

**COMMONWEALTH OF
PENNSYLVANIA
DEPARTMENT OF
GENERAL SERVICES**



**DISPARITY STUDY IN BUILDING
CONSTRUCTION AND
BUILDING DESIGN**

AUGUST 2007



**SUBMITTED BY:
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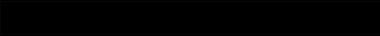
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CONTRACTING AND PROCUREMENT ANALYSIS

I. INTRODUCTION

Mason Tillman was commissioned to conduct a Disparity Study for the Department of General Services (DGS) of the Commonwealth of Pennsylvania. The Study examined building construction and building design contracts awarded by the Public Works Bureau of Construction and Engineering and Architecture from January 1, 2003 to December 31, 2005.

A. Scope of the Analysis

The Disparity Study is divided into two main tasks. First, the laws, regulations, and procedures which govern the procurement of building construction and building design contracts are described and analyzed. The second is the analysis of the impact of these laws, regulations, and procedures on the participation of minority and woman-owned construction and design firms. The laws and regulations that govern the Commonwealth's procurement process are outlined in this section.

1. Statutes

Commonwealth Procurement Code, 62 Pa. C.S. §101 et. seq. is the single most important law governing building construction and design professional services. With certain exceptions,¹ the Code establishes construction procurement policy and supervision of construction procurement for executive and independent agencies. The specific construction powers,

¹ The following construction services is not procured through the Department of General Services: bridge, highway, dam, airport (except vertical construction), railroad or other heavy or specialized construction including: 1) the construction of facilities and improvements by the Department of Conservation and Natural Resources in state parks and state forests, and 2) construction activities, excluding buildings, solely within the expertise of the Department of Environmental Protection including, but not limited to mine reclamation, oil and gas well plugging, waste site remediation, flood control and stream rehabilitation.



duties, and procedures of the DGS are set forth in *Commonwealth Procurement Code* 62 Pa. C.S. §322. The Code gives the DGS five methods to procure construction² contracts and four methods to procure design professional services contracts.³ Other procurement laws that impact construction but are not included in the Code are:

- The Steel Products Procurement Act, 73 P.S. §1881 et seq.
- The Trade Practices Act, 71 P.S. §773.101 et seq.
- The Pennsylvania Prevailing Wage Act, 43 P.S. §165-1 et seq.
- The Separations Act, 71 P.S. §1618

2. Executive Orders

Construction procurement standards are also dictated by two Executive Orders:

- Executive Order No. 2004-6, Minority and Woman-Owned Business Opportunities, and
- Executive Order No. 2006-2, Contract Compliance

3. Regulations

There are several regulations controlling the construction procurement that pre-date the *Commonwealth Procurement Code*⁴:

- 4 Pa.Code Chapter 60, Responsibility
- 4 Pa. Code Chapter 62, Committee on Construction Contract Documents
- 4 Pa. Code Chapter 64, Selections Committee
- 4 Pa. Code Chapter 67, Emergency Construction Repairs

² DGS can use the competitive sealed bidding method (Section 512), the competitive sealed proposals method (Section 513), the small procurement methods (Section 514), the sole source procurement method (Section 515), the emergency procurement method (Section 516) and the multiple awards procurement method (Section 517).

³ The Department of General Services should use the procurement of design professional services method (Section 905) unless the small procurement method (Section 514), the sole source procurement method (Section 515) or the emergency procurement method (Section 516) can be justified.

⁴ The Commonwealth was in the process of updating the regulations in 2007.



4. Policy and Procedures

The DGS Procurement Handbook⁵ records the construction policy and procedures. Construction procedures are found in Part IV of the Handbook. Statements of Policy published by DGS can be found at 4 Pa.Code §§ 58.201-58.210, Internal Guidelines for MBE/WBE Certification. 4 Pa. Code § 68.101, and Contract Compliance Construction Contracts.

II. DEFINITIONS

Construction is defined as the process of building, altering, repairing, improving, or demolishing any public structure, building, or other public improvements of any kind to public real property. The term does not include the routine operation or maintenance of existing structures, buildings, or real property, as well as bridge, highway, dam, airport (except vertical construction), or railroad construction.

A Design/Build Contract is defined as a construction contract in which the contractor is responsible for both the design and construction of any public structure, building, or public improvements of any kind to any public real property.

Design Professional Services is defined as professional services within the scope of the practice of architecture, geology, engineering, landscape architecture, or land surveying. The services include studies, investigations, surveying, mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual design, plans and specifications, value engineering, maintenance manuals, and other related services associated with the construction, alteration, or repair of real property. The term includes services provided under the supervision of a professional engineer to develop engineering software which will aid design professionals in performing their work.

III. OVERVIEW OF THE PROCUREMENT PROCESS

The primary procurement methods used by the DGS are the competitive sealed bids method as set forth in 62 Pa.C.S. § 512. However, the emergency and sole source methods are available for the DGS to procure construction and design professional services costing

⁵ Some of the procurement procedures are a part of DGS' procurement practices which may not be contained in DGS' procurement manual.



\$100,000 or more. The DGS has delegated to Commonwealth agencies the authority to act as purchasing agents and to contract on their own behalf for construction contracts that are no greater than \$100,000 for design professional services, competitive sealed proposals (62 Pa.C.S. § 513) for construction, and the selections committee method.

Table 1.01 summarizes the Commonwealth's procurement policies and procedures for building construction and design professional services procurements. Table 1.01 also describes the bid/RFP solicitation methods, threshold levels, and advertising requirements for the Commonwealth's building construction and design professional services procurements.



Table 1.01 Commonwealth of Pennsylvania Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Requisition Approval	Procurement Approval
Building Construction and Building Design	Valued at \$5,000 or less	None	Small No Bid	Contracting Officer	Purchasing Agency
Building Construction and Building Design	Valued at more than \$5,000 but does not exceed \$10,000	None	Small Informal Procurement Procurements are made through solicitations of three bids by telephone, facsimile, or electronic transmission, and a contract Solicitations must include at least one DGS-certified MBE/WBE, if available	Contracting Officer Contracting Officer	Purchasing Agency Agency Head
Building Construction	Valued at more than \$10,000 but does not exceed \$100,000	Advertised on the DGS website	Delegated Competitive Sealed Bidding Minimum Participation Levels (MPL) are established and the IFBs include MBE/WBE solicitation requirements	Contracting Officer	Purchasing Agency

Table 1.01 Commonwealth of Pennsylvania Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Requisition Approval	Procurement Approval
Building Construction and Building Design	Valued at more than \$100,000	Advertised on the DGS website	<p>Non-delegated Competitive Sealed Bidding (MPLs are established and the IFBs include MBE/WBE solicitation requirements)</p> <p>Non-Delegated Competitive Sealed Proposals - determined on a project-by-project basis for major construction projects. (Disadvantaged Business Participation is evaluated and scored)</p>	DGS Deputy Secretary for Public Works	DGS
Design Professional Services	Valued at more than \$100,000	Advertised on the DGS website	<p>Selection Committee Procedures</p> <p>MBE/WBE status is considered in selection process</p>	DGS Deputy Secretary	DGS Secretary
Emergency	None	None	Solicit two quotes, if practicable	Purchasing Agency Contracting Officer	DGS Director of the Bureau of Engineering Architecture

Table 1.01 Commonwealth of Pennsylvania Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Requisition Approval	Procurement Approval
Sole Source	Valued at more than \$5,000	None	Solicit quote from single contractor	DGS Director of the Bureau of Engineering Architecture	Purchasing Agency Head

A. Construction Competitive Sealed Bidding Method

1. Advertisement

The DGS Bidding Unit advertises the project on the DGS website.⁶ Projects are typically advertised six weeks before the bid opening date. Plans and specifications are available for a refundable deposit.

2. Pre-Award Procedures

Sealed bids are submitted to one of three DGS regional headquarters. Eastern Region projects are submitted to the DGS in Kutztown, Central Region projects are submitted to the Harrisburg office, and Western Region projects are submitted to the Pittsburgh office. DGS personnel are responsible for conducting a public bid opening. The name and bid amount (including base bids if applicable) for each bidder are read aloud.

The Bidding Unit submits the bids to the Legal Unit for review. The Legal Unit determines the responsive bidders. The Bidding Unit forwards the responsive bids to the Bureau of Minority and Women Business Opportunities (BMWBO) for review. The BMWBO notifies the Bidding Unit whether or not the lowest bidder complied with the BMWBO requirements. If the low bidder is responsive, the Bidding Unit prepares a recommendation for award, which is routed for signatures through the Legal Unit, the Deputy Secretary, and then to the Secretary of the DGS.

B. DGS Construction Competitive Sealed Proposal Method

1. Authority

The Deputy Secretary, in conjunction with the Using Agency, makes a written determination that the low bid process is either not practical or advantageous for each construction project. The Using Agency sends notice of intent to use the competitive sealed proposal method to the Director of the Bureaus of Engineering and Architecture (BEA).

2. Evaluation Committee

The DGS appoints an Evaluation Committee (Committee) which consists of at least one representative from the Using Agency, the DGS Regional Director, and two other employees

⁶ www.dgs.state.pa.us/dgs/cwp/view.asp?a=3&q=121446.



who possess construction experience. The Committee is charged with the following responsibilities:

- a. To adapt the RFP template language to the specific requirements of the project.
- b. Establish technical qualifications (i.e. Critical Path Method, scheduling, historic renovation, excavation, blasting, security hardware, and theater construction experience) deemed important for the project.
- c. Allocate points for the technical qualifications (as described above) and the overall percentages for the technical, cost, and Disadvantaged Business submission. Cost must be worth at least 50 percent of the points. Typically, cost is 60 points, technical 30 points and Disadvantaged Business 10 points.
- d. Conduct discussions with select responsible offerors under consideration for award. The purpose of the discussions is to assure that the offeror understands the solicitation requirements and to obtain best and final offers.

3. Advertisement

Once the RFP has been finalized, the DGS Bidding Unit posts it to the DGS website. The RFPs are typically released six weeks before the submittal due date. Plans and specifications can be obtained for a refundable deposit.

4. Pre-Award Procedures

Sealed proposals are submitted to the DGS in Harrisburg on a Tuesday. The proposals must contain the technical scope, **MBE/WBE requirements**, and a budget. The proposals remain sealed for two days allowing proposers additional time to submit subcontractor qualifications. On the following Friday morning, representatives from the DGS Legal Unit, the Comptroller's Office, and the Bidding Unit open the proposals and conduct a compliance/cost review. Proposals that do not satisfy the criteria set forth on the RFP's Mandatory Requirement Checklist are rejected as non-responsive.

The DGS calculates the total of the lowest responsive proposers for each discipline to determine the minimum amount of money that must be available to make an award. If this amount exceeds the available funding for the project, the Bidding Unit contacts the Using Agency to discuss further options. If there are insufficient funds, the proposals are returned with no award.



Once the funding issue is resolved, the technical submission is forwarded to the Evaluation Committee for scoring and the **MBE/WBE** submission is forwarded to the BMWBO for scoring. The Committee members have several weeks to evaluate the proposals.

Committee members score each element of the technical proposal. The Chairperson of the Committee calculates the overall technical points for each proposal. After the technical points are calculated, the Chairperson opens the sealed **MBE/WBE** scores report from the BMWBO.

The cost score is calculated by the chairperson based upon the objective formula set forth in the RFP. The lowest cost for each discipline receives 100 percent of the available cost points, and the higher cost proposals each receive a *pro rata* share of the points based upon their cost compared to the lowest cost. The chairperson adds the technical, cost, and **MBE/WBE** scores for each proposer by discipline and determines the highest score. The chairperson or the Deputy Secretary prepares a recommendation memorandum who forwards it to the Secretary for review and contract award.

5. Post-Award Procedures

The Using Agency signs the contract and obtains signatures as required from the following: the agency counsel, Office of General Counsel, and the Office of Attorney General. The Using Agency also monitors the contractor's performance.

The BMWBO monitors the contractor's adherence to **MBE/WBE** commitments made as part of the proposal submission and notifies the purchasing agency of any noncompliance issues.

The Using Agency evaluates the completed work prior to issuing final payment to ensure that all terms and conditions have been met and the services are provided to the agency's satisfaction. A complete contract file is maintained by the Using Agency which also submits required information to DGS.

C. Selections Committee Method

Design professional services projects that are not small procurements, sole source procurement (62 Pa.C.S. § 515), or emergency procurement are publicly advertised and posted on the DGS website. Interested firms must submit to the DGS Bureau of Engineering and Architecture (Form 150). Form 150 describes the firm's experience, team members, and abilities. The Selections Committee conducts a public meeting to review applications from interested firms and recommends three firms for each project. This recommendation is based upon established criteria, including equitable distribution of projects among firms, particular capability, geographic proximity of the firm to the project location and availability of manpower to perform the project, MBE/WBE participation is also considered.



The Secretary of the DGS chooses one of the three firms recommended by the Committee and the DGS Bureau of Engineering and Architecture negotiates the fee and the level of MBE/WBE participation with the selected firm.



2

MINORITY AND WOMAN-OWNED BUSINESS ENTERPRISE PROGRAM

I. INTRODUCTION

On April 15, 2004, Governor Edward G. Rendell issued *Executive Order 2004-6* after making a finding that the level of participation by minority and woman-owned businesses in the Commonwealth's procurement of supplies, services, and construction averaged only two percent of the total dollars spent by the Commonwealth.

Executive Order 2004-6 authorized the Commonwealth to take steps not only to prevent discrimination, but also to increase the Commonwealth contract participation rate with minority and woman-owned businesses and other similarly disadvantaged businesses. The formulation of specific policy initiatives to increase minority business enterprise and women business enterprise (MBE/WBE) participation was assigned to the Department of General Services (DGS). The DGS was assigned responsibility for the formulation of the general procurement policy under Section 310 of the *Commonwealth Procurement Code*, 62 Pa. C. S. § 301.

Executive Order 2004-6 designated the DGS to increase MBE/WBE participation in the Commonwealth's contracts. The Executive Order requires the DGS to do the following:

- Establish a procurement policy that will give consideration, when possible and cost effective, to contractors offering to utilize minority and woman-owned businesses and disadvantaged businesses in the selection and award of contracts.



- Develop and maintain an effective enterprise-wide data collection system in procurement and contracting, and require quarterly and annual reporting on MBE/WBE participation levels and dollars spent in each agency.
- Create an internal data linkage of MBE/WBEs so that agency buyers and purchasing agents will have a substantial number of commodities or service-specific MBE/WBE businesses to solicit.
- Train procurement buyers and purchasing agents to assist in the department's mission to contract MBE/WBEs.

II. DEFINITIONS

Small Businesses - Businesses that are independently owned, not dominant in their field of operation, employ no more than 100 persons and earn less than \$20 million in gross annual revenues, except information technology sales or service businesses who produce \$25 million in gross annual revenues.

Disadvantaged Businesses - Businesses that are owned or controlled by a majority of persons, not limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages.

Small Disadvantaged Businesses - Small businesses that are owned or controlled by a majority of persons, not limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages and certified with either:

- The Department of General Services Bureau of Minority and Women Business Opportunities (BMWBO); or
- The United States Small Business Administration Small Disadvantaged Businesses or 8(a) Small Disadvantaged Business Program.

Socially Disadvantaged Businesses - Businesses that the BMWBO determines are owned or controlled by a majority of persons, not limited to members of minority groups, who are subject to racial or ethnic prejudice or cultural bias, but do not qualify as small businesses. In order for a business to qualify as socially disadvantaged, the offeror must include in its proposal clear and convincing evidence to establish that the business has personally suffered



racial or ethnic prejudice or cultural bias stemming from the business person's color, ethnic origin, or gender.

Minority Business Enterprise- A small business that is:

- A sole proprietorship owned and controlled by a minority.
- A partnership or joint venture controlled by minorities in which at least 51 percent of the beneficial ownership interest is held by minorities.
- A corporation or other entity controlled by minorities in which at least 51 percent of the voting interest and 51 percent of the beneficial ownership interest are held by minorities.

Women Business Enterprise- A small business that is:

- A sole proprietorship owned and controlled by a woman.
- A partnership or joint venture controlled by women in which at least 51 percent of the beneficial ownership interest is held by women.
- A corporation or other entity controlled by women in which at least 51 percent of the voting interest and 51 percent of the beneficial ownership interest are held by women.

III. THE BUREAU OF MINORITY AND WOMEN BUSINESS OPPORTUNITIES

The Bureau of Minority and Women Business Opportunities (BMWBO) is charged with implementing the *Commonwealth Procurement Code*, 62 Pa. C. S. § 301, to assist MBE/WBEs and Disadvantaged Business Enterprises (DBE) gain access to the Commonwealth's contracts.

The BMWBO has three organizational divisions to meet its policy objectives. The Certification Division handles business certification and assistance. The Business Development Division promotes the successful involvement of MBE/WBEs and DBEs in contracting through education and information. Free training programs and resource materials are made available to certified businesses, the business community, and organizations assisting small businesses. The Business Development Division also investigates allegations of fraud and unfair practices against certified businesses in State contracting and investigates companies that seek to obtain certification fraudulently. The Supplier Diversity Division monitors the participation of certified businesses in State contracting and ensures adherence to the Commonwealth programs that promote opportunities for certified and other small businesses. This division also monitors overall program compliance.



IV. SOURCES OF CERTIFICATION

The BMWBO certifies businesses as MBE/WBEs and DBEs. As outlined above in the definitions section, to be certified as an MBE/WBE, the business must be 51 percent owned and controlled by women or specified minority group members. Minority groups are defined as African Americans, Hispanic Americans, Native Americans, Pacific Islanders and Asian Americans. To qualify as an MBE/WBE, the business must not have more than 100 employees, must be owned by a United States citizen, and be in business for at least one year or have a two-year business plan that has been reviewed by the Small Business Development Center. Also, the business must be independent of any other business entity, a for-profit company, and qualified to provide the goods and services for which it is being certified.

In addition to its own certification, the BMWBO will accept certifications by third parties, such as the Minority Supplier Development Council, the Women Business Enterprise National Council, and other public certification agencies. The BMWBO provides a streamlined certification process to certain Pennsylvania businesses that hold certifications from the Pennsylvania Unified Certification Program, the Minority Supplier Development Council, or the Women Business Enterprise National Council. During fiscal year 2003-2004, the DGS spent \$338,000 to operate the Certification Division in the BMWBO and had approximately 1800 businesses certified as MBE/WBEs. In addition, the BMWBO sponsors networking events to maximize the number of firms seeking certification and allow certified business owners to meet and promote their products and services to State purchasing agents and prime contractors.

V. MINIMUM PARTICIPATION LEVELS

Pursuant to the provisions of *Executive Order No. 2004-6*, the Department of General Services requires for construction projects that each bidder stipulate its minimum participation levels (MPLs) for utilization of MBE/WBE subcontractors and suppliers. The MBE/WBE participation level is determined by the bidder. The level is calculated by adding all dollar commitments to DGS-certified MBEs and dividing that total amount by the total contract bid price. The bidder participation level for WBEs is similarly calculated by adding all dollar commitments to DGS-certified WBEs and dividing that total amount by the total contract bid price. Only DGS-certified MBEs and WBEs may be used in calculating the MPLs. The Notice to Bidders provides a format for the contractor to record its MPLs. Table 2.01 describes the format.



Table 2.01 Minimum Participation Levels (MPLs) Format

	MBE	WBE
General Construction	_____%	_____%
HVAC	_____%	_____%
Plumbing	_____%	_____%
Electrical	_____%	_____%

Included in the invitation for bids is the MBE/WBE Subcontractor and Supplier Certification, Solicitation and Commitment Form (Form 16). Form 16 is comprised of two parts, Certification (Form 16A) and Record of MBE/WBE Solicitations and Commitments (Form 16B). The information contained in Form 16 is presented below in Table 2.02.

Table 2.02 MBE/WBE Subcontractor and Supplier Certification, Solicitation and Commitment Form (Form 16) Requirements

Forms	
Certification (Form 16A).	The Form 16A Certification must be completed and signed by each bidder and submitted with its bid. Failure to complete, sign and submit this form with the bid results in rejection of the bid.
Record of MBE/WBE Solicitations and Commitments (Form 16B).	
Instructions	
Form 16A requires bidders to respond to the MPLs in one of three ways:	
1.	A bidder can commit to meet both MPLs. If the bidder commits to meet both MPLs, no documentation in regard to MBE/WBE solicitations and commitments must be submitted with the bid.
2.	A bidder can commit to meet participation levels lower than the MPLs, but must provide evidence by way of Form 16B - Record of MBE/WBE Solicitations And Commitments, and documentation (copies of MBE/WBE quotes) that it solicited a minimum of five MBE subcontractors and five WBE subcontractors within the Work Area (defined below) and five MBE suppliers and five WBE suppliers.



3. A bidder can commit to meet participation levels lower than the MPLs and can indicate that it did not solicit five MBE subcontractors, five WBE subcontractors, five MBE suppliers and five WBE suppliers but must provide a satisfactory written reason(s) for not soliciting the minimum number of MBEs and WBEs.

Bidders are encouraged to make commitments to commit to both the MBE and WBE MPLs for the project. A bidder which commits to meet both the MBE and WBE MPLs must stipulate the commitment and submit a signed Certification form with its bid. The bidder is not required to:

1. Complete the remaining portions of Certification (Form 16A);
2. Complete Form 16B - Record of Solicitations and Commitments; or
3. Submit any MBE/WBE solicitation/commitment documentation with its bid documents.

If the bidder is selected for award, the bidder will be required to submit detailed information including but not limited to any contracts or letters of intent documenting the bidder's commitment to the MPLs within ten (10) calendar days after receiving the notice of award.

A bidder who does not commit to meet the MPLs, but has solicited a minimum of five MBEs and five WBEs subcontractors and five MBEs and five WBEs supplies, must do the following:

1. Complete and sign Certification (Form 16A);
2. Complete Form 16B – Record of MBE/WBE Solicitations and Commitments; and
3. Submit the completed Certification (Form 16A), the Record of MBE/WBE Solicitations and Commitments (Form 16B), copies of the MBE/WBE quotes that it received, and other applicable documentation concurrently with its bid.

Bidders must include information on the Record of MBE/WBE Solicitations And Commitments (Form 16B) identifying all MBEs and WBEs solicited, all MBE and WBE quotes received (solicited and unsolicited) and all MBEs and WBEs to which it has made commitments.

A bidder which does not commit to the MPLs and who has not solicited five MBEs and five WBEs subcontractors and five MBEs and five WBEs suppliers, must do the following:

1. Include in its bid documents the reason(s) that it did not solicit a minimum of five MBEs and five WBEs for subcontracting and five MBEs and five WBEs for supplies.
2. Complete and sign Form 16A - Certification;
3. Complete Form 16B - Record of MBE/WBE Solicitations and Commitments; and
4. Submit the completed Certification (Form 16A), the Record of MBE/WBE Solicitation And Commitments (Form 16B), copies of MBE/WBE quotes that it received, and other applicable documentation concurrently with its bid.



<p>Bidders must include information on Form 16B - Record of MBE/WBE Solicitations And Commitments identifying all MBEs and WBEs solicited, all MBE and WBE quotes received (solicited and unsolicited) and all MBEs and WBEs to which it has made commitments.</p>	
(a)	<p>MBE/WBE subcontractors and suppliers will be credited toward the MPLs at 100 percent of the total dollar value of the subcontract/supply contract. Suppliers also are credited at 100 percent. Non-stocking suppliers, which are commonly and ordinarily the custom in the industry and a part of the industry's trade practice, also are credited at 100 percent of the total dollar value of the supply contract; non-stocking suppliers, which are not commonly and ordinarily the custom in the industry nor a part of the industry's trade practice, are not credited.</p>
(b)	<p>If the prime bidder is an MBE or WBE firm, the value of the prime bidder's contract will not be credited towards the MPL. All prime bidders, including MBE/WBE prime bidders, are expected to comply.</p>
(c)	<p>MBE/WBE subcontractors must perform at least seventy-five percent of the subcontract, not including cost of materials, with their own employees to be counted toward the MPLs.</p>
(d)	<p>A firm that is both an MBE and a WBE will receive credit toward the MPLs as either an MBE or WBE but not in both. Bidders must indicate on the Form 16B – Record of Solicitations and Commitments- whether the MBE/WBE is being listed as MBE or WBE. If the bidder does not indicate the category within which it is using the firm, the BMWBO at its discretion shall credit the firm as either MBE or WBE.</p>
<p>Responsiveness</p>	
(a)	<p>A bidder which submits the signed Certification (Form 16A), shall be presumed to be responsive. The bidder will be required to provide detailed information including but not limited to copies of quotes and any contractors or letters of intent documenting its commitment to the MPLs within ten (10) calendar days of a DGS request. Failure to provide the documentation, satisfactory to the Department, detailing commitments made to MBEs and WBEs within ten calendar days after notice of award from the DGS shall result in rejection of the bid as non-responsive and the bidder's bid security shall be forfeited as liquidated damages for the bid default.</p>
(b)	<p>A bidder who does not commit in its bid documents to meet the MPLs must submit a completed Form 16A and 16B with its bid and must submit copies of all quotes (solicited and unsolicited) received from MBEs and WBEs. The Bidder must comply with the following requirements in order to be considered responsive:</p>



(i)	<p><u>Minimum Solicitation Requirement</u> Except as provided in subsections (iv) and (v) below, where the bid amount exceeds \$50,000 and the bidder does not commit to meet the MPLs, the bidder must solicit proposals from a <u>minimum</u> of five Department-certified MBE Subcontractors, five Department-certified WBE Subcontractors, five Department-certified MBE Suppliers, and five Department-certified WBE Suppliers. For clarity, unless the bidder commits to meeting the MPL for MBEs, the Bidder must solicit a <u>minimum</u> of five MBE Subcontractors and five MBE Suppliers. Similarly, unless the bidder commits to meeting the MPL for WBEs, the bidder must solicit a <u>minimum</u> of five WBE Subcontractors and five WBE Suppliers.</p>
(ii)	<p><u>Work Area.</u> For subcontractors, solicitations must be made in the Work Area, which for the purposes of the Department’s MBE/WBE Policy is defined as the county in which the work is to be performed, adjoining counties, and any other county within a 50-mile radius of the job site. For subcontractors, except as provided in part (iv) below, if fewer than five eligible, Department-certified MBEs or five eligible, Department-certified WBEs exist within the Work Area, the bidder shall solicit from each category the maximum possible number of certified entities within the Work Area and solicit the remaining required number of certified entities outside of the Work Area.</p>
(iii)	<p><u>Timely Solicitations.</u> The bidder must initiate all MBE/WBE solicitations no later than five (5) business days prior to the scheduled bid opening date.</p>
(iv)	<p><u>Exemption of Minimum Solicitation Requirement for Subcontracting.</u> A bidder who will perform the contract work with its own forces is exempt from the minimum solicitation requirements for subcontractors only. If the bidder will perform the work with its own forces, it must provide an explanation on the Form 16A under statement 3.</p>
(v)	<p><u>Exemption of Minimum Solicitation Requirement for Supplies.</u> A bidder who will not need to procure supplies from any supplier or other outside resource is exempt from the minimum solicitation requirements for suppliers only. If the bidder will obtain no supplies from any resources outside of its own company, it must provide an explanation on the Form 16A under statement 3.</p>



	<p>(vi) <u>Written Explanations</u> A bidder who does not commit to meet both MPLs must include a written explanation of its failure to commit to both MPLs on Form 16A under statement 2 or 3. This explanation must demonstrate that the bidder has not engaged in discriminatory practices. A bidder who does not meet the minimum solicitation requirement, including the exceptions identified in subsections iv and v above, must provide a written explanation of its failure to do so on Form 16A under statement 3.</p>
	<p>(vii) <u>Solicitations</u> Mailings intended to provide notice of a contractor's interest in bidding a construction contract to large numbers of MBEs and WBEs will not be deemed solicitations, but rather will be treated as informational notification only. A bidder should only solicit MBE/WBE subcontractors, manufacturers or suppliers whose work, material, or supplies are within the project scope and are related to project line items or portions thereof. Limited numbers of, or nonexistent, MBEs or WBEs in a geographic area, by itself, is not a reason for failing to solicit subcontractors, manufacturers or suppliers. Bidders must indicate whether minority or women businesses were solicited for each type of work the bidder expects to subcontract for and for all materials which the bidder expects to procure and, if not, the reason(s) solicitations were not made. The bidder must submit with its bid an example of its request for quotation issued to MBE and WBE contractors and suppliers.</p>
	<p>(viii) <u>DGS Certification</u> The BMWBO will credit only DGS-certified MBEs or WBEs toward a bidder's MPLs.</p>
	<p>(ix) <u>Commitments</u> Bidders must indicate the reason why it has not committed to an MBE or WBE for a type of subcontract work or for certain supplies in any area where a quote was received from an MBE or WBE. Where the bidder receives no quotations and makes no commitments to MBEs or WBEs, the bidder must specify on Form 16B - Record of MBE/WBE Solicitations And Commitments that no quotes were received. If there is another reason why no commitments were made, then provide this reason. If the bidder fails to use a quote from an MBE or WBE because the bidder feels the quote was not competitive, the bidder must submit a copy of the lower or more competitive quote(s).</p>



(c) Failure to properly complete and submit Form 16A - Certification, and Form 16B - Record of MBE/WBE Solicitations And Commitments, and the required documentation with the bid shall result in the rejection of the bid. Failure to comply with the requirements in (I) through (ix) of subparagraph 2(b) above shall also result in rejection of the bid as not responsive. If there is a technical deficiency in the information submitted on the Form, or if some or all of the required documentation is not submitted with the bid, or if the Department requests an explanation for the bidder's failure to comply with subparagraph 2(b)(iii), then the Department, in its sole discretion, may notify the bidder by facsimile transmission or by express mail that the bidder has two (2) business days from the date of receipt of the notification to correct the deficiency. If the deficiency is not corrected within the two (2)-business day period, the bid will be rejected as nonresponsive. The two (2)-business day period is provided at the Department's discretion. The bidder is expected and required to make the necessary efforts regarding MBE and WBE subcontractors and suppliers five (5) business days prior to submission of the bid documents. A bidder who has not committed to meet the MPLs shall not be given the opportunity during the two (2)-business day period to solicit potential MBE/WBE subcontractors and supplies. **If a bidder fails to respond with the requested documentation within the two (2)-business day period, the Department may charge the difference between the nonresponsive bidder's bid price and the next responsive bidder's bid price against the nonresponsive bidder's bid security.** Even if the Form 16A – Certification and Form 16B - Record of MBE/WBE Solicitations And Commitments are submitted and the bidder provides the documentation requested by the DGS to establish its solicitations and commitments, the DGS may also reject the bid if it determines that the bidder has discriminated against MBEs and/or WBEs in its solicitations and commitments to subcontractors or suppliers for the project.

(d) Upon notice from the Department of the need to remedy any deficiency in the MBE/WBE submission requirements, the bidder should fully review the requirements as well as its submission and the subsequently provided information to ensure that the submission and the subsequently provided information fully comply with the requirements section A.31 and Form 16. The Department of General Services disclaims any and all responsibility for notifying the bidder of all deficiencies.

(e) If a bidder is determined to be responsive, it does not mean that the bidder will be awarded the contract.

Responsibility

(a) A bidder who does not commit to meet the MPLs for MBEs or WBEs shall meet the following standards for review:



(i)	The bidder was not motivated by considerations of race or gender in failing to commit to the MPLs. If the bidder receives a solicited or unsolicited quote and does not commit to all or any portion of the quote, the bidder must provide a written explanation on Form 16A why the quote was not used, or why only a portion of the quote was used. The bidder must also furnish a copy of any competitive quote(s).
(ii)	The bidder must show that minority and women businesses were not treated less favorably than other businesses in the contract solicitation and commitment process.
(iii)	The bidder's solicitation and commitment decisions were not based upon policies, which discriminate against MBEs or WBEs.
(b)	Commitments to MBE and WBE firms made prior to contract award must be maintained throughout the term of any resulting contract, unless the BMWBO has given prior written approval to a change in commitment to these firms.
(c)	If the DGS selects a lower base bid, the DGS may reduce the MBE/WBE commitments accordingly to reflect the reduction in the contract amount or changes in the contract scope. However, the MBE/WBE commitments remain intact if the deleted work does not affect the commitments.
Access to Information	
The BMWBO and the Office of the Inspector General may obtain documents and information that may be required to ascertain bidder or contractor responsibility from any bidder, contractor, subcontractor, supplier or manufacturer. If the bidder fails to provide requested information, the Department may declare the bidder not responsible. Information the Department obtains during a review of a firm's solicitation and commitment process will be maintained on a confidential basis, to the extent permitted by law.	
MBE/WBE Certification	
(a)	The BMWBO will not credit a bidder for MBE/WBE manufacturers, subcontractors or suppliers that are not DGS-certified as MBEs or WBEs. All firms listed in the bid documents – including out-of-state firms – must be DGS-certified as an MBE or WBE to receive credit.
(b)	DGS certification of an entity as an MBE or WBE means only that the applicant for certification has submitted information that qualifies it as an MBE or WBE in terms of its ownership and control. DGS certification does not imply, and no bidder shall infer, that the Department has in any way investigated or approved the entity's competence to perform work.



- (c) Under the Act of December 21, 1984, No. 230, P.L. 210, 18 Pa. C.S.A. § 4017.2, a person commits a felony of the third degree, if, in the course of business, he or she engages in deception relating to MBE/WBE certification.

The Contract Documents

The bid of the successful bidder, including the completed MBE/WBE Solicitation/Commitment Sheet and accompanying documents regarding solicitation and commitments to MBEs and WBEs, becomes part of the contract.

Resources

The Bureau of Minority and Women Business Opportunities (BMWBO) is available for technical assistance to all bidders submitting proposals for this contract. A listing of Department-certified MBEs and WBEs is incorporated in the contract documents. Department certification of an entity as an MBE/WBE means only that the applicant for certification has submitted information that qualifies it as an MBE/WBE in terms of its ownership and control. It does not imply, and no bidder shall infer, that the Department has in any way investigated or approved the entity's competence to perform work.

