

State of New Jersey

Construction Services Disparity Study

EXECUTIVE SUMMARY

October 2005

**Submitted to:
The Disparity Study Commission**

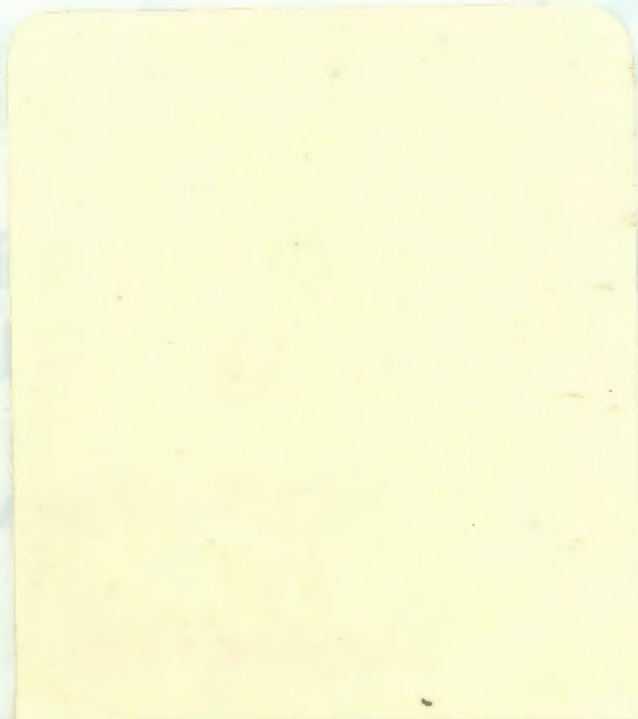
**Submitted by:
Mason Tillman Associates, Ltd.**



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ACKNOWLEDGMENT

In 2003, the State of New Jersey commissioned a Discrimination in State Employment and Contracting Disparity Study to update the State's original disparity study and findings, which are set forth in the Study on Discrimination in Public Works, Procurement and Construction Contracts, dated February 22, 1993. Mason Tillman Associates, Ltd., of Oakland, California was selected by the Disparity Study Commission to perform the construction services portion of the Study.

The purpose of the Disparity Study is to determine whether there is a disparity between the number of qualified minority and women-owned businesses ready, willing and able to perform construction and construction-related services and the number of contractors/vendors actually engaged to perform such services. The study period covered July 1, 2000 to June 30, 2002.

Management Interventions, Inc, a Trenton-based female-minority-owned firm, assisted Mason Tillman in the performance of the Study. Management Interventions, Inc performed data collection activities and outreach to the business community.

The Study could not have been conducted without the cooperation of the local chambers of commerce and business organizations, and the many State of New Jersey business owners who demonstrated their commitment to the Study by participating in interviews and public hearings. In addition, the State Agencies, Authorities, and Commissions, and Colleges, and Universities' staff played a critical role in assisting with the data collection by making available State personnel, contract records, and documents needed to perform the Study. This Study could not have been completed without their extraordinary effort.

Regena L. Thomas, Secretary of State along with Assistant Secretary of State, Kathleen Kisko, the Chairman of the Disparity Study Commission, Peter M. Suzuki, Esq. and the Disparity Study Commissioners provided overall guidance and direction for the Study.

Jeanne M. Victor and Sharon B. Hartley, Directors of the Disparity Study Commission managed the completion of the Study. Their leadership and guidance helped keep the Study process focused and on target.

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New Jersey Construction Services Disparity Study*

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EXECUTIVE SUMMARY

I. STUDY OVERVIEW

A. Purpose

The purpose of the New Jersey (State) Disparity Study was to determine if a significant disparity existed between the availability of ready, willing, and able minority and woman-owned business enterprises (M/WBEs) and the utilization of such businesses in the State's procurement process. The prime utilization analysis included construction services and construction-related services awarded by State Agencies, Authorities, and Commissions, and State Colleges and Universities. State Colleges and Universities were analyzed separately from the State Agencies, Authorities, and Commissions, and presented in a separate volume. The findings of both are discussed in this Executive Summary. Contracts awarded between July 1, 2000 and June 30, 2002 were studied.

B. Legal Requirements

Since the U.S. Supreme Court's 1989 ruling in *City of Richmond v. J. A. Croson Co.* (*Croson*),¹ local governments have been concerned about the legal validity of minority and woman-owned business programs. The *Croson* decision and subsequent lower court rulings imposed new standards on how local governments can utilize contracting programs to increase the involvement of M/WBEs. The new standards provide that a factual basis must be established before using race and gender-based remedies to promote business with M/WBEs. A disparity study is the method to establish the required factual predicate.

C. Study Management

Mason Tillman Associates, Ltd., a public policy consulting firm based in Oakland California, was selected to perform the Disparity Study. The New Jersey Disparity Study Commission managed the Disparity Study.

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

D. Industries

The Disparity Study included analysis and evaluation of construction service and construction-related service contracts.

