs received 0.01% of all contracts valued under \$15,000.

Native American-owned LOSBs received 0.00% of all contracts valued under \$15,000.

Caucasian-owned LOSBs received 11.84% of all contracts valued under \$15,000.

Table 11.19 details the use of LOSB prime contractors by ethnicity on all contracts valued under \$15,000. LOSBs received 24.48% of the dollars awarded under \$15,000. Of the 24.48% African Americans received 12.64%, Hispanic Americans received .01% and Caucasian received 11.84%. Non-LOSBs received 75.52% of dollars awarded on contracts valued under \$15,000.



Table 11.19: LOSB Utilization Goal Attainment, All Industries, Under \$15,000 by Ethnicity

Ethnicity	LOSB Firms		Non-LOSB Firms	
	Certified Dollars	Percent of Total Dollars	Non-certified Dollars	Percent of Total Dollars
African American	\$2,537,024	12.64%	\$958,085	4.77%
Asian American	\$0	0.00%	\$145,480	0.72%
Hispanic American	\$1,594	0.01%	\$43,265	0.22%
Native American	\$0	0.00%	\$46,019	0.23%
Caucasian	\$2,375,398	11.84%	\$13,964,074	69.57%
TOTAL	\$4,914,016	24.48%	\$15,156,923	75.52%

4. All Industries: LOSB Utilization

The assessment of the LOSB Program’s effectiveness illustrated that despite the County’s Ordinance and best efforts, LOSBs were utilized at a lower level than the stated overall 20% goal. The LOSB underutilization was also analyzed by ethnicity. Non-LOSB African Americans received 1.55% of total contract dollars. Non-LOSB Asian Americans, Hispanic Americans, and Native Americans collectively only received 1.72% of dollars.

The County’s overall utilization of LOSBs and non-LOSBs by ethnicity is summarized below and in Table 11.20.

African American-owned LOSBs received 4.25% of all County contracts.

Asian American-owned LOSBs received 0.00% of all County contracts.

Hispanic American-owned LOSBs received 0.00% of all County contracts.

Native American-owned LOSBs received 0.00% of all County contracts.

Caucasian-owned LOSBs received 4.39% of all County contracts.



Table 11.20: LOSB Overall Utilization Goal Attainment by Ethnicity

Ethnicity	LOSB Firms		Non-LOSB Firms	
	Certified Dollars	Percent of Total Dollars	Non-certified Dollars	Percent of Total Dollars
African American	\$8,104,341	4.25%	\$2,954,751	1.55%
Asian American	\$0	0.00%	\$624,960	0.33%
Hispanic American	\$1,594	0.00%	\$43,265	0.02%
Native American	\$0	0.00%	\$713,301	0.37%
Caucasian	\$8,355,969	4.39%	\$169,713,027	89.08%
TOTAL	\$16,461,904	8.64%	\$174,049,303	91.36%

The findings that the LOSBs have not been utilized on County contracts at the levels set forth in the Ordinance indicate a need for stricter compliance with the County’s procurement procedures. The fact that the utilization of ethnic groups has been lower than their availability is additional evidence that the statistical disparity documented in the Study needs to be addressed with race and gender specific remedies.

The recommendations to enhance the County’s LOSB Program are discussed in the Race and Gender-Neutral Recommendations and Race and Gender-Conscious Recommendations sections in this Chapter. Specifically, the LOSB Program may benefit from enhancements of the good faith efforts policies, implementation of small contract set asides, and a small contract rotation component. Revisions to the sole source procurement solicitation process and modified bonding requirements on small contracts should also assist the County in meeting the LOSB program objectives.

V. Race and Gender-Neutral Recommendations

The race and gender-neutral recommendations presented in this section apply to the three industries examined in the Disparity Study: construction, professional services, and commodities and services. By applying the proposed recommendations to the procurement process, the County could address the barriers that market area minority, women, and small businesses encounter while trying to do business in the County.

As proposed, these recommendations should strengthen the LOSB Program, and increase contracting with the M/WBEs that were underutilized at a statistically significant level. Implementation of these strategies should significantly improve M/WBE access to County contracts.



The recommendations include administrative strategies which might require modifications to procurement policy. As proposed, the data management standards designed to strengthen the monitoring, tracking, and reporting of subcontractor utilization will necessitate modifications to the current procurement procedures. In addition, the proposed website modifications would necessitate enhancements to the site to provide for a more accessible and user-friendly resource for businesses.