VI. DISADVANTAGED BUSINESS UTILIZATION PROGRAM

The Commonwealth's Disadvantaged Business (DB) Program promotes contracting and subcontracting opportunities to eligible businesses so that they might participate in State contracting. Prime contractors are encouraged to consider disadvantaged businesses when seeking supplies and services their own companies cannot provide. The Commonwealth's DB Program utilizes the following types of disadvantaged businesses—Small Disadvantaged Businesses and Socially Disadvantaged Businesses.

A. Disadvantaged Program Award Point System

In the RFP process, contracts are awarded according to a point system. Each proposal is evaluated, and points are assigned for the technical aspect of the proposal, cost, and Disadvantaged Business participation. The total number of these points determines which offeror will be selected for contract negotiation.

A prime contractor can earn Disadvantaged Business points according to the following priority ranking. The higher the ranking, the greater the potential points.



Table 2.03 Disadvantaged Business Points

Priority Rank	Type of Disadvantaged Business Participation
1	Small Disadvantaged Business as prime contractor
2	Non-Disadvantaged Business prime contractor establishing joint venture with Small Disadvantaged Business
3	Non-Disadvantaged Business prime contractor subcontracting to Small Disadvantaged Business(s).
4	Socially Disadvantaged Business as prime contractor

B. Disadvantaged Business Verification Certification

The prime contractor is responsible for verifying the Disadvantaged Business status of listed subcontractors. It is the prime contractor’s responsibility to provide:

- A Small Disadvantaged Businesses certified by the BMWBO as an MBE/WBE must provide a photocopy of their BMWBO certificate.
- Small Disadvantaged Businesses certified by the U.S. Small Business Administration pursuant to Section 8(a) of the Small Business Act (15 U.S.C. § 636(a)) as an 8(a) or small disadvantaged business must submit proof of U.S. Small Business Administration certification. The owners of such businesses must also submit proof of United States citizenship.
- All businesses claiming Small Disadvantaged Business status, whether as a result of BMWBO certification or U.S. Small Business Administration certification as an 8(a) or small disadvantaged business, must attest to the fact that the business has 100 or fewer employees.
- All businesses claiming Small Disadvantaged Business status, whether as a result of BMWBO certification or U.S. Small Business Administration certification as an 8(a) or small disadvantaged business, must submit proof that their gross annual revenues are less than \$20,000,000 (\$25,000,000 for those businesses in the information technology sales or service business). This can be accomplished by including a recent tax return or audited financial statement.



C. Disadvantaged Business Submittal

All businesses claiming status as a Socially Disadvantaged Business must include in the Disadvantaged Business Submittal of the proposal clear and convincing evidence to establish that the business has personally suffered racial or ethnic prejudice or cultural bias stemming from the business person's color, ethnic origin or gender. The submitted evidence of prejudice or bias must:

1. Evidence of Prejudice or Bias

- Be rooted in treatment that the business person has experienced in American society, not in other countries.
- Show prejudice or bias that is chronic and substantial, not fleeting or insignificant.
- Indicate that the business person's experience with the racial or ethnic prejudice or cultural bias has negatively impacted his or her entry into and/or advancement in the business world.

The BMWBO shall determine whether the Offeror has established that a business is socially disadvantaged by clear and convincing evidence.

2. Required Information

In addition to the above verifications, the Offeror must include in the Disadvantaged Business Submittal of the proposal the following information:

- The name and telephone number of the Offeror's project (contact) person for the Small Disadvantaged Business.
- The business name, address, name and telephone number of the primary contact person for each Small Disadvantaged Business included in the proposal. The Offeror must specify each Small Disadvantaged Business to which it is making commitments. The Offeror will not receive credit for stating that it will find a Small Disadvantaged Business after the contract is awarded or for listing several businesses and stating that one will be selected later.
- The specific work, goods or services each Small Disadvantaged Business will perform or provide.
- The estimated dollar value of the contract to each Small Disadvantaged Business.



- Of the estimated dollar value of the contract to each Small Disadvantaged Business, the percent of the total value of services or products purchased or subcontracted that will be provided by the Small Disadvantaged Business directly.
- The location where each Small Disadvantaged Business will perform these services.
- The time frame for each Small Disadvantaged Business to provide or deliver the goods or services.
- The amount of capital, if any, each Small Disadvantaged Business will be expected to provide.
- The form and amount of compensation each Small Disadvantaged Business will receive.
- For a joint venture agreement, a copy of the agreement signed by all parties.
- For a subcontract, a signed subcontract or letter of intent.

The Offeror is required to submit only one copy of its Disadvantaged Business Submittal. The submittal shall be clearly identified as Disadvantaged Business information and sealed in its own envelope, separate from the remainder of the proposal.

3. Contractual Obligation

The Offeror must include the dollar value of the commitment to each Small Disadvantaged Business in the same sealed envelope with its Disadvantaged Business Submittal. The following will become a contractual obligation once the contract is fully executed:

- The amount of the selected Offeror's Disadvantaged Business commitment;
- The name of each Small Disadvantaged Business; and
- The services each Small Disadvantaged Business will provide, including the time frame for performing the services.

i) Subcontractors

A Small Disadvantaged Business can be included as a subcontractor with as many prime contractors as it chooses in separate proposals.



An Offeror that qualifies as a Small Disadvantaged Business and submits a proposal as a prime contractor is not prohibited from being included as a subcontractor in separate proposals submitted by other Offerors.

ii) Participation Rates

All contracts containing Disadvantaged Business participation and/or Enterprise Zone Small Business participation must also include a provision requiring the selected contractor to meet and maintain those commitments made to Disadvantaged Businesses and/or Enterprise Zone Small Businesses at the time of proposal submittal or contract negotiation, unless a change in the commitment is approved by the BMWBO. All contracts containing Disadvantaged Business participation and/or Enterprise Zone Small Business participation must include a provision requiring Small Disadvantaged Business subcontractors, Enterprise Zone Small Business subcontractors and Small Disadvantaged Businesses or Enterprise Zone Small Businesses in a joint venture to perform at least 50 percent of the subcontract or Small Disadvantaged Business/Enterprise Zone Small Business participation portion of the joint venture.

iii) Proposed Changes

The selected contractor's commitments to Disadvantaged Businesses and/or Enterprise Zone Small Businesses made at the time of proposal submittal or contract negotiation shall be maintained throughout the term of the contract. Any proposed change must be submitted to the BMWBO, which will make a recommendation to the Contracting Officer regarding a course of action.

If a contract is assigned to another contractor, the new contractor must maintain the Disadvantaged Business participation and/or Enterprise Zone Small Business participation of the original contract.

iv) Quarterly Utilization Report

The selected contractor shall complete the Prime Contractor's Quarterly Utilization Report (or similar type document containing



the same information) and submit it to the contracting officer of the Issuing Office and the BMWBO within 10 workdays at the end of each quarter the contract is in force. This information will be used to determine the actual dollar amount paid to Small Disadvantaged Business and/or Enterprise Zone Small Business subcontractors and suppliers, and Small Disadvantaged Business and/or Enterprise Zone Small Business participants involved in joint ventures. Also, this information will serve as a record of fulfillment of the commitment the selected contractor made and for which it received Disadvantaged Business and Enterprise Zone Small Business points. If there was no activity during the quarter then the form must be completed by stating “No activity in this quarter.”

NOTE: EQUAL EMPLOYMENT OPPORTUNITY AND CONTRACT COMPLIANCE STATEMENTS REFERRING TO COMPANY EQUAL EMPLOYMENT OPPORTUNITY POLICIES OR PAST CONTRACT COMPLIANCE PRACTICES DO NOT CONSTITUTE PROOF OF DISADVANTAGED BUSINESSES STATUS OR ENTITLE AN OFFEROR TO RECEIVE CREDIT FOR DISADVANTAGED BUSINESSES UTILIZATION.

VII. DESIGN PROFESSIONAL SELECTION PROGRAM

In furtherance of the stated policy of the Commonwealth to assist small and disadvantaged businesses in learning how to do business with Commonwealth agencies, the Selections Committee encourages both responses from minority-owned businesses (MBEs) and woman-owned businesses (WBEs) and responses that include consultants and/or joint venture opportunities with MBEs or WBEs.

Commonwealth encouragement of MBE/WBE participation by making the use of Commonwealth-certified MBEs/WBEs a factor in the evaluation of those applying for consideration as Commonwealth design professionals helps to insure that disadvantaged businesses will be equitably treated in professional selections. To foster the policy, the Selections Committee considers participation by Commonwealth-certified MBEs/WBEs as one of the factors in its selection process for design professional agreements.



Firms wishing to participate in Commonwealth design professional agreements can submit a 150 Form¹ to DGS' Bureau of Engineering/Architecture (which describes the firm's experience, team members, and abilities.) The form also gives firms the opportunity to specify whether the professional or consultants being proposed on the projects are Commonwealth-certified MBEs or WBEs. Where the proposing firm is itself a Commonwealth-certified MBE or WBE, the firm should state that fact in its proposal. "Commonwealth-certified" includes businesses certified by the Department's Bureau of Minority and Women Business Opportunities (BMWBO).

The Selections Committee conducts a public meeting to review applications from interested firms and recommends three firms for each project. This recommendation is based upon established criteria. One of the criteria is MBE/WBE participation in the design team in accordance with established policy.²

The Secretary of the DGS chooses one of the three firms recommended by the Committee and representatives of the DGS' Bureau of Engineering/Architecture negotiate the fee and the MBE/WBE participation with the firm.

¹ Form 150 can be found on DGS' website at www.dgs.state.pa.us/dgs/lib/dgs/forms/constr/150asp.dot.

² The MBE/WBE Policy can be found on DGS' web site at www.dgs.state.pa.us/dgs/lib/dgs/prosel/MBE_WBE_Policy%28021704%29.pdf.



3

LEGAL ANALYSIS

I. INTRODUCTION

This section discusses the state of the law applicable to affirmative action programs in the area of public contracting. Two United States Supreme Court decisions, *City of Richmond v. J.A. Croson Co.*¹ (*Croson*) and *Adarand v. Peña*² (*Adarand*), raised the standard by which federal courts will review such programs. In those decisions, the Court announced that the constitutionality of affirmative action programs that employ racial classifications would be subject to “strict scrutiny.” An understanding of *Croson*, which applies to state and local governments, is necessary in developing sound Minority-Owned Business Enterprise (MBE) and Woman-Owned Business Enterprise (WBE) programs. Broad notions of equity or general allegations of historical and societal discrimination against minorities are insufficient to meet the requirements of the Equal Protection Clause of the Constitution. Instead, governments may adopt race-conscious programs only as a remedy for identified discrimination found in a disparity study, and this remedy must impose a minimal burden upon unprotected classes.

Adarand, which followed *Croson* in 1995, applied the strict scrutiny standard to federal programs. The U.S. Department of Transportation (USDOT) amended its regulations to focus on outreach to Disadvantaged Business Enterprises (DBEs). Although the Supreme Court heard argument in *Adarand* in the October 2001 term, it subsequently decided that it had improvidently granted *certiorari*. Thus, the amended USDOT regulations continue to be in effect.

A caveat is appropriate here. The review under strict scrutiny is fact-specific. Nevertheless, three post-*Croson* Federal Court of Appeals opinions provide guidelines for the evidence that should be adduced if race-conscious remedies are put in place. The Third, Eleventh, and

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

² *Adarand Constructors, Inc. v. Federico Peña*, 515 U.S. 200 (1995).



Tenth Circuits assessed the disparity studies in question on their merits instead of disposing of the cases on procedural issues.³

From a legal standpoint, the purpose of this study is three-fold: (1) to examine the conditions that exist in the Commonwealth of Pennsylvania's market area; (2) to determine from an analysis of those conditions, whether, pursuant to the *Croson* model, the conditions justify race-conscious affirmative action programs; and (3) to make appropriate recommendations if the findings support such programs.

II. STANDARDS OF REVIEW

The standard of review represents the measure by which a court evaluates a particular legal issue. This section discusses the standard of review that the Supreme Court set for state and local programs in *Croson* and, potentially, federal programs in *Adarand*. It also discusses lower courts' interpretations of these two Supreme Court cases and evaluates the implications for program design that arise from these decisions.

A. Race-Conscious Programs

In *Croson*, the United States Supreme Court affirmed that pursuant to the 14th Amendment, the proper standard of review for state and local race-based programs is strict scrutiny.⁴ Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.⁵ The Court recognized that a state or local entity may take action, in the form of a MBE program, to rectify the effects of *identified, systemic racial discrimination* within its jurisdiction.⁶ Justice O'Connor, speaking for the majority, articulated various methods of demonstrating discrimination and set forth guidelines for

³ *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), on remand, 893 F. Supp. 419 (E.D. Pa 1995), aff'd, 91 F.3d 586 (3d Cir. 1996) cert. denied. 519 U.S. 1113 (1997); *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996), aff'd, 122 F. 3d 895 (11th Cir. 1997); and *Concrete Works of Colorado, Inc. v. City and County of Denver Colo.*, 823 F. Supp 821 (D. Colo 1993), rev'd. 36 F.3d 1513 (10th Cir. 1994) ("*Concrete Works I*"), cert. denied. 514 U.S. 1004 (1995) on remand, 86 F.Supp 2d 1042 (D. Colo. 2000), rev'd. 321 F.3d 950 (10th Cir. 2003) ("*Concrete Works II*"), cert. denied. 540 U.S. 1027 (2003). In the federal court system, there are primarily three levels of courts: the Supreme Court, appellate courts, and district courts. The Supreme Court is the highest ranking federal court, and its rulings, when joined by the majority of the court are binding on all other federal courts. Appellate court rulings are binding on all district courts in their geographical area and are used for guidance in other circuits. District court rulings, while providing insight into an appropriate legal analysis, are not binding on other courts at the district, appellate, or Supreme Court levels.

⁴ *Croson*, 488 U.S. at 493-95.

⁵ *Id.* at 493.

⁶ *Croson*, 488 U.S. at 509.



crafting MBE programs so that they are “narrowly tailored” to address systemic racial discrimination.⁷ The specific evidentiary requirements are detailed in Section IV.

B. Woman-Owned Business Enterprise

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

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

In other contexts, the Supreme Court has acknowledged that in limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists the members of that sex, which are disproportionately burdened.¹¹

The Third Circuit, in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)*, ruled in 1993 that the standard of review that governs WBE programs is different than the standard imposed upon MBE programs.¹² The court rejected

⁷ *Id.* at 501-02. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting: compelling interest and narrowly tailored remedies. The Supreme Court in *Croson* and subsequent cases provides fairly detailed guidance on how those concepts are to be treated in contracting.

⁸ See e.g., *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), cert. denied, 502 U.S. 1033(1992); *Philadelphia*, 91 F.3d 586 (3d Cir. 1996), cert. denied, 502 U.S. 1033 (1992); *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996), aff’d., 122 F.3d 895 (11th Cir. 1997), cert. denied, 188 S.Ct. 1186 (1998). *Concrete Works II*, 321 F.3d at 959, is in accord.

⁹ *Craig v. Boren*, 429 U.S. at 198-99 (1976).

¹⁰ *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). See also *Michigan Road Builders Ass’n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), aff’d., 109 S.Ct. 1333 (1989).

¹¹ *Id.* at 728.

¹² *Philadelphia*, 6 F.3d at 1000-01.



the application of strict scrutiny to gender-based classifications.¹³ Instead, the Third Circuit held that whereas MBE programs must be “narrowly tailored” to a “compelling state interest,” WBE programs must be “substantially related” to “important governmental objectives.”¹⁴ An MBE program would only survive constitutional scrutiny 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.¹⁵

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.”¹⁶ The justification is valid only if members of the gender benefitted 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.¹⁷

The Eleventh Circuit also applies intermediate scrutiny.¹⁸ The district court in *Engineering Contractors Association of South Florida v. Metropolitan Dade County (Dade County)*, which was affirmed by the Eleventh Circuit U.S. Court of Appeals, cited the Third Circuit’s 1993 formulation in *Philadelphia*: “[T]his standard requires the [county] to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.”¹⁹ Although the *Dade County* district court applied the intermediate scrutiny standard, it queried whether the Supreme Court decision in *United States v. Virginia*,²⁰ finding the all male program at Virginia Military Institute unconstitutional, signaled a heightened level of scrutiny: parties who seek to defend gender-based government action must demonstrate an “exceedingly persuasive justification” for that action.²¹ The *Dade County* appellate court echoed that speculation but likewise concluded that “[u]nless and until the Supreme Court tells us otherwise, intermediate scrutiny remains

¹³ *Id.* at 1001.

¹⁴ *Id.* at 1009.

¹⁵ *Id.* at 1002, citing *Croson*.

¹⁶ *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 940 (9th Cir. 1987).

¹⁷ *Id.* at 940.

¹⁸ *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994), rehearing denied, 60 F.3d 717 (11th Cir. 1994).

¹⁹ *Dade County*, 122 F.3d at 909, (citing *Philadelphia*, 6 F.3d at 1010 (3d Cir. 1993)).

²⁰ 116 S.Ct. 2264 (1996).

²¹ *Dade County*, 943 F.Supp. at 1556.



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.”²²

The *Dade County* appellate court noted that, at the time, by articulating the “probative evidence” standard, the Third Circuit in *Philadelphia* was the only federal appellate court that explicitly attempted to clarify the evidentiary requirement applicable to gender-conscious programs.²³ It went on to interpret that standard to mean that “evidence offered in support of a gender preference must not only be ‘probative’ [but] must also be ‘sufficient’.”²⁴ 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;²⁵ 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”²⁶ but instead ensuring that the affirmative action is “a product of analysis rather than a stereotyped reaction based on habit.”²⁷ This determination turns on whether there is evidence of past discrimination in the economic sphere at which the affirmative action program is directed.²⁸ 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.”²⁹

C. Local Business Enterprise

The Ninth Circuit Court of Appeals applied the rational basis standard when evaluating LBE programs, holding that a local entity may give a preference to local businesses to address the economic disadvantages those businesses face in doing business within the city or county.³⁰

In *AGCC I*, a pre-*Croson* case, the City and County of San Francisco conducted a detailed study of the economic disadvantages faced by San Francisco-based businesses versus businesses located outside the City and County boundaries. The study showed a competitive

²² *Dade County*, 122 F.3d at 908.

²³ *Id.* at 909.

²⁴ *Id.*

²⁵ *Id.* at 910 (citing *Ensley Branch*, 31 F.3d at 1580).

²⁶ *Id.* (citing *Hayes v. North State Law Enforcement Officers Ass’n.*, 10 F.3d 207, 217 (4th Cir.1993), racial discrimination case).

²⁷ *Id.* (citing *Philadelphia*, 6 F.3d at 1010 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 582-583 (1990)).

²⁸ *Id.* (citing *Ensley Branch*, 31 F.3d at 1581).

²⁹ *Dade County*, 122 F.3d at 929. However, Judge Posner, in *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001), questioned why there should be a lesser standard where the discrimination was against women rather than minorities.

³⁰ *AGCC I*, 813 F.2d at 943. Based on the disparity study findings about locally funded operations, such a response may be appropriate in that context.



disadvantage in public contracting for businesses located within the City versus businesses from other areas.

San Francisco-based businesses, conducting business within the City, had higher administrative costs. Such costs included higher taxes, rents, wages, insurance rates, and benefits for labor. In upholding the LBE Ordinance, the Ninth Circuit held that “. . . the City may rationally allocate its own funds to ameliorate disadvantages suffered by local business, particularly where the city itself creates some of the disadvantages.”³¹

D. Disadvantaged Business Enterprise Programs

In response to the United States Supreme Court’s decision in *Adarand*, which applied the strict scrutiny standard to federal programs, the U. S. Department of Transportation (USDOT) revised provisions of the DBE rules. Effective March 1999, the USDOT replaced 49 CFR Part 23 of its DBE program rules, with 49 CFR Part 26. The goal of promulgating the new rule was to modify the DBE program consistent with the “narrow tailoring” requirement of *Adarand*. The new provisions apply only to the airport, transit, and highway financial assistance programs of the USDOT.

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:³²

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

³¹ *Id.* at 943.

³² These were the issues on which the district court in Philadelphia reviewed the disparity study before it.



Thus, a disparity study must be analytically rigorous, at least to the extent that the data permits, if it is to withstand legal challenge.³³

A. Strong Basis in Evidence

Croson requires defendant jurisdictions to produce a “strong basis in evidence” that the objective of the challenged MBE program is to rectify the effects of discrimination.³⁴ The issue of whether or not the government has produced a strong basis in evidence is a question of law.³⁵ 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.³⁶

The adequacy of the government’s evidence is “evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction].”³⁷ The onus is upon the jurisdiction to provide a factual predicate which is sufficient in scope and precision to demonstrate that contemporaneous discrimination necessitated the adoption of the MBE program. The various factors which must be considered in developing and demonstrating a strong factual predicate in support of MBE programs are discussed in Section IV.

B. Ultimate Burden of Proof

The party challenging an MBE program will bear the ultimate burden of proof throughout the course of the litigation despite the government’s obligation to produce a strong factual predicate to support its program.³⁸ The plaintiff must persuade the court that the program is constitutionally flawed by challenging the government’s factual predicate for the program or by demonstrating that the program is overly broad.

³³ *Croson*, 488 U.S. 469.

³⁴ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513 at 1522 (10th Cir. 1994), (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 292 (1986), rehearing denied, 106 S.Ct. 3320 (1986); see *Croson* 488 U.S. at 509 (1989).

³⁵ *Id.* (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941 (D. Conn. 1992), judgement vacated, 41 F.3d 62 (C.A.2 1994).

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

³⁷ *Id.* (citing *Croson* 488 U.S. at 498).

³⁸ *Id.* (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-278 (1986).



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)*.³⁹ She stated that following the production of the factual predicate supporting the program:

[I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored."⁴⁰

In *Philadelphia*, 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.⁴¹ That court wrote that the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered.⁴² 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.⁴³

The situation differs if the plaintiff's theory is that an agency's conclusions as to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, once the agency comes forward with evidence of facts alleged to justify its conclusions, the plaintiff has the burden of persuading the court that those facts are not accurate. However, the ultimate issue of whether a strong basis in evidence exists is an issue of law, and the burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue.⁴⁴

Concrete Works II made clear that 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 (2000): "[g]eneral criticism of disparity studies, as opposed to

³⁹ *Wygant v. Jackson Board of Education*, 476 U.S. 267, 293 (1986).

⁴⁰ *Id.*

⁴¹ *Philadelphia*, 91 F.3d at 597.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ At first glance, the position of the Third Circuit does not square with what the Eleventh Circuit announced as its standard in reviewing whether a jurisdiction has established the "compelling interest" required by strict scrutiny. That court said the inquiry was factual and would be reversed only if it was "clearly erroneous." However, the difference in formulation may have had to do with the angle from which the question is approached: If one starts with the disparity study – whether a compelling interest has been shown – factual issues are critical. If the focus is the remedy, because the constitutional issue of equal protection in the context of race comes into play, the review is necessarily a legal one.



particular evidence undermining the reliability of the particular disparity study is of little persuasive value.”⁴⁵

The Supreme Court’s disposition of plaintiff’s petition for *certiorari* strongly supports the conclusion that plaintiff has the burden of proof. Supreme Court review of appellate decisions is discretionary, in that four justices have to agree, so normally little can be inferred from its denial. However, *Concrete Works* is not the typical instance. Justice Scalia concurred in *Croson* that strict scrutiny was required of race-conscious contracting programs. However, his antagonism there, and over the years, to the use of race is clear. Justice Scalia’s view is that governmental remedies should be limited to provable individual victims. That view is at the base of his written dissent, on which only Chief Justice Rehnquist joined, to the Court’s decision not to grant *certiorari* in *Concrete Works*.⁴⁶

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

IV. CROSON EVIDENTIARY FRAMEWORK

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

A. Active or Passive Participation

Croson requires that the local entity seeking to adopt a MBE program must have perpetuated the discrimination to be remedied by the program. However, the local entity need not be an

⁴⁵ *Concrete Works II*, 321 F.3d at 979.

⁴⁶ *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado*, 321 F.3d 950 (10th Cir. 2003), *petition for cert. denied*, 540 U.S. 1027 (2003) (“*Concrete Works II*”).



active perpetrator of such discrimination. Passive participation will satisfy this part of the court's strict scrutiny review.⁴⁷

An entity will be considered an "active" participant if the evidence shows that it has created barriers that actively exclude MBEs from its contracting opportunities. In addition to examining the government's contracting record and process, MBEs who have contracted or attempted to contract with that entity can be interviewed to relay their experiences in pursuing contracting opportunities with that entity.⁴⁸

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.⁴⁹ The *Croson* Court emphasized a government's ability to passively participate in private sector discrimination with monetary involvement, stating, "[I]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice."⁵⁰

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. In *Concrete Works I*, the Tenth Circuit considered a purely private sector definition of passive discrimination. Since no government funds were involved in the contracts analyzed in the case, the court questioned whether purely private sector discrimination is likely to be a fruitful line of inquiry.⁵¹ On remand, the district court rejected the three disparity studies offered to support the continuation of Denver's M/WBE program because each focused on purely private sector discrimination. Indeed, Denver's focus on purely private sector discrimination may account for what seemed to be a shift by the court away from the standard *Croson* queries of (1) whether there was a firm basis in the entity's contracting process to conclude that discrimination existed; (2) whether race-neutral remedies would resolve what was found;

⁴⁷ *Croson*, 488 U.S. at 509.

⁴⁸ *Wygant v. Jackson Board of Education*, 476 U.S. 267 at 275 (1985).

⁴⁹ *Croson*, 488 U.S. at 492; *Coral Construction*, 941 F.2d at 916.

⁵⁰ *Croson*, 488 U.S. at 492.

⁵¹ *Concrete Works I*, 36 F.3d at 1529. "What the Denver MSA data does not indicate, however, is whether there is any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. That is, we cannot tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a "a passive participant" in a system of racial exclusion practiced by elements of the local construction industry" [citing *Croson*]. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race and gender-conscious program. The record before us does not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and this may well be a fruitful issue to explore at trial."



and (3) whether any race-conscious remedies had to be narrowly tailored. The court noted that in the City of Denver’s disparity studies the chosen methodologies failed to address the following six questions:

- 1) whether there was pervasive discrimination throughout the Denver Metropolitan Statistical Area (MSA)
- 2) were all designated groups equally affected
- 3) was such discrimination intentional
- 4) would Denver’s use of such firms constitute “passive participation”
- 5) would the proposed remedy change industry practices
- 6) was the burden of compliance—which was on white male prime contractors in an intensely competitive, low profit margin business—a fair one⁵²

The court concluded that the City of Denver had not documented a firm basis of identified discrimination derived from the statistics submitted.⁵³

However, the Tenth Circuit on appeal of that decision completely rejected the district court’s analysis. The district court’s queries required Denver to *prove* the existence of discrimination. Moreover, the Tenth Circuit explicitly held that “passive” participation included private sector discrimination in the marketplace. The court, relying on *Shaw v. Hunt*,⁵⁴ a post-*Croson* Supreme Court decision, wrote as follows:

The *Shaw* Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 910. The City can satisfy this condition by identifying the discrimination “public or private, with some specificity.” *Id.* (quoting *Croson*, 488 U.S. at 504 (*emphasis added*)). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.*⁵⁵

The Tenth Circuit therefore 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

⁵² *Concrete Works*, 86 F.Supp. 2d at 1042 (D. Colo 2000).

⁵³ *Id.* at 61.

⁵⁴ 517 U.S. at 519 (North Carolina redistricting plan that classified voters by race was not narrowly tailored to serve a compelling state interest).

⁵⁵ *Concrete Works II*, 321 F.3d at 975-76.



in turn discriminated against M/WBE subcontractors in other private portions of their business.”⁵⁶ The court emphasized that its reading of *Croson*⁵⁷ and its own precedents supported that conclusion. Also, the court pointed out that the plaintiff, which had the burden of proof, failed to introduce controverting evidence and merely *argued* that the private sector was out of bounds and that Denver’s data was flawed.⁵⁸

Upholding Denver’s plan the court found that the disparities in MBE private sector participation, demonstrated with rate of business formation, and lack of access to credit which effected MBEs’ ability to expand in order to perform larger contracts, gave Denver a firm basis to conclude that there was actionable private sector discrimination. For technical legal reasons,⁵⁹ however, the court did not examine whether the consequent public sector remedy – i.e., one involving a goal requirement on the City of Denver’s contracts – was “narrowly tailored.” The court took this position despite plaintiff’s contention that the remedy was inseparable from the findings and that the court should have addressed the issue of whether the program was narrowly tailored.

Ten months later, in *Builders Association of Greater Chicago v. City of Chicago*,⁶⁰ the question of whether a public sector remedy is “narrowly tailored” when it is based on purely private sector discrimination was at issue. The district court reviewed the remedies derived from private sector practices with a more stringent scrutiny. It found that there was discrimination against minorities in the Chicago construction industry. However, it did not find the City of Chicago’s subcontracting goal an appropriate remedy because it was not “narrowly tailored” to address the documented private discrimination due to lack of access to credit for MBEs. The court also criticized the remedy because it was a “rigid numerical quota,” and there was no individualized review of MBE beneficiaries, citing Justice O’Connor opinion in *Gratz v. Bollinger*.⁶¹

⁵⁶ *Id.*, 321 F.3d at 976.

⁵⁷ *See also Shaw v. Hunt*, 517 U.S. 899 (1996), which it cited.

⁵⁸ Whether Denver had the requisite strong basis to conclude that there was discrimination was a question of law; that is, it was for the Tenth Circuit to decide. The standard by which the factual record before it was reviewed was “clearly erroneous.”

⁵⁹ Plaintiff had not preserved the issue on appeal. Therefore, it was no longer part of the case.

⁶⁰ 298 F.Supp 2d 725 (N.D.Ill. 2003).

⁶¹ 123 S.Ct, 2411, 2431 (2003), remand, 80 Fed. Appx. 417 C.A.6 (2003). *Croson* requires a showing that there was a strong basis for concluding that there was *discrimination* before a race-conscious remedy can be used in government contracting. In the University of Michigan cases that considered race-conscious admissions programs, a key element in the decisions is the Court acceptance of *diversity* as a constitutionally sufficient ground; it did not require a showing of past *discrimination* against minority applicants. If it had, the basis for a program would have disappeared. Discrimination is the historic concern of the 14th Amendment, while promoting diversity is of recent origin. The Court may have been disposed therefore to apply a more rigorous review of legislation based on diversity. The 14th Amendment’s prohibitions are directed against “state action.” The behavioral analysis of businesses that contract with state and local governments is a conceptual step away from the behavioral analysis of the same businesses private sector transactions.. As a result of this distinction, courts may apply the *Gratz* approach of more searching scrutiny to remedial plans based on private sector contracting.



The probative value of evidence of private sector practices also arose in *Builders Ass'n of Greater Chicago v. County of Cook*.⁶² In this case the Seventh Circuit cited *Associated General Contractors of Ohio, Inc. v. Drabik*⁶³ in throwing out a 1988 Cook County ordinance under which at least 30 percent of the value of prime contracts were to go to minority subcontractors and at least 10 percent to women owned businesses. Appellants argued that evidence of purely private sector discrimination justified a public sector program. However, the court pointed out that the program remedying discrimination in the private-sector would necessarily address only private-sector participation. In order to justify the public-sector remedy, the County would have had to demonstrate that it had been at least a passive participant in the discrimination by showing that it had infused tax dollars into the discriminatory private industry.

B. Systemic Discriminatory Exclusion

Croson clearly established that an entity enacting a business affirmative action program must demonstrate identified, systemic discriminatory exclusion on the basis of race or any other illegitimate criteria (arguably gender).⁶⁴ Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.⁶⁵ Using appropriate evidence of the entity's active or passive participation in the discrimination, as discussed above, the showing of discriminatory exclusion must cover each racial group to whom a

⁶² 256 F.3d 642 (7th Cir. 2001).

⁶³ 214 F.3d 730 (6th Cir. 2000), cert. denied sub nom. *Johnson v. Associated General Contractors of Ohio, Inc.*, 531 U.S. 1148 (2001).

⁶⁴ *Croson*, 488 U.S. 469. See also *Monterey Mechanical v. Pete Wilson et al.*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, 138 F.3d. 1270 (1998). The Fifth Circuit Court in *W.H. Scott Construction Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (1999), found that the City's MBE program was unconstitutional for construction contracts because minority participation goals were arbitrarily set and not based on any objective data. Moreover, the Court noted that had the City implemented the recommendations from the disparity study it commissioned, the MBE program may have withstood judicial scrutiny (the City was not satisfied with the study and chose not to adopt its conclusions). "Had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City's construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support the Department's 15% DBE-participation goal."

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

⁶⁵ *Id.* at 509.



remedy would apply.⁶⁶ Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

Croson enumerates several ways an entity may establish the requisite factual predicate. First, a significant statistical disparity between “the number of qualified minority contractors willing and able to perform a particular service,” and the number of such contractors actually engaged by an entity or by the entity’s prime contractors, may support an inference of discriminatory exclusion.⁶⁷ In other words, when the relevant statistical pool is used, a showing of gross statistical disparity alone “may constitute prima facie proof of a pattern or practice of discrimination.”⁶⁸

The *Croson* Court made clear that both prime and subcontracting data was relevant. The Court observed that “[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city’s construction expenditures.”⁶⁹ Subcontracting data is also an important means by which to assess suggested future remedial actions. Since the decision makers are different for the awarding of prime and subcontracts, the remedies for discrimination identified at a prime versus subcontractor level might also be different.

Second, “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”⁷⁰ Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.⁷¹ Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

In *Coral Construction*, the Ninth Circuit Court of Appeals further elaborated upon the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual

⁶⁶ *Id.* at 506. As the Court said in *Croson*, “[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.” See *North Shore Concrete and Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998), which rejected the inclusion of Native Americans and Alaskan Natives in the City’s program, citing *Croson*.

⁶⁷ *Id.* at 509.

⁶⁸ *Id.* at 501 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

⁶⁹ *Croson*, 488 U.S. at 502-03.

⁷⁰ *Id.* at 509.