E. Contract Thresholds

The following tables describe the thresholds used in the analysis of the State contracts.

Table 1: Contract Thresholds for State Agencies, Authorities, and Commissions

Type of Contract	Construction Services	Construction-Related Services
Informal Contracts	Contracts valued less than \$41,100	Contracts valued less than \$25,000
Formal Contracts	Contracts valued between \$41,100 and \$500,000	Contracts valued between \$25,000 and \$500,000
Subcontracts	All formal contracts	All formal contracts

Table 2: Contract Thresholds for State Colleges and Universities

Type of Contract	Construction Services	Construction-Related Services
Informal Contracts	Contracts less than \$19,500	Contracts less than \$19,500
Formal Contracts	Contracts valued between \$19,500 and \$500,000	Contracts valued between \$19,500 and \$500,000
Subcontracts	All formal contracts	All formal contracts

F. Key Findings

1. State Agencies, Authorities, and Commissions

- *Prime Contract Disparity*: Statistically significant disparity was found for African American firms in construction services prime contracts, and for African American, Asian American, Hispanic American, and Caucasian Female firms in construction-related services prime contracts.
- *Informal Contract Disparity*: Statistically significant prime contract disparity was identified for all ethnic/gender groups, except Native Americans, in informal contracts for both industries.
- *Subcontract Disparity*: Statistically significant subcontractor disparity was identified for African American and Asian American firms only in construction services.

2. State Colleges and Universities

- *Prime Contract Disparity*: Statistically significant disparity was found for African American, Asian American, and Hispanic American firms in construction services prime contracts and for African American and Asian American firms in construction-related services prime contracts.
- *Informal Contract Disparity*: Statistically significant disparity was found for African American, Asian American, and Hispanic American firms in construction services informal prime contracts and for African American and Asian American firms in construction-related services informal prime contracts.
- *Subcontract Disparity*: Statistically significant subcontractor disparity was identified for African American, Asian American, and Caucasian Female firms only in construction subcontracts and for African American, Asian Americans, and Hispanic Americans in construction-related services subcontracts.

G. Key Recommendations

1. Race and Gender-Neutral Recommendations

- Unbundle large procurement into smaller contracts, where feasible, to maximize small business participation
- Eliminate pre-qualification standards in all but large and complex projects to provide otherwise capable firms the opportunity to compete for State contracts

2. Race and Gender-Conscious Recommendations

- Provide incentive credits to statistically underutilized groups on construction-related contracts

- Provide joint venture incentive credits for formal construction-related contracts among the statistically significant underutilized groups
- Establish a Sheltered Market program for informal contracts to limit competition to firms from the statistically underutilized groups and other firms of comparable capacity
- Establish overall M/WBE subcontracting goals for the participation of statistically underutilized groups in the State's subcontracts
- Establish contract-specific M/WBE subcontracting goals on all construction contracts for groups with an identified disparity.

II. DISPARITY STUDY PURPOSE AND SCOPE

The purpose of the Disparity Study was to determine if a significant disparity existed between the availability of ready, willing, and able M/WBEs and the utilization of such businesses in the State's construction and construction-related procurement process.

Included in the Disparity Study were the State's construction and construction-related prime contracts and subcontracts issued during the July 1, 2000 to June 30, 2002 study period. Only those State Agencies, Authorities, and Commissions, and State Colleges and Universities that awarded construction and construction-related contracts to for-profit businesses were included in the Study. Examples of the types of contract awards for each industry included in the Disparity Study are the following:

- *Construction Services* included new construction and renovations, except routine building maintenance. All residential and non-residential building construction; heavy construction, such as streets, roads, and bridges; and special trade construction, such as fencing, HVAC, paving, and electrical were included.
- *Construction-related Services* included design services, such as architectural, engineering, and construction management services, that are performed as part of a construction project.

The study findings are presented in three volumes. Volume 1 presents the legal analysis, anecdotal analysis, and pre-qualification analysis which are common to all State agencies. Volume 2 presents the disparity analysis and recommendations for State Agencies, Authorities, and Commissions. Volume 3 presents the disparity analysis and recommendations for State Colleges and Universities.

III. LEGAL BACKGROUND

Two United States Supreme Court decisions, *Croson* and *Adarand Constructors, Inc. v. Federico Pena (Adarand)*,² raised the standard by which federal courts review M/WBE programs. In those decisions, the Court announced that the constitutionality of affirmative action programs that employ racial classifications would be subject to “strict scrutiny.” Understanding *Croson*, which applies to state and local governments, is necessary to develop a sound M/WBE program. Broad notions of equity or general allegations of historical and societal discrimination against minorities are insufficient to meet the Constitutional requirements. Instead, governments may adopt race-conscious programs only as a remedy for identified discrimination, and this remedy must not unduly burden non-M/WBEs.