A. Pre-Award Recommendations

1. Enhance Locally Owned Small Business Program

The LOSB Program could be an incentive to attract businesses to the County. The goals to utilize locally owned small businesses as set forth in the Ordinance should be required and implemented in concert with the M/WBE goals. An LOSB that is also an M/WBE could meet both the LOSB and the M/WBE goals. A lower LOSB size standard would offer small businesses a competitive advantage which could also be an incentive to locate within Shelby County. A lower size standard would enable small businesses to bid against similarly situated businesses instead of the large businesses currently eligible for LOSB certification. Currently, the County requires that an LOSB vendor maintain less than \$5,000,000 average annual total sales for each of the last three (3) fiscal years in order to be eligible for the LOSB Program. As noted in Table 11.21, nearly 97% of the County businesses have an annual revenue of less than \$2,500,000.

According to ReferenceUSA®, the leading provider in business and consumer research, 43.32 % of the businesses in the United States have annual revenue of less than \$500,000. As illustrated in Table 11.21 the State of Tennessee and Shelby County’s percentages of businesses with annual revenue under \$500,000 are similar to that of the United States at 44.13% and 41.00% respectively. It is recommended that the LOSB average annual revenues over a three year period should be less than \$1,000,000.

Table 11.21: Business Profile by Annual Revenue

Annual Revenue	State of Tennessee	Shelby County
Less than \$500,000	44.13%	41.00%
\$500,000-\$999,999	28.87%	30.56%
\$1,000,000-\$2,500,000	16.98%	16.70%
\$2,500,001-\$4,999,999	5.10%	5.93%
\$5,000,000-\$10,000,000	2.63%	2.91%
More than \$10,000,000	2.28%	2.91%
TOTAL	100.00%	100.00%



a. Small Contracts Business Set Aside

The LOSB Program should include a small business set aside for prime contracts valued at \$15,000 or less. The small business set aside would limit competition to businesses from the statistically significant underutilized groups and other businesses that are certified as an LOSB. The set aside would allow the eligible businesses to bid as prime contractors in a sheltered market with similarly situated small businesses and thereby increase their opportunities to be a prime contractor.

2. Review Selection Panel Process

The evaluation panel members for architecture and engineering and professional services contracts should have accountability for their individual scores. The panel members should be required to sign their evaluation form. The evaluation scores of the panel members should be released when the award is approved. The bidders should have access to the evaluation forms upon written request. The contract award should be posted at the time of award.

The evaluators' scores should be made available at the time of the award. The proposal and the statement of qualifications, and bids should be released upon request at the time the notice of Intent to Award is published. Providing such information upon demand creates greater transparency and allows unsuccessful bidders to improve their bids in response to future County solicitations.

3. Implement Small Contract Rotation Component

The County should create a rotation program for certified small local businesses. Contracts earmarked for the rotation program should have an estimated contract value of less than \$15,000. Competition for contracts should be limited to the eligible LOSBs and M/WBEs. County departments should identify small contracts for the program annually. The award of contracts valued \$15,000 and under should be limited to LOSBs and M/WBEs: quotations would only be accepted from businesses certified as an LOSB or M/WBE.

4. Enhance Sole Source Procurement Process

Sole source and single source provisions of the County's procurement process allow for the award of contracts without a competitive bid to businesses that are determined to be the sole provider of a given commodity or service. Currently, the Procurement Manual requires adherence to specific sole source procedures in order to award single source contract for supplies, materials, and equipment. In order to exempt the purchase of supplies, materials and equipment from the sole source bid requirements, four conditions must be met: (1) the Administrator of Purchasing has determined that the items are available from only one source; (2) the Administrator of Purchasing certifies that the specifications for the purchases were not specifically designed to create a sole source supplier; (3) the Administrator certifies the same to the County Mayor for those items/services over \$25,000; and (4) the County Mayor or designee approves the sole source



purchase for those items over \$25,000 after approval of the Administrator of Purchasing.³⁹⁰ The Board of Commissioners must approve sole source contracts over \$50,000. These requirements should also be rigorously adhered to in all single source procurements for professional services.