⁷¹ *Id.*



predicate for an MBE program.⁷² 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.⁷³

Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.⁷⁴ Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”⁷⁵

1. Geographic Market

Croson did not speak directly to how the geographic market is to be determined. In *Coral Construction*, the Court of Appeals held that “an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction.”⁷⁶ Conversely, in *Concrete Works I*, the Tenth Circuit Court of Appeals specifically approved the Denver MSA as the appropriate market area since 80 percent of the construction contracts were let there.⁷⁷

Read together, these cases support a definition of market area that is reasonable rather than dictate a specific formula. Since *Croson* and its progeny did not provide a bright line rule for local market area, that determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.⁷⁸ Extra-jurisdictional evidence may be permitted where doing so is reasonably related to where the jurisdiction contracts.⁷⁹

⁷² *Coral Construction*, 941 F.2d at 919.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (quoting *International Brotherhood of Teamsters v. United States (Teamsters)*, 431 U.S. 324, 339 (1977)).

⁷⁶ *Coral Construction*, 941 F.2d at 925.

⁷⁷ *Concrete Works*, 823 F.Supp. 821, 835-836 (D.Colo. 1993); rev'd on other grounds, 36 F.3d 1513 (10th Cir. 1994).

⁷⁸ *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990); *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

⁷⁹ 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.



2. Current Versus Historical Evidence

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

On the one hand, *Croson* requires that an MBE program be "narrowly tailored" to remedy current evidence of discrimination.⁸⁰ 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 M/WBE program based upon outdated evidence.⁸¹ 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.⁸²

Pre-program data regarding an entity's utilization of M/WBEs prior to enacting the M/WBE program may be relevant to assessing the need for the agency to keep such a program intact. A possibly fruitful line of inquiry: an examination of whether different programmatic approaches in the same market area led to different outcomes in M/WBE participation. The Tenth Circuit reached this conclusion in *Concrete Works II*. It is permissible for a study to examine programs where there were no goals.

Similarly, the Eleventh Circuit in *Dade County* cautions that using post-enactment evidence (post-program data) may mask discrimination that might otherwise be occurring in the relevant market.

Thus, an entity should look both at pre-program and post-program data in assessing whether discrimination exists currently and analyze whether it would exist absent an M/WBE program.

⁸⁰ See *Croson*, 488 U.S. at 509-10.

⁸¹ *Id.* at 499, stating that "[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination".

⁸² See *AGCC II*, 950 F.2d 1401 at 1414 (consultant study looked at City's MBE utilization over a one year period). Ultimately dismissing plaintiff's case in *Behavioral Interventions v. Missouri Office of Administration*, Case No. 04-0872-CV-W-GAF (W. D. Mo. 2005), the district court criticized the age of the data on which the program was based (it was nine years old) (May 17, 2005). It is important in such situations that the jurisdiction has an updated study.



3. Statistical Evidence

To determine whether statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the “disparity index,” which consists of the percentage of minority (or women) contractor participation in local contracts divided by the percentage of minority (or women) contractor availability or composition in the population of available firms in the local market area.⁸³ 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.

The Third Circuit Court of Appeals, in *Philadelphia*, ruled that the “relevant statistical pool” includes those businesses that not only exist in the marketplace, but that are qualified and interested in performing the public agency’s work. In that case, the Third Circuit rejected a statistical disparity finding where the pool of minority businesses used in comparing utilization to availability were those that were merely licensed to operate in the City of Philadelphia. Merely being licensed to do business with the City does not indicate either a willingness or capability to do work for the City. As such, the court concluded this particular statistical disparity did not satisfy *Croson*.⁸⁴

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

Second, M/WBE dollar participation can be compared to M/WBE availability. This could show a disparity between the award of contracts by an entity in the relevant locality/market area to available majority contractors and the award of contracts to M/WBEs. Thus, in *AGCC II*, an independent consultant’s study compared the number of available MBE prime contractors in the construction industry in San Francisco with the amount of contract dollars awarded to San Francisco MBEs over a one-year period. The study found that available

⁸³ 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).

⁸⁴ *Philadelphia*, 91 F.3d 586. The courts have not spoken to the non-M/WBE component of the disparity index. However, if only as a matter of logic, the “availability” of non-M/WBEs requires that their willingness to be government contractors be established. The same measures used to establish the interest of M/WBEs should be applied to non-M/WBEs.



MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-minority counterparts.⁸⁵ Such statistical disparities are ‘an invaluable tool’ in demonstrating the discrimination necessary to establish a compelling interest.⁸⁶

Whether a disparity index supports an inference that there is discrimination in the market turns not only on what is being compared, but also on whether any disparity is statistically significant. 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.”⁸⁷ However, the Court has not assessed nor attempted to cast bright lines for determining if a disparity index is sufficient to support an inference of discrimination. Rather, the analysis of the disparity index and the finding of its significance are judged on a case by case basis.⁸⁸

Following the dictates of *Croson*, courts will carefully examine whether there is data that shows that M/WBEs are ready, willing, and able⁸⁹ to perform.⁹⁰ *Concrete Works I* made the same point: capacity—i.e., whether the firm is able to perform—is a ripe issue when a disparity study is examined on the merits:

[Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the market place 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

⁸⁵ *AGCC II*, 950 F.2d 1401 at 1414. Specifically, the study found that MBE availability was 49.5 percent for prime construction, but MBE dollar participation was only 11.1 percent; that MBE availability was 36 percent prime equipment and supplies, but MBE dollar participation was 17 percent; and that MBE availability for prime general services was 49 percent, but dollar participation was 6.2 percent.

⁸⁶ *AGCCII*, 950 F.2d at 1414, quoting *Coral Const.* and citing *Croson*.

⁸⁷ *Croson*, 488 U.S. at 501 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977)).

⁸⁸ *Concrete Works*, 36 F.3d at 1522.

⁸⁹ The phrase “ready, willing and able” is found in the federal regulations implementing the decision in *Croson*. See 49 CFR § 26.45 (“relative availability” means “the availability of ready, willing and able DBEs compared to all businesses ready, willing and able” to participate in the federally funded contract). The word “ready” is not found in the *Croson* decision, in which the court stated that 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. *Croson*, 488 U.S. at 509. Courts that use the phrase “ready, willing and able” do not ascribe a meaning to the word “ready” that requires an additional analysis beyond the factors in the methodology described in Chapter 7, *infra*. See e.g. *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F. Supp. 2d 775, 840-859 (W.D. Tex. 2007) (dismissing challenges to four disparity studies by Mason Tillman Associates, Ltd. The plaintiff failed to rebut the statistical evidence contained in any of the disparity studies with “credible, particularized” evidence from its own expert reports.).

⁹⁰ It should be noted that the *Philadelphia* study was vulnerable on this issue.



underutilization than does data that takes into consideration the size of MBEs and WBEs.⁹¹

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

The Sixth Circuit Court of Appeals, in *Drabik*, concluded that for statistical evidence to meet the legal standard of *Croson*, it must consider the issue of capacity.⁹² The State's factual predicate study based its statistical evidence on the percentage of M/WBE businesses in the population. The statistical evidence did not take into account the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.⁹³ The court reasoned as follows:

Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to perform the work in question, would also fail to satisfy the court's criteria. If MBEs comprise 10% of the total number of contracting firms in the State, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.⁹⁴

Further, *Drabik* also pointed out that the State not only relied upon the *wrong type of statistical data* but that the data was more than twenty years old.⁹⁵

The appellate opinions in *Philadelphia*⁹⁶ and *Dade County*,⁹⁷ regarding disparity studies involving public sector contracting, are particularly instructive in defining availability.

⁹¹ *Concrete Works*, 36 F.3d at 1528.

⁹² See *Drabik*, 214 F.3d 730, finding the program unconstitutional under *Croson*.

⁹³ *Id.*

⁹⁴ *Id.* at 736.

⁹⁵ *Drabik* rejected the analysis of the Ohio Supreme Court in *Ritchey Produce Co. v. State of Ohio*, 707 N.E.2d 871 (1999), which had found the 1980 MBE statute constitutional because there were findings in the legislative record that MBEs in Ohio received substantially fewer state contracts than their percentage among businesses in the State.

⁹⁶ *Philadelphia*, 6 F.3d 990 (3rd Cir. 1993), on remand, 893 F.Supp. 419 (E.D. Penn. 1995), aff'd, 91 F.3d 586 (3rd Cir. 1996).

⁹⁷ *Dade County*, 943 F.Supp. 1546.



First, in *Philadelphia*, the earlier of the two decisions, contractors' associations challenged a city ordinance creating set-asides for minority subcontractors on city public works contracts, and summary judgment was granted for the contractors.⁹⁸ 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.⁹⁹

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."¹⁰⁰ It was unnecessary to make this determination because the court found that even if there was a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.

When the court looked at subcontracting, it found that a firm basis in evidence did not exist. The only subcontracting evidence presented was a review of a random 25 to 30 percent of project engineer logs on projects over \$30,000. The consultant reviewer determined that no MBEs were used during the study period based upon the consultant's recollection 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 were discriminating against subcontractors.¹⁰¹

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that "[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE;" and it was a "reasonable choice" under the circumstances to use a list of certified contractors as a source for available firms.¹⁰² Although theoretically it may have been possible to adopt a more refined approach, the court found that using the list of certified contractors was a rational approach to identifying qualified firms.

Furthermore, the court discussed whether bidding was required in prime construction contracts as the measure of "willingness," and stated, "[p]ast discrimination in a marketplace

⁹⁸ *Philadelphia*, 91 F.3d 586.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 605.

¹⁰¹ 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.

¹⁰² *Philadelphia*, 91 F.3d at 603.



may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work.”¹⁰³

In addition, the court found that a program certifying MBEs for federal construction projects was a satisfactory measure of capability of MBE firms.¹⁰⁴ 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.”¹⁰⁵ 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.¹⁰⁶ Therefore, the court was somewhat flexible in evaluating the appropriate method of determining the availability of MBE firms in the statistical analysis of a disparity.

In *Dade County*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs was taken into account.¹⁰⁷ 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.¹⁰⁸ In addition, a comprehensive count of bidders is dependent on the adequacy of the agencies’ record keeping.¹⁰⁹

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

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Florida 1996).

¹⁰⁸ Cf. *League of United Latin American Citizens v. Santa Ana*, 410 F.Supp. 873, 897 (C.D. Cal. 1976), modifying, WL 13332 (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), aff’d., 702 F.2d 221 (1981). (Involving the analysis of available applicants in the employment context).

¹⁰⁹ Cf. *EEOC v. American Nat’l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir.), 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).



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

C. Anecdotal Evidence

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."¹¹⁰ Anecdotal evidence should be gathered to determine if minority contractors are systematically being excluded from contracting opportunities in the relevant market area. As will be discussed below, anecdotal evidence will not suffice standing alone to establish the requisite predicate for a race conscious program. Its great value lies in pointing to remedies that are 'narrowly tailored', the second prong of a *Croson* study.

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

- M/WBEs denied contract despite being the low bidder – *Philadelphia*¹¹¹
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority to underbid the MBEs – *Cone Corporation v. Hillsborough County*¹¹²
- M/WBEs' inability to obtain contracts for private sector work – *Coral Construction*¹¹³
- M/WBEs told they were not qualified although they were later found to be qualified when evaluated by outside parties – *AGCC*¹¹⁴
- Attempts to circumvent M/WBE project goals – *Concrete Works I*¹¹⁵

¹¹⁰ *Croson*, 488 U.S. at 509. The Court specifically cited to *Teamsters*, 431 U.S. at 338.

¹¹¹ *Philadelphia*, 6 F.3d at 1002.

¹¹² *Cone Corporation v. Hillsborough County*, 908 F.2d at 916 (11th Cir.1990).

¹¹³ For instance, where a small percentage of an MBE's 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).

¹¹⁴ *AGCC II*, 950 F.2d at 1415.

¹¹⁵ *Concrete Works*, 36 F.3d at 1530.



- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on entity's contracts – *AGCC*¹¹⁶

Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies such as outreach to the M/WBE community. Set-asides are at the other end of the spectrum. Race-neutral measures, by definition, are accessible to all segments of the business community regardless of race. They are not intrusive, and in fact, require no evidence of discrimination before implementation. Conversely, race-conscious measures such as set-asides fall at the other end of the spectrum and require a larger amount of evidence.¹¹⁷

Courts must assess the extent to which relief disrupts settled “rights and expectations” when determining the appropriate corrective measures.¹¹⁸ Presumably, courts would look more favorably upon anecdotal evidence which supports a less intrusive program than a more intrusive one. For example, if anecdotal accounts related experiences of discrimination in obtaining bonds this may be sufficient evidence to support a bonding program that assists M/WBEs. However, these accounts would not be evidence of a statistical availability that would justify a racially limited program such as a set-aside.

As noted above, in *Croson*, the Supreme Court found that Richmond’s MBE program was unconstitutional because the City lacked proof that race-conscious remedies were justified. However, the Court opined that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”¹¹⁹

In part, it was the absence of such evidence that proved lethal 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.”¹²⁰

¹¹⁶ *AGCC II*, 950 F.2d at 1415.

¹¹⁷ 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.”).

¹¹⁸ *Wygant*, 476 U.S. at 283.

¹¹⁹ *Croson*, 488 U.S. at 509, citing *Teamsters*, 431 U.S. at 338.

¹²⁰ *Id.* at 480.



This was not the situation confronting the Ninth Circuit in *Coral Construction*. There, the 700-plus page appellate record contained the affidavits of “at least 57 minority or women contractors, each of whom complains 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.”¹²¹

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.”¹²² 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 pure anecdotal evidence:

Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices.¹²³

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.”¹²⁴

Two other circuit courts also suggested that anecdotal evidence might be dispositive, while rejecting it in the specific case before them. For example, in *Contractors Ass’n*, 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*.¹²⁵ The circuit court disapproved of the district court’s actions because in its view the court’s rejection of this evidence betrayed the court’s role in disposing of a motion for summary judgment.¹²⁶ “Yet,” the circuit court stated:

¹²¹ *Coral Const.*, 941 F.2d at 917-18.

¹²² *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).

¹²³ *Id.* at 919.

¹²⁴ *Id.*

¹²⁵ *Philadelphia*, 6 F.3d at 1002.

¹²⁶ *Id.* at 1003.



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.¹²⁷

The D.C. 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*.¹²⁸ 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. The more specific testimony about discrimination by white firms could not in itself support an industry-wide remedy [quoting *Coral*]. Anecdotal evidence is most useful as a supplement to strong statistical evidence—which the Council did not produce in this case.¹²⁹

The Eleventh Circuit is also in accord. In applying the “clearly erroneous” standard to its review of the district court's decision in *Dade County*, it commented that “[t]he picture painted by the anecdotal evidence is not a good one.”¹³⁰ However, it held that this was not the “exceptional case” where, unreinforced by statistics, the anecdotal evidence was enough.¹³¹

In *Concrete Works I*, the Tenth Circuit Court of Appeals described the type of anecdotal evidence that is most compelling: evidence within a statistical context. In approving of the anecdotal evidence marshaled by the City of Denver in the proceedings below, the court recognized that “[w]hile a factfinder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carries more weight due to the systemic impact that such institutional

¹²⁷ *Id.*

¹²⁸ 963 F.2d at 427 (D.C. Cir.1992), remand, WL 167160 (D.D.C. 1992)..

¹²⁹ *Id.*

¹³⁰ *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County*, 943 F.Supp 1546 (S.D. Fla. 1996), aff'd, 122 F.3d 895 (11th Cir. 1997).

¹³¹ *Id.* at 926.



practices have on market conditions.”¹³² 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*.¹³³ There, the court approved a “vast number of individual accounts of discrimination” which included numerous reports of MBEs denied contracts despite being the low bidder; MBEs told they were not qualified although they were later found qualified when evaluated by outside parties; MBEs refused work even after they were awarded the contracts as low bidder; and MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal, the City points to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the city’s procurement processes; an “old boy’s network” still exists; and racial discrimination is still prevalent within the San Francisco construction industry.¹³⁴ 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 catalogue of the characteristics of appropriate anecdotal evidence. The cases suggest that, to be optimally persuasive, anecdotal evidence must satisfy six particular requirements.¹³⁵ These requirements are that the accounts:

- are gathered from minority contractors, preferably those that are “qualified”¹³⁶
- concern specific, verifiable instances of discrimination¹³⁷
- involve the actions of governmental officials¹³⁸
- involve events within the relevant jurisdiction’s market area¹³⁹

¹³² *Concrete Works I*, 36 F.3d at 1530.

¹³³ *AGCC II*, 950 F.2d 1401.

¹³⁴ *Id.* at 1415.

¹³⁵ *Philadelphia*, 6 F.3d at 1003. The anecdotal evidence must be “dominant or pervasive.”

¹³⁶ *Philadelphia*, 91 F.3d at 603.

¹³⁷ *Coral Construction*, 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.”

¹³⁸ *Crosos*, 488 U.S. at 509.

¹³⁹ *Coral Construction*, 941 F.2d at 925.



- discuss the harm that the improper conduct has inflicted on the businesses in question¹⁴⁰ and
- collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic¹⁴¹

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 a race-conscious remedy. However, the foregoing cases, and others, provide some guidance by implication.

Philadelphia makes clear that 14 accounts will not suffice.¹⁴² While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type called for above, were insufficient to justify the program in *Coral Construction*. The number of anecdotal accounts relied upon by the district court in approving Denver's M/WBE program in *Concrete Works I* is unclear, but by one count the number might have exceeded 139.¹⁴³ It is, of course, a matter of speculation as to how many of these accounts were indispensable to the court's approval of the Denver M/WBE program.

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

V. LOCAL IMPACT OF CROSON

At the time of the decision in *Croson*, numerous government set-aside programs were in place in Pennsylvania. The decisions of the Third Circuit Court of Appeals in the

¹⁴⁰ *O'Donnell*, 963 F.2d at 427.

¹⁴¹ *Coral Construction*, 941 F.2d at 919.

¹⁴² *Philadelphia*, 6 F.3d. at 1002-03.

¹⁴³ The Denver City Council enacted its M/WBE ordinance in 1990. The program was based on the results of public hearings held in 1983 and 1988 at which numerous people testified (approximately 21 people and at least 49 people, respectively), and on a disparity study performed in 1990. See *Concrete Works of Colorado v. Denver*, 823 F.Supp. 821, 833-34. The disparity study consultant examined all of this preexisting data, presumably including the anecdotal accounts from the 1983 and 1988 public hearings, as well as the results of its own 69 interviews, in preparing its recommendations. *Id.* at 833-34. Thus, short of analyzing the record in the case, it is not possible to determine a minimum number of accounts because it is not possible to ascertain the number of consultant interviews and anecdotal accounts that are recycled statements or statements from the same people. Assuming no overlap in accounts, however, and also assuming that the disparity study relied on prior interviews in addition to its own, the number of M/WBEs interviewed in this case could be as high as 139, and, depending on the number of new people heard by the Denver Department of Public Works in March 1988 (See *Id.* at 833), the number might have been even greater.



Philadelphia case are the most significant. However, other post-*Croson* cases are worth mentioning.

As would be expected, government quotas and set-asides established without the necessary evidentiary basis were successfully challenged. See e.g. *Main Line Paving Co., Inc. v. Board of Educ., School Dist. of Philadelphia*¹⁴⁴ (minority set aside policy for construction contractors violated equal protection clause, and gender-based set aside did not survive intermediate level of scrutiny); *Quirin v. City of Pittsburgh*¹⁴⁵ (Pittsburgh’s policy setting quota for representation of women in fire department was unconstitutional.); see also *Independent Enterprises Inc. v. Pittsburgh Water and Sewer Authority*,¹⁴⁶ (contractor’s allegations—that Authority’s MBE/WBE utilization plan, under which bids not meeting goals were rejected, lacked an evidentiary base and was not narrowly tailored—supported an equal protection claim under *Croson*).¹⁴⁷

Other programs, such as the DGS’ non-discrimination program often went unchallenged or, if challenged, were upheld. In a post-*Croson* challenge, a district court upheld the *facial validity* of the Governor’s Executive Order and DGS’ policy statement, which established MBE/WBE “participation objectives.” *Associated Pennsylvania Constructors v. Jannetta*.¹⁴⁸ The DGS policy provided that when a bidder did not meet the minimum participation levels, the bid could still be “responsive” so long as the contractor’s solicitation practices demonstrated that the contractor had not discriminated:

The policies do not require use of certain percentages of women and minorities, but, rather, seek to ensure no *current discrimination*. The policies are screening devices as opposed to a classification based on whether prime contractors meet certain quotas for awards to minority and women contractors. Having taken the position that the policy statements create no quota or goal system, the court finds that strict scrutiny does not apply. Rather, the rationale basis test applies.¹⁴⁹

The nondiscrimination program was upheld *as applied*, as well.¹⁵⁰

¹⁴⁴ 725 F. Supp. 1349 (E.D. Pa. 1989), Supplemental Opinion, 1990 U.S. Dist. LEXIS 3048 (E.D. Pa. Mar. 20, 1990), vacated, 1990 U.S. Dist. LEXIS 5047 (E.D. Pa. Apr. 27, 1990).

¹⁴⁵ 801 F.Supp. 1486 (W.D. Pa. 1992).

¹⁴⁶ 103 F. 3d 1165 (3d Cir. 1997).

¹⁴⁷ *Id.* at 1176.

¹⁴⁸ 738 F.Supp. 891 (M.D. Pa. 1990) (memorandum).

¹⁴⁹ *Id.* at 893 (emphasis in original).

¹⁵⁰ *First Capital Insulation, Inc. v. Jannetta*, 768 F.Supp. 121 (M.D. Pa. 1991).



As discussed in Chapter 2, DGS continues to use a similar nondiscrimination program for construction acquired through competitive sealed bidding pursuant to 62 Pa.C.S. § 512. *Perry Const. Group, Inc. v. Dep't of General Services*¹⁵¹, (describing current program and upholding agency's application of policy). During the time of the study, the overwhelming majority of construction projects were bid pursuant to 62 Pa.C.S. § 512.

In addition to the DGS nondiscrimination program, the Commonwealth has established panoply of race and gender neutral programs to facilitate full participation by MBE/WBEs in Pennsylvania contracting, including construction.¹⁵²

DGS recently implemented a program to assist small and disadvantaged businesses for construction procured via competitive sealed proposals pursuant to 62 Pa.C.S. § 513. S.¹⁵³

VI. CONSIDERATION OF RACE-NEUTRAL OPTIONS

A remedial program must address the source of the disadvantage faced by minority or woman owned businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, a MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.¹⁵⁴

On the other hand, a M/WBE program cannot stand if the sole barrier to minority or woman business participation is a barrier which is faced by all new businesses, regardless of ownership.¹⁵⁵ If the evidence demonstrates that the sole barrier to M/WBE participation is that M/WBE's disproportionately lack capital, or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.¹⁵⁶ In other

¹⁵¹ 863 A.2d 619 (Pa. Commonwealth. 2004) (no constitutional challenge; challenge went to how to count number of MBE/WBE solicitations under policy); *cf. Buckley & Co., Inc v. Philadelphia*, 2002 WL 1472334 (Pa.Com. Pl., May 22, 2002) (No. 1894 March Term 2002) (not reported in A.2d) (no constitutional challenge; however, Philadelphia failed to follow its own instructions in application of plan.)

¹⁵² These include the Minority Business Development Authority established by the General Assembly, 73 P.S. §390.1 *et seq.*; the Economic Development Program, 12 Pa.C.S. § 301 *et seq.* [BMWBO should go provide citations for and descriptions of the programs on its website

¹⁵³ <http://www.dgs.state.pa.us/bcabd/cwp/view.asp?a=3&q=119339&bcabdNav=&bcabdRNavradD9917=#Starting>]
The use of the sealed competitive proposal method of procurement for construction has been temporarily enjoined. *Pa. Associated Builders and Contractors, Inc. v. Commonwealth Dep't of General Services*, 899 A.2d 389 (Pa. Cmwlth. 2006), *rev'd*, 932 A.2d 1271 (Pa. 2007). No challenge to the small and disadvantaged business component of the process is presented in pending case.

¹⁵⁴ *AGCC II*, 950 F.2d at 1404.

¹⁵⁵ *Croson*, 488 U.S. at 508.

¹⁵⁶ *Id.* at 507.



words, if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

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

The Supreme Court has recently explained that although ‘narrow tailoring does not require exhaustion of every conceivable race-neutral alternative’ it ‘does require serious, good faith consideration of workable race-neutral alternatives that will achieve ... diversity[.]’ *Grutter vs. Bollinger*, 123 S.Ct, at 2344, 2345. The County has failed to show the necessity for the relief it has chosen, and the efficacy of alternative remedies has not been sufficiently explored.¹⁵⁷

If the barriers appear race-related, but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found. If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, M/WBEs 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.¹⁵⁸

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.¹⁵⁹ Instead, an entity must make a serious, good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing low MBE utilization, it is imperative to examine barriers to MBE participation that go beyond “small business problems.” The impact on the distribution of contracts of programs that have been implemented to improve MBE utilization should also be measured.¹⁶⁰

VII. CONCLUSION

The decision of the U.S. Supreme Court in the *Croson* case changed the legal landscape for business affirmative action programs and altered the authority of local governments to

¹⁵⁷ *Hershell Gill*, 333 F.Supp. 2d 1305, 1330 (S.D.Fla. 2004).

¹⁵⁸ *Id.* (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

¹⁵⁹ *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

¹⁶⁰ *Dade County*, 122 F.3d at 927. At the same time, the Eleventh Circuit’s caveat in *Dade County* should be kept in mind: “Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications that a government may use to treat race-based problems. Instead, it is the strongest of medicines, with many potentially harmful side-effects, and must be reserved to those severe cases that are highly resistant to conventional treatment.” For additional guidance, see *supra* the discussion of narrow tailoring in *Concrete Works, Adarand, County of Cook, City of Chicago*.



institute remedial race-conscious public contracting programs. This chapter has examined what *Croson* and its progeny require of a disparity study if it is to serve as legal justification for a race (and gender)-conscious affirmative action program for the Commonwealth of Pennsylvania. Great care must be exercised in determining whether discrimination has been “identified.” If it has, race-neutral remedies have to be considered, and any race-conscious remedy must be “narrowly tailored.”

VIII. LIST OF CASES

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Statutes

62 Pa. Cons. Stat. § 513 (2006 Sup.)



4

PRIME CONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

As set forth in *Croson* and its progeny, a disparity study must document minority contracting history in the jurisdiction under review. The first step in a disparity study is the statistical analysis of prime contracts. In this study, purchase orders and direct purchases were categorized as prime contracts. The objective of the statistical analysis is to determine the level of minority and woman-owned business enterprise (M/WBE) prime contractor utilization compared to non-M/WBE prime contractor utilization. A prime contractor utilization analysis was undertaken on building construction and building design contracts awarded by the Commonwealth of Pennsylvania (Commonwealth) between January 1, 2003 to December 31, 2005.

The contracts awarded by the Commonwealth during the study period were separated into two industries for purposes of the analysis. The industries are construction and design professional services. Construction included public work for new construction, remodeling, renovation, maintenance, demolition and repair of any public structure or building, and other public improvements. Design professional services included those professional services within the scope of the practice of architecture, geology, engineering, landscape architecture, or land surveying, including studies, investigations, surveying, mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual design, plans and specifications, value engineering, maintenance manuals, and other related services associated research, planning, development, design, construction, alteration, or repair of real property. Design professional services also included services provided under the supervision of a professional engineer to develop engineering software which will aid design professionals in performing their work.

The Commonwealth's utilization of prime contractors in these two industries is analyzed in this chapter.



II. PRIME CONTRACT DATA SOURCES

The data from the Commonwealth's construction contracts were obtained from the FoxPro database maintained by the Department of General Services. The design professional services contracts were compiled by the Commonwealth under the direction of the Assistant Chief Council.

Payment data were extracted from the Department of Treasury's financial management information system, SAP. Extensive efforts were undertaken by the Commonwealth staff to reconcile the two databases, as the FoxPro database was contract-driven while the SAP system was purchase order-driven. A comprehensive list of contracts within the study period was finalized only after tremendous effort.

The ethnicity and gender of the prime contractors had to be reconstructed for some of the contracts. Incomplete ethnicity and gender information is a common occurrence in data collected from government agencies for disparity studies. Since ethnicity and gender information is critical to the utilization analysis, research was conducted to secure complete information. Company names were cross-referenced with certification lists, membership directories for chambers of commerce and trade organizations, and web sites in an effort to determine the ethnicity and gender of the contractors. A survey of utilized businesses was also conducted to collect ethnicity and gender information that was not available from published sources. The ethnicity and gender classification of the utilized businesses was determined through this combined effort.

III. PRIME CONTRACTOR UTILIZATION THRESHOLDS

Contracts within each of the two industries were grouped into three size categories. One category included all contracts regardless of size. The second category included all contracts under \$500,000. This analysis was restricted to a level where there was a demonstrated capacity within the pool of willing M/WBEs to perform. The third size category included informal contracts under \$10,000 for construction and under \$100,000 for design professional services which did not require advertising. Informal contract thresholds are depicted in Table 4.01.

A review of the Commonwealth's procurement practices included in *Chapter 2: Contracting and Procurement Analysis* found that some industry categories used different dollar thresholds for informal contracting and some did not require advertising at all.



Table 4.01 Informal Contract Thresholds for Commonwealth Departments

Industry	Informal Contract Thresholds
Construction	\$10,000
Design Professional Services	\$100,000

IV. PRIME CONTRACTOR UTILIZATION

As depicted in Table 4.02 below, the Commonwealth awarded 732 prime contracts during the January 1, 2003 to December 31, 2005 study period. These contracts included 643 for construction and 89 for design professional services.

The payments made by the Commonwealth during the study period for all contracts awarded totaled \$544,189,970. These expenditures included \$509,124,852 for construction and \$35,065,118 for design professional services.

Table 4.02 Total Prime Contracts and Dollars Expended: All Industries, January 1, 2003 to December 31, 2005

Industry	Total Number of Contracts	Total Dollars Expended
Construction	643	\$509,124,852
Design Professional Services	89	\$35,065,118
Total Expenditures	732	\$544,189,970



A. All Prime Contracts, by Industry

1. Construction Prime Contractor Utilization: All Contracts

Table 4.03 summarizes all contract dollars expended by the Commonwealth on construction prime contracts. Minority Business Enterprises received 1.51 percent of the construction prime contract dollars; Women Business Enterprises received 3.87 percent; and Caucasian Male Business Enterprises received 94.61 percent.

African Americans received 6 or 0.93 percent of the construction contracts during the study period, representing \$4,939,612 or 0.97 percent of the contract dollars.

Asian Americans received 2 or 0.31 percent of the construction contracts during the study period, representing \$533,980 or 0.1 percent of the contract dollars.

Hispanic Americans received 2 or 0.31 percent of the construction contracts during the study period, representing \$2,239,131 or 0.44 percent of the contract dollars.

Native Americans received none of the construction contracts during the study period.

Minority Business Enterprises received 10 or 1.56 percent of the construction contracts during the study period, representing \$7,712,723 or 1.51 percent of the contract dollars.

Women Business Enterprises received 37 or 5.75 percent of the construction contracts during the study period, representing \$19,719,817 or 3.87 percent of the contract dollars.

Minority and Women Business Enterprises received 47 or 7.31 percent of the construction contracts during the study period, representing \$27,432,540 or 5.39 percent of the contract dollars.

Caucasian Male Business Enterprises received 596 or 92.69 percent of the construction contracts during the study period, representing \$481,692,312 or 94.61 percent of the contract dollars.



**Table 4.03 Construction Prime Contractor Utilization: All
Contracts, January 1, 2003 to December 31, 2005**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	6	0.93%	\$4,939,612	0.97%
Asian Americans	2	0.31%	\$533,980	0.10%
Hispanic Americans	2	0.31%	\$2,239,131	0.44%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	37	5.75%	\$19,719,817	3.87%
Caucasian Males	596	92.69%	\$481,692,312	94.61%
TOTAL	643	100.00%	\$509,124,852	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	3	0.47%	\$21,368	0.00%
African American Males	3	0.47%	\$4,918,244	0.97%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	2	0.31%	\$533,980	0.10%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	2	0.31%	\$2,239,131	0.44%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	37	5.75%	\$19,719,817	3.87%
Caucasian Males	596	92.69%	\$481,692,312	94.61%
TOTAL	643	100.00%	\$509,124,852	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	3	0.47%	\$21,368	0.00%
Minority Males	7	1.09%	\$7,691,355	1.51%
Caucasian Females	37	5.75%	\$19,719,817	3.87%
Caucasian Males	596	92.69%	\$481,692,312	94.61%
TOTAL	643	100.00%	\$509,124,852	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	10	1.56%	\$7,712,723	1.51%
Women Business Enterprises	37	5.75%	\$19,719,817	3.87%
Minority and Women Business Enterprises	47	7.31%	\$27,432,540	5.39%
Caucasian Male Business Enterprises	596	92.69%	\$481,692,312	94.61%
TOTAL	643	100.00%	\$509,124,852	100.00%



2. Design Professional Services Contractor Utilization: All Contracts

Table 4.04 summarizes all contract dollars expended by the Commonwealth on design professional services prime contracts. Minority Business Enterprises received 5.91 percent of the design professional services prime contract dollars; Women Business Enterprises received 7.9 percent, and Caucasian Male Business Enterprises received 86.2 percent.

African Americans received 1 or 1.12 percent of the design professional services contracts during the study period, representing \$319,125 or 0.91 percent of the contract dollars.

Asian Americans received 4 or 4.49 percent of the design professional services contracts during the study period, representing \$1,482,543 or 4.23 percent of the contract dollars.

Hispanic Americans received 1 or 1.12 percent of the design professional services contracts during the study period, representing \$269,655 or 0.77 percent of the contract dollars.

Native Americans received none of the design professional services contracts during the study period.

Minority Business Enterprises received 6 or 6.74 percent of the design professional services contracts during the study period, representing \$2,071,323 or 5.91 percent of the contract dollars.

Women Business Enterprises received 6 or 6.74 percent of the design professional services contracts during the study period, representing \$2,768,818 or 7.9 percent of the contract dollars.

Minority and Women Business Enterprises received 12 or 13.48 percent of the design professional services contracts during the study period, representing \$4,840,142 or 13.8 percent of the contract dollars.

Caucasian Male Business Enterprises received 77 or 86.52 percent of the design professional services contracts during the study period, representing \$30,224,977 or 86.2 percent of the contract dollars.



**Table 4.04 Design Professional Services Prime Contractor
Utilization: All Contracts, January 1, 2003 to December 31,
2005**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	1	1.12%	\$319,125	0.91%
Asian Americans	4	4.49%	\$1,482,543	4.23%
Hispanic Americans	1	1.12%	\$269,655	0.77%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	6	6.74%	\$2,768,818	7.90%
Caucasian Males	77	86.52%	\$30,224,977	86.20%
TOTAL	89	100.00%	\$35,065,118	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	1	1.12%	\$319,125	0.91%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	4	4.49%	\$1,482,543	4.23%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	1	1.12%	\$269,655	0.77%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	6	6.74%	\$2,768,818	7.90%
Caucasian Males	77	86.52%	\$30,224,977	86.20%
TOTAL	89	100.00%	\$35,065,118	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	0	0.00%	\$0	0.00%
Minority Males	6	6.74%	\$2,071,323	5.91%
Caucasian Females	6	6.74%	\$2,768,818	7.90%
Caucasian Males	77	86.52%	\$30,224,977	86.20%
TOTAL	89	100.00%	\$35,065,118	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	6	6.74%	\$2,071,323	5.91%
Women Business Enterprises	6	6.74%	\$2,768,818	7.90%
Minority and Women Business Enterprises	12	13.48%	\$4,840,142	13.80%
Caucasian Male Business Enterprises	77	86.52%	\$30,224,977	86.20%
TOTAL	89	100.00%	\$35,065,118	100.00%



B. Prime Contracts under \$500,000, by Industry

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

Table 4.05 summarizes all contract dollars expended by the Commonwealth on construction prime contracts under \$500,000. Minority Business Enterprises received 1.26 percent of the construction prime contract dollars; Women Business Enterprises received 5.03 percent; and Caucasian Male Business Enterprises received 93.71 percent.

African Americans received 4 or 0.89 percent of the construction contracts under \$500,000 during the study period, representing \$109,818 or 0.14 percent of the contract dollars.

Asian Americans received 2 or 0.45 percent of the construction contracts under \$500,000 during the study period, representing \$533,980 or 0.68 percent of the contract dollars.

Hispanic Americans received 1 or 0.22 percent of the construction contracts under \$500,000 during the study period, representing \$346,000 or 0.44 percent of the contract dollars.

Native Americans received none of the construction contracts under \$500,000 during the study period.

Minority Business Enterprises received 7 or 1.56 percent of the construction contracts under \$500,000 during the study period, representing \$989,798 or 1.26 percent of the contract dollars.

Women Business Enterprises received 30 or 6.7 percent of the construction contracts under \$500,000 during the study period, representing \$3,969,830 or 5.03 percent of the contract dollars.

Minority and Women Business Enterprises received 37 or 8.26 percent of the construction contracts under \$500,000 during the study period, representing \$4,959,628 or 6.29 percent of the contract dollars.

Caucasian Male Business Enterprises received 411 or 91.74 percent of the construction contracts under \$500,000 during the study period, representing \$73,905,654 or 93.71 percent of the contract dollars.



**Table 4.05 Construction Prime Contractor Utilization:
Contracts under \$500,000, January 1, 2003 to December 31,
2005**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	4	0.89%	\$109,818	0.14%
Asian Americans	2	0.45%	\$533,980	0.68%
Hispanic Americans	1	0.22%	\$346,000	0.44%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	30	6.70%	\$3,969,830	5.03%
Caucasian Males	411	91.74%	\$73,905,654	93.71%
TOTAL	448	100.00%	\$78,865,282	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	3	0.67%	\$21,368	0.03%
African American Males	1	0.22%	\$88,450	0.11%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	2	0.45%	\$533,980	0.68%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	1	0.22%	\$346,000	0.44%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	30	6.70%	\$3,969,830	5.03%
Caucasian Males	411	91.74%	\$73,905,654	93.71%
TOTAL	448	100.00%	\$78,865,282	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	3	0.67%	\$21,368	0.03%
Minority Males	4	0.89%	\$968,430	1.23%
Caucasian Females	30	6.70%	\$3,969,830	5.03%
Caucasian Males	411	91.74%	\$73,905,654	93.71%
TOTAL	448	100.00%	\$78,865,282	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	7	1.56%	\$989,798	1.26%
Women Business Enterprises	30	6.70%	\$3,969,830	5.03%
Minority and Women Business Enterprises	37	8.26%	\$4,959,628	6.29%
Caucasian Male Business Enterprises	411	91.74%	\$73,905,654	93.71%
TOTAL	448	100.00%	\$78,865,282	100.00%



2. Design Professional Services Prime Contractor Utilization: Contracts under \$500,000

Table 4.06 summarizes all contract dollars expended by the Commonwealth on design professional services prime contracts under \$500,000. Minority Business Enterprises received 11.46 percent of the design professional services prime contract dollars; Women Business Enterprises received 5.98 percent of the contract dollars; and Caucasian Male Business Enterprises received 82.56 percent of the prime contract dollars.

African Americans received 1 or 1.43 percent of the design professional services contracts under \$500,000 during the study period, representing \$319,125 or 1.77 percent of the contract dollars.

Asian Americans received 4 or 5.71 percent of the design professional services contracts under \$500,000 during the study period, representing \$1,482,543 or 8.2 percent of the contract dollars.

Hispanic Americans received 1 or 1.43 percent of the design professional services contracts under \$500,000 during the study period, representing \$269,655 or 1.49 percent of the contract dollars.

Native Americans received none of the design professional services contracts under \$500,000 during the study period.

Minority Business Enterprises received 6 or 8.57 percent of the design professional services contracts under \$500,000 during the study period, representing \$2,071,323 or 11.46 percent of the contract dollars.

Women Business Enterprises received 4 or 5.71 percent of the design professional services contracts under \$500,000 during the study period, representing \$1,080,201 or 5.98 percent of the contract dollars.

Minority and Women Business Enterprises received 10 or 14.29 percent of the design professional services contracts under \$500,000 during the study period, representing \$3,151,524 or 17.44 percent of the contract dollars.

Caucasian Male Business Enterprises received 60 or 85.71 percent of the design professional services contracts under \$500,000 during the study period, representing \$14,919,409 or 82.56 percent of the contract dollars.



**Table 4.06 Design Professional Services Prime Contractor
Utilization: Contracts under \$500,000, January 1, 2003 to
December 31, 2005**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	1	1.43%	\$319,125	1.77%
Asian Americans	4	5.71%	\$1,482,543	8.20%
Hispanic Americans	1	1.43%	\$269,655	1.49%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	4	5.71%	\$1,080,201	5.98%
Caucasian Males	60	85.71%	\$14,919,409	82.56%
TOTAL	70	100.00%	\$18,070,934	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	1	1.43%	\$319,125	1.77%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	4	5.71%	\$1,482,543	8.20%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	1	1.43%	\$269,655	1.49%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	4	5.71%	\$1,080,201	5.98%
Caucasian Males	60	85.71%	\$14,919,409	82.56%
TOTAL	70	100.00%	\$18,070,934	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	0	0.00%	\$0	0.00%
Minority Males	6	8.57%	\$2,071,323	11.46%
Caucasian Females	4	5.71%	\$1,080,201	5.98%
Caucasian Males	60	85.71%	\$14,919,409	82.56%
TOTAL	70	100.00%	\$18,070,934	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	6	8.57%	\$2,071,323	11.46%
Women Business Enterprises	4	5.71%	\$1,080,201	5.98%
Minority and Women Business Enterprises	10	14.29%	\$3,151,524	17.44%
Caucasian Male Business Enterprises	60	85.71%	\$14,919,409	82.56%
TOTAL	70	100.00%	\$18,070,934	100.00%



C. Informal Prime Contracts under \$10,000 and \$100,000, by Industry

1. Construction Prime Contractor Utilization: Contracts under \$10,000

Table 4.07 summarizes all contract dollars expended by the Commonwealth on construction prime contracts under \$10,000. Minority Business Enterprises received 17.5 percent of the construction prime contract dollars; Women Business Enterprises received 12.87 percent; and Caucasian Male Business Enterprises received 69.63 percent.

African Americans received 3 or 17.65 percent of the construction contracts under \$10,000 during the study period, representing \$21,368 or 17.5 percent of the contract dollars.

Asian Americans received none of the construction contracts under \$10,000 during the study period.

Hispanic Americans received none of the construction contracts under \$10,000 during the study period.

Native Americans received none of the construction contracts under \$10,000 during the study period.

Minority Business Enterprises received 3 or 17.65 percent of the construction contracts under \$10,000 during the study period, representing \$21,368 or 17.5 percent of the contract dollars.

Women Business Enterprises received 2 or 11.76 percent of the construction contracts under \$10,000 during the study period, representing \$15,713 or 12.87 percent of the contract dollars.

Minority and Women Business Enterprises received 5 or 29.41 percent of the construction contracts under \$10,000 during the study period, representing \$37,081 or 30.37 percent of the contract dollars.

Caucasian Male Business Enterprises received 12 or 70.59 percent of the construction contracts under \$10,000 during the study period, representing \$85,022 or 69.63 percent of the contract dollars.



**Table 4.07 Construction Prime Contractor Utilization:
Contracts under \$10,000, January 1, 2003 to December 31,
2005**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	3	17.65%	\$21,368	17.50%
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	2	11.76%	\$15,713	12.87%
Caucasian Males	12	70.59%	\$85,022	69.63%
TOTAL	17	100.00%	\$122,103	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	3	17.65%	\$21,368	17.50%
African American Males	0	0.00%	\$0	0.00%
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	2	11.76%	\$15,713	12.87%
Caucasian Males	12	70.59%	\$85,022	69.63%
TOTAL	17	100.00%	\$122,103	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	3	17.65%	\$21,368	17.50%
Minority Males	0	0.00%	\$0	0.00%
Caucasian Females	2	11.76%	\$15,713	12.87%
Caucasian Males	12	70.59%	\$85,022	69.63%
TOTAL	17	100.00%	\$122,103	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	3	17.65%	\$21,368	17.50%
Women Business Enterprises	2	11.76%	\$15,713	12.87%
Minority and Women Business Enterprises	5	29.41%	\$37,081	30.37%
Caucasian Male Business Enterprises	12	70.59%	\$85,022	69.63%
TOTAL	17	100.00%	\$122,103	100.00%



2. Design Professional Services Prime Contractor Utilization: Contracts under \$100,000

Table 4.08 summarizes all contract dollars expended by the Commonwealth on design professional services prime contracts under \$100,000. Minority Business Enterprises received none of the design professional services prime contract dollars; Women Business Enterprises received 1.23 percent; and Caucasian Male Business Enterprises received 98.77 percent.

African Americans received none of the design professional services contracts under \$100,000 during the study period.

Asian Americans received none of the design professional services contracts under \$100,000 during the study period.

Hispanic Americans received none of the design professional services contracts under \$100,000 during the study period.

Native Americans received none of the design professional services contracts under \$100,000 during the study period.

Minority Business Enterprises received none of the design professional services contracts under \$100,000 during the study period.

Women Business Enterprises received 1 or 8.33 percent of the design professional services contracts under \$100,000 during the study period, representing \$7,315 or 1.23 percent of the contract dollars.

Minority and Women Business Enterprises received 1 or 8.33 percent of the design professional services contracts under \$100,000 during the study period, representing \$7,315 or 1.23 percent of the contract dollars.

Caucasian Male Business Enterprises received 11 or 91.67 percent of the design professional services contracts under \$100,000 during the study period, representing \$585,513 or 98.77 percent of the contract dollars.



**Table 4.08 Design Professional Services Prime Contractor
Utilization: Contracts under \$100,000, January 1, 2003 to
December 31, 2005**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
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	1	8.33%	\$7,315	1.23%
Caucasian Males	11	91.67%	\$585,513	98.77%
TOTAL	12	100.00%	\$592,828	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
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	1	8.33%	\$7,315	1.23%
Caucasian Males	11	91.67%	\$585,513	98.77%
TOTAL	12	100.00%	\$592,828	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	0	0.00%	\$0	0.00%
Minority Males	0	0.00%	\$0	0.00%
Caucasian Females	1	8.33%	\$7,315	1.23%
Caucasian Males	11	91.67%	\$585,513	98.77%
TOTAL	12	100.00%	\$592,828	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	0	0.00%	\$0	0.00%
Women Business Enterprises	1	8.33%	\$7,315	1.23%
Minority and Women Business Enterprises	1	8.33%	\$7,315	1.23%
Caucasian Male Business Enterprises	11	91.67%	\$585,513	98.77%
TOTAL	12	100.00%	\$592,828	100.00%



V. SUMMARY

The Commonwealth's prime contractor utilization analysis examined the \$544,189,970 expended on the 732 contracts awarded between January 1, 2003 to December 31, 2005. The \$544,189,970 expended included 643 contracts for construction and 89 contracts for design professional services.

The utilization analysis was performed separately for informal and formal contracts. The informal levels included contracts under \$100,000 for design professional services and \$10,000 for construction. The analysis of formal contracts was limited to contracts under \$500,000 for each industry. *Chapter 8: Prime Contractor Disparity Analysis* will present the statistical analysis of disparity in each of the two industries.





5

SUBCONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

As discussed in *Chapter 4: Prime Contractor Utilization Analysis*, a disparity study documents Minority and Woman-owned Business Enterprise (MBE/WBE) contracting history in the jurisdiction under review. A finding of subcontractor disparity is required to implement a race-based program targeted to benefit MBE/WBE subcontractors. In order to analyze subcontractor disparity, it is imperative to determine the level of MBE/WBE and non-MBE/WBE subcontractor utilization on Commonwealth of Pennsylvania (Commonwealth) contracts during the January 1, 2003 to December 31, 2005 study period.

II. SUBCONTRACTOR UTILIZATION DATA SOURCES

Extensive efforts were undertaken to obtain subcontractor records for the Commonwealth's construction and design professional services contracts. The Commonwealth project files and expenditure surveys were used to reconstruct all construction and design professional prime contracts valued at \$100,000 or more.

Mason Tillman visited the Commonwealth's Department of Public Works to reconstruct subcontractor data from various documents found in the project files. The documents include, but are not limited to, contract documents, contract compliance status reports, subcontractor affidavits for final payment, contractor utilization plans, and prevailing wage documents.

The Commonwealth's prime contractors were surveyed by Mason Tillman Associates to determine their subcontractors. The prime contractors were asked to provide the name, award, and payment amounts for each subcontractor. Subcontractors were then called to verify the payments that were received from the prime contractors.



The Department of Public Works assisted Mason Tillman in collecting subcontract data from seven prime contractors after a second review of the project files by Mason Tillman concluded that the data was not in the project files. Those seven prime contractors did not respond to the prime contractor expenditure survey. Commonwealth staff from the Department of Public Works provided indispensable assistance throughout this process.

III. SUBCONTRACTOR UTILIZATION ANALYSIS

As depicted in Table 5.01 below, Mason Tillman was able to reconstruct and analyze 1,361 subcontracts for the 732 prime contracts valued at \$100,000 and more that were awarded between January 1, 2003 and December 31, 2005, the three-year study period for the subcontractor analysis. The 1,361 subcontracts included 1,255 construction subcontracts and 106 design professional services contracts.

On the subcontracts identified, \$160,459,321 total dollars were expended of which \$155,154,180 were for construction subcontracts and \$5,305,141 were for design professional services contracts.

Table 5.01 Total Subcontract Awards and Dollars: All Industries, January 1, 2003 to December 31, 2005

Industry	Total Number of Subcontracts	Total Dollars Expended
Construction	1,255	\$155,154,180
Design Professional Services	106	\$5,305,141
Total	1,361	\$160,459,321



A. Construction Utilization: All Subcontracts

Table 5.02 depicts construction subcontracts awarded by prime contractors. Minority Business Enterprises received 3.37 percent of the construction subcontract dollars; Women Business Enterprises received 7.94 percent; and Caucasian Male Business Enterprises received 88.68 percent.

African American Businesses received 51 or 4.06 percent of the construction subcontracts during the study period, representing \$4,542,379 or 2.93 percent of the subcontract dollars.

Asian American Businesses received 19 or 1.51 percent of the construction subcontracts during the study period, representing \$509,056 or 0.33 percent of the subcontract dollars.

Hispanic American Businesses received 2 or 0.16 percent of the construction subcontracts during the study period, representing \$179,698 or 0.12 percent of the subcontract dollars.

Native American Businesses received none of the construction subcontracts during the study period.

Minority Business Enterprises received 72 or 5.74 percent of the construction subcontracts during the study period, representing \$5,231,133 or 3.37 percent of the subcontract dollars.

Women Business Enterprises received 143 or 11.39 percent of the construction subcontracts during the study period, representing \$12,326,037 or 7.94 percent of the subcontract dollars.

Minority and Women Business Enterprises received 215 or 17.13 percent of the construction subcontracts during the study period, representing \$17,557,170 or 11.32 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 1,040 or 82.87 percent of the construction subcontracts during the study period, representing \$137,597,010 or 88.68 percent of the subcontract dollars.



**Table 5.02 Construction Utilization: All Subcontracts,
January 1, 2003 to December 31, 2005**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	51	4.06%	\$4,542,379	2.93%
Asian Americans	19	1.51%	\$509,056	0.33%
Hispanic Americans	2	0.16%	\$179,698	0.12%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	143	11.39%	\$12,326,037	7.94%
Caucasian Males	1,040	82.87%	\$137,597,010	88.68%
TOTAL	1,255	100.00%	\$155,154,180	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	25	1.99%	\$982,418	0.63%
African American Males	26	2.07%	\$3,559,961	2.29%
Asian American Females	7	0.56%	\$159,521	0.10%
Asian American Males	12	0.96%	\$349,535	0.23%
Hispanic American Females	1	0.08%	\$145,100	0.09%
Hispanic American Males	1	0.08%	\$34,598	0.02%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	143	11.39%	\$12,326,037	7.94%
Caucasian Males	1,040	82.87%	\$137,597,010	88.68%
TOTAL	1,255	100.00%	155,154,180	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	33	2.63%	\$1,287,039	0.83%
Minority Males	39	3.11%	\$3,944,094	2.54%
Caucasian Females	143	11.39%	\$12,326,037	7.94%
Caucasian Males	1,040	82.87%	\$137,597,010	88.68%
TOTAL	1,255	100.00%	\$155,154,180	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	72	5.74%	\$5,231,133	3.37%
Women Business Enterprises	143	11.39%	\$12,326,037	7.94%
Minority and Women Business Enterprises	215	17.13%	\$17,557,170	11.32%
Caucasian Male Business Enterprises	1,040	82.87%	\$137,597,010	88.68%
TOTAL	1,255	100.00%	\$155,154,180	100.00%



B. Design Professional Services: All Subcontracts

Table 5.03 depicts design professional services subcontracts awarded by prime contractors. Minority Business Enterprises received 2.31 percent of the design professional services subcontract dollars; Women Business Enterprises received 3.23 percent; and Caucasian Male Business Enterprises received 94.46 percent.

African American Businesses received 1 or 0.94 percent of the design professional services subcontracts during the study period, representing \$34,829 or 0.66 percent of the subcontract dollars.

Asian American Businesses received 2 or 1.89 percent of the design professional services subcontracts during the study period, representing \$70,472 or 1.33 percent of the subcontract dollars.

Hispanic American Businesses received 1 or 0.94 percent of the design professional services subcontracts during the study period, representing \$17,250 or 0.33 percent of the subcontract dollars.

Native American Businesses received none of the design professional services subcontracts during the study period.

Minority Business Enterprises received 4 or 3.77 percent of the design professional services subcontracts during the study period, representing \$122,551 or 2.31 percent of the subcontract dollars.

Women Business Enterprises received 14 or 13.21 percent of the design professional services subcontracts during the study period, representing \$171,311 or 3.23 percent of the subcontract dollars.

Minority and Women Business Enterprises received 18 or 16.98 percent of the design professional services subcontracts during the study period, representing \$293,862 or 5.54 percent of the subcontract dollars.

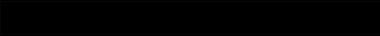
Caucasian Male Business Enterprises received 88 or 83.02 percent of the design professional services subcontracts during the study period, representing \$5,011,279 or 94.46 percent of the subcontract dollars.



**Table 5.03 Design Professional Services Utilization: All
Subcontracts, January 1, 2003 to December 31, 2005**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	1	0.94%	\$34,829	0.66%
Asian Americans	2	1.89%	\$70,472	1.33%
Hispanic Americans	1	0.94%	\$17,250	0.33%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	14	13.21%	\$171,311	3.23%
Caucasian Males	88	83.02%	\$5,011,279	94.46%
TOTAL	106	100.00%	\$5,305,141	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	1	0.94%	\$34,829	0.66%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	2	1.89%	\$70,472	1.33%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	1	0.94%	\$17,250	0.33%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	14	13.21%	\$171,311	3.23%
Caucasian Males	88	83.02%	\$5,011,279	94.46%
TOTAL	106	100.00%	5,305,141	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	0	0.00%	\$0	0.00%
Minority Males	4	3.77%	\$122,551	2.31%
Caucasian Females	14	13.21%	\$171,311	3.23%
Caucasian Males	88	83.02%	\$5,011,279	94.46%
TOTAL	106	100.00%	\$5,305,141	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	4	3.77%	\$122,551	2.31%
Women Business Enterprises	14	13.21%	\$171,311	3.23%
Minority and Women Business Enterprises	18	16.98%	\$293,862	5.54%
Caucasian Male Business Enterprises	88	83.02%	\$5,011,279	94.46%
TOTAL	106	100.00%	\$5,305,141	100.00%





6

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.*¹ held that programs established by local governments to set goals for the participation of minority and woman-owned firms must be supported by *evidence of past discrimination in the awarding of their contracts*.

Prior to the *Croson* decision, many agencies and jurisdictions implementing race-conscious programs did so without developing a detailed public record to document discrimination in their awarding of contracts. Instead, they relied upon common knowledge and what was viewed as widely-recognized patterns of discrimination, both local and national.²

Croson established that a local government could not rely on society-wide discrimination as the basis for a race-based program, but instead was required to identify discrimination within its own jurisdiction.³ In *Croson*, the Court found the City of Richmond's Minority Business Enterprise (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 and business utilization. Therefore, the identification of the local market area is particularly important because that factor establishes the parameters within which to conduct a disparity study.

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

² *United Steelworkers v. Weber*, 433 U.S. 193, 198, n. 1 (1979).

³ *Croson*, 488 U.S. at 497 (1989).



B. Application of the Croson Standard

While *Croson* emphasized the importance of the local market area, it provided little assistance in defining its parameters. It is, however, informative to review the Court’s definition of market area in the City of Richmond context. In discussing the scope of the constitutional violation that must be investigated, the Court interchangeably used the terms “relevant market,”⁴ “Richmond construction industry,”⁵ and “city’s construction industry”⁶ to define the proper scope of the examination of the existence of discrimination. This substitution of terms lends support to a definition of market area that coincides with the boundaries of a jurisdiction.

In analyzing the cases following *Croson*, a pattern emerges that provides additional guidance. The body of cases examining market area support a definition of market area that is reasonable.⁷ In *Cone Corporation v. Hillsborough County*,⁸ the Eleventh Circuit Court of Appeals considered a study in support of Florida’s Hillsborough County MBE program, which used minority contractors located in the 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 the County, not in the construction industry in general. Hillsborough County had extracted data from within its own jurisdictional boundaries and assessed the percentage of minority businesses available in Hillsborough County. The court stated that the study was properly conducted within the “local construction industry.”⁹

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII)*,¹⁰ the Ninth Circuit Court of Appeals found the City and County of San Francisco’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. The court found it appropriate to

⁴ *Croson*, 488 U.S. at 471 (1989).

⁵ *Id.* at 500.

⁶ *Id.* at 470.

⁷ See e.g., *Concrete Works of Colorado v. City of Denver, Colorado*, 36 F.3d 1513, 1528 (10th Cir. 1994).

⁸ *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

⁹ *Id.* at 915.

¹⁰ *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991).



use the City and County as the relevant market area within which to conduct a disparity study.¹¹

In *Coral Construction v. King County*, the 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.”¹² In support of its MBE program, the State of Washington’s King County offered studies compiled by other jurisdictions, including entities completely within the County or coterminous with the boundaries of the County, as well as a separate jurisdiction completely outside of the County. The plaintiffs contended that *Croson* required King County to compile its own data and cited *Croson* as prohibiting data sharing.

The court found that data sharing could potentially lead to the improper use of societal discrimination data as the factual basis for a local MBE program and that innocent third parties could be unnecessarily burdened if an MBE program were based on outside data. However, the court also found that the data from entities within the County and from coterminous jurisdictions was relevant to discrimination in the County. They also found that the data posed no risk of unfairly burdening innocent third parties.

Concerning data gathered by a neighboring county, the court concluded that this data 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 legitimately 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.”¹³ However, the court did note that the “world of contracting does not conform itself neatly to jurisdictional boundaries.”¹⁴

There are other situations where courts have approved a definition of market area that extends beyond a jurisdiction’s geographic boundaries. In *Concrete Works v. City and County of Denver*,¹⁵ the Tenth Circuit Court of Appeals directly addressed the issue of whether extra-jurisdictional evidence of discrimination can be used to determine “local market area” for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA) to support its MBE program. Plaintiffs argued that the federal constitution prohibited consideration of evidence beyond jurisdictional boundaries. The Court of Appeals disagreed.

¹¹ *Id.* at 1415.

¹² *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875 (1992).

¹³ *Id.* at 917.

¹⁴ *Id.*

¹⁵ *Concrete Works*, 36 F.3d 1513, 1528 (10th Cir. 1994).



Critical to the court's acceptance of the Denver MSA as the relevant local market was the finding that more than 80 percent of construction and design contracts awarded by Denver were awarded to contractors within the MSA. Another consideration was that Denver's analysis was based on U.S. Census data, which was available for the Denver MSA but not for the city itself. There was no undue burden placed on nonculpable parties, as Denver had conducted a majority of its construction contracts within the area defined as the local market. Citing *AGCCII*,¹⁶ 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."¹⁷

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 which received more than 90 percent of the dollar value of all contracts awarded by the agency.¹⁸

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 individuals or qualified minority business owners in the government's marketplace.¹⁹ 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. In addition, other cases have approved the use of a percentage of the dollars spent by an agency on contracting.

It follows then that an entity may limit consideration of evidence of discrimination to discrimination occurring within its own jurisdiction. Under certain circumstances, extra-jurisdictional evidence can be used if the percentage of governmental dollars supports such boundaries. Taken collectively, the cases support a definition of market area that is reasonable rather than dictating a specific or unreasonably rigid formula. In other words, since *Croson* and its progeny did not provide a bright line rule for local market area, that determination should be fact-based and case-specific.

¹⁶ *AGCCII*, 950 F.2d 1401 (9th Cir. 1991).

¹⁷ *Concrete Works*, 36 F.3d at 1528 (10th Cir. 1994).

¹⁸ *Opportunity Denied! New York State's Study*, 26 *Urban Lawyer* No. 3, Summer 1994.

¹⁹ *Croson*, 488 U.S. at 501 (1989).



II. COMMONWEALTH OF PENNSYLVANIA'S MARKET AREA

The Commonwealth of Pennsylvania awarded 732 construction, and design professional contracts valued at \$544,189,970 during the study period of January 1, 2003 to December 31, 2005. A total of 93.17 percent of the contracts and 94.08 percent of the dollars were awarded to businesses in the market area of the Commonwealth of Pennsylvania. In light of standards articulated by *Crososn*, the market area for this Disparity Study was determined by the geographic location of the prime contractors who were awarded the majority of the Commonwealth's 732 contracts. The analysis of discrimination has been limited to that occurring within this market area.

Table 6.01 depicts the overall number of construction and design professional contracts and the dollar value of those contracts awarded by the Commonwealth between January 1, 2003 and December 31, 2005. Of the 732 contracts awarded by the Commonwealth during the study period, 682 or 93.17 percent were awarded to market area businesses. The dollar value of contracts awarded to market area businesses was \$511,948,764 or 94.08 percent of all contract dollars awarded.

The breakdown of contracts awarded to market area businesses is as follows:

Construction Contracts: 594 or 92.38 percent of these contracts were awarded to market area businesses. The dollar value of those contracts was \$477,321,312 or 93.75 percent of the total construction dollars.

Design Professional Contracts: 88 or 98.88 percent of these contracts were awarded to market area businesses. The dollar value of those contracts was \$34,627,452 or 98.75 percent of the total design professional dollars.



**Table 6.01 Commonwealth of Pennsylvania's Market Area:
January 1, 2003 to December 31, 2005**

Market Area	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Combined Types of Work				
Market Area	682	93.17%	\$511,948,764	94.08%
Outside Market Area	50	6.83%	\$32,241,207	5.92%
Total	732	100.00%	\$544,189,970	100.00%
Construction				
Market Area	594	92.38%	\$477,321,312	93.75%
Outside Market Area	49	7.62%	\$31,803,540	6.25%
Total	643	100.00%	\$509,124,852	100.00%
Design Professional				
Market Area	88	98.88%	\$34,627,452	98.75%
Outside Market Area	1	1.12%	\$437,667	1.25%
Total	89	100.00%	\$35,065,118	100.00%



7

AVAILABILITY ANALYSIS

I. INTRODUCTION

According to Croson, availability is defined as the number of businesses in the jurisdiction’s market area that are willing and able to provide goods or services.¹ To determine availability, minority and woman-owned business enterprises (M/WBEs) and non-M/WBEs within the jurisdiction’s market area that are willing and able to provide the goods and services need to be enumerated. When considering sources for determining the number of willing and able M/WBEs and non-M/WBEs, the selection must be based on whether the following two significant aspects about the population in question can be gauged from the sources: 1) a firm’s interest in doing business with the jurisdiction, as implied by the term “willing;” and 2) a firm’s ability or capacity to provide a service or good, as implied by the term “able.”

The determination of availability must follow from the definition of the jurisdiction’s market area. The market area analysis presented in *Chapter 6: Market Area Analysis* defined the Commonwealth of Pennsylvania as the market area for this Study because the majority of the utilized businesses are domiciled in the Commonwealth.

The compiled list of available businesses includes minority, woman, and Caucasian male-owned businesses in the areas of construction and design professional services. Separate availability lists were compiled for prime contractors and subcontractors within the two industries. Each availability list is presented below.

¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989). Courts that use the phrase “ready, willing and able” do not ascribe a meaning to the word “ready” that requires an additional analysis beyond the factors in the methodology used for this study, which has been accepted in court. *See e.g. Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F. Supp. 2d 775, 839 (W.D. Tex. 2007) (The four Mason Tillman studies performed for local jurisdictions were relied upon by the 109th Congress as the factual predicate for the Reauthorization of the 1207 Program. In response to a challenge to Congress’ reliance on these local government studies, the Court in *Rothe* reviewed Mason Tillman’s methodology.



II. PRIME CONTRACTOR AVAILABILITY DATA SOURCES

A. Prime Contractor Sources

Market area M/WBEs and non-M/WBEs willing and able to do business with the Commonwealth were identified from various sources. Most sources included businesses that had demonstrated their willingness to provide the goods and services procured by the Commonwealth. For the other sources, willingness of the listed business had to be determined. Table 7.01 lists all the sources used.

Table 7.01 Prime Contractor Availability Data Sources

Source	Type of Information
Commonwealth of Pennsylvania and Other Government Records	
Commonwealth of Pennsylvania Utilized Vendors	M/WBEs and non-M/WBEs
Commonwealth of Pennsylvania Unsuccessful Bidders	M/WBEs and non-M/WBEs
Certification Lists	
Pennsylvania Unified Certification Program (PUCP)	M/WBEs and non-M/WBEs
Small Business Administration: Pronet	M/WBEs and non-M/WBEs
Pennsylvania Department of General Services- Bureau of Minority and Women Business Opportunities	M/WBEs
Minority Business Enterprise Council	M/WBEs



Table 7.01 Prime Contractor Availability Data Sources

Source	Type of Information
Trade Association Membership Lists	
Associated General Contractors of Pennsylvania Building Chapter	M/WBEs and non-M/WBEs
American Institute of Architects Pennsylvania	M/WBEs and non-M/WBEs
American Institute of Architects Central Pennsylvania	M/WBEs and non-M/WBEs
Associated Builders and Contractors, Inc. Southeast Pennsylvania Chapter	M/WBEs and non-M/WBEs
Associated Builders and Contractors, Inc. Eastern Pennsylvania Chapter	M/WBEs and non-M/WBEs
Associated Builders and Contractors, Inc. Keystone Chapter	M/WBEs and non-M/WBEs
Associated Builders and Contractors, Inc. Central Pennsylvania Chapter	M/WBEs and non-M/WBEs
Associated Builders and Contractors, Inc. Cumberland Valley Chapter	M/WBEs and non-M/WBEs
Associated Builders and Contractors, Inc. Western Pennsylvania Chapter	M/WBEs and non-M/WBEs
Business Association Membership Lists	
Armstrong County Chamber of Commerce	M/WBEs and non-M/WBEs
Regional Business Alliance	M/WBEs and non-M/WBEs
Wilkesburg Chamber of Commerce	M/WBEs and non-M/WBEs
African American Chamber of Commerce	M/WBEs
Oakmont Pennsylvania Chamber of Commerce	M/WBEs and non-M/WBEs
Greater Bridgeville Area Chamber of Commerce	M/WBEs and non-M/WBEs
Cranberry Area Chamber of Commerce	M/WBEs and non-M/WBEs



Table 7.01 Prime Contractor Availability Data Sources

Source	Type of Information
Monroeville Area Chamber of Commerce	M/WBEs and non-M/WBEs

B. Determination of Willingness

The term “willingness” refers to a firm’s indicated interest in doing government contracting. This term, as it has been used in *Croson* and its progeny, is discussed in detail in *Chapter 3 Legal Analysis* of this report. Companies identified from the Commonwealth and other government sources listed in Table 7.01 have demonstrated their willingness to perform on public contracts. These businesses either bid on Commonwealth or other government contracts, secured government certification, or responded to the outreach campaign conducted in conjunction with this Study. It is therefore presumed that companies that sought government contracts are willing to provide the goods and services needed by the Commonwealth.

Companies from the non-government sources listed in Table 7.01 were not presumed to be willing, based on the *Croson* criteria. These companies were surveyed to determine their willingness to bid on Commonwealth contracts. The surveyed businesses that indicated an interest in contracting with the Commonwealth were combined with the market area businesses from the government and outreach lists to create a unique list of willing businesses.