Sole source contracts should be tracked by industry and department. Prior to the approval of the sole source purchase, the procurement should be posted on the County's website for at least 30 days to allow providers of the requested commodities or services to make themselves known to the County. In addition the Administrator of Purchasing should send the notice of intent to sole source, with the specifications, to certified LOSBs and M/WBEs within the industry classification. The certified LOSBs and M/WBEs should be notified 30 days before approval to enter into a contract is granted. The Equal Opportunity Compliance Office should be required to sign off on the single source procurements before they can be submitted to the Mayor, Administrator of Purchasing or the Board of Commissioners for approval.

a. Modify Solicitation Procedures for Professional Services Sole Source Contracts

The sole source requirements imposed upon purchases of supplies, materials and equipment by the Purchasing Rules and Regulations should be applied similarly to professional services that are procured through sole source negotiations. The procurement procedures should be revised to apply to professional services sole source contracts.

5. Revise Bonding Requirements

"There are companies called bond daddies, they were legendary. We call them bond daddies because they drive around selling fraudulent bonds to people."

Bonding requirements on public contracts can be a significant disincentive to bidders and act as a barrier to small and M/WBE bidders. The bonding requirements on small contracts should be evaluated to ensure that they are not disproportionately high when considering the County's potential liability. On small contracts, the bonding requirements should be set in relation to the nature and scope of work to be performed, while balancing liability, risk, and statutory requirements. In addition, the County should implement standard risk management provisions that reflect reasonable risks for all of its contracts.

b. Waive Bond Requirements on Small Contracts

The County should waive the bonding requirement when the engineer's estimate is less than \$25,000. A small contracts bond provision could serve as a significant incentive for small businesses to bid on County projects, thereby increasing the number of LOSBs and M/WBEs awarded small contracts.



³⁹⁰ Shelby County, Tn., Purchasing Policy Rules and Regulations, Policy No. P-220 § IV (F) (Feb. 22, 2010).

6. Develop Contract Opportunities Forecast

The County should publish a 12 to 24-month contract opportunities forecast annually. The forecast should identify contract renewals and new opportunities anticipated to be awarded. This forecast should be distributed to business and trade associations and published on the County's website.

7. Unbundle Large Procurements into Smaller Contracts

The bundling of contracts prevents small businesses from bidding on items of work for which they are qualified because the contract includes items that only very large companies can perform. Given the geographic market area's ever-increasing small business population, attention to the size of solicitations is simply good business. During the study period, 70% of the County's construction, professional services, and commodities and services contracts were awarded to 47 vendors. Unbundling could bring more opportunities within reach of more businesses, which would generate more bidders for County contracts.

One form of bundling is when various goods or services that could be purchased individually are grouped together into a single solicitation. Bundling also occurs when projects that are on separate sites—or on discrete areas of the same site—are included in one solicitation. Multi-year agreements are additional examples of the type of procurements that small purchases are combined into one large contract. Price agreements against which purchase orders are issued, customarily for small items of work, are another example of bundling. Work orders issued against a multi-year construction contract are also an example of the type of procurement that could be unbundled. In determining whether solicitations should be unbundled, the following criteria should be considered:

- Whether or not the project takes place in more than one location
- Size and complexity of the procurement
- Similarity of the goods and services procured
- Sequencing and delivery of the work
- Size of the task orders issued against the procurement



8. Require LOSB and M/WBE Quotes for Contracts Valued Under \$5,000

“The good old boy network is a system where a couple of people are in a position to get the work that prevents a minority like me to get a piece of the pie. And the County keeps using their own little set of people. They will make it appear that the bidding process is fair, but it’s not.”

The County should limit quotes on construction, professional services, and commodities and services contracts valued under \$5,000 to LOSB and M/WBEs. To increase the number of small contract opportunities, larger construction and professional services projects should be reviewed to identify items of work that can be unbundled into contracts that small businesses can perform as prime contractors.

9. Provide Adequate Lead Time When Advertising Solicitations

In order to maximize M/WBE participation, the County should ensure that prime contractors have adequate lead time to bid. Prime contractors, including LOSBs and M/WBEs, should receive notice of contract opportunities at least four (4) weeks before the bids are due. Lead time should be adequate to allow businesses sufficient time to address questions and concerns about the solicitation, but should also permit prime contractors to give more lead time to subcontractors.

M/WBE and other small subcontractors have expressed frustration that prime contractors contact them at the last minute in order to meet good faith effort requirements. With longer lead time, prime contractors would have sufficient time to search and contact qualified LOSB and M/WBE subcontractors to meet contracting goals, and subcontractors would have sufficient lead time to prepare bids or proposals. Prime contractors should be required to allow at least five (5) business days for subcontractors to submit their bids and statements of qualifications.