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

Tables 7.02 through 7.04 present the distribution of willing prime contractors. The sources are ranked from prime contractors utilized by a Commonwealth agency to companies identified during the Study outreach activities. Each company in the distribution of sources is *counted only once*. For example, a utilized prime contractor counted once in the prime contractor utilization source will not be counted a second time as a bidder, certified firm, or company identified during outreach.



As noted in Table 7.02, 99.73 percent of the businesses on the unique list of available prime contractors were obtained from the Commonwealth's records of utilized contractors, bidders, or various government certification lists. Companies identified through the business outreach and the willingness survey made up 0.27 percent of the available firms.

Table 7.02 Distribution of Prime Contractor Availability Data Sources, Construction and Design Professional Services

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	5.55%	12.07%	10.64%
Bidders Lists	10.68%	36.59%	30.93%
Certification Lists	56.31%	7.14%	17.89%
SBA Pro-Net	27.18%	43.93%	40.27%
Subtotal	99.72%	99.73%	99.73%
Community Meeting Attendees	0.28%	0.16%	0.18%
Willingness Survey	0.00%	0.12%	0.09%
Subtotal	0.28%	0.27%	0.27%
Grand Total*	100.00%	100.00%	100.00%

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



The distribution of available businesses by source was performed for each industry. As noted in Table 7.03, 99.78 percent of the construction companies identified were derived from the Commonwealth's records and various government certification lists. Companies identified through the business outreach and the willingness survey represent 0.22 percent of the willing firms.

Table 7.03 Distribution of Prime Contractor Availability Data Sources, Construction

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	5.93%	11.90%	10.75%
Bidders	14.72%	42.95%	37.52%
Certification Lists	47.80%	6.70%	14.62%
SBA Pro-net	31.36%	38.21%	36.89%
Subtotal	99.81%	99.77%	99.78%
Community Meeting Attendees	0.19%	0.14%	0.15%
Willingness Survey	0.00%	0.09%	0.07%
Subtotal	0.19%	0.23%	0.22%
Grand Total*	100.00%	100.00%	100.00%

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



Table 7.04 depicts the data sources for the available design professional services contractors. As noted below, 99.35 percent of the design professional services prime contractors were obtained from the Commonwealth's records and various government certification lists. Companies identified through the business outreach and the willingness survey represent 0.65 percent of the willing firms.

Table 7.04 Distribution of Prime Contractor Availability Data Sources, Design Professional Services

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	5.36%	13.45%	10.52%
Bidders	1.79%	0.76%	1.13%
Certification Lists	78.13%	9.64%	34.47%
SBA Pro-net	14.29%	75.38%	53.24%
Subtotal	99.55%	99.24%	99.35%
Community Meeting Attendees	0.45%	0.51%	0.49%
Willingness Survey	0.00%	0.25%	0.16%
Subtotal	0.45%	0.76%	0.65%
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 a firm's capacity or ability to work on the contracts awarded by the jurisdiction.² However, capacity requirements are not delineated in *Croson*. In fact, a standard for capacity has only been addressed in a few cases. Each case where capacity has been considered has involved large, competitively bid construction prime contracts. Therefore, in order to assess the capacity of willing market area firms to do business with the Commonwealth, four approaches were employed.

- The size of all prime contracts awarded by the Commonwealth was analyzed to determine the capacity needed to perform the average awarded contract
- The largest contracts awarded to M/WBEs were identified to determine demonstrated ability to win large, competitively bid contracts
- The M/WBE certification process was assessed to determine if it meets the standard set in *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)*,³ which found certification to be a measure of capacity
- The disparity analysis has been restricted to an examination of the prime contract awards in the amount of \$500,000 or less to limit the capacity required to perform the contracts subjected to the statistical analysis

This methodology was sufficient to determine the capacity of the willing market area firms to do business with the Commonwealth.

A. Size of Prime Contracts Analyzed

In *Associated General Contractors of California v. City of Columbus* and *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade City*, the courts were primarily concerned with the capacity analysis of available businesses to bid on large, competitively bid contracts. It should also be noted that the focus in both cases was on the bidding company's size and ability to perform on large, competitively bid construction contracts.⁴

² *Croson*, 488 U.S. 469.

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

⁴ *Associated General Contractors of California v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996), and *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade City*, 943 F. Supp. 1546 (S.D. Fla. 1996), aff'd 122 F.3d 895 (11th Cir. 1997).



The Commonwealth's building construction and design professional services contracts were analyzed to determine the size of awarded contracts and, therefore, the capacity required to perform the Commonwealth's contracts. The size distribution illustrates the fact that limited capacity is needed to perform the overwhelming majority of the Commonwealth's contracts. The analysis in Table 7.05, which combines both industries, demonstrates that 6.69 percent of the Commonwealth's contracts were less than \$25,000, 25 percent were less than \$100,000, and 70.77 percent were less than \$500,000. Contracts that were \$500,000 or more constitute 29.23 percent of the Commonwealth's contracts.

It should be noted that some of the data was only available as purchase orders with more than one purchase order corresponding to the same contract. In that case, one large contract may also be represented in the data by multiple small purchase orders. Some purchase orders could not be linked to a contract; consequently, the number of small contracts may be overstated.

1. Construction Contracts by Size

Table 7.06 depicts the Commonwealth's construction contracts awarded within the eight dollar ranges. Contracts valued at less than \$25,000 were 7 percent; those less than \$100,000 were 26.59 percent; and those less than \$500,000 were 69.67 percent.

The P-value⁵ of >0.05 indicates significant difference in the size of construction contract dollars awarded to the ethnic and gender groups.

2. Design Professional Services Contracts by Size

Table 7.07 depicts the Commonwealth's design professional services contracts within the eight dollar ranges. Contracts valued at less than \$25,000 were 4.49 percent, those less than \$100,000 were 13.48 percent, and those less than \$500,000 were 78.65 percent.

The P-value cannot be calculated because of an insufficient number of design professional services contracts awarded to M/WBEs.

⁵ P-value is the probability that a given statistical finding is due to chance. When a P-value is very small, it means that the finding is very unlikely to be a chance occurrence and is very likely to represent an existing pattern. The industry standard is that if a P-value is less than 0.05, or in other words, the probability that a given finding is due to chance is less than 5 percent, the finding is considered statistically significant. "P-value<0.001" indicates a very strong statistical significance.



Table 7.05 Prime Contracts by Size: Construction and Design Professional Services, January 1, 2003 to December 31, 2005

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males			
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
\$1 - \$24,999	7	16.28%	39	5.79%	3	100.00%	0	0.00%	49	6.69%
\$25,000 - \$49,999	2	4.65%	44	6.54%	0	0.00%	0	0.00%	46	6.28%
\$50,000 - \$99,999	5	11.63%	82	12.18%	0	0.00%	1	7.69%	88	12.02%
\$100,000 - \$249,999	12	27.91%	159	23.63%	0	0.00%	1	7.69%	172	23.50%
\$250,000 - \$499,999	8	18.60%	147	21.84%	0	0.00%	8	61.54%	163	22.27%
\$500,000 - \$999,999	4	9.30%	83	12.33%	0	0.00%	0	0.00%	87	11.89%
\$1,000,000 - \$2,999,999	3	6.98%	86	12.78%	0	0.00%	3	23.08%	92	12.57%
\$3,000,000 and greater	2	4.65%	33	4.90%	0	0.00%	0	0.00%	35	4.78%
Total	43	100.00%	673	100.00%	3	100.00%	13	100.00%	732	100.00%

P-Value < 0.05

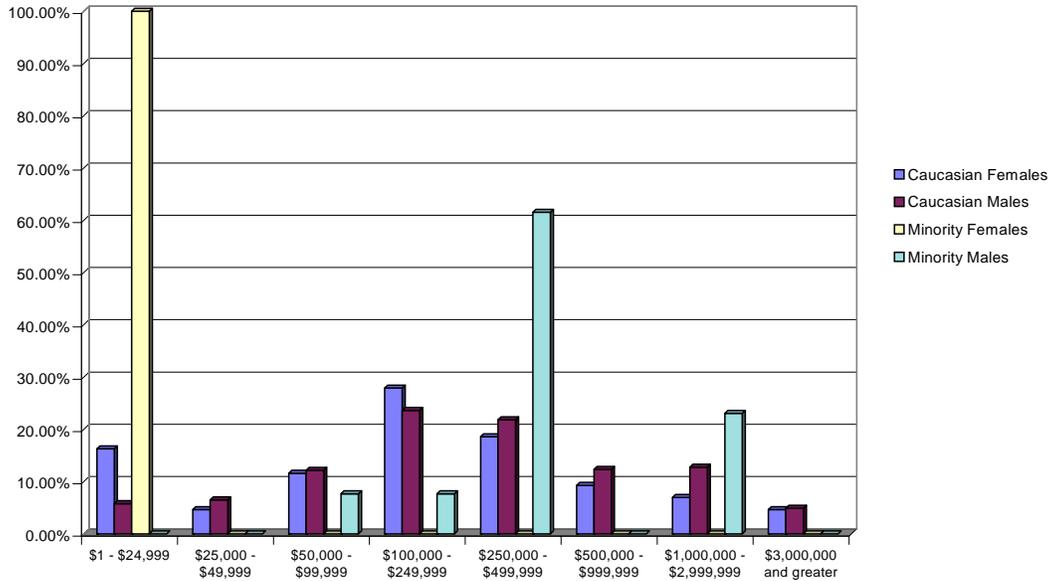


Table 7.06 Construction Prime Contracts by Size: January 1, 2003 to December 31, 2005

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$24,999	6	16.22%	36	6.04%	3	100.00%	0	0.00%	45	7.00%
\$25,000 - \$49,999	2	5.41%	42	7.05%	0	0.00%	0	0.00%	44	6.84%
\$50,000 - \$99,999	5	13.51%	76	12.75%	0	0.00%	1	14.29%	82	12.75%
\$100,000 - \$249,999	12	32.43%	140	23.49%	0	0.00%	1	14.29%	153	23.79%
\$250,000 - \$499,999	5	13.51%	117	19.63%	0	0.00%	2	28.57%	124	19.28%
\$500,000 - \$999,999	2	5.41%	70	11.74%	0	0.00%	0	0.00%	72	11.20%
\$1,000,000 - \$2,999,999	3	8.11%	82	13.76%	0	0.00%	3	42.86%	88	13.69%
\$3,000,000 and greater	2	5.41%	33	5.54%	0	0.00%	0	0.00%	35	5.44%
Total	37	100.00%	596	100.00%	3	100.00%	7	100.00%	643	100.00%

P-Value > 0.05

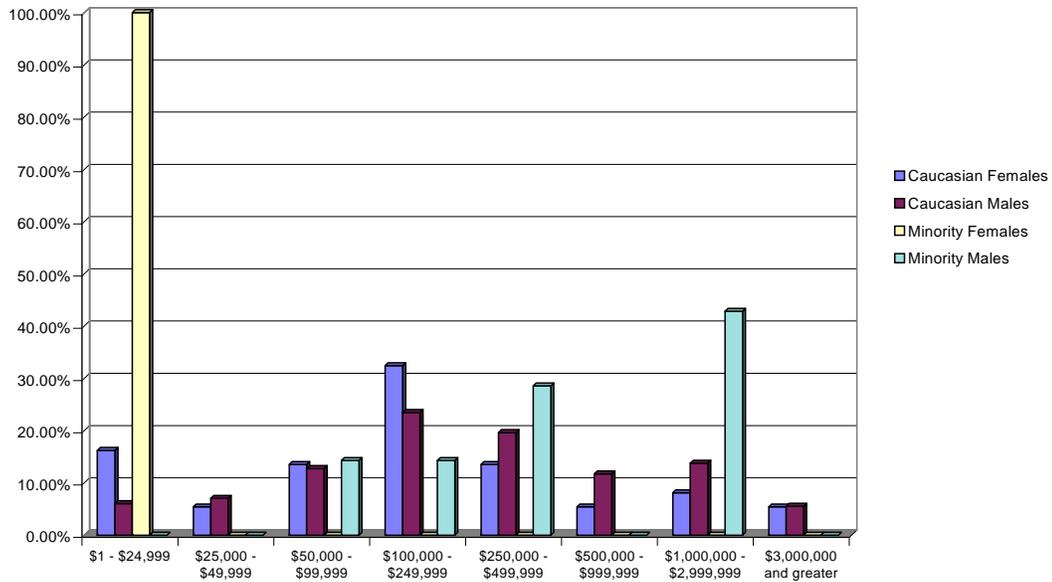
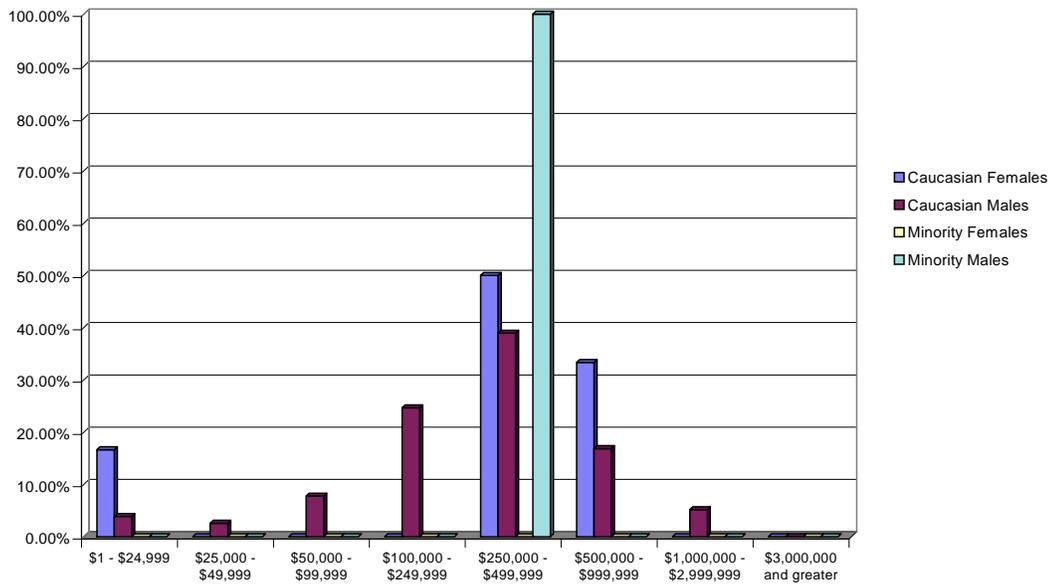


Table 7.07 Design Professional Services Prime Contracts by Size: January 1, 2003 to December 31, 2005

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$24,999	1	16.67%	3	3.90%	0	0.00%	0	0.00%	4	4.49%
\$25,000 - \$49,999	0	0.00%	2	2.60%	0	0.00%	0	0.00%	2	2.25%
\$50,000 - \$99,999	0	0.00%	6	7.79%	0	0.00%	0	0.00%	6	6.74%
\$100,000 - \$249,999	0	0.00%	19	24.68%	0	0.00%	0	0.00%	19	21.35%
\$250,000 - \$499,999	3	50.00%	30	38.96%	0	0.00%	6	100.00%	39	43.82%
\$500,000 - \$999,999	2	33.33%	13	16.88%	0	0.00%	0	0.00%	15	16.85%
\$1,000,000 - \$2,999,999	0	0.00%	4	5.19%	0	0.00%	0	0.00%	4	4.49%
\$3,000,000 and greater	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Total	6	100.00%	77	100.00%	0	0.00%	6	100.00%	89	100.00%

Insufficient Data



B. Largest M/WBE Prime Contract Awards by Industry

M/WBEs were awarded large prime contracts in every industry. The distribution of the largest M/WBE prime contracts awarded is depicted in Table 7.08 below. In each industry, M/WBEs were awarded very large, competitively bid contracts. The utilization analysis shows that M/WBEs demonstrated the capacity to successfully compete for contracts as large as \$5.1 million in construction and \$0.9 million in design professional services.

Table 7.08 Largest M/WBE Prime Contract Awards by the Industry

Largest Prime Contract Value		
Ethnic Group	Construction	Design Professional Services
African Americans	\$2,699,897	\$319,125
Asian Americans	\$288,000	\$490,568
Hispanic Americans	\$1,893,131	\$269,655
Native Americans	\$0	\$0
Caucasian Females	\$5,145,000	\$922,508
M/WBEs	\$5,145,000	\$922,508

C. Commonwealth of Pennsylvania Certification Standards

Philadelphia is the only appellate court decision to address the merits of certification as a measure of capacity.⁶ The court found that programs certifying MBEs for the City of Philadelphia construction projects funded by the United States Department of Transportation (USDOT) satisfied the determination of a firm's capability. Thus, a certification process which reviews the qualifications of an applicant using the standards set forth in the USDOT regulations, 49 Code of Federal Regulations Part 26, would be sufficient to demonstrate the capability of MBEs.

⁶ *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), on remand, 893 F. Supp. 419 (E.D. Penn. 1995), affd, 91 F.3d 586 (3d Cir. 1996).



IV. PRIME CONTRACTOR AVAILABILITY ANALYSIS

The analysis of the size of the Commonwealth's contracts demonstrates that the capacity needed to perform on most of the contracts is limited. Furthermore, the awards the Commonwealth has made to M/WBE firms demonstrate that the capacity of the willing firms is considerably greater than what is needed to bid on the majority of the contracts awarded in each of the industries studied. The prime contractor availability findings are summarized below.

A. Construction Prime Contractor Availability

The distribution of available construction prime contractors is summarized in Table 7.09 below:

African Americans account for 5.52 percent of the construction firms in the Commonwealth's market area.

Asian Americans account for 1.1 percent of the construction firms in the Commonwealth's market area.

Hispanic Americans account for 1.33 percent of the construction firms in the Commonwealth's market area.

Native Americans account for 0.37 percent of the construction firms in the Commonwealth's market area.

Minority Business Enterprises account for 8.32 percent of the construction firms in the Commonwealth's market area.

Women Business Enterprises account for 10.94 percent of the construction firms in the Commonwealth's market area.

Minority and Women Business Enterprises account for 19.26 percent of the construction firms in the Commonwealth's market area.

Caucasian Male Business Enterprises account for 80.74 percent of the construction firms in the Commonwealth's market area.



Table 7.09 Available Construction Prime Contractors

Ethnicity	Percent of Businesses
African Americans	5.52%
Asian Americans	1.10%
Hispanic Americans	1.33%
Native Americans	0.37%
Caucasian Females	10.94%
Caucasian Males	80.74%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	1.18%
African American Males	4.34%
Asian American Females	0.33%
Asian American Males	0.77%
Hispanic American Females	0.22%
Hispanic American Males	1.10%
Native American Females	0.15%
Native American Males	0.22%
Caucasian Females	10.94%
Caucasian Males	80.74%
TOTAL	100.00%
Minority and Gender	Percent of Businesses
Minority Females	1.88%
Minority Males	6.44%
Caucasian Females	10.94%
Caucasian Males	80.74%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	8.32%
Women Business Enterprises	10.94%
Minority and Women Business Enterprises	19.26%
Caucasian Male Business Enterprises	80.74%
TOTAL	100.00%



B. Design Professional Services Prime Contractor Availability

The distribution of available design professional services prime contractors is summarized in Table 7.10.

African Americans account for 6.31 percent of the design professional services firms in the Commonwealth's market area.

Asian Americans account for 9.06 percent of the design professional services firms in the Commonwealth's market area.

Hispanic Americans account for 3.07 percent of the design professional services firms in the Commonwealth's market area.

Native Americans account for none of the design professional services firms in the Commonwealth's market area.

Minority Business Enterprises account for 18.45 percent of the design professional services firms in the Commonwealth's market area.

Women Business Enterprises account for 17.8 percent of the design professional services firms in the Commonwealth's market area.

Minority and Women Business Enterprises account for 36.25 percent of the design professional services firms in the Commonwealth's market area.

Caucasian Male Business Enterprises account for 63.75 percent of the design professional services firms in Commonwealth's market area.



Table 7.10 Available Design Professional Services Prime Contractors

Ethnicity	Percent of Businesses
African Americans	6.31%
Asian Americans	9.06%
Hispanic Americans	3.07%
Native Americans	0.00%
Caucasian Females	17.80%
Caucasian Males	63.75%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	1.94%
African American Males	4.37%
Asian American Females	1.78%
Asian American Males	7.28%
Hispanic American Females	0.32%
Hispanic American Males	2.75%
Native American Females	0.00%
Native American Males	0.00%
Caucasian Females	17.80%
Caucasian Males	63.75%
TOTAL	100.00%
Minority and Gender	Percent of Businesses
Minority Females	4.05%
Minority Males	14.40%
Caucasian Females	17.80%
Caucasian Males	63.75%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	18.45%
Women Business Enterprises	17.80%
Minority and Women Business Enterprises	36.25%
Caucasian Male Business Enterprises	63.75%
TOTAL	100.00%



V. SUBCONTRACTOR AVAILABILITY ANALYSIS

A. Sources of Potentially Willing and Able Subcontractors and Availability

All available prime contractors were also included in the calculation of subcontractor availability. Additional subcontractors in the Commonwealth's market area were identified using sources in Table 7.11.

Table 7.11 Unique Subcontractor Availability Data Sources

Type of Record	Type of Information
<ul style="list-style-type: none">• Subcontracting records provided by the Commonwealth	<ul style="list-style-type: none">• M/WBEs and non-M/WBEs
<ul style="list-style-type: none">• Prime contractor survey which identified subcontractors utilized by the Commonwealth	<ul style="list-style-type: none">• M/WBEs and non-M/WBEs

B. Determination of Willingness and Capacity

Subcontractor availability was limited to businesses determined to be willing and able to perform as prime contractors and businesses utilized as subcontractors; therefore, the determination of willingness was achieved. *Croscon* does not require a measure of subcontractor capacity; therefore, it is not necessary to address capacity issues in the context of subcontractors.



C. Construction Subcontractor Availability

The distribution of available construction subcontractors is summarized in Table 7.12.

African Americans account for 5.11 percent of the construction firms in the Commonwealth's market area.

Asian Americans account for 1.02 percent of the construction firms in the Commonwealth's market area.

Hispanic Americans account for 1.17 percent of the construction firms in the Commonwealth's market area.

Native Americans account for 0.29 percent of the construction firms in the Commonwealth's market area.

Minority Business Enterprises account for 7.59 percent of the construction firms in the Commonwealth's market area.

Women Business Enterprises account for 10.65 percent of the construction firms in the Commonwealth's market area.

Minority and Women Business Enterprises account for 18.24 percent of the construction firms in the Commonwealth's market area.

Caucasian Male Business Enterprises account for 81.76 percent of the construction firms in the Commonwealth's market area.



Table 7.12 Available Construction Subcontractors

Ethnicity	Percent of Businesses
African Americans	5.11%
Asian Americans	1.02%
Hispanic Americans	1.17%
Native Americans	0.29%
Caucasian Females	10.65%
Caucasian Males	81.76%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	1.11%
African American Males	4.00%
Asian American Females	0.32%
Asian American Males	0.70%
Hispanic American Females	0.20%
Hispanic American Males	0.96%
Native American Females	0.12%
Native American Males	0.18%
Caucasian Females	10.65%
Caucasian Males	81.76%
TOTAL	100.00%
Minority and Gender	Percent of Businesses
Minority Females	1.75%
Minority Males	5.84%
Caucasian Females	10.65%
Caucasian Males	81.76%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	7.59%
Women Business Enterprises	10.65%
Minority and Women Business Enterprises	18.24%
Caucasian Male Business Enterprises	81.76%
TOTAL	100.00%



D. Design Professional Services Subcontractor Availability

The distribution of available design professional services subcontractors is summarized in Table 7.13.

African Americans account for 6.1 percent of the design professional services firms in the Commonwealth's market area.

Asian Americans account for 8.4 percent of the design professional services firms in the Commonwealth's market area.

Hispanic Americans account for 2.57 percent of the design professional services firms in the Commonwealth's market area.

Native Americans account for none of the design professional services firms in the Commonwealth's market area.

Minority Business Enterprises account for 17.07 percent of the design professional services firms in the Commonwealth's market area.

Women Business Enterprises account for 18.16 percent of the design professional services firms in the Commonwealth's market area.

Minority and Women Business Enterprises account for 35.23 percent of the design professional services firms in the Commonwealth's market area.

Caucasian Male Business Enterprises account for 64.77 percent of the design professional services firms in the Commonwealth's market area.



Table 7.13 Available Design Professional Services Subcontractors

Ethnicity	Percent of Businesses
African Americans	6.10%
Asian Americans	8.40%
Hispanic Americans	2.57%
Native Americans	0.00%
Caucasian Females	18.16%
Caucasian Males	64.77%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	1.63%
African American Males	4.47%
Asian American Females	1.76%
Asian American Males	6.64%
Hispanic American Females	0.27%
Hispanic American Males	2.30%
Native American Females	0.00%
Native American Males	0.00%
Caucasian Females	18.16%
Caucasian Males	64.77%
TOTAL	100.00%
Minority and Gender	Percent of Businesses
Minority Females	3.66%
Minority Males	13.41%
Caucasian Females	18.16%
Caucasian Males	64.77%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	17.07%
Women Business Enterprises	18.16%
Minority and Women Business Enterprises	35.23%
Caucasian Male Business Enterprises	64.77%
TOTAL	100.00%



8

PRIME CONTRACTOR DISPARITY ANALYSIS

I. INTRODUCTION

The objective of the disparity analysis is to determine the level minority and woman-owned business enterprises (M/WBEs) were utilized on the Commonwealth of Pennsylvania (Commonwealth) contracts. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to M/WBEs would be approximate to the proportion of available M/WBEs¹ in the relevant market area. If the available M/WBEs are underutilized, a statistical test can determine the probability that the disparity is due to chance. If there is a low probability that the disparity is due to chance,² *Croson* states that an inference of discrimination can be made.

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

A disparity ratio less than 0.80 indicates a relevant degree of disparity. This disparity may be detected using a parametric analysis,³ where the number of contracts is sufficiently large and the variation of the contract amount is not too large. When the variation in contract dollar

¹ Availability is defined as the number of willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 7.

² 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 courts to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within the 95 percent confidence level.

³ 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.



amounts is high, a disparity may not be detectable. Under the condition when the variation in contract dollar amounts is high, a non-parametric analysis⁴ would be employed to analyze the contracts ranked by dollar amount.

In order to assess whether the difference in contract values is attributable to chance, a P-value⁵ is calculated. 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 of less than 0.05, the difference is statistically significant.⁶

There are two critical constraints in performing statistical tests of significance. First, the size of the population affects the reliability of the results. In other words, a relatively small population size, whether in terms of the total number of contracts or the total number of available businesses, decreases the reliability of the statistical results. Second, although an inference of discrimination cannot be made if statistical significance is not obtained from the test, one cannot infer from the results that there was no discrimination. Thus, the results of the statistical disparity analysis are necessarily influenced by the size of the population in each industry and ethnic/gender category. Where the results are not statistically significant, the existence of discrimination *cannot* be ruled out. Given these limitations, the anecdotal data has an especially important role in explaining the conditions of discrimination that might exist in the market area.

The analysis of the value of prime contract dollars for each ethnic and gender group incorporates the number of prime contracts awarded. Hence, the disparity analysis for the value of prime contract dollars awarded reflects an analysis of both the number of prime contracts awarded and the value of the prime contract dollars received by each ethnic/gender group.

II. DISPARITY ANALYSIS

Prime contract disparity analysis was performed on construction and design professional services contracts awarded between January 1, 2003 to December 31, 2005.

As demonstrated in *Chapter 7: Availability Analysis*, the majority of the Commonwealth's contracts were small with 70.77 percent under \$500,000 and 48.5 percent under \$250,000. The fact that the majority of the Commonwealth's contracts were small suggests that the

⁴ 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.

⁵ P-value is a measure of statistical significance.

⁶ The study does not test statistically the overutilization of M/WBEs or the underutilization of Caucasian males.



capacity needed to perform most of the contracts awarded during the study period was minimal. There is also evidence that the willing firms had the capacity to perform contracts in excess of \$500,000. Therefore, a threshold of \$500,000 was set for the prime contract disparity analysis to ensure that willing firms had the capacity to perform contracts included in the analysis. The prime contract disparity findings in the two industries under consideration are summarized below.

A. Disparity Analysis: All Contracts under \$500,000, by Industry

1. Construction Prime Contracts under \$500,000

The disparity analysis of all construction prime contracts under \$500,000 is depicted in Table 8.01 and Chart 8.01.

African American Businesses represent 5.52 percent of the available construction firms and received 0.14 percent of the construction prime contracts under \$500,000. This underutilization is statistically significant.

Asian American Businesses represent 1.1 percent of the available construction firms and received 0.68 percent of the construction prime contracts under \$500,000. This underutilization is not statistically significant.

Hispanic American Businesses represent 1.33 percent of the available construction firms and received 0.44 percent of the construction prime contracts under \$500,000. This underutilization is not statistically significant.

Native American Businesses represent 0.37 percent of the available construction firms and received none of the construction prime contracts under \$500,000. While this group was underutilized, there were too few firms to determine statistical significance.

Minority Business Enterprises represent 8.32 percent of the available construction firms and received 1.26 percent of the construction prime contracts under \$500,000. This underutilization is statistically significant.

Women Business Enterprises represent 10.94 percent of the available construction firms and received 5.03 percent of the construction prime contracts under \$500,000. This underutilization is statistically significant.

Minority and Women Business Enterprises represent 19.26 percent of available construction firms and received 6.29 percent of the construction prime contracts under \$500,000. This underutilization is statistically significant.



Caucasian Male Business Enterprises represent 80.74 percent of the available construction firms and received 93.71 percent of the construction prime contracts under \$500,000. This overutilization is statistically significant.



Table 8.01 Disparity Analysis: Construction Prime Contracts under \$500,000, January 1, 2003 to December 31, 2005

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$109,818	0.14%	5.52%	\$4,355,594	-\$4,245,776	0.03	< .05 *
Asian Americans	\$533,980	0.68%	1.10%	\$871,119	-\$337,139	0.61	not significant
Hispanic Americans	\$346,000	0.44%	1.33%	\$1,045,342	-\$699,342	0.33	not significant
Native Americans	\$0	0.00%	0.37%	\$290,373	-\$290,373	0.00	----
Caucasian Females	\$3,969,830	5.03%	10.94%	\$8,624,075	-\$4,654,245	0.46	< .05 *
Caucasian Males	\$73,905,654	93.71%	80.74%	\$63,678,779	\$10,226,875	1.16	< .05 †
TOTAL	\$78,865,282	100.00%	100.00%	\$78,865,282			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$21,368	0.03%	1.18%	\$929,193	-\$907,825	0.02	< .05 *
African American Males	\$88,450	0.11%	4.34%	\$3,426,400	-\$3,337,950	0.03	< .05 *
Asian American Females	\$0	0.00%	0.33%	\$261,336	-\$261,336	0.00	----
Asian American Males	\$533,980	0.68%	0.77%	\$609,783	-\$75,803	0.88	----
Hispanic American Females	\$0	0.00%	0.22%	\$174,224	-\$174,224	0.00	----
Hispanic American Males	\$346,000	0.44%	1.10%	\$871,119	-\$525,119	0.40	not significant
Native American Females	\$0	0.00%	0.15%	\$116,149	-\$116,149	0.00	----
Native American Males	\$0	0.00%	0.22%	\$174,224	-\$174,224	0.00	----
Caucasian Females	\$3,969,830	5.03%	10.94%	\$8,624,075	-\$4,654,245	0.46	< .05 *
Caucasian Males	\$73,905,654	93.71%	80.74%	\$63,678,779	\$10,226,875	1.16	< .05 †
TOTAL	\$78,865,282	100.00%	100.00%	\$78,865,282			
Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$21,368	0.03%	1.88%	\$1,480,902	-\$1,459,534	0.01	< .05 *
Minority Males	\$968,430	1.23%	6.44%	\$5,081,526	-\$4,113,096	0.19	< .05 *
Caucasian Females	\$3,969,830	5.03%	10.94%	\$8,624,075	-\$4,654,245	0.46	< .05 *
Caucasian Males	\$73,905,654	93.71%	80.74%	\$63,678,779	\$10,226,875	1.16	< .05 †
TOTAL	\$78,865,282	100.00%	100.00%	\$78,865,282			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$989,798	1.26%	8.32%	\$6,562,428	-\$5,572,630	0.15	< .05 *
Women Business Enterprises	\$3,969,830	5.03%	10.94%	\$8,624,075	-\$4,654,245	0.46	< .05 *
Minority and Women Business Enterprises	\$4,959,628	6.29%	19.26%	\$15,186,503	-\$10,226,875	0.33	< .05 *
Caucasian Male Business Enterprises	\$73,905,654	93.71%	80.74%	\$63,678,779	\$10,226,875	1.16	< .05 †

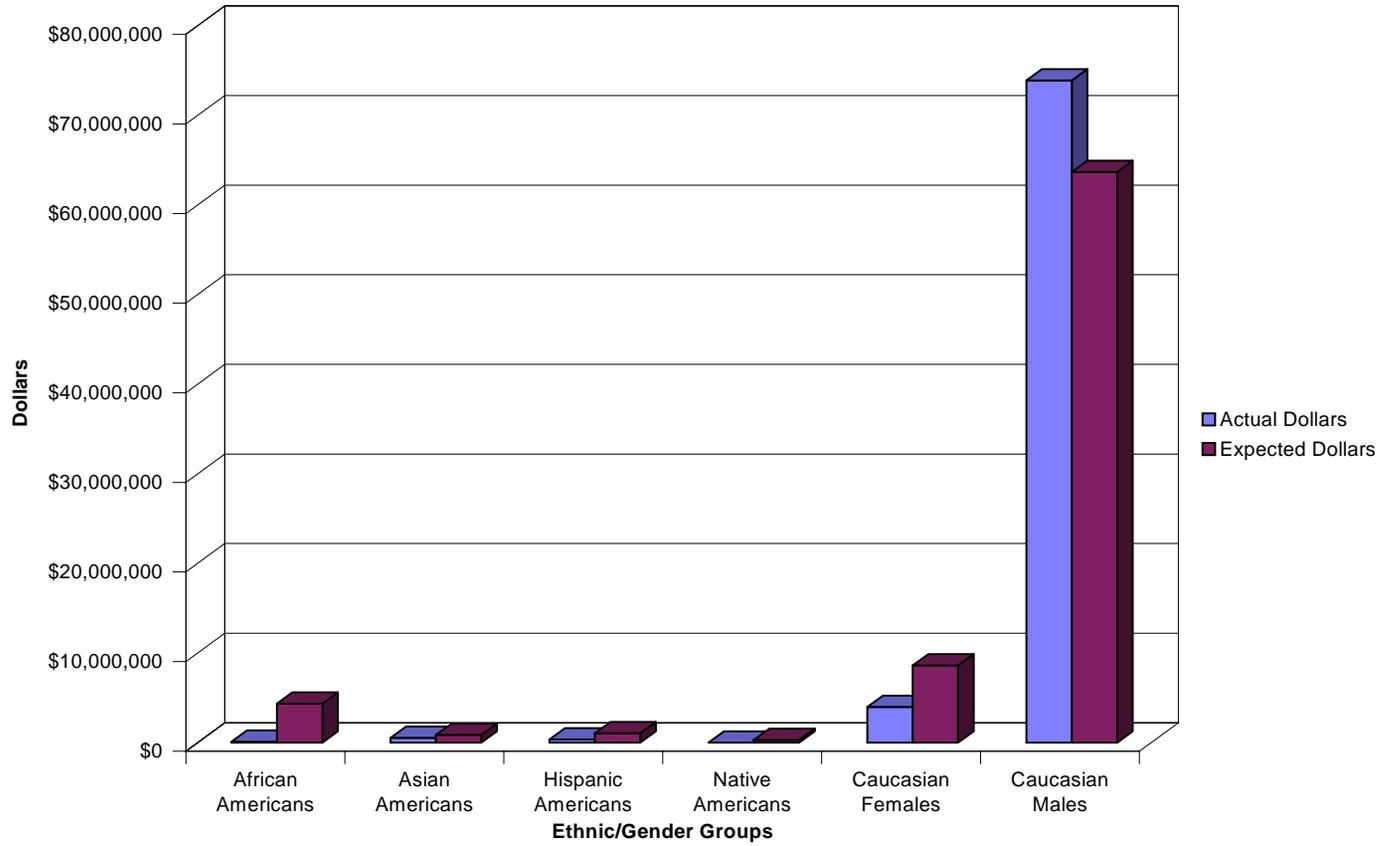
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of Caucasian males.

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

Chart 8.01 Disparity Analysis: Construction Prime Contracts under \$500,000, January 1, 2003 to December 31, 2005



2. Design Professional Services Prime Contracts under \$500,000

The disparity analysis of all design professional services prime contracts under \$500,000 is depicted in Table 8.02 and Chart 8.02.

African American Businesses represent 6.31 percent of the available design professional services firms and received 1.77 percent of the design professional services prime contracts under \$500,000. This underutilization is not statistically significant.

Asian American Businesses represent 9.06 percent of the available design professional services firms and received 8.2 percent of the design professional services prime contracts under \$500,000. This underutilization is not statistically significant.

Hispanic American Businesses represent 3.07 percent of the available design professional services firms and received 1.49 percent of the design professional services prime contracts under \$500,000. This underutilization is not statistically significant.

Native American Businesses represent none of the available design professional services firms and received none of the design professional services prime contracts under \$500,000. While this group was underutilized, there were too few available firms to determine statistical significance.

Minority Business Enterprises represent 18.45 percent of the available design professional services firms and received 11.46 percent of the design professional services prime contracts under \$500,000. This underutilization is not statistically significant.

Women Business Enterprises represent 17.8 percent of the available design professional services firms and received 5.98 percent of the design professional services prime contracts under \$500,000. This underutilization is statistically significant.

Minority and Women Business Enterprises represent 36.25 percent of the available design professional services firms and received 17.44 percent of the design professional services prime contracts under \$500,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 63.75 percent of the available design professional services firms and received 82.56 percent of the design professional services prime contracts under \$500,000. This overutilization is statistically significant.



Table 8.02 Disparity Analysis: Design Professional Services Prime Contracts under \$500,000, January 1, 2003 to December 31, 2005

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$319,125	1.77%	6.31%	\$1,140,399	-\$821,274	0.28	not significant
Asian Americans	\$1,482,543	8.20%	9.06%	\$1,637,496	-\$154,952	0.91	not significant
Hispanic Americans	\$269,655	1.49%	3.07%	\$555,579	-\$285,924	0.49	not significant
Native Americans	\$0	0.00%	0.00%	\$0	\$0	----	----
Caucasian Females	\$1,080,201	5.98%	17.80%	\$3,216,509	-\$2,136,308	0.34	< .05 *
Caucasian Males	\$14,919,409	82.56%	63.75%	\$11,520,951	\$3,398,458	1.29	< .05 †
TOTAL	\$18,070,934	100.00%	100.00%	\$18,070,934			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	1.94%	\$350,892	-\$350,892	0.00	not significant
African American Males	\$319,125	1.77%	4.37%	\$789,507	-\$470,382	0.40	not significant
Asian American Females	\$0	0.00%	1.78%	\$321,651	-\$321,651	0.00	not significant
Asian American Males	\$1,482,543	8.20%	7.28%	\$1,315,845	\$166,699	1.13	**
Hispanic American Females	\$0	0.00%	0.32%	\$58,482	-\$58,482	0.00	----
Hispanic American Males	\$269,655	1.49%	2.75%	\$497,097	-\$227,442	0.54	not significant
Native American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Native American Males	\$0	0.00%	0.00%	\$0	\$0	----	----
Caucasian Females	\$1,080,201	5.98%	17.80%	\$3,216,509	-\$2,136,308	0.34	< .05 *
Caucasian Males	\$14,919,409	82.56%	63.75%	\$11,520,951	\$3,398,458	1.29	< .05 †
TOTAL	\$18,070,934	100.00%	100.00%	\$18,070,934			
Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$0	0.00%	4.05%	\$731,025	-\$731,025	0.00	not significant
Minority Males	\$2,071,323	11.46%	14.40%	\$2,602,448	-\$531,125	0.80	not significant
Caucasian Females	\$1,080,201	5.98%	17.80%	\$3,216,509	-\$2,136,308	0.34	< .05 *
Caucasian Males	\$14,919,409	82.56%	63.75%	\$11,520,951	\$3,398,458	1.29	< .05 †
TOTAL	\$18,070,934	100.00%	100.00%	\$18,070,934			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$2,071,323	11.46%	18.45%	\$3,333,473	-\$1,262,150	0.62	not significant
Women Business Enterprises	\$1,080,201	5.98%	17.80%	\$3,216,509	-\$2,136,308	0.34	< .05 *
Minority and Women Business Enterprises	\$3,151,524	17.44%	36.25%	\$6,549,982	-\$3,398,458	0.48	< .05 *
Caucasian Male Business Enterprises	\$14,919,409	82.56%	63.75%	\$11,520,951	\$3,398,458	1.29	< .05 †

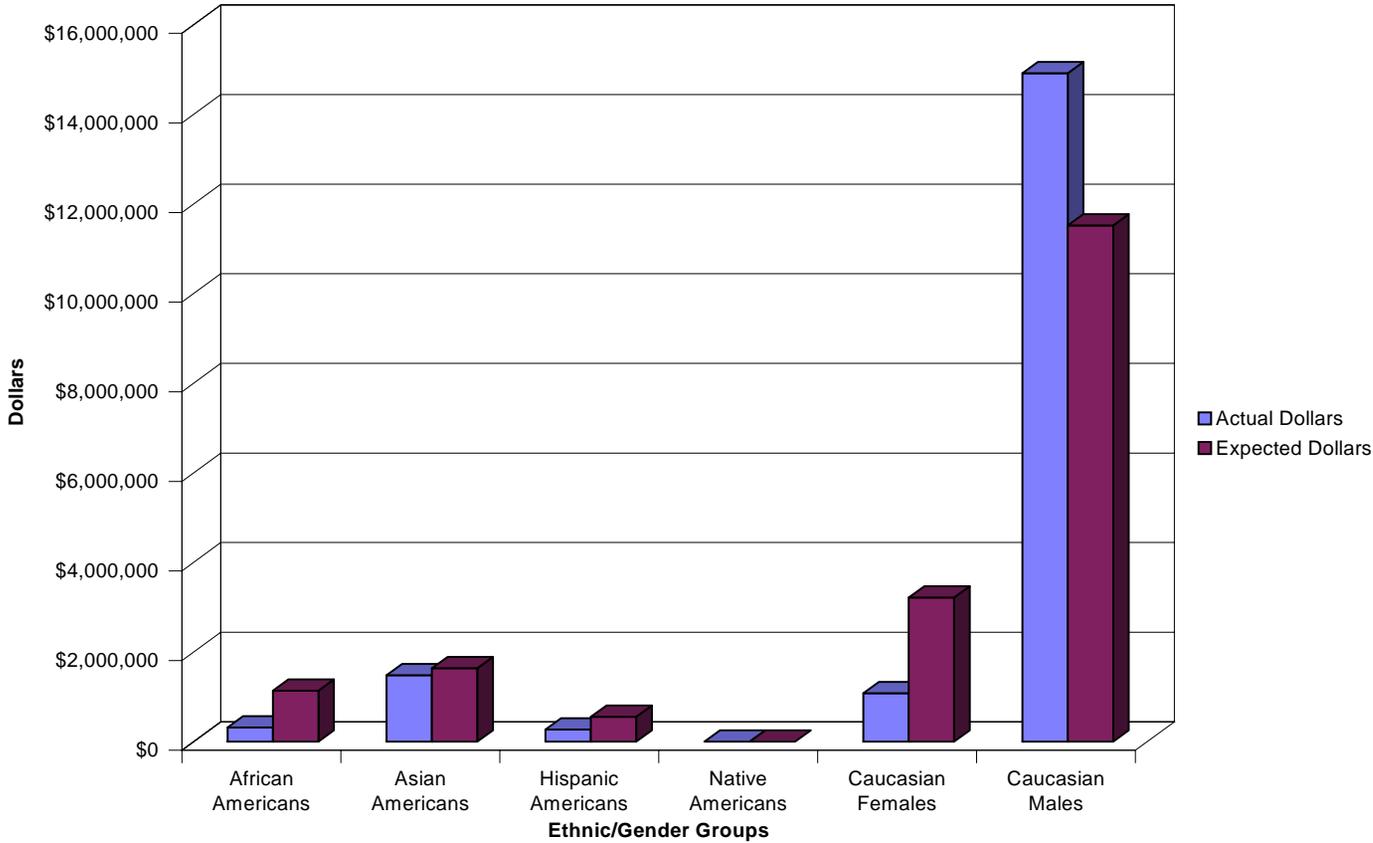
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of Caucasian males.

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

Chart 8.02 Disparity Analysis: Design Professional Services Prime Contracts under \$500,000, January 1, 2003 to December 31, 2005



B. Disparity Analysis: All Contracts under \$100,000 and \$10,000 by Industry

At the informal level, there were only three construction contracts and no design professional services contracts awarded to minority business enterprises. Only two construction contracts and one design professional services contract were awarded to women business enterprises.

In addition, there were too few informal construction and design professional contracts to analyze to perform a statistical analysis.

III. SUMMARY

A. Construction Prime Contracts

As indicated in Table 8.03, African American and Women Business Enterprise construction prime contractors were determined to be underutilized at the formal contract level.

Table 8.03 Disparity Summary: Construction Prime Contract Dollars, January 1, 2003 to December 31, 2005

Ethnicity/Gender	Contracts Under \$500,000
African Americans	Yes
Asian Americans	No
Hispanic Americans	No
Native Americans	---
Minority Business Enterprises	Yes
Women Business Enterprises	Yes
Minority and Women Business Enterprises	Yes

- Yes = Statistically significant disparity was found
- No = Statistically significant disparity was not found
- = There were insufficient records to determine statistical disparity
- ** = The study did not test statistically the overutilization of M/WBEs



B. Design Professional Services Prime Contracts

As indicated in Table 8.04, Women Business Enterprises prime contractors were determined to be underutilized at the formal contract level.

Table 8.04 Disparity Summary: Design Professional Services Contract Dollars, January 1, 2003 to December 31, 2005

Ethnicity / Gender	Contracts under \$500,000
African Americans	No
Asian Americans	No
Hispanic Americans	No
Native Americans	---
Minority Business Enterprises	No
Women Business Enterprises	Yes
Minority and Women Business Enterprises	Yes

- Yes = Statistically significant disparity was found
- No = Statistically significant disparity was not found
- = There were insufficient records to determine statistical disparity
- ** = The study did not test statistically the overutilization of M/WBEs





9

SUBCONTRACTOR DISPARITY ANALYSIS

I. INTRODUCTION

The objective of this analysis is to determine if Minority-owned Business Enterprise and Woman-owned Business Enterprise (MBE/WBE) subcontractors were underutilized at a statistically significant level. A detailed discussion of the statistical procedures for conducting a disparity analysis is set forth in *Chapter 8: Prime Contractor Disparity Analysis*. The same analytical procedures were used to perform the subcontractor disparity analysis. Under a fair and equitable system of awarding subcontracts, the proportion of subcontracts and subcontract dollars awarded to MBE/WBEs should be approximate to the proportion of available MBE/WBEs in the relevant market area. If the proportions are not approximate and a disparity exists between these proportions, the probability that the disparity is due to chance can be determined using a statistical test. If there is a low probability that the disparity is due to chance, *Croson* states that an inference of discrimination can be made.¹

II. DISPARITY ANALYSIS

As detailed in *Chapter 5: Subcontractor Utilization Analysis*, extensive efforts were undertaken to obtain subcontracting records for the Commonwealth's construction and design professional services contracts. Subcontract records were compiled for construction and design professional services during the January 1, 2003 to December 31, 2005 study period. A subcontractor disparity analysis of these records was performed.

¹ When conducting statistical tests, a level of confidence 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 courts as an acceptable level in determining whether an inference of discrimination can be made. Thus the data analyzed here was done within the 95 percent confidence level.



A. Construction Subcontractor Disparity Analysis: January 1, 2003 to December 31, 2005

1. Construction Subcontractor Disparity Analysis: All Subcontracts

The disparity analysis of construction subcontract dollars is depicted in Table 9.01 and Chart 9.01.

African American Businesses represent 5.11 percent of the available construction firms and received 2.93 percent of the construction subcontract dollars. This underutilization is statistically significant.

Asian American Businesses represent 1.02 percent of the available construction firms and received 0.33 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Hispanic American Businesses represent 1.17 percent of the available construction firms and received 0.12 percent of the construction subcontract dollars. This underutilization is statistically significant.

Native American Businesses represent 0.29 percent of the available construction firms and received none of the construction subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

Minority Business Enterprises represent 7.59 percent of the available construction firms and received 3.37 percent of the construction subcontract dollars. This underutilization is statistically significant.

Women Business Enterprises represent 10.65 percent of the available construction firms and received 7.94 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Minority and Women Business Enterprises represent 18.24 percent of the available construction firms and received 11.32 percent of the construction subcontract dollars. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 81.76 percent of the available construction firms and received 88.68 percent of the construction subcontract dollars. This overutilization is statistically significant.



Table 9.01 Disparity Analysis: Construction Subcontracts, January 1, 2003 to December 31, 2005

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$4,542,379	2.93%	5.11%	\$7,925,272	-\$3,382,893	0.57	< .05 *
Asian Americans	\$509,056	0.33%	1.02%	\$1,585,054	-\$1,075,999	0.32	not significant
Hispanic Americans	\$179,698	0.12%	1.17%	\$1,811,491	-\$1,631,792	0.10	< .05 *
Native Americans	\$0	0.00%	0.29%	\$452,873	-\$452,873	0.00	----
Caucasian Females	\$12,326,037	7.94%	10.65%	\$16,529,853	-\$4,203,816	0.75	not significant
Caucasian Males	\$137,597,010	88.68%	81.76%	\$126,849,638	\$10,747,372	1.08	< .05 †
TOTAL	\$155,154,180	100.00%	100.00%	\$155,154,180			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$982,418	0.63%	1.11%	\$1,720,916	-\$738,498	0.57	not significant
African American Males	\$3,559,961	2.29%	4.00%	\$6,204,356	-\$2,644,395	0.57	< .05 *
Asian American Females	\$159,521	0.10%	0.32%	\$498,160	-\$338,639	0.32	----
Asian American Males	\$349,535	0.23%	0.70%	\$1,086,894	-\$737,360	0.32	----
Hispanic American Females	\$145,100	0.09%	0.20%	\$317,011	-\$171,911	0.46	----
Hispanic American Males	\$34,598	0.02%	0.96%	\$1,494,480	-\$1,459,881	0.02	----
Native American Females	\$0	0.00%	0.12%	\$181,149	-\$181,149	0.00	----
Native American Males	\$0	0.00%	0.18%	\$271,724	-\$271,724	0.00	----
Caucasian Females	\$12,326,037	7.94%	10.65%	\$16,529,853	-\$4,203,816	0.75	not significant
Caucasian Males	\$137,597,010	88.68%	81.76%	\$126,849,638	\$10,747,372	1.08	< .05 †
TOTAL	\$155,154,180	100.00%	100.00%	\$155,154,180			
Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$1,287,039	0.83%	1.75%	\$2,717,236	-\$1,430,197	0.47	not significant
Minority Males	\$3,944,094	2.54%	5.84%	\$9,057,454	-\$5,113,359	0.44	< .05 *
Caucasian Females	\$12,326,037	7.94%	10.65%	\$16,529,853	-\$4,203,816	0.75	not significant
Caucasian Males	\$137,597,010	88.68%	81.76%	\$126,849,638	\$10,747,372	1.08	< .05 †
TOTAL	\$155,154,180	100.00%	100.00%	\$155,154,180			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$5,231,133	3.37%	7.59%	\$11,774,690	-\$6,543,556	0.44	< .05 *
Women Business Enterprises	\$12,326,037	7.94%	10.65%	\$16,529,853	-\$4,203,816	0.75	not significant
Minority and Women Business Enterprises	\$17,557,170	11.32%	18.24%	\$28,304,542	-\$10,747,372	0.62	< .05 *
Caucasian Male Business Enterprises	\$137,597,010	88.68%	81.76%	\$126,849,638	\$10,747,372	1.08	< .05 †

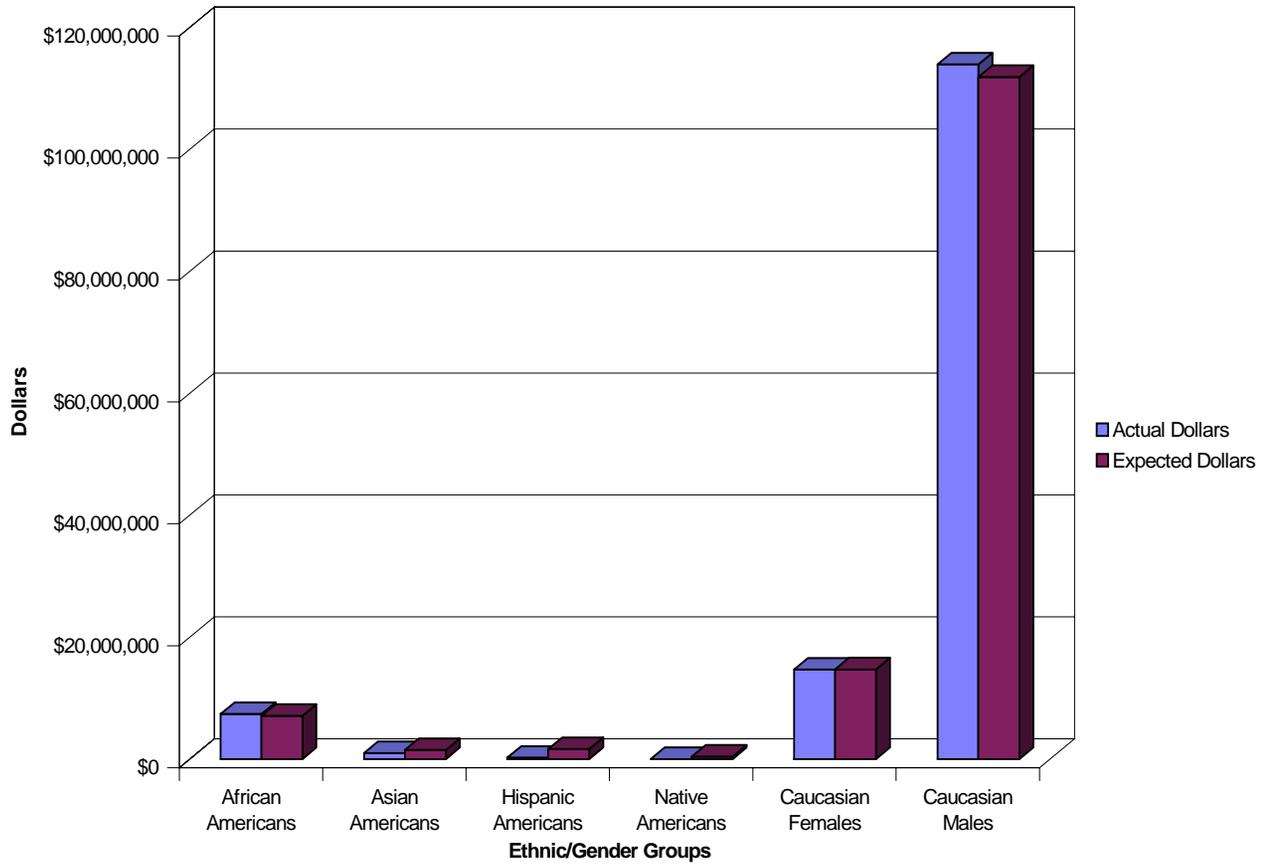
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of Caucasian males.

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

Chart 9.01 Disparity Analysis: Construction Subcontracts, January 1, 2003 to December 31, 2005



B. Design Professional Services Subcontractor Analysis: January 1, 2003 to December 31, 2005

The disparity analysis of design professional services subcontract dollars is depicted in Table 9.02 and Chart 9.02.

African American Businesses represent 6.10 percent of the available design professional services firms and received 0.66 percent of the design professional services subcontract dollars. This underutilization is statistically significant.

Asian American Businesses represent 8.4 percent of the available design professional services firms and received 1.33 percent of the design professional services subcontract dollars. This underutilization is statistically significant.

Hispanic American Businesses represent 2.57 percent of the available design professional services firms and received 0.33 percent of the design professional services subcontract dollars. This underutilization is not statistically significant.

Native American Businesses represent none of the available design professional services firms and received none of the design professional services subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

Minority Business Enterprises represent 17.07 percent of the available design professional services firms and received 2.31 percent of the design professional services subcontract dollars. This underutilization is statistically significant.

Women Business Enterprises represent 18.16 percent of the available design professional services firms and received 3.23 percent of the design professional services subcontract dollars. This underutilization is statistically significant.

Minority and Women Business Enterprises represent 35.23 percent of the available design professional services firms and received 5.54 percent of the design professional services subcontract dollars. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 64.77 percent of the available design professional services firms and received 94.46 percent of the design professional services subcontract dollars. This overutilization is statistically significant.



Table 9.02 Disparity Analysis: Design Professional Services Subcontracts, January 1, 2003 to December 31, 2005

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$34,829	0.66%	6.10%	\$323,484	-\$288,655	0.11	< .05 *
Asian Americans	\$70,472	1.33%	8.40%	\$445,689	-\$375,217	0.16	< .05 *
Hispanic Americans	\$17,250	0.33%	2.57%	\$136,582	-\$119,332	0.13	not significant
Native Americans	\$0	0.00%	0.00%	\$0	\$0	----	----
Caucasian Females	\$171,311	3.23%	18.16%	\$963,264	-\$791,953	0.18	< .05 *
Caucasian Males	\$5,011,279	94.46%	64.77%	\$3,436,121	\$1,575,158	1.46	< .05 †
TOTAL	\$5,305,141	100.00%	100.00%	\$5,305,141			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	1.63%	\$86,262	-\$86,262	0.00	not significant
African American Males	\$34,829	0.66%	4.47%	\$237,222	-\$202,393	0.15	not significant
Asian American Females	\$0	0.00%	1.76%	\$93,451	-\$93,451	0.00	not significant
Asian American Males	\$70,472	1.33%	6.64%	\$352,238	-\$281,766	0.20	not significant
Hispanic American Females	\$0	0.00%	0.27%	\$14,377	-\$14,377	0.00	----
Hispanic American Males	\$17,250	0.33%	2.30%	\$122,205	-\$104,955	0.14	not significant
Native American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Native American Males	\$0	0.00%	0.00%	\$0	\$0	----	----
Caucasian Females	\$171,311	3.23%	18.16%	\$963,264	-\$791,953	0.18	< .05 *
Caucasian Males	\$5,011,279	94.46%	64.77%	\$3,436,121	\$1,575,158	1.46	< .05 †
TOTAL	\$5,305,141	100.00%	100.00%	\$5,305,141			
Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$0	0.00%	3.66%	\$194,091	-\$194,091	0.00	< .05 *
Minority Males	\$122,551	2.31%	13.41%	\$711,665	-\$589,114	0.17	< .05 *
Caucasian Females	\$171,311	3.23%	18.16%	\$963,264	-\$791,953	0.18	< .05 *
Caucasian Males	\$5,011,279	94.46%	64.77%	\$3,436,121	\$1,575,158	1.46	< .05 †
TOTAL	\$5,305,141	100.00%	100.00%	\$5,305,141			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$122,551	2.31%	17.07%	\$905,756	-\$783,205	0.14	< .05 *
Women Business Enterprises	\$171,311	3.23%	18.16%	\$963,264	-\$791,953	0.18	< .05 *
Minority and Women Business Enterprises	\$293,862	5.54%	35.23%	\$1,869,020	-\$1,575,158	0.16	< .05 *
Caucasian Male Business Enterprises	\$5,011,279	94.46%	64.77%	\$3,436,121	\$1,575,158	1.46	< .05 †

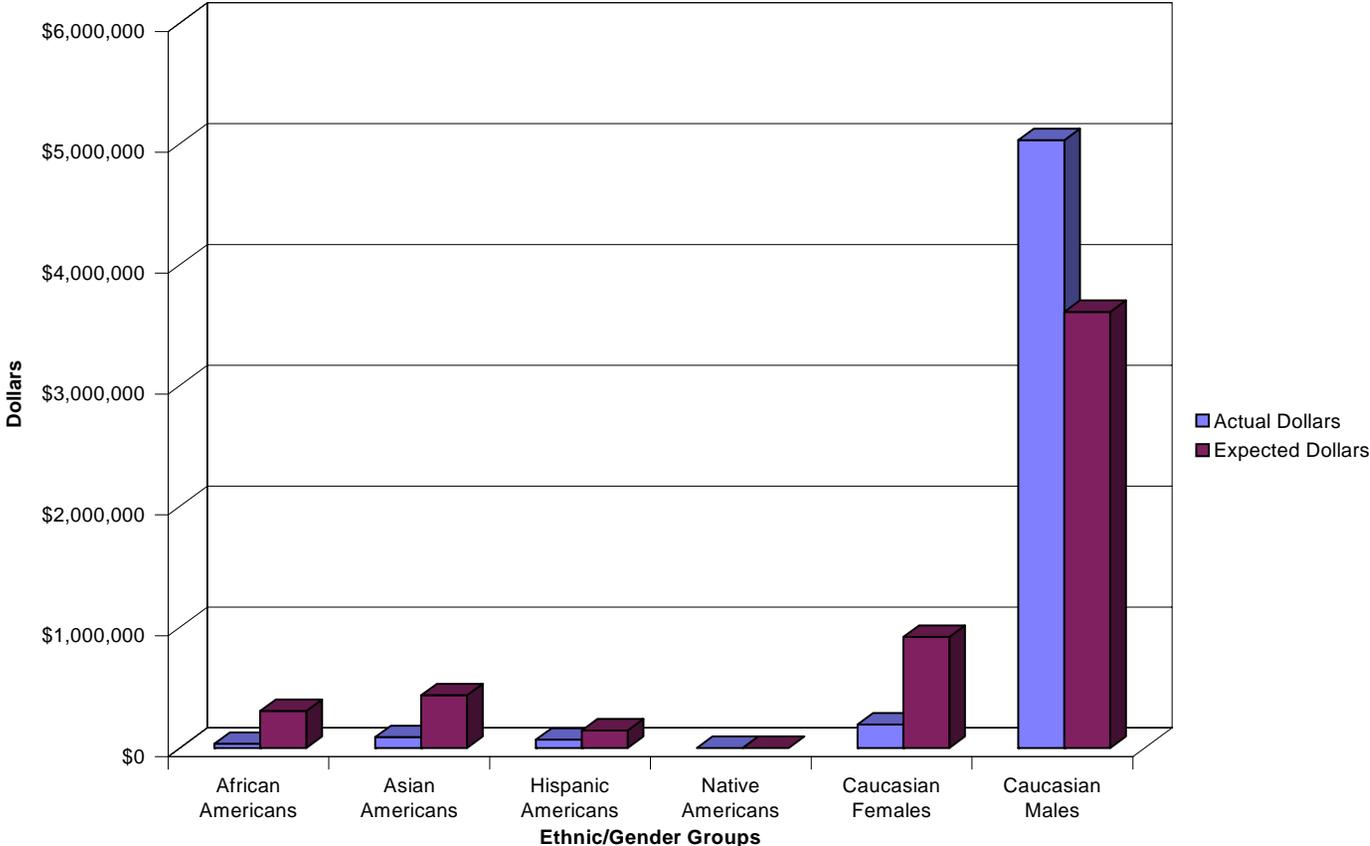
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of Caucasian males.

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

Chart 9.02 Disparity Analysis: Design Professional Services Subcontracts, January 1, 2003 to December 31, 2005



III. SUBCONTRACTOR DISPARITY SUMMARY

The subcontractor disparity findings in the industries under consideration are summarized in Table 9.03 below.

As indicated in Table 9.03, there was a statistically significant disparity found in all construction subcontracts for African Americans and Hispanic Americans but not for Women Business Enterprises. Design professional services subcontracts had a statistically significant disparity for African Americans, Asian Americans, and Women Business Enterprises.

Table 9.03 Subcontractor Disparity Summary, January 1, 2003 to December 31, 2005

Ethnicity / Gender	Construction Subcontracts	Design Professional Services Subcontracts
African Americans	Yes	Yes
Asian Americans	No	Yes
Hispanic Americans	Yes	No
Native Americans	---	---
Minority Business Enterprises	Yes	Yes
Women Business Enterprises	No	Yes
Minority and Women Business Enterprises	Yes	Yes

Yes = Statistically significant disparity was found

No = Statistically significant disparity was not found

--- = There were insufficient records to determine statistical disparity

** = The study did not test statistically the overutilization of M/WBEs



10

ANECDOTAL ANALYSIS

I. INTRODUCTION

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

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

A. Anecdotal Evidence of Active or Passive Participation

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

¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, at 509 (1989)



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

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

This chapter presents anecdotal accounts excerpted from interviews with businesses domiciled in the Commonwealth of Pennsylvania (Commonwealth). The anecdotes provide accounts of both active and passive discrimination encountered in the market area.

B. Anecdotal Methodology

The method of gathering anecdotal testimony was the oral history interview. Oral history is defined by the *American Heritage Dictionary* as “historical information obtained in tape-recorded interviews with individuals having firsthand knowledge.” In-depth interviews have been determined by Mason Tillman Associates to be superior to the other forms of gathering anecdotal evidence—mail, telephone survey, or public hearing testimony. It affords the researcher a greater opportunity to garner in-depth accounts of testimony to assess the effects of exclusionary practices on MBE/WBEs and the means by which these practices occur. The in-depth interviews are also structured in a manner that affords MBE/WBEs a process in which their anonymity can be preserved.

² *Croson*, 488 U.S. at 491-93, 509.

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

⁴ 488 U.S. at 509.



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

Potential interviewees were identified using bidders list, certification records, community meetings and other organization's membership directories. Once identified, interviewees were pre-screened to determine if they operated within the defined market area, and were willing to commit to the interview process.

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

Once completed, the interviews were transcribed and analyzed for barriers MBE/WBE businesses encounter. From this analysis of the transcripts, the anecdotal report was completed. The anecdotal report describes general market conditions, prime contractor barriers, and the range of experiences encountered by interviewees attempting to do business in the Commonwealth's market area generally, and with the Commonwealth, specifically.

II. BUSINESS BARRIERS

A. Racial Barriers

Some minority business owners reported that their skills and capabilities have not been evaluated with the same standards as their non-minority counterparts. A minority male owner of a construction-related firm reported that he was treated differently because of racial stereotypes:

At least four or five times, I have been at pre-bid conferences, and as soon as I walk in people just start looking at me because I'm the only Hispanic in the room. I believe it is because certain negative information is reported in the newspaper about Hispanic Americans, and then people try to match you with that person. And I think that is wrong. There are a lot of good people out there that are not Caucasians, and they are doing quite well. They have businesses, they work, and they have a good family. When I am out trying to improve my company I get sick in my stomach at the way people approach me. A lot of people don't have a very good opinion about Latinos in this area and the surrounding towns. It's just



a difficult town. Hopefully, companies will realize that it's not the color of your skin or your gender; it's about the service you can you provide.

This minority male owner of a construction-related company believes that some procurement managers assume that minority businesses provide inferior services:

Some buyers for the Commonwealth overlook many companies of color that are quite capable and offer great service and pricing. They should look at us for what we can do from a business perspective instead of what we can't do. I think this perception permeates in a lot of procurement professional heads. When they hear diversity, they assume that those businesses have less quality, less service and oftentimes that is not the case. Many of these opinions are tied to individual perceptions of minority firms. Most organizations do not like change. The procurement managers need to come out of their comfort zone and look at alternative businesses whether to drive down costs, get better service, or for diversity and give minority businesses an opportunity. I was brought up as an African-American in this country with parents who came out of the Jim Crow South. We just accept that it's just the way it is, and you have to work harder but you don't cry or moan.

A minority male owner of construction-related company reported that he has experienced racist behavior from colleagues who did not recognize his ethnicity:

I deal with some old timers at [business name withheld] who bust my [expletive removed] . . . and they don't realize that what they are saying is racist and silly. It's just the way those ole boys were brought up. I take it for what it's worth. I'm getting paid to do my job. I have mentioned that I'm [ethnicity withheld], and they did not even realize my ethnicity, but it's so ingrained that they didn't realize that they were being racist.