10. Promote Direct Supplier Requirement

The County should require manufacturers doing business with the County to document that it has LOSB and M/WBE distributors authorized to sell its product line at the regional or the national level. This should be a minimum requirement to be prequalified by the County.

11. Conduct an M/WBE Program Campaign Outreach

There should be a comprehensive outreach campaign to promote the M/WBE Program. The outreach plan should include the following strategies:



- Disseminate press releases and public service announcements to the media in order to inform the community regarding the M/WBE Program
- Establish partnerships with local business organizations to establish collaborative opportunities to communicate with M/WBEs
- Produce an electronic newsletter to announce the M/WBE Program
- Coordinate with market area governments and agencies to maximize the dissemination of M/WBE Program information

12. Remove Brand Name Requirements in Solicitations

The County should refrain from specifying brand names in solicitations in order to avoid restricting competition because the named brands may not be available to small and M/WBEs or offered at a competitive price.

B. Post-Award Recommendations

1. Require Goal Attainment at Bid Opening

The prime contractor should be required to meet the M/WBE subcontract goal at the time of bid opening. Submitted with the bid should be a Subcontractor Utilization Plan form listing all subcontractors, suppliers, and truckers proposed to meet the subcontract goal. The plan should detail each M/WBE and LOSB business's percentage of the prime contractor's bid amount. Prime contractors and all subcontractors should be required to sign letters of intent specifying the dollar amount of the contract, scope of work, and any certification at the time of the bid opening.

A responsive bid should meet the M/WBE goal or document a good faith effort. A prime contractor that fails to meet the goal at the time of bid opening would be required to document a good faith effort. In the event that the good faith effort documentation is not submitted with the bid or the submittal is not approved, the County should move to the next lowest bidder. The next lowest bidder's response to the goal will be reviewed until a responsive bidder is identified. If no bidder is found to be responsive, the contract will be cancelled and re-advertised.

2. Offer Incentives to Prime Contractor's that Satisfy M/WBE Goals

The County should offer incentives for prime contractors that meet the M/WBE goals. Incentives can be an effective strategy to secure compliance with M/WBE subcontract goals. A prime contractors could receive a 2 percent bid discount on low bid solicitations. Prompt payment provision could be accelerated from 15 days to 7 days when the subcontracting goal is met.



3. Monitor Compliance with LOSB Goals

“I am aware of a bid where the prime contractor submitted a letter of good faith. But I, in turn, wrote a letter stating that no one had contacted us from that Company. We had not received any solicitations from that company to do business. So my question is, does the County verify the actual good faith efforts?”

A Utilization Report of both LOSBs and M/WBEs that present year-to-date payment, original award, and contract modifications should be published quarterly. Currently, the County Commission measures compliance with LOSB goals annually.³⁹¹ The annual LOSB Utilization Form captures the following information:

- Department name
 - Annual estimated expenditures
 - Annual loss estimated expenditures
 - Expenditures to date
 - LOSB expenditures to date
 - Variance (LOSB allocation to actual(s))
- Utilization percentage

The LOSB Utilization Report should be expanded to present the department awards and payments by ethnicity, gender, certification status, and industry. The expanded Utilization Report should capture utilization information that measures the effectiveness of both the LOSB and M/WBE programs by ethnicity, gender, industry, and department. In addition, the report should include the original award and contract modifications. This data should be reported at the prime and subcontract level within each industry. Change orders, amendments, and substitutions should be separately reported by prime contract, department and industry. Department waivers to the subcontract goal or failure to meet the subcontract goal should also be published in the quarterly Utilization Report.

4. Publish M/WBE Utilization Reports to Website

The County should publish the quarterly LOSB and M/WBE Utilization Reports. At a minimum, the utilization reports should also be posted on the County’s website and made available to businesses by email.



³⁹¹ Shelby County, Tenn., Ord. No. 324, *Resolution to Establish Reasonable Utilization Standards and Reporting Requirements for All Elected and Appointed County Officials for the Purpose of Monitoring Expenditures with Locally Owned Small Businesses* (July 13, 2009) (The County Commission adopted this resolution in order to mandate an annual rating system, where departments are required to submit a scorecard reporting all purchases by dollar level and commodity type).