III. BARRIERS CREATED BY THE CONTRACTOR COMMUNITY

A. Difficulty Breaking Into the Contracting Community

Many minority and women business owners reported on the difficulties they encountered trying to break into the contractor community. This minority female owner of a construction company for over twenty years expressed her frustration regarding attempts to secure work from Commonwealth agencies:

In Pittsburgh, we are getting beaten-up and I don't even know why we bother to get certified. It's just a piece of doggone paper. They are not helping us and none of these organizations are helping any Black business owners. Commonwealth agencies will get Black contractors from Ohio and West Virginia to come up here and bid on work. They will not use the certified Black contractors here in Pittsburgh. I don't understand that. I just said the heck with it, I don't want to go through it anymore. I am just tired of the hassles and the stress and getting no results. It's like no one's hearing me. I even complained to state representatives, and they did absolutely nothing. In the meantime, my bills are still coming in every month.

This same business owner also believes that big general contractors do not hire minority subcontractors:

The big general contractors like [company names withheld] are being awarded all the work, and they will not use any minority subcontractors. I don't know how they get away with that, and we are on the outside looking in. We got to fight to get a job. Right now these houses are being built on the north side. We went there every day screaming and hollering because they did not have any Black workers on the job.

A minority male owner of a construction-related company explained why his business has been unable to complete with larger, more established companies:

Most of the contracts are secured by larger corporations that have been established in this industry and elsewhere for many years. Small companies use more resources as compared to a



larger corporation that has more capital and more employees. I have not been able to secure a contract with either the federal government or the Commonwealth.

This same business owner believes that oftentimes the award selection has already been determined before the bid is due:

The time that it takes to prepare any proposal is quite excessive, and we very seldom hear about bids except from the federal government. By the time that we submit our proposal, the award selection has already been done, either officially or unofficially.

This Caucasian female owner of a construction-related company provided an example where she was unable to compete with large firms:

Probably three years ago with the Department of Labor, we went to several national vendors and asked them if we could work as subcontractors. But their response to us was that it's good business, we want the work for ourselves. They would rather do the work internally and use their own resources, and they didn't want anything to do with us. So we could not get a bid even though we were the incumbent subcontractor to [company name withheld].

This minority male owner of a construction-related company also reported that his company is unable to compete with larger contractors:

The people that we work with at the Commonwealth are trying their best to improve opportunities for minority businesses. But the people that actually get the big jobs are these big contractors that are all owned by Caucasians, or they say they are owned by Caucasian women.

This Caucasian female owner of a construction-related company explained that she has experienced difficulty trying to network with established prime contractors:

There have been many events that have been organized by different government agencies to bring women and minorities together with prime contractors. We have had extreme difficulty trying to network and have conversations with prime contractors. Even when we make contact and exchange



business cards and try to follow up, we don't get called back. It's all part of a formality, just going through the motions.

This minority male owner of a construction-related company explained why he decided to seek work from the private sector rather than from the Commonwealth:

The Commonwealth of Pennsylvania is very difficult to deal with in terms of getting work. So, we do much more work in the private sector and with non-profit agencies. The Commonwealth requires an extensive amount of paperwork, and it is very political. It's hard to determine whether we are going to actually get any business with them or not. We basically walked away from the Commonwealth because we are doing well in the private sector. We tried to get business, and they kept saying, 'No thank you.' I don't know why they are wasting time sending out RFP?

This minority male owner of a construction-related company for two decades reported that he was denied a contract because of lack of experience:

I spent a lot of money and time pitching a proposal to the Commonwealth, so I was shocked I missed it with another major firm. They gave it to him and told us that we did not have any experience. I don't know how you can say we don't have experience when we have 24 years of experience in that particular field. So we lost, and that was a big discouragement to me. It went to a major White firm.

A minority male owner of a construction-related company believes that he is unable to secure work from the Commonwealth because many of its large contracts are outsourced:

The Commonwealth is outsourcing a lot of large contracts and resulting subcontracts that could have been acquired in the Commonwealth. The Philadelphia School District is notorious for doing that. They will use an out of state firm for products and services that could have been acquired locally.



IV. DIFFICULTIES IN THE CONTRACTING PROCESS

A. Difficulty Obtaining Bid Information

One of the most common barriers for MBE/WBEs to contracting with government agencies is navigating through the agency's bid process. The interviewees described a number of barriers they encountered with the Commonwealth in trying to secure information on upcoming contracting opportunities.

A Caucasian female owner of a construction-related reported that the Commonwealth's bonding requirements have prevented her business from being placed on their bidders list:

I had difficulty getting on the bidders list with the Commonwealth of Pennsylvania because of the bonding requirements. The terms and conditions to underwrite the insurance can make the exposure pertaining to the contract open ended. Even when a smaller firm is able to provide the required bonding to get on the bidder's list, that can tie up their bonding capacity for other projects without a guarantee that they will ever get work with the Commonwealth of Pennsylvania.

A minority male owner of a construction-related company believes the Commonwealth should centralize its bid announcements for all Commonwealth agencies:

When I tried to apply to Pennsylvania to submit a bid, I found that there is a central repository of certified companies based on their product code and service code, each individual agency also keeps its own separate list. However, if you want to work with the Department of Corrections or Pennsylvania Higher Education there is a central list that Department of General Services (DGS) maintains. Each agency also maintains its own list. So, when we try to seek work from a large state like Pennsylvania with multiple departments, agencies and quasi-agencies, the process is very cumbersome.

North Carolina has a great free bid registration process where you input your codes and every bid that goes out from any agency goes through a central agency. Whereas with Pennsylvania, unless the bid is fairly large it doesn't get noticed



or publicized, and of course, the majority of those bids are jobs that small businesses cannot deliver upon. So, the Commonwealth seems to almost be backwards in how it operates its procurement process.

This minority male owner of a construction-related company explained the enormous cost of preparing a bid for Commonwealth contracts for his small business:

Preparing to submit a bid on a Commonwealth project can take two to three weeks worth of work. And, I need to be able to pay someone for that kind of effort. I am talking about 120 hours. Our average accountants are paid \$40 an hour. So it costs about \$4,800 to bid on a contract.

This minority male owner of a construction-related company also reported on the time he has to expend on responding to Commonwealth bids:

It takes a lot of man hours to respond to a Commonwealth bid. We have to take the time to research what it is that they are looking for and then formulate a plan.

B. Inadequate Lead Time

Many interviewees believe that some prime contractors purposely give subcontractors deadlines that are impossible to meet. Some business owners explained that they prefer not to respond to late bid notices because they may not properly bid their work and the prime contractor will subsequently be held accountable.

A minority male owner of a construction-related company explained that he routinely receives bid notices late from prime contractors:

On a lot of jobs, prime contractors are supposed to have a percentage of minorities doing work, and they have to show it on their bid. Most of these companies will fax a bid request on a Friday afternoon, and want it back by the following Monday. Then they will tell the Commonwealth that they tried to get minority subcontractors, but the minority contractors never responded. So, those are the difficulties that we confront.

On most occasions when we get bids, they want them returned in two or three days. We try not to respond even though we need the job. We do not respond because if we don't put the proper things on the bid, it will affect us and we will be



accountable for it. But, most of the time when we receive notices, there is no way we could put it together in the limited time they give us. About 90 percent of the bids we receive are late. The Commonwealth is not the problem. It's the prime contractors working for the Commonwealth.

A Caucasian female owner of a construction-related company reported that based on her knowledge, some general contractors deliberately deny minority subcontractors adequate time to respond to their bid:

My clients told me they submitted bid notices without sufficient time to prepare, and it was costly. I have frequently seen large general contractors wait until there are minutes or hours left before submitting their bid, and then will still start contacting some of my clients for quotes. I think they experienced this with the Commonwealth. Sometimes they break their necks to respond in time. In general, these subcontractors are African American. If I'm involved I take their complaints over to the Office of Small Business. It almost seems like it's deliberate. It seems like the larger general contractors don't really want to work with minority subcontractors. They call at the last minute, because they already have their preferred list of subcontractors. And by not giving the minority subcontractors adequate lead time, they are not able to respond.

A Caucasian female owner of a construction-related company for nearly twenty years reported that 70 percent of the bid requests she received from prime contractors do not have adequate time to respond:

I would say when a bid request comes from a prime contractor, about 70 percent of them are late. We have had to pull employees from other projects and other functions to respond to a late bid request.

This minority male owner of a construction-related company explained why he is often unable to adequately respond to bids let by the DGS:

I found that by the time the bid is posted DGS' due date is sometimes impossible to meet. By the time we receive the prints and the information, it only leaves a three to four-day window. When we review the bid and contact suppliers, we



don't have the time to complete the bid. At the least, we need 14 days to respond to a bid notice.

A minority male owner of a construction-related company reported that if more time is allotted for businesses to respond to a bid, the Commonwealth would receive better responses to their bids:

Oftentimes, the Commonwealth has studied a job for a year, and then they require a response within a week. That's late and is the contracting officer's fault. He should allow more time to get a better response from the contractors. I need two to three weeks to respond. We have had a few calls asking why we didn't respond to a bid, and we tell that we did not have enough time.

A minority male owner of a construction-related company for over twenty years reported that the time allowed to respond to a bid request can be inadequate:

If we have at least two weeks or a month ahead of the bid due date, then we have time to do a good job preparing a bid response. Right now we have about a week to respond.

C. Prime Contractors Avoiding MBE/WBE Participation Requirements

The objectives and policies of MBE/WBE programs can be undermined when prime contractors purposely use tactics to circumvent MBE/WBE participation requirements. Several interviewees reported on incidents where prime contractors listed them as subcontractors in their bid documents but never utilized their services.

A minority male owner of a construction-related company spoke of a candid conversation with a prime contractor who reported circumventing the Commonwealth's MBE/WBE subcontracting requirements:

I have had a couple conversations with [prime contractor name withheld], and he said outright that the Commonwealth has all these systems to help minority subcontractors but he uses his own people that he has worked with in the past. So, it really begs the question as to why are folks trying to get certified when the prime contractors don't adhere to the Commonwealth's minority subcontracting requirements.



A minority male owner of a construction-related company for over twenty-five years reported an incident where he believes a prime contractor listed his company as a subcontractor on bid documents with no real intent of utilizing his services:

A prime contractor put my name as one of their qualified minority subcontractors when they submitted a proposal. I think it was a scam. They never called us for price. A guy I previously worked with laughed at me and told me they just wanted to use me.

This minority male owner of a construction-related company also reported that a prime contractor used his MBE status without providing his business with subcontracting opportunities:

After a meeting with a prime contractor they asked for our minority status because they needed it on their bid. But, they didn't want to work with us at all. I did not complain because I was sick and tired of the whole situation.

A minority female owner of a construction company for over twenty-five years reported practices of prime contractors avoiding MBE/WBE requirements:

I have heard of general contractors claiming they had minority contractors, and they pay them whatever they want and the subcontractors accept whatever is given to them. And that's the way the general contractors do it.

V. EXCESSIVE CERTIFICATION PROCEDURES

Some interviewees believe the MBE/WBE certification process requires excessive paperwork and information about the program is not easy to access.

One minority business owner of a construction company complained that his firm received confusing information from the Commonwealth.

When we initially tried to get certified with the Commonwealth to get information and all the paperwork together, we got thrown around like a volleyball. We were told, 'well, you have to call here, or you have to get in touch with this department or with that person.' Finally, we were able to get in contact



with someone in Harrisburg and she told us, ‘Listen, they have been running you around and around for a long time. They have given you misinformation and misguided you. This is what you need to do.’ She was able to direct us in the right direction. And we got all the paperwork done and were able to get certified. I guess we were so insistent that it just came to a point where we were able to be directed to the right path. But, as far as getting certified, it was a lot of paperwork.

A minority male owner of a construction-related firm for over twenty years believes the Commonwealth should accept business enterprise certifications from other local entities:

The Department of General Services has its own certification. But, my question is if I have a certification that is good for other counties, why is it not good for the Commonwealth? Why do I have to get more certifications from the Commonwealth when I already have a certification that qualifies in another county. For example, if you certify with Allegheny County, it is good for Westmoreland and all the other counties.

A Caucasian female owner of a construction-related firm for twelve years believes that the Commonwealth’s certification process consisted of a lot of paperwork and believes that clearer instructions or a seminar for other female business owners would be beneficial:

I am a certified woman-owned business with the Commonwealth of Pennsylvania. The process wasn’t bad, it was just a lot of paperwork. When I first went through the certification process, it took about four months. Two months of data gathering and two more months to wait for a response from the Commonwealth. I think there needs to be better instructions or maybe a seminar to help women business owners understand what they are filling out. Because if you are rejected you may not be able to reapply for another year.

A minority male owner of a construction-related company describes the Commonwealth’s certification process as difficult, but beneficial to his firm:

I have been certified for a number of years, and initially, the process was very difficult. But, being certified has helped me obtain contracts.



VI. FINANCIAL BARRIERS

A. Difficulty Obtaining Financing

According to many interviewees, their limited access to capital limits their growth potential. They reported that they faced many barriers trying to obtain financing for their companies. Some interviewees also believe certain financial institutions treat business owners differently based on their ethnicity.

This minority male owner of a construction-related company believes he was treated differently by financing institutions because of his ethnicity:

It took us a year to get a credit line with [financing institution name withheld]. We had to call them all the time to find out why we were not getting the credit line. The reason I'm leaving them now is because their process is just too slow. I know other people that have businesses, and in one or two weeks, they have a response back. They are not Latino like me, they are Caucasians. I know a lot of African Americans and Caucasian people that own their own businesses. But I understand that some of my friends who are African Americans are having problems, too. But it seems like when you have a different type of skin color or ethnicity, you are treated differently. Some financing institutions think differently about minority business owners like we can't pay our bills on time. Right now, I'm certified with Dunn & Bradstreet and our credit is clean as a whistle, and we still have problems obtaining financing.

A minority male owner of a construction-related company explained the impact of inadequate financing has had on his small business:

The inability to secure financing has limited the types of jobs we can seek. Especially with construction, you have to be able to finance your projects.

A Caucasian female owner of a construction-related company also explained how her business has been affected by lack of financing:

I constantly have to pay my vendors' finance charges because I can't get an adequate line of credit. My line used to be twice the size that it is now. I am subjected to vendor terms that are not favorable, because I am trying to keep my business intact.



This Caucasian female owner of a construction-related company for six years reported that she and her partner had to use money from their personal bank accounts, because they were not able to get a loan for their small business:

They would not give us a small loan to start our business. We only requested \$20,000, but we could not get a bank that was sympathetic. My partner and I had to use our personal monies. She had to take out a loan from her parents, and I had to go into my joint savings with my husband.

A minority male owner of a construction-related company was disappointed because of the limited financial assistance that was available for his company:

I found that the financial assistance that I thought was available was often a lot of lip service. And, the loan documents were cumbersome with paperwork that did not allow us to move fast enough to react to the job opportunities in the market. So that has had a chilling effect on my small businesses.

A minority male owner of a construction company reported that he has a hard time obtaining financing for his twenty-year old business:

I have never been able to get financing. They wanted all kinds of collateral. I have since established some credit, but I still find it hard to get a loan.

This minority male owner of a construction-related company also reported on the negative impact insufficient financing:

Without funding I can't retain adequate staff, or pay my employees' salaries without work. Secondly, you really need funding to get work from the agencies. So, I tend to go for smaller projects.

B. Difficulty Obtaining Bonding

Obtaining bonding was reported as a major obstacle for small business owners. Their inability to secure a bond was considered a significant factor in determining business development.



A minority male owner of a construction company has not been able to get bonding for his twenty-year old business:

Our biggest problem right now is trying to get bonded and to get a line of credit. My wife and I don't want to lose our business. So, we really have to come in here and work this business. The last time we tried to get bonding we worked with a company that did not want to give a small company like ours any bonding. So far, we still do not have a bond.

This minority male owner of a construction-related firm reported on the challenges he has encountered trying to obtain bonding for his business:

We just got our first bond last year. This has been our biggest challenge. No one would even talk to us. We were told that we had not been in business long enough, or we were not a big enough company, or did not have enough collateral. Since the collapse of the bonding market in 2001, there is not a willingness to give bonding to new or small companies. And it's not getting any better. Even though we have a bonding line, it's still a challenge each time we seek bonding. We have passed on a lot of jobs because we could not get enough bonding or could not get bonding in time.

A Caucasian female owner of a construction-related company believes that a personal relationship with a bonding agent is needed for small businesses to secure bonding:

If a firm is not able to access bonding, they are unable to work. Especially in the public sector. First, a firm needs a relationship with a bonding agent to get access to surety bonding. Also, bonding companies will not consider bonding a contractor for a contract that is greater than the largest contract they have previously completed.

This Caucasian female owner of a construction-related company reported that she is unable to meet the Commonwealth's bonding requirements:

If we did not have to meet the bonding requirements, we could have received more job opportunities. Lack of bonding affects our profitability. The fact that we have to meet the bonding requirements makes it difficult or impossible for us to compete.



This minority male construction contractor for 15 years reported that even though he has worked on projects valued up to \$750,000, he is unable to secure bonding on projects with the same value:

We have bid jobs up to \$750,000 because we did not have to be bonded. But, we could not do that same work if it required a bond.

A minority male owner of a construction company explained why bonding is expensive for his trade:

In the electrical trades a lot of quotes require high numbers because the materials and labor are expensive. So, bonding tends to be real high. Normally with the Commonwealth, bonding requirements are not less than \$100,000.

C. Late Payment by Prime Contractors and Commonwealth Agencies

Lack of access to capital causes most MBE/WBEs to operate their businesses under limited financial conditions. This problem is compounded when prime contractors do not pay their MBE/WBE subcontractors in a timely manner. This issue causes a myriad of problems for MBE/WBEs, ranging from limited cash flow, difficulty paying employees, and personal financial hardships.

A minority male owner of a construction-related firm reported that he is routinely paid late by prime contractors:

In my opinion, late payments are when payments are past 90 days due. The construction and design industry are notoriously known for late payments. When my invoices go out, I never know when I am going to get paid. And it's just a very dire circumstance in our industry. Many businesses have gone under with really nice accounts receivables. Approximately 80 to 90 percent of my payments are late. I usually get paid directly through prime contractors. I have been told, 'I haven't been paid yet,' or for some reason or another. Any subcontractor will be familiar with this practice. The market is a very hostile environment. And if the prime contractor has the capital and the ability to delay payments to their subcontractors, it usually will happen. Late payments has had a disastrous effect on my cash flow.



A minority male owner of a construction-related company for six years reported that he has waited up to a year to receive payment:

It could be six months to a year before we actually received payment. We heard a lot of horror stories from business owners that had big contracts with the Commonwealth or the City of Philadelphia and then wind-up damn near bankrupt because they were on the hook waiting for their money which took forever because of bureaucracy.

This minority male owner of a construction-related company also reported that some small companies are forced out of business because of late payments:

Slow payments has caused some business owners to go out of business and not be able to perform.

A minority male owner of a construction-related firm for twenty-three years reported that the practice of late payment from prime contractors is a major problem for his small business:

One of the main problems with prime contractors is I have to wait to be paid. Even though they have a ton of money, they don't pay my bill until they get paid. And, I don't know when DGS pays them.

A minority male owner of a construction-related company reported on an incident where a late payment from the Commonwealth caused extreme financial hardship on his company:

I had a contract with the Commonwealth of Pennsylvania which was helpful. But, it almost put me out of business. They were slow in payment, and I still remember the day the IRS was going to shut me down if I didn't get a check to them within two weeks. And, the check came just in the nick of time. I paid the IRS off and swore I would never put myself in that position again. It took the Commonwealth of Pennsylvania about six months to pay me.

A Caucasian female owner of a construction-related company reported that she waits 45 to 60 days to receive payment from the City of Philadelphia:

Currently, I have an invoice pending with the City of Philadelphia and others that have taken anywhere from 45 to 60 days before I received payment.



VII. PUBLIC SECTOR VS. PRIVATE SECTOR

The interviewees compared their experiences seeking contracting opportunities in the public and private sector.

This minority male owner of a construction-related company reported that he is successful in the private sector because of the recommendations he receives from his clients:

I have been successful in the private sector rather than with the Commonwealth's program. The customers that I have in the private sector recommend me to other customers because of the services we provide.

A minority male owner of a construction-related company believes the public sector has more job opportunities than the private sector, but he has been unable to penetrate the contracting network in the public sector:

There are better opportunities if you are able to break into the public sector contracting network. But, the private sector is paying my bills right now.

A minority male owner of a construction-related company explained why he prefers working in the private sector:

There is no paperwork in the private sector, and they will call when they need the service. There is no bidding involved. The public sector is entirely too much of a headache. It is bureaucratic and slow to pay.

A minority male owner of a construction-related company explained what he believes are the major differences between the public and private sectors:

In general, the public sector is more secure because of their public projects. The private sector is not as secure.



VIII. COMMENTS ABOUT THE COMMONWEALTH'S MBE/WBE PROGRAM

The Department of General Services' Bureau of Minority and Women Business Opportunities (BMWBO) office certifies businesses as MBE/WBEs. The BMWBO also accepts certifications by third parties, such as the Minority Supplier Development Council or the Women Business Enterprise National Council. Many interviewees described the BMWBO's program as valuable and instrumental in growing and sustaining their businesses. Conversely, some business owners believe that the DGS' MBE/WBE program lacks adequate monitoring and authority.

This minority male owner of a construction-related company for 15 years also believes the BMWBO's program is valuable but could use stricter penalties for noncompliance:

Based on my knowledge and interaction with the [BMWBO] office, the program is valuable. I recommend to all minority businesses to pursue certification with DGS, because I believe that provides the ticket for opportunities. I will also say the Commonwealth's bureaucracy can be a debilitating factor for small and minority businesses that are trying to obtain parity in contracting opportunities. I think the monitoring process needs stronger sanctions for noncompliance and rewards as incentives.

A minority male owner of a construction-related firm believes the BMWBO is working diligently trying to increase opportunities for minority business owners:

The [BMWBO] is trying to give minority companies a chance. They target big companies to make sure they have minority participation on every job the Commonwealth is doing.

A minority owner of a construction company also believes that the BMWBO is beneficial for minority business owners:

The [BMWBO] at least offers opportunities for minority businesses. I don't think any agency operates perfectly, but the intention is right. I would like it to be a little bit more open and easier to get bid opportunities.



This minority owner of a construction-related company believes that the BMWBO program levels the playing field for minority businesses:

The [BMWBO] program is very valuable because it helps level the field when competitive bids are involved.

This minority owner of a construction-related company for almost three decades believes that his company would go out of business if the BMWBO's program was eliminated:

I think the General Services is doing a good job. I think if they ever abandoned the minority program, they might as well say to contractors like me, 'you are out of business.'

A minority owner of a construction-related company believes prime contractors should be held accountable to meet the MBE/WBE goals:

Being classified as an MBE often means that people pigeonhole you and don't allow you to take advantage of mergers or joint ventures. The procurement professionals need clear, targeted goals on what they are suppose to do to increase diversity. This accountability is not there and we are spinning our wheels. The system does not have teeth.

A minority male owner of a construction company reported that his MBE certification status has been beneficial for his company:

Our certification status has definitely helped us, because we are on different bidding lists that have opportunities which require MBE participation. So, yes it is definitely a benefit.

This minority male owner of a construction company for ten years reported that he never heard of the Commonwealth's BMWBO program:

I am not aware of a minority program, so I can't say if it is valuable. It hasn't assisted me at any point in my career or life for that matter.

This Caucasian female owner of a construction-related company for twelve years reported that her WBE certification has not benefitted her small company:

Being a certified woman-owned business has had no influence on my business. It's great to put on paper, but that in and of itself is not enough to get State government work.



IX. EXEMPLARY CONTRACT PRACTICES

Although interviewees were solicited for information on barriers they experienced with the Commonwealth, many business owners shared their sentiments regarding the positive experiences and relationships they developed with managers and staff at Commonwealth and other agencies in the State.

A minority male owner of a construction company spoke of the helpful assistance he received from the DGS:

The Department of General Services tries to help minority contractors by providing networking opportunities, and they inform us on how to get work. I feel like someone in the Commonwealth is trying to do something for minority businesses. I remember one Black female worker for the Commonwealth. Her name is [Commonwealth employee name withheld], she was awesome. She always made phone calls and she was attentive. I thought they were very nice and informative.

A minority male owner of a construction company for 15 years reported that he was able to secure contracts with Allegheny County because of the loan he obtain through the County's Loan Fund Program:

We worked on a project that we would not have bid if the working loan fund from Allegheny County was not available. We qualified for a \$100,000 line of credit which is the maximum that you can get as an MBE. If you apply for a loan with Allegheny County through their working loan fund, you have to go through the process as if you were applying to a bank. However, the difference is they relax the standards a little bit. They are not as stringent as the mainstream banks.

A minority male owner of a construction-related company spoke highly of school district managers:

There are a couple of Information Technology managers at the Philadelphia School District that went out of their way to help us.



This minority male owner of a construction-related company also experienced positive working relationships with the Commonwealth:

[Name withheld] comes to mind, who works at the Small Business Development Center. He has been of extreme value to us. He assisted us with meeting established businesses which would have been impossible without his help.

A minority male owner of a construction-related company reported on organizations that provided assistance to his business:

There are some organizations like SANE that do a very good job, and they have a good mentoring program. [And, name withheld] from the SBA gave us guidance and tips on obtaining bonding.

This Caucasian female owner of a construction-related company for over 15 years expressed her positive sentiments regarding the Commonwealth:

I think the Commonwealth of Pennsylvania is wonderful in their efforts to communicate to small business owners. My hat is off to the Commonwealth of Pennsylvania in making that kind of effort. I think they are making a great effort.

A Caucasian female owner of a constructed-related company six years had a positive experience while working on a project with the Commonwealth:

General services has been excellent. When we worked with them, we were very comfortable with how the project was unfolding.

X. RECOMMENDATIONS

The interviewees described recommendations that they believe will help grow and maintain MBE/WBE businesses. Several business owners suggested the Commonwealth consider unbundling large contracts into smaller projects and other recommendations including improving access to contract opportunities and an expansion of the MBE/WBE status to include disabled veteran business owners.



This minority male construction contractor who has been in business for 15 years recommends unbundling large contracts to create more contracting opportunities for minority businesses:

To significantly increase minority participation on any government level, it takes a willingness on the part of the Commonwealth to unbundle some of the large bid packages. We have a track record of doing contracts valued at \$750,000. If the Commonwealth unbundled the large bids to \$150,000 to \$200,000, we would have access to more work. Instead, of it's all or nothing.

A minority male owner of a construction-related firms also recommends that the Commonwealth unbundle large projects to create opportunities for small businesses:

I have asked that they unbundle contracts; they are too big. They are so large that minorities can't touch them. DGS bundles A/C with their plumbing and electrical jobs.

Another minority male owner of a construction-related company recommended that large contracts be unbundled into smaller projects:

There are no incentives for anyone really to monitor whether projects could be unbundled. I don't mean they need to break up every project into 10,000 projects that will become impracticable to manage. But, I think there are opportunities to unbundle large projects that the Commonwealth is not looking at. They are not looking to find ways to make it work.

And this minority male owner of a construction-related company believes that the Commonwealth should consider unbundling contracts in order to reduce bonding requirements:

They should breakup jobs so that they can issue smaller bond requirements instead of one massive bond. The biggest struggle with small contractors is bonding. It's a problem that inhibits us from growing. The bonding markets need to be improved, or contracting officers for public works projects should reduce the terms on the bonding.



A minority male owner of a construction company suggested that the Commonwealth assist small businesses in securing financing:

I recommend the Commonwealth facilitate loans for small companies to be able to compete.

A minority male owner of a construction-related company for six years recommends that the Commonwealth pay mobilization costs to small business owners:

I would recommend that companies should be able to request at least 50 percent of their project costs up front. This will allow small businesses to continue to operate effectively while the project is in operation.

This minority male owner of a construction-related company for 15 years recommends that veterans be afforded the opportunity to be part of the minority business enterprise program:

I am hoping that the Commonwealth of Pennsylvania will pass an Executive Order that would allow veterans to be included in the small minority program.

A minority male owner of a construction company for 20 years recommends that the Commonwealth help facilitate joint ventures between small businesses and larger established companies:

There should more opportunities for small businesses to partner with established companies through joint ventures. In my case, joint ventures helped keep my company stable.

A minority male owner of a construction-related firm suggested set-asides for minority professional services firms:

I recommend the Commonwealth carve out opportunities for professional minority firms. We have been neglected and ignored for some time. Instead of just helping the construction contractors, there should be set-asides for minority qualified professional firms like accounting, engineering, and other consulting firms. I think this should be done if the Department of General Services wants to get more minorities involved.



A minority male owner of a construction-related company recommends that selection committees debrief unsuccessful bidders as to why they were not awarded a contract:

The selection committee can be more proactive in debriefing the unsuccessful bidders.

This minority female owner of a construction company suggested technical assistance for new business owners on how to respond to bid requests:

There needs to be training for new business owners on how to respond to proposals. No one is showing these younger contractors how to write up a proposal to get work with the Commonwealth.

A minority male owner of a construction-related company recommends a mentoring program for small start-up businesses:

I think it would be nice if there were mentors to help small businesses navigate within the State government. I think that would help grow small businesses.

XI. SUMMARY

An overwhelming majority of the interviewees explained why they believe the Commonwealth's BMWBO's program is valuable for small, women, and minority businesses. Many of the interviewees credited MBE/WBE programs with maintaining their businesses.

There were reported barriers to financing and bonding. Racial stereotyping was reported and it was also suggested that some prime contractors preferred not to work with minority subcontractors.

The recommendations centered on strategies to increase the participation of minority and woman-owned businesses on Commonwealth contracts. An overwhelming majority of the interviewees recommended the Commonwealth unbundle large contracts into smaller projects.

Finally, many Commonwealth managers were given accolades by the business owners for their hard work and dedication to supporting and sustaining small, minority and women businesses. The effort of staff to ensure that fair and even handed policy implementation of the Commonwealth's procurement policy was also lauded by the interviewees.



11

RECOMMENDATIONS

I. INTRODUCTION

This chapter provides recommendations that the Commonwealth of Pennsylvania (Commonwealth) may implement to achieve parity in its contracting. The recommendations are based on a review of the Minority and Woman-Owned Business Enterprise (MBE/WBE) Program and a statistical analysis of contracts awarded in the construction and design professional services industries during the study period, January 1, 2003 through December 31, 2005. An overview of the MBE/WBE Program is presented in the section *Summary of the MBE/WBE Program*. The following section, *Disparity Analysis Findings*, presents the results of Mason Tillman's disparity analysis. The following section, *Race and Gender Conscious Remedies*, describes constitutionally permissible race and gender-conscious standards to remedy the identified disparities. The next section, *Race and Gender-Neutral Remedies*, contains recommendations specific to the MBE/WBE Program, general procurement strategies to improve the Commonwealth's contracting activities, website enhancements, and data management recommendations. The final section, *Administrative Recommendations*, presents administrative actions the Commonwealth may take to strengthen its contracting policies and activities.

II. SUMMARY OF THE MBE/WBE PROGRAM

A. Program Review

In 2004, the issuance of Executive Order 2004-6 reaffirmed the Commonwealth's commitment to utilize minority, woman-owned, disadvantaged, and small businesses in its contracting activities and to prevent discrimination against such businesses. Executive Order 2004-6 charged the Department of General Services (DGS) with the implementation of a program focused on increasing contracting opportunities for disadvantaged businesses.



1. Responsibilities of the DGS

Executive Order 2004-6 contains guidelines for the DGS in the administration of the MBE/WBE Program, which are as follows:

- a. Develop and implement policy initiatives to substantially increase contracting and subcontracting opportunities for minority and woman-owned businesses and other disadvantaged businesses in the Commonwealth's procurement of supplies, services, and construction.
- b. Centrally manage Commonwealth information, policies, procedures, and issues pertaining to minority and woman-owned businesses and other disadvantaged businesses.
- c. Expand the pool of certified minority and woman-owned businesses by repealing the eight-year graduation requirement for Commonwealth-certified MBE/WBEs, periodically adjusting the business size limitations, establishing reciprocal certification agreements with other agencies, and establishing an expedited certification process for MBE/WBEs already certified with other agencies.
- d. Enforce compliance with the MBE/WBE Program by businesses and Commonwealth agencies.
- e. Make investigations and reports relating to the administration of the MBE/WBE Program and operations of an executive agency as they relate to the program.
- f. Request all such information or assistance as may be necessary for carrying out the duties and responsibilities provided in the Executive Order from any federal, state, or local government agency or unit thereof.

2. Responsibilities of Agency Managers

In addition to outlining the responsibilities of the DGS, Executive Order 2004-6 provides guidelines for agency managers involved in procurement, which are as follows:

- a. Be responsible for ensuring that all competitive contract opportunities issued by their respective agencies seek to maximize participation by MBE/WBEs and other disadvantaged businesses.



- b. Give consideration, when possible and cost effective, to contractors offering to utilize MBE/WBEs and disadvantaged businesses in the selection and award of contracts.
- c. Ensure that the agency's commitment to the MBE/WBE Program is clearly understood and appropriately implemented and enforced by all agency employees.
- d. Designate a responsible official to supervise the agency MBE/WBE Program and ensure compliance within the agency.
- e. Furnish the DGS all requested information or assistance.
- f. Recommend sanctions to the Secretary of General Services against businesses that fail to comply with the policies of the MBE/WBE Program.

3. Objective of the DGS

The DGS has the responsibility to increase the utilization of MBE/WBEs and other disadvantaged businesses in the Commonwealth's contracts. Executive Order 2004-6 outlines the methods through which the DGS will achieve this objective, which are as follows:

- a. Establish a procurement policy that will give consideration to contractors offering to utilize MBE/WBEs and disadvantaged businesses in the selection and award of contracts.
- b. Develop and maintain an effective data collection system in procurement and contracting, and institute quarterly and annual reporting requirements on the participation level and spending in each agency.
- c. Create an internal data system so that agency buyers and purchasing agents will have a substantial number of MBE/WBEs to solicit for commodities or services.
- d. Train procurement buyers and purchasing agents so that they can assist in the mission.