5. Publish Prime Contract Awards to Website

“I called [County employee name withheld] three or four times to find out who won the award. They brushed me off.”

The County should publish its contract awards for all construction, professional services, and commodities and services contracts. The awards should be posted on the website and emailed to each bidder once the contract is approved. The anecdotal analysis revealed that many business owners experienced difficulty acquiring information on contract awards.

6. Provide Debriefing Sessions for Unsuccessful Bidders

Debriefing sessions for unsuccessful bidders should be held by the project manager or the appropriate County department. Additionally, bids should state that the debriefing sessions are an option and the procedure for scheduling the debriefing should be set forth in the solicitation and the bid award notice. These sessions could provide vital information to help small businesses prepare more competitive submittals in the future.

7. Implement Dispute Resolution Standards

Dispute resolution standards should be established to allow businesses to resolve issues relating to work performance after a contract award. A dispute resolution process should apply to disputes between prime contractors and the County, as well as disputes between subcontractors and prime contractor, LOSB and M/WBE certification denials, and other contract issues. The dispute resolution process should include provisions for an ombudsperson. The ombudsperson could handle disputes, as needed, to achieve timely and cost-effective resolution. A dispute resolution meeting should be mandatory in the event a dispute cannot be resolved by the ombudsperson within twenty (20) working days.

The first step in the dispute resolution process would be the submission of an oral or written complaint by the aggrieved party to the ombudsperson. The ombudsperson would then aid the parties in resolving the dispute by investigating the claim and making initial contact with the County, prime contractor, and if relevant the subcontractor. If the dispute is not resolved through these means within twenty (20) working days, the ombudsperson will assist the aggrieved party in filing a request for a dispute resolution meeting. Any party that does not respond to requests by the ombudsperson will be placed on a suspension list until the matter is resolved. The suspension list should be monitored and approved by the Division of Administration and Finance.

The meeting would be the second step in the resolution process. Neither party may involve legal representation during this initial informal process in order to avoid significant legal costs for both parties. If the parties are not able to reach a mutually agreed upon resolution through meeting, the dispute may proceed to formal mediation or arbitration. A dispute must be taken to mediation before it can proceed to arbitration.



Arbitration is the final step to resolving a dispute. The decision reached by the arbitrator is final and binding. The parties may retain legal representation during the mediation or arbitration process. A vendor who is found to be in non-compliance with the procurement rules, regulations, relevant laws, LOSB Program, or M/WBE Program will be debarred for a minimum of two (2) years.

8. Implement an Expedited Payment Program

“There have been times when I turned in my paperwork and did not receive payment until after 60 to 90 days which extremely cuts into my profits.”

Expedited payment standards should be implemented in order to remove the most significant barrier to small businesses—late payments from prime contractors. Payments to prime contractors would be made within fifteen (15) days of the County receiving an undisputed invoice, and prime contractors would be required to pay their subcontractors within five (5) days of receipt of their invoice payment. The County should also implement measures that encourage prime contractors to quickly resolve disputed invoices between the subcontractor and prime contractor.

a. Give Five-day Notice of Invoice Disputes

Invoice disputes are a source of delayed invoice payments. While the County has informal means to resolve payment disputes, the resolution process should be formalized. Within five (5) days of receiving a disputed invoice, the County should provide the contractor with an Invoice Dispute Notification detailing all items in dispute. Undisputed invoice amounts should be paid within fifteen (15) days and disputed items should be resolved in a timely manner and thereafter paid promptly.

The prime contractor should have the same obligation to give notice to the subcontractor within five (5) days of receiving a disputed invoice. The prime contractor should pay the subcontractor within five (5) days of receiving payment from the County. The prime contractor should be penalized if the subcontractor is not paid timely.

9. Verify Subcontractor Payment

In order to monitor compliance with the prompt payment provision, the County should verify payments made to M/WBE and LOSB subcontractors. A payment verification program would allow subcontractors to notify the County of late payments or non-payments in real time. In addition, each subcontractor listed as paid for the previous billing cycle should be contacted electronically to verify that payment was received. This verification procedure 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 would be to have the prime contractor submit to the County 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 County'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.

10. Institute Mobilization Payment for Subcontractors

Whenever a mobilization payment is made to a prime contractor as the first payment of its bid amount, the subcontractor should be paid the appropriate share of its bid when directed to mobilize prior to commencing work. Subcontractors should also receive the mobilization payment because project start-up costs are indeed significant for a subcontractor. Mobilization payments on construction projects cover site location costs including equipment, supplies, trailers, and other operations which must be performed or cost incurred prior to beginning work on the project site.

11. Withhold Subcontract Payment from Prime Award

The County should institute a standard to withhold a fee equivalent to the value of the subcontract award from the prime contractor's contract. The County would withhold an amount equivalent to the subcontractor payments from the prime award until the subcontractor's work is completed and approved by the prime contractor. This standard should mitigate against the prime contractor's unauthorized substitution of the subcontractors work. In the event that the prime contractor fails to meet the subcontract requirements, the withheld amount may be put into a technical assistance fund.

C. Supportive Services

The County could work with the United States Small Business Administration (SBA) to strengthen the capacity of LOSBs and M/WBEs. The County should promote cross-marketing strategies through relationships with other governments in the region to strengthen and expand its pool of certified businesses using low to no cost resources. Listed below are federal programs and technical assistance services that provide technical assistance to small businesses at low-cost or no-cost basis. The following services can be promoted to LOSBs:

- SBA's 7(j) Management and Technical Assistance Program gives small companies assistance in preparing proposals and bids, regardless of the owners' race or gender.
- SBA's Service Corps of Retired Executives (SCORE) is a volunteer association that provides in-depth counseling and training to small businesses in almost every area of business management, regardless of the owner's race or gender.



- Women’s Business Centers are sponsored by the SBA and give financial management, marketing, and technical assistance to women business enterprises.
- The Minority Business Development Agency provides funding for Minority Business Development Centers (MBDCs), Native American Business Development Centers (NABDCs), Business Resource Centers (BRCs), and Minority Business Opportunity Committees (MBOCs).

VI. Data Management Recommendations

A. Track and Report Subcontractors

1. Create a Subcontractor Utilization Tracking System

Subcontracting activity should be tracked with a comprehensive data collection system. 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 by industry classification using North American Industry Classification System (NAICS) codes and the procurement method. Government agencies and not-for-profit organizations should also be coded so they can be differentiated in the system and excluded from the analysis and reports of subcontractor commitments and payments.

Computerized data entry forms could be designed to capture all the necessary information required to produce the required reports. All required information would need to be captured in the tracking forms. Customized queries designed in the contract monitoring system would analyze the data necessary to produce the LOSB and M/WBE reports electronically. Standard reports would be designed to meet the LOSB and M/WBE reporting requirements. The reporting module would list the different reports. The user would simply have to point, click, and print the named report.

A data tracking application with a web-based interface would also allow virtual submission of the required data by prime contractors and subcontractors, thereby eliminating the need for the County to enter the information into its system. A web-based interface would also allow the subcontractor to independently enter the amount paid and certify the accuracy of the entry, thereby eliminating the need for the submission of a cancelled subcontractor check with the prime contractor’s invoice.



VII. Website Enhancement Strategies

The County website (<https://www.shelbycountyttn.gov/index.aspx?NID=35>) was evaluated in January 2016 to assess its usability, functionality, and informational value for contractors inquiring about doing business with the County. The goal of the review was to assess the presentation of information relevant to businesses (content) and the ease of use (structure). The website was found to be visually appealing, professionally formatted, and informative. There was a good use of color and a consistent layout. The website quickly loaded within 10 seconds using Google Chrome, Google Chrome for Mobile, Mozilla Firefox, Microsoft Internet Explorer, and Apple Safari. The website was error-free, with no spelling or grammatical errors detected. Additionally, the website offered a mobile-optimized view.

A. Structural Enhancements

Recommendations presented in this section are intended to enhance the website's utility and functionality for its business users. The structure of the Purchasing webpage requires users to search through various indexes to locate procurement information. The webpage also lacks important descriptive information that should be prominently placed at the top of the website.

1. Shelby County Website Readability Recommendations

The website was found to be concise and explanatory, but the website was placed at a Flesch-Kincaid 46 reading ease score. Flesch-Kincaid is a readability test that measures the grade level required to read the text, and is designed to indicate how difficult a reading passage is to understand, measured by grade level. Table 11.22 below identifies the reading difficulty of the County's website. Given its Flesch-Kincaid reading ease score, the County's website is measured as "Difficult," indicating that the County's website may not be accessible to business users whose education level is lower than high schools or some college. The County should take measures to reach the "Standard" Flesch-Kincaid reading ease score, which requires a score between 60 and 70.