4. Program Components

In the effort to increase the participation of MBE/WBEs and small businesses in the Commonwealth's contracting activities, a number of strategies have been developed. They are discussed below.



a. Contract-specific Minimum Participation Levels

The Commonwealth's competitive bid proposals for construction projects valued at over \$50,000 include participation thresholds called Minimum Participation Levels (MPLs) that require specific levels of MBE/WBE participation. These levels are assigned for each contract, requiring prime contractors to seek out MBE/WBE subcontractors and suppliers. When prime contractors do not meet the MPLs, they must demonstrate certain levels of effort to achieve the MPLs. On construction projects prime contractors must solicit at least five MBE and five WBE subcontractors. They must also solicit five MBE and five WBE suppliers.

b. Best Value Program

The Commonwealth has a Best Value Program where construction contracts are awarded based on price and qualifications, instead of on the lowest bid. The evaluation criteria includes the following factors:

- Contractor's proposed project approach;
- Project management;
- Relevant project experience;
- Understanding of the project schedule and project milestones;
- Safety records;
- Disadvantaged Business Enterprise participation; and
- Other criteria unique to the specific project.

To that end, the Commonwealth of Pennsylvania recently revised its RFP template by enhancing DGS' procurement procedures to increase DBE participation. The Commonwealth has introduced requirements in order to ensure bidders are making a bona fide attempt to work with small disadvantaged businesses, by holding bidders accountable to demonstrate the level of commitments made to these disadvantaged businesses. In a separately sealed Disadvantaged Business Submittal, bidders must provide the following information:

- The contact information for each specific small disadvantaged business (SDB) included in the proposal;



- The specific work, goods, or services that the SDB will perform or provide, including all such work or services provided by any Proposer who qualifies as a small disadvantaged business;
- The form and amount of compensation each SDB will receive, including the form and amounts retained by any proposer who qualifies as an SDB;
- The estimated dollar value of commitments to each SDB;
- The location where the SDB will provide these services or products;
- The designation of SDB construction suppliers as non-stocking or stocking suppliers;
- The timeframe for the SDB to provide services or goods;
- The amount of capital, if any, the SDB will be expected to provide;
- Proof of Disadvantaged Business certification;
- In the case of a joint venture, a copy of the agreement signed by all parties;
- A summary of the Proposer's past performance and assistance efforts with respect to SDBs, including five past projects completed by the Proposer that show actual SDB participation, any SDB outreach program that the firm has established or participated in that encourages maximum participation by SDBs, a detailed description to firm's commitment to assist SDB in their workforce development (i.e., school-to-work program craft training, mentorship program)
- If the proposer does not meet or exceed the BMWBO-established participation levels, the Proposer's must include documented efforts to interact with SDBs.

The BMWBO then conducts its evaluation of the submittals independent of the RFP Evaluation Committee and forwards the scores to the Chairperson of the Evaluation Committee. The maximum Disadvantaged Business Submittal Score is 100. The BMWBO scores the submittals in two steps. The first step is a calculation of the disadvantaged business commitment listed in the proposal, based upon the highest percentage of commitments in regards to the participation levels established by the BMWBO. This means that Proposers whose commitments exceed the BMWBO established disadvantaged business participation levels will score higher than those whose commitments equal the participation level goals. The second step is a core based upon the bidder's past utilization of disadvantaged businesses.



c. Socially Disadvantaged Business Program

The Commonwealth also has a Socially Disadvantaged Business Program. To qualify as a socially disadvantaged business, the owner must have suffered chronic and substantial racial or ethnic prejudice or cultural bias in the United States due to the business person's race, ethnic origin, or gender. In addition, the company must be for-profit and owned by a United States citizen. In the evaluation of proposals, points are assigned for the technical aspect of the proposal, cost, and disadvantaged business participation, and contracts are awarded according to a point system.

The Commonwealth will make a written determination as to whether the normal low bid process is either not practical or advantageous on a construction project for design professional services projects. The Department of General Services (DGS) appoints an Evaluation Committee which consists of at least one representative from the using agency, the DGS Regional Director for the project, and two other Commonwealth employees that possess construction experience.

The Committee has the following responsibilities:

- Edits the template RFP to adapt the language to the specific project requirements.
- Establishes technical qualifications (i.e. Critical Path Method, scheduling, historic renovation, excavation, blasting, security hardware, and theater construction experience) deemed important for the project.
- Allocates points for the technical qualifications and the overall percentages for the technical, cost, and MBE/WBE submission. Cost must always be worth at least 50 percent of the points. Typically, cost is 60 points, technical is 30 points, and MBE/WBE is 10 points.
- Conducts discussions with responsible offerors whose proposals are determined to be reasonably likely of being selected for award. The purpose of the discussions are to assure full understanding of the responsiveness to the solicitation requirements and to obtain best and final offers.

Each member of the Committee reveals his or her individual scores on each element of the technical proposal. The Chairperson of the Committee calculates the overall technical points for each proposal. After all technical points are calculated, the Chairperson opens the sealed report from the BMWBO on the MBE/WBE scores.

The Chairperson then opens the cost submission and calculates the cost score based upon an objective formula set forth in the Request For Proposal. The lowest cost for each discipline receives 100 percent of the available cost points, and higher proposals each receive a *pro rata* share of the points based upon their cost compared to the low cost. The Chairperson



adds the technical, cost, and MBE/WBE scores for each proposer by discipline and determines the highest score. A recommendation memo is prepared by the Chairperson to the Deputy Secretary, who forwards the memo to the Secretary for review and award of contracts.

III. MBE/WBE DISPARITY ANALYSIS FINDINGS

The disparity analysis assessed the level of contracting the DGS conducted with MBE/WBEs. It also determined if the levels were commensurate with the availability of MBE/WBEs to perform work on the construction and design professional services contracts. This analysis offered the most objective measure of the effectiveness of the DGS MBE/WBE Program established by Executive Order 2004-6. The United States Supreme Court's *Croson*¹ decision enumerates a methodology for measuring the utilization of available MBE/WBEs in government contracting. The analysis measures whether there is statistically significant underutilization in the government's contracting with available MBE/WBEs. Instances where an ethnic or gender group is underutilized and the underutilization is statistically significant constitute disparity. A disparity can be addressed using a race-based remedy.

Tables 11.01 and 11.02 present the findings from the disparity analysis of the Commonwealth's utilization of willing and able MBE/WBEs. The statistical findings are presented by ethnicity and gender within the two industries, construction and design professional services. The award of contracts in both industries was examined at the prime contract and subcontract levels.

The prime contract thresholds examined were at both the formal and informal contract levels: Formal contracts valued at \$500,000 and under and subcontracts for all prime contracts valued over \$100,000 were included in the analysis.

A. Formal Prime Contracts

A summary of the identified disparity in the award of formal prime contracts valued at \$500,000 and under is presented in Table 11.01.

As shown in Table 11.01, African Americans, Minority Business Enterprises, Women Business Enterprises, and Minority and Women Business Enterprises had findings of statistically significant disparity in the award of formal prime construction contracts. Women Business Enterprises and Minority and Women Business Enterprises had findings of statistically significant disparity in the award of formal prime design professional services contracts.

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



These findings demonstrate that the Commonwealth was not effective in utilizing the MBE/WBEs willing and able to perform work on its contracts valued at \$500,000 and under.

Table 11.01 Summary of Formal Prime Contract Disparity Findings

Ethnicity and Gender	Construction Services	Design Professional Services
Formal Contracts - \$500,000 and Under		
African Americans	Yes	No
Asian Americans	No	No
Hispanic Americans	No	No
Native Americans	---	---
Minority Business Enterprises	Yes	No
Women Business Enterprises	Yes	Yes
Minority and Women Business Enterprises	Yes	Yes

Yes = Statistically significant disparity was found

No = Statistically significant disparity was not found

--- = There were insufficient records to determine statistical disparity

B. Informal Prime Contracts

At the informal level, there were only 17 construction contracts and 12 design professional services contracts awarded during the study period. Thus, there were too few informal construction and design professional services contracts to perform a statistical analysis of disparity.

C. Subcontracts

As shown in Table 11.02 below, African American and Hispanic American subcontractors were underutilized at a statistically significant level in the construction industry. African Americans, Asian Americans, Minority Business Enterprises, Women Business Enterprises, and Minority and Women Business Enterprises were underutilized at a statistically significant level for design professional services subcontracts.



Table 11.02 Summary of Subcontract Disparity Findings

Ethnicity and Gender	Construction	Design Professional Services
All Subcontracts		
African Americans	Yes	Yes
Asian Americans	No	Yes
Hispanic Americans	Yes	No
Native Americans	---	---
Minority Business Enterprises	Yes	Yes
Women Business Enterprises	No	Yes
Minority and Women Business Enterprises	Yes	Yes

Yes = Statistically significant disparity was found
 No = Statistically significant disparity was not found
 --- = There were insufficient records to determine statistical disparity

In summary, disparity analysis for this Study found that African Americans, Minority Business Enterprises, Women Business Enterprises, and Minority and Women Business Enterprises had findings of statistically significant disparity in the award of formal prime construction contracts.

For subcontracts, African Americans and Hispanic American subcontractors were underutilized at a statistically significant level in the construction industry. In addition, African Americans, Asian Americans, Minority Business Enterprises, Women Business Enterprises, and Minority and Women Business Enterprises were underutilized at a statistically significant level for design professional services subcontracts.



IV. RACE AND GENDER-CONSCIOUS REMEDIES

This section contains Constitutionally permissible race and gender-conscious remedies that the Commonwealth may use to remedy the documented disparities in its contracting activities.

These recommendations incorporate a number of best management practices which could improve the Commonwealth's procurement process regarding construction and design professional services. As such, they can serve as a guide for the Commonwealth as it formulates policy and procedures to achieve equity and reduce the documented barriers to MBE/WBE contracting.

A. Formal Prime Contract Remedies

1. Design Professional Services Industry

MBE/WBEs had findings of statistically significant disparity in the award of formal prime contracts in the design professional services industry. Currently, firms wishing to participate in Commonwealth design professional services projects must submit Form 150 to DGS' Bureau of Engineering/Architecture. The firm can describe its experience, team members, abilities, and whether or not it is a Commonwealth-certified MBE or WBE on the form. If the proposing firm is itself a Commonwealth-certified MBE or WBE, the firm also includes that fact in its proposal. "Commonwealth-certified" includes businesses certified by the Department's Bureau of Minority and Women Business Opportunities (BMWBO).

The Selections Committee conducts a public meeting to review applications from interested firms and recommends three firms for each project. This recommendation is based upon established criteria. The Selections Committee considers participation by Commonwealth-certified MBEs/WBEs as one of the factors in its selection process for design professional agreements.

The Secretary of the DGS chooses one of the three firms recommended by the Committee and representatives of the DGS' Bureau of Engineering/Architecture negotiate the fee and the MBE/WBE participation with the firm. The following recommendations are strategies to increase contracting opportunities for MBE/WBEs and disadvantaged businesses.

a. Expand the Design Professional Services Selection Committee Panel

The Design Professional Services Selection Committee unilaterally controls the participation level of MBE/WBEs on the Commonwealth's design professional services contracts, because it recommends awards for the Commonwealth's formal design professional services contracts. The Design Professional Services Selection Committee is appointed by the Governor. The Design Professional Services Selection Committee members are architects and engineers from the construction community. The committee reviews proposals and



statements of qualifications submitted to the Commonwealth, except responses to solicitations for small procurements, sole source procurements, and emergency procurements. The Committee recommends three firms for each project after the review of applications. The Secretary of the DGS chooses one of the three firms recommended by the Committee, and representatives of the DGS Bureau of Engineering and Architecture negotiate the fee and the MBE/WBE participation requirements for the firm. The Committee's recommendation is based upon established criteria, including equitable distribution of projects among firms, particular capability, geographic proximity of the firm to the project location, manpower necessary to perform the project, and MBE/WBE participation in the design team in accordance with established policy.

Although all panel members should be charged with the responsibility of increasing diversity on the Commonwealth's design professional services contracts, the Commonwealth should expand the Committee to include panel members who are minority and women design professionals. Augmenting the Committee would provide balance to the Committee. The additional panel members could represent the interests of MBE/WBEs during the evaluation process.

In addition, the head of the BMWBO should be appointed to the Committee. Currently, the MBE/WBE participation analysis for design professional services is conducted after the selection of three firms. The BMWBO representative would be charged with reviewing submissions for the attainment of MBE/WBE participation.

The Commonwealth Procurement Code should be amended to allow implementation of the recommendations, so that they would be statutorily applicable to all Commonwealth agencies, universities, and colleges.

b. Incentive Credits

In the professional services industry, contracts are not awarded strictly based on the lowest bid. Instead, the solicitation is issued as either a Request For Proposals or Request For Qualifications and the firm is selected by accumulated points based upon its qualifications to perform the work in the solicitation.

Currently, the Commonwealth offers incentive credits to increase the participation of small DBEs on a project by project basis on construction contracts. Although the Commonwealth considers utilizing incentive credits on a project by project basis for construction contracts, a formal implementation of incentive credits is recommended for design professional services contracts.

Incentive credits would be incorporated in the evaluation process for the award of prime contracts. Incentive credits would be given to prime contractors that are members of the statistically significant underutilized groups for design professional services contracts, when these awards are based on qualifications and not the lowest bid. Fifteen to 20 percent of the



evaluation credits could be comprised of such incentive credits when the selection process includes a proposal or statement of qualifications. Including incentive credits in the evaluation criteria might counterbalance the competitive disadvantage experienced by these groups. As a result, offsetting this disadvantage could mitigate the disparity in these industries. These credits would be applied in the evaluation process for formal contracts under \$500,000.

c. Publish Short-lists

Once the three firms have been selected for further review, the Commonwealth should notify all bidders via mail and through a posting on its website of the decision of the Committee prior to the award of the contract. The level of MBE/WBE participation should also be posted.

d. Establish Minimum Participation Levels

The Commonwealth should set Minimum Participation Levels for MBE/WBE subconsultant participation on design professional services contract using the same guidelines it uses to set MPLs for construction contracts.

B. Informal Prime Contract Remedies

Small informal construction contracts are used by Commonwealth agencies to procure services directly from contractors and are valued at between \$3,000 and \$10,000.

Small informal procurements are made through the solicitation of three bids by telephone, facsimile transmission, or electronic mail. The purchasing agency reviews the lists of certified businesses on the DGS website to determine if there are DGS-certified MBE/WBEs which can furnish the needed services.

Because so few informal contracts were awarded during the study period, the Commonwealth should increase the number of informal contracts it awards as a way to provide more opportunities for MBE/WBEs to participate in the Commonwealth's contracts and to serve as prime contractors.

1. Unbundle Large Procurements into Smaller Contracts Where Feasible

MBE/WBEs and other small businesses are often unable to compete for very large contracts. Bundling occurs when small purchases are consolidated into one contract or when goods or services previously purchased individually are grouped together in a single solicitation. Large contracts should be unbundled to maximize small business participation at both the prime contract and subcontract levels. In making the initial determination whether subcontracting opportunities exist in a given contract, the Commonwealth should investigate the opportunities for unbundling large contracts. Unbundling these large procurements



would increase the opportunities for MBE/WBEs and other small businesses to compete for Commonwealth contracts. The federal government has made contract unbundling a key element of its small business agenda.²

In determining whether projects 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
- Public safety issues and convenience
- Procurement segmentation options

2. Small Contracts Rotation Program

Once the Commonwealth increases the number of informal contracts that it awards, a small contracts rotation program would be beneficial in providing opportunities for MBE/WBEs on design professional services contracts. This program would limit competition to firms from the statistically significant underutilized groups and other disadvantaged businesses of comparable capacity. It would also ensure that quotations for informal contracts are solicited from a diverse pool of small businesses on a rotating basis. Through the award of small prime contracts, this program is a means for building the capacity of the MBE/WBEs that had a finding of statistically significant underutilization.

Members of the statistically significant underutilized groups would be presumed to be eligible. The eligibility of any other group would be determined through a certification process. Eligible businesses would be required to pre-qualify for the program. For the design professional services industry, the business would pre-qualify by submitting its hourly rate schedule, overhead and profit rates, proof of insurance, and two examples of projects of similar size.

Pre-qualification lists of the approved businesses would be categorized by type of design professional service, the project personnel, number of hours needed to complete the project, and any direct costs that would need to be determined when issuing the work order. Work orders would be assigned on a rotating basis, and no business in the rotation would be eligible to receive a second assignment until all other businesses on the list had been offered at least one assignment.

²United States. The Office of Federal Procurement Policy (OFPP). *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business*. Washington D.C. Executive Office of the President, October 2002.



On a regular schedule, perhaps as frequently as each quarter, there would be an open enrollment period. On a designated date during each period, a random list of the newly pre-qualified businesses would be appended to the end of the pre-qualified list.

The existence of a small contracts rotation program should be widely advertised to the ethnic and gender groups in each industry with a statistical disparity. The list of pre-qualified vendors would be posted for public view on the Commonwealth's website.

Financial support and technical assistance should also be made available to firms that participate in the program. Financial incentives could include such items as prompt payment, eliminating the requirement for bonding insurance, reducing the insurance requirement, and paying for mobilization to offset start-up costs. Firms would graduate from the program once they reach a certain size threshold or after participating in the program for a specified time period.

The Commonwealth Procurement Code should be amended to allow implementation of the recommendations, so that they would be statutorily applicable to all Commonwealth agencies, universities, and colleges.

C. Subcontract Remedies

Subcontract goals should be established for the Commonwealth's prime contracts as a strategy for eliminating the documented disparity in the award of subcontracts. The goal should reflect the availability of statistically significant underutilized groups as documented in the Study and reviewed at least every five years.



Table 11.03 depicts the availability of minority and women construction subcontractors.

Table 11.03 Construction Subcontractor Availability

Underutilized Groups	Percentage
African Americans	5.11%
Asian Americans	1.02%
Hispanic Americans	1.17%
Native Americans	0.29%
Minority Business Enterprises	7.59%
Women Business Enterprises	10.65%
Minority and Women Business Enterprises	18.24%

Table 11.04 depicts the availability of minority and women design professional subcontractors.

Table 11.04 Design Professional Services Subcontractor Availability

Underutilized Groups	Percentage
African Americans	6.10%
Asian Americans	8.40%
Hispanic Americans	2.57%
Native Americans	0%
Minority Business Enterprises	17.07%
Women Business Enterprises	18.16%
Minority and Women Business Enterprises	35.23%

1. Establish Contract-Specific MBE/WBE Subcontracting Goals

Contract-specific MBE/WBE subcontracting goals should be set on all construction and design professional services contracts. Goals will address the identified disparity. Moreover, setting goals narrowly tailored to the availability of the businesses to perform the identified subcontracting opportunities is the most prudent method to remedy the disparity.



A contract-specific goal setting method also ensures that MBE/WBE goals are reasonably attainable.

The goals should reflect the actual availability in the geographic area where the project is located. Both the items of work in the contract and the availability of MBE/WBEs to perform the work items must be determined in order to set a contract-specific goal. To set contract-specific goals, the Commonwealth will need to maintain a current database with available MBE/WBE and non-MBE/WBE firms willing and able to perform on the Commonwealth's contracts.

2. Require Prime Contractors to Make Good Faith Efforts

The Commonwealth should develop concise and detailed good faith effort requirements for its prime contractors, to ensure they are making a bonafide attempt at meeting the Commonwealth's MBE/WBE subcontractor participation requirements. Documentation of a good faith effort should include, but not be limited to, the following:

- Attendance at pre-bid conference
- Copies of written notification sent to all MBE/WBEs that perform the type of work to be subcontracted, in sufficient time to allow the MBE/WBE to participate effectively
- Advisement of the MBE/WBE of the specific work the prime contractor intends to subcontract, that their interest in the project is being solicited, and how to obtain information for the review and inspection of the plans, specifications, and requirements of the bid
- A written statement that economically feasible portions of work were selected to be performed by MBE/WBEs, including where appropriate, segmenting or combining elements of work into economically feasible units
- A statement of the efforts made to negotiate with MBE/WBEs, including the name, address, and telephone number of the MBE/WBE that was contacted; the date the negotiations took place; and a description of the information provided to the MBE/WBE regarding the plans, specifications and requirements for the portions of the work to be performed

The ability of the prime contractor to perform the work with its own work force should not in itself excuse the contractor from making good faith efforts to meet the MBE/WBE participation goals. The good faith effort requirements should also include penalties and sanctions for non-compliance.



V. RACE AND GENDER-NEUTRAL REMEDIES

Mason Tillman makes specific race and gender-neutral program recommendations for the procurement process as applied in each industry. These recommendations incorporate a number of best management practices that could improve the Commonwealth's procurement process. As such, they can serve as a guide for the Commonwealth as it formulates policy and procedures to achieve equity and reduce the documented barriers to MBE/WBE contracting. These recommendations would also benefit all small businesses interested in doing business with the Commonwealth.

A. Procurement Recommendations

Remedies that apply to various stages in the procurement process that would increase MBE/WBE and small business participation in the Commonwealth's contracts through race and gender-neutral means are outlined below.

1. Pre-Bid Recommendations

This section contains recommendations for the Commonwealth to implement prior to the release of a bid.

a. Establish Partnerships with Lending Institutions

MBE/WBEs and small businesses often have trouble securing adequate bonding to work on the Commonwealth's contracts. The Commonwealth should establish partnerships with lending institutions to create financing and bonding opportunities for MBE/WBEs. Lending institutions and bonding companies should then be encouraged to establish relationships with MBE/WBEs.

b. Evaluate Insurance Requirements

Insurance requirements can be a disincentive to bidders. They can also constitute a barrier to MBE/WBEs and small businesses as well as increase the Commonwealth's costs to procure services. Insurance requirements should be evaluated to ensure that construction and design professional services contracts do not carry a disproportionately high level of coverage. As a general practice, the Commonwealth should implement standard provisions applicable to all Commonwealth contracts. The insurance requirements on small contracts should be set in relation to the actual contract liability. Revised insurance requirements could attract more bidders, thus increasing competition and reducing costs. Any revisions to the insurance provisions should comply with statutory requirements.

The Commonwealth should also consider establishing an owner-controlled insurance program to consolidate risk management costs and reduce the burden of the insurance



premium for small contractors. The Commonwealth would benefit as well, since the contractor passes the fee for the surety bond to the Commonwealth in its pricing.

c. Revise Informal Bid Process

Commonwealth agencies are required to obtain at least three quotes for building construction and building design contracts with an estimated value between \$5,000 and \$10,000. One of these quotes must come from certified MBE/WBEs. The Commonwealth should seek to increase the number of quotes that must be obtained from three to five. Three of the five quotes should be solicited from certified MBE/WBEs. The Commonwealth should also inform businesses of contract opportunities via automatic fax and e-mail distribution based on the services and/or commodities the business registers to perform. The increase in the number of quotes and the regular notification of contracting opportunities would provide certified MBE/WBEs with greater access to Commonwealth contracts and increase the number of MBE/WBEs seeking certification.

2. Pre-Award Recommendations

Pre-award remedies apply to the period in the procurement process that is after a project has been released for solicitation and before it has been awarded to a prime contractor.

a. Phase Retainage Requirements

Withholding retainage, the percentage of the contract value withheld from each payment until the successful completion of a contract, for MBE/WBE and other small prime contractors and subcontractors reduces a firm's cash flow and can be a burden on small businesses. Retainage should be eliminated for small contracts and reduced for MBE/WBE prime contractors. In addition, the MBE/WBE subcontractor's portion of the retainage should be released once its work has been completed and accepted. Retainage payments should also be released based on completion of work by line item. MBE/WBEs that complete a line item of work are currently required to wait for their final payment after the completion of the project. This practice would reduce the cash flow burden experienced by MBE/WBE prime contractors and subcontractors and would allow MBE/WBEs to build capacity.

b. Implement Penalties for Failure to List Subcontractors on Bid Documents

Failure of the prime contractor to submit as part of the bid the names of subcontractors, the naming of itself to perform such work, or the naming of two or more subcontractors to perform the same work should render the prime contract bidder's bid as non-responsive and therefore void.



c. Review Bids and Proposals for Goal Attainment

Prime contractors should be required to list all subcontractors included in their bids, proposals, and statements of qualification and all subcontractors who submitted bids, proposals, or statements of qualification but were not hired. The listing should include the subcontractor's name, address, items of work, and award amount. A form requesting the identification of subcontractors should be included in the solicitation and required with the response at the time of bid opening. This requirement should be applicable to all formal contracts. M/WBE participation should be reviewed at the time the submission is opened. The level of M/WBE participation on each contract recommended for award should be a matter of public record and reported on the Commonwealth's website.

3. Post-Award Recommendations

Post-award remedies are applicable to the procurement process after a contract has been awarded.

a. Monitor Subcontractor Substitution

Prime contractors on construction contracts cannot substitute a subcontractor listed in a contract without prior written approval. The provisions should also apply to design professional services contracts. Subcontractor substitution should be closely monitored on construction and design professional services contracts. Substitutions may be granted if the subcontractor does the following:

- Provides a written statement agreeing to the substitution,
- Does not execute the contract despite having enough time to do so,
- Becomes insolvent,
- Fails or refuses to satisfy contractual agreements, or
- Fails to meet contract insurance requirements.

Before approving the prime contractor's request for substitution, the Commonwealth should give written notice to the subcontractor of the prime contractor's request for substitution and the reason for the request. The subcontractor will have ten business days to submit a written objection to the Commonwealth. If written objections are filed, the Commonwealth will give written notice of a hearing date to the prime contractor and subcontractor within five business days. At the hearing, the prime contractor and subcontractor will present their respective cases and an agency representative and BMWBO representative will make a final decision, which will be issued in writing to all parties. The absence of an objection from the subcontractor should constitute a consent to the substitution. The Commonwealth may also initiate a substitution if it determines that the work performed by the subcontractor is substantially unsatisfactory, not in accordance with the contract agreement, or is substantially delaying or disrupting the progress of the project. The subcontractor's due process should be retained in instances where the Commonwealth initiates substitution procedures.



b. Reimburse Mobilization Costs

Project start-up costs can be significant, and a firm that has limited resources and access to credit may find that mobilization expenses inhibit their ability to bid. Reimbursement should be made to prime contractors with MBE/WBE subcontractors and MBE/WBE prime contractors for bonding, insurance, and mobilization which were required and expended at the start of the contract.

Payment for mobilization, the initial payment made to a prime contractor when work commences on a construction project as reimbursement for the costs of starting a job, could mitigate the start-up cost barriers faced by MBE/WBEs and small businesses. Costs for storing materials and temporary electrical services related to starting a job should also be reimbursed by the Commonwealth. If a mobilization payment is made to a prime contractor, a subcontractor must be paid an amount equal to its participation level on the prime contract at the time it is directed to mobilize and prior to commencing work.

c. Evaluate Staff Compliance with the MBE/WBE Program

DGS staff compliance should be evaluated through both department-level reports of MBE/WBE utilization and staff performance reviews. DGS staff members who comply with MBE/WBE Program requirements to utilize MBE/WBEs on informal contracts should be recognized. Such acknowledgment should be in the form of a letter from supervisory staff and recognition in the semi-annual MBE/WBE report. The commendation should be posted on the BMWBO website. Formal recognition would provide staff with an additional incentive to meet MBE/WBE Program requirements and reward those who consistently demonstrate a commitment to diversity. Program compliance should be included as part of a manager's performance evaluation as well.

d. Conduct Bid and Proposal Debriefing Sessions

Evaluations should be reviewed and distributed to bidders promptly, and the Commonwealth should conduct a debriefing session before awarding the contract. Protest procedures should be publicized as well.

Feedback to unsuccessful bidders can provide MBE/WBEs valuable assistance as to why their bid was not selected, and it can also provide tips on what to do differently when submitting their next bid to the Commonwealth. Debriefing unsuccessful bidders can increase the Commonwealth's bid and RFP submission rate.



B. Internet-Specific Recommendations

The Commonwealth's website is quite comprehensive and contains many features that make it very useful for vendors interested in obtaining contracts with the Commonwealth. Mason Tillman offers a few additional enhancements that may allow increased access to information online that would aid in MBE/WBEs participating in Commonwealth contracts.

1. Post Project Forecasts on the Internet

A quarterly forecast of contract opportunities should be available on the BMWBO website to provide firms with adequate notice of upcoming contracts. The master list of all upcoming contract opportunities should be maintained by the DGS. Project forecasts would provide prime contractors and subcontractors with more lead time for networking, outreach, and team building.

Notice of upcoming solicitations should be advertised on the Internet. Upcoming solicitations could be listed 15 to 30 days prior to the actual release date. The listings would consist of the project description or product specifications, anticipated release date, and subcontracting goals. Listings should also be posted the same day each week.

Agency payments to prime contractors and prime contractor payments to subcontractors should also be posted on the Internet.

In addition, the Commonwealth should post its Intent to Award decisions on the Internet. Monthly reports of formal and informal contract awards should also be posted on the Internet. This public notice should include the contractor's name, awarding procurement official, award amount, and contractor's MBE/WBE status.

2. Provide Downloadable Forms and Manuals

The homepage for the DGS should include a separate section dedicated to downloading documents, such as program manuals, policy statements, and forms. There are numerous documents available for downloading that relate to different contracting issues, and the consolidation of this information would make it easier for vendors to access the necessary forms.

C. Data Management Recommendations

The Commonwealth's tracking methods for contract awards, payments, change orders, and amendments could be enhanced for a more accurate assessment of program effectiveness and program compliance.

1. Track Subcontractor Data



Construction subcontracting records are electronically tracked only for MBE/WBEs in both the FoxPro and SQL databases. Tracking both MBE/WBE and non-MBE/WBE subcontractors for all contracts would allow for a more accurate assessment of subcontractor utilization. The SQL database that is currently used by the Bureau of Minority and Women Business Opportunities should be modified so that it can be used as a utilization tracking tool to ensure effective contract compliance.

2. Maintain a Comprehensive Bidders List

The Commonwealth collects information on all MBE/WBE and non-MBE/WBE prime contractors that submit bids for contracts. The Commonwealth does not, however, collect bidder information on subcontractors.

Maintaining a comprehensive subcontractor bidders list would assist the Commonwealth in compiling and maintaining a current data set of firms that are ready, willing, and able to perform services and provide goods to the Commonwealth. This list would be useful for setting MBE/WBE goals and for future disparity study research. Therefore, the Commonwealth should collect information on all vendors that submit bids, which should include: successful and unsuccessful prime contractors and subcontractors, and M/WBEs and non-MBE/WBEs.

The following are the minimum recommended fields to be recorded:

- Name and Address of Prime Contractor
- Prime Contractor Certification Status
- Prime Contractor Bid Amount
- Name and Address of Subcontractor
- Subcontractor Certification Status
- Service or Commodity to be Provided by each Subcontractor
- Subcontractor Bid Amount

3. Prime Contract Data

The Commonwealth tracks construction and design prime contracts in the FoxPro database. The construction contract records are fairly comprehensive. However, the data for design contracts is incomplete and sometimes inaccurate. A more systematic contract tracking database should be set up to link directly to the Department of Treasury's financial management information system by a unique contract number. This will result in better project and contract management. Accurate and up-to-date electronic contract recording will ensure that the total vendor payments do not exceed the contract amount including modifications.



VI. ADMINISTRATIVE RECOMMENDATIONS

The following recommendations do not apply to a particular step in the procurement process. Instead, they apply to the DGS's BMWBO Business Enterprise Program as a whole and are intended to increase the efficacy and efficiency of the program.

A. Delegation Agreements

The Department of General Services can authorize another agency to procure on behalf of the Commonwealth under certain conditions. Any Commonwealth agency can act as a purchasing agency and contract on its own behalf for construction services if:

- a. The total estimated construction contract is no greater than \$100,000, and
- b. The agency complies with the requirements and procedures for competitive sealed bidding, competitive sealed proposals, multiple awards, sole source procurement, or emergency procurement.

The MBE/WBE program provisions apply to these delegated contracts. The BMWBO reviews responsive bids as to determine whether the lowest bidder complied with the MBE/WBE program requirements for construction bids valued at less than \$100,000.

The Commonwealth can authorize procurement to be undertaken through delegated authority for contracts greater than \$100,000. The Commonwealth must ensure that the responsibility to meet the MBE/WBE program requirements are not forfeited in the delegation. The BMWBO should review the Memo of Understanding between the Commonwealth and the college, university, or other entity to ensure that MBE/WBE program requirements are included. The delegation authority should allow for the BMWBO to review responsive bids to confirm that the bidder/proposer fulfilled the MBE/WBE program requirements, as required on non-delegated construction procurements valued at less than \$100,000.

The Commonwealth Procurement Code should be amended to allow implementation of the recommendations, so that they would be statutorily applicable to all Commonwealth agencies, universities, and colleges.

B. Revise Executive Order No. 2004-6

Executive Order 2004-6 was enacted on April 15, 2004, after a finding that the level of participation by minority and woman-owned businesses in the Commonwealth's procurement of supplies, services, and construction averaged only two percent of the total dollars spent by the Commonwealth.

The Commonwealth initiated provisions to prevent discrimination against MBE/WBEs and to increase the participation of MBE/WBEs on its contracts. MBE/WBE goals were



implemented along with race-neutral remedies. However, these measures have not been sufficient in increasing the MBE/WBE participation rates as indicated by the disparity findings. The Commonwealth should consider revising Executive Order 2004-6 to include additional remedies to address the documented disparity.

Executive Order 2004-6 should be expanded to include, but not limited to, the following provisions:

- a. Specifications for RFBs, RFPs, and RFQs for all Commonwealth-funded projects should include the BMWBO's MBE/WBE program requirements.
- b. Solicitations for all Commonwealth funded construction and design professional services contracts should be submitted to the BMWBO's Office before the contract is released to the public, to ensure compliance with the MBE/WBE program requirements.
- c. Projects for the Commonwealth's universities and colleges should be subjected to the BMWBO's MBE/WBE Program requirements.

Projects that are initially funded by sources other than the Commonwealth, but are later reimbursed by the Commonwealth, in whole or part, should also be subjected to the MBE/WBE provisions.

Steps must be taken to pass legislation and codify the revised Executive Order 2004-6 in order to standardize the provisions so that they would be statutorily applicable to all Commonwealth agencies, universities, and colleges.