Table 11.22: Readability Result by Flesch-Kincaid Grade Reading Ease Score³⁹²

Style	Flesch Reading Ease Score	Average Sentence Length in Words	Average No. of Syll. Per 100 Words	Type of Magazine	Estimated School Grade Completed	Estimated Percent of U.S. Adults
Very Easy	90 to 100	8 or less	123 or less	Comics	4th grade	93
Easy	80 to 90	11	131	Pulp fiction	5th grade	91
Fairly Easy	70 to 80	14	139	Slick fiction	6th grade	88
Standard	60 to 70	17	147	Digests	7th or 8th grades	83
Fairly Difficult	50 to 60	21	155	Quality	Some high school	54
Difficult	30 to 50	25	167	Academic	High school or some college	33
Very Difficult	0 to 30	29 or more	192 or more	Scientific	College	4.5

2. Link County’s Logo to the Homepage

The logo on every webpage is small and difficult for users to identify. Therefore, the logo size should be increased to make it more prominent. The logo should also link back to the County’s Website.

3. Functionality

a. Provide Meaningful and User-friendly Formatting for URLs

The County Purchasing webpage Uniform Resource Locator (URL) pattern, (<https://www.shelbycountyttn.gov/index.aspx?nid=1513>), does not have any language indicating the content except for a link back to the homepage. The use of meaningless URLs can confuse users exploring the website and hinder an efficient search for needed information.

The web address should be easily understandable and formatted as a forward slash followed by the path location (<http://www.shelbycountyttn.gov>). For example, the County should elect for a webpage address that clearly describes the content contained therein, such as (<http://www.shelbycountyttn.gov/purchasing>) or (<http://www.shelbycountyttn.gov/eoc>).



³⁹² Flesch, Rudolf. "How to Write Plain English". University of Canterbury. Retrieved February 2016.

b. Provide Accessibility for Persons with Disabilities

Users with disabilities can contact the County for reasonable accommodations (<https://www.shelbycountyttn.gov/index.aspx?nid=169>). The County should consider a text-to-speech feature to provide immediate access to the website without staff assistance. The text-to-speech feature reads text on the webpage aloud, thereby removing a barrier for visually impaired individuals. A text-to-speech feature would reduce the necessary need for staff to respond to inquiries regarding accessibility.

c. Control External Links

Most of the links connecting to external websites or Portable Document Format (PDF) files were maintained in a user-friendly manner. In general, external links should open in a new tab instead of leading the user away from the County's webpage. However, some links resulted in the webpage loading within the parent tab instead of a new tab.³⁹³ Consequently, the user experiences loss of navigation from the County's webpage. A more cohesive structure of the County's webpage would greatly enhance accessibility and overall usability.

B. Content Enhancements

Recommendations presented in this section are intended to enhance the accessibility and usability of the website's content. Mason Tillman conducted a review of the Purchasing webpage (<https://www.shelbycountyttn.gov/index.aspx?NID=189>). This page should be updated in order to be a comprehensive one-stop location for businesses seeking to work with the County.

1. Provide Consistent Layout

The County's website usability is hampered by the inconsistent layout. The County's Purchasing website should house all of the information that corresponds to the procurement process, and should be easily accessible at one location on the Shelby County Website. A more cohesive design would greatly enhance accessibility and overall usability.

The Purchasing web page is embedded in the County's website, and is accessible from two different locations on the County website. First, the Purchasing webpage can be found via the "How Do I?" drop-down menu as a hyperlink entitled "Do Business With the County." The Purchasing webpage provides three general categories of information: (1) "Become a Qualified Vendor," (2) "Qualify as a Locally-Owned Business," and (3) "View Bids, RFPs & RFQs." Second, the "Become a Qualified Vendor" webpage is located on the "Doing Business with Shelby County" through a hyperlink located on the "Popular Pages" menu.



³⁹³ For example, the link (<https://www.shelbycountyttn.gov/index.aspx?NID=202>) to ESM solutions corporation bidding procedures on website (<http://www.esmsolutions.com/>) webpage loaded within the parent tab instead of a new tab.

The Purchasing Page is the most critical link that guides a business owner looking to do business with the County and should be more readily accessible. Upon initially entering the website, the Purchasing webpage should be located at one specific link, with a uniform title, and at the top of the website in a clearly designated area.

2. Provide an Intuitive, Easy to Navigate Website

A business considering contracting with the County is able to arrive at the Purchasing Page by looking under the various links listed above, but the organization is scattered and should be presented in a unified and centralized format.

The County website provides a drop-down menu bar with links that describe the methods of qualification in order to do business with the County, but does not list the types of services and business opportunities available with the County in an accessible manner. The placement of the required services should be more prominent to lessen the time it takes for user to locate procurement, bidding, certification, and LOSB information.

3. Consolidate Bid Information Within a Single Webpage

The County should consolidate all procurement information into a single Purchasing webpage so that users are not required to perform extensive research into multiple indexes to gather relevant procurement information.

Currently, the Purchasing webpage provides three general categories of information, which link to three separate webpages: (1) “Become a Qualified Vendor,” (2) “Qualify as a Locally-Owned Business,” and (3) “View Bids, RFPs & RFQs.” The “Become a Qualified Vendor” webpage contains general information on bidding procedures, government purchases, and the authorization process; this webpage also includes a link to submit vendor registration forms. The LOSB Program web page contains information on how the program is facilitated and provides the contact information for the Purchasing Department. The “View Bids, RFPs & RFQs” page contains a list of open bids by department.

Such valuable information on vendor qualification procedures, LOSB resources, and bidding information should be more easily accessible, without having to conduct a search through various index features. In addition, the County should include information regarding loan assistance, procurement forms and related services.

4. Enable Website Interaction

Solicitation documents are currently provided so that they are easy to locate and download. However, the website should be updated so that a search function allows for users to search for solicitations using keywords. Also, the County should include a bulletin board update to facilitate



interactive communication between vendors and County staff. This feature would reduce the amount of time a vendor would need to expend in order to search through solicitations, and eliminate the need for County staff to respond to inquiries regarding solicitations. Open and closed solicitations should be posted and classified by industry and award.

a. Publish All Contracting Opportunities

All contracting opportunities should be posted on the County's website. E-mail notices of contracting opportunities should also be targeted to certified businesses providing the goods or services being solicited.

b. Publish Contract Awarded Information

The County should maintain a database of all the construction, professional services, and commodities and other services contracts awarded. The County maintains a database of all requests for bids, Requests for Proposal, and Requests for Questions on the webpage (<http://www.shelbycountyttn.gov/Bids.aspx?CatID=showStatus&txtSort=Category&showAllBids=on&Status=open>), but contract award information is not reported. A comprehensive, searchable list containing information on contractor name, award date, and award amount should be maintained. By making contract award data public, the County can ensure transparency in the award of prime contracts and reduce the frequency of vendor inquiries regarding the awarded contract.

c. Publish Prime Contractor Payments

Prime contractor payments should be posted on the County's website to allow subcontractors to track their prime contractor's payment. This can keep the public informed and can mitigate the late payment problem. To facilitate this, payments should be updated weekly or bi-weekly on the same day of the week. The webpage should be searchable by contract number, contract description, prime contractor number, and prime contractor name. This system will reduce subcontractors' inquiries about payment.

5. Provide Staff Directory by Departments

The Staff Directory should be updated to include information organized by Department. Currently, there are some departments that do not have complete contact information on their webpages or in the Staff Directory.³⁹⁴ All contact information of departments should be provided on each department's webpage, and linked back to the Staff Directory.



³⁹⁴ For example, while the webpage for Fire Department (<https://www.shelbycountyttn.gov/index.aspx?nid=443>) does not have any content, there is contact information of Fire Department at Contact Us (Staff Directory) on the homepage (<https://www.shelbycountyttn.gov/Directory.aspx?did=623>). Similarly, limited information is provided for other departments such as Head Start, Ryan White Program (<https://www.shelbycountyttn.gov/index.aspx?NID=2311>).

6. Maintain Virtual Plan Room

Online access to plans and specifications could reduce the cost for the County to produce the documents, and the costs for contractors to acquire them. Such software could reduce the need to designate or pay for a space for a physical plan room and reduce the reproduction cost for contractors.

7. Advertise Technical Assistance Workshops and Training

The County can capitalize on community resources by providing links to different government entities, non-profits, and third party organizations. Therefore, events and programs from those organizations (especially from ethnic/trade organizations that often offer workshops and training sessions free of charge to small businesses) can be posted on the Purchasing webpage. The County can also post news from organizations for which the County's website provides links. Providing additional community resources can bolster the County website's community outreach.

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