IV. HISTORY OF THE STATE'S M/WBE PROGRAM

The “Set-Aside Act,” N.J.S.A. 52:32-17, effective October 1, 1984, was established for Small Businesses, Female Businesses, and Minority Businesses. The Act established a program requiring State Agencies with contracting authority to award not less than 15 percent of State contracts to eligible small businesses, seven percent to eligible minority businesses, and three percent to eligible female businesses. The Act applied to State Agencies, Authorities, and Commissions and State Colleges and Universities during the Study Period of July 1, 2000 to June 30, 2002.

In 2003, the Act’s provisions were amended by the Consent Decree in *Geod Corp. v. State of New Jersey, et al*, dated July 10, 2003. The Consent Decree permanently enjoined the State from enforcing the Set-Aside Act as it related to setting aside contracts for bidding by M/WBEs, or requiring or permitting the State to establish M/WBE contract goals or targets for the award of State dollars. Implementing regulations, effective September 2003, created bidding set-asides for only small businesses and eliminated from the set-aside rules all references to minority and woman-owned businesses, N.J.A.C. 12A: 10-1.2 *et seq.*, and N.J.A.C. 17: 13-1.2 *et seq.*

² 115 S.Ct. 2097 (1995).

V. CONTRACT DATA SOURCES

A. State Agencies, Authorities, and Commissions

The State Agencies', Authorities', and Commissions' prime contract data were collected primarily from the agencies in addition to several centralized sources of electronic records. The centralized sources were the Treasury Department's Purchase Bureau, Division of Property Management and Construction, and the Office of Management and Budget. The provided electronic data were extracted from the following database systems:

- Purchase Bureau's Management Acquisition Control System Enhanced (MACS-E)
- Division of Property Management and Construction's Project Management Information System (DPMC)
- Office of Management and Budget's New Jersey Comprehensive Financial System (NJCFS)

These three centralized databases were the source of prime contract records for the following State Agencies and Authorities:

State Departments:

- Agriculture
- Corrections
- Education
- Environmental Protection, including Bureau of Coastal Engineering
- Health and Senior Services
- Human Services
- Labor
- Law and Public Safety
- Treasury

Authorities:

- New Jersey Building Authority
- New Jersey Public Broadcasting

Prime contracts for two departments were only partially obtained from the centralized sources. Listed below are the Agencies for which a portion of the data was obtained through the centralized sources, and the balance was provided by the particular Agency.

- **Department of Military and Veterans Affairs** provided all of their construction and construction-related contract records. Small contracts for construction repairs were obtained from MACS-E.
- **Department of Transportation** provided all of the construction and construction-related contracts related to the transportation industry. Records for all other construction and construction-related contracts were provided by Treasury's Division of Property Management and Construction (DPMC).

Data for the remaining 13 State Agencies, Authorities, and Commissions were provided by each State Agency, Authority, and Commission. Each State Agency, Authority, and Commission compiled its records of prime contracts awarded during the study period and submitted an electronic file. Some State Agencies, Authorities, and Commissions also provided bidder lists and pre-qualification lists.

Agencies providing all prime contract data from their own sources are listed below:

Commissions:

- New Jersey Meadowlands Commission
- North Jersey District Water Supply
- Passaic Valley Sewage Commission
- Pinelands Commission

Authorities:

- Casino Reinvestment Development Authority
- New Jersey Economic Development Authority³/Schools Construction Corporation
- New Jersey Highway Authority/New Jersey Turnpike Authority
- Garden State Parkway
- South Jersey Transportation Authority
- New Jersey Sports and Exposition Authority
- New Jersey Water Supply Authority
- New Jersey Transit Corporation
- New Jersey Housing and Mortgage Finance Authority

B. State Colleges and Universities

The State Colleges and Universities' prime contract data were collected from each State College and University, with two exceptions. First, Richard Stockton College managed its own small construction and construction-related contracts. Its data for large contracts were provided by the State Treasury Department's Division of Property Management and

³ None of the New Jersey Economic Development Authority contracts were within the study period. Schools Construction Corporation (SCC) contracts were provided directly from SCC.

Construction (DPMC). Second, Rowan College provided its contracts in a hard copy report. Additional contracts for Rowan College were identified by the Treasury's Division of Contract Compliance data and collected by Mason Tillman.

The State Colleges and Universities which provided all prime contract data from their own sources are listed below:

Colleges and Universities

- The College of New Jersey
- Kean University
- Montclair State University
- New Jersey City University
- New Jersey Institute of Technology
- Ramapo College
- Rutgers University
- University Medicine & Dentistry of New Jersey
- William Paterson College

VI. STUDY METHODOLOGY AND STRUCTURE

A. Methodology

The review of *Croson* and related case law provided the legal framework for conducting a disparity study. A legal review is the **first step** in a disparity study. Case law sets the

<p>Disparity Study: Critical Components</p> <ol style="list-style-type: none">1. Legal Framework2. Utilization Analysis3. Market Area Analysis4. Availability Analysis5. Disparity Analysis6. Anecdotal Analysis7. Race Neutral Assessment8. Recommendations
--

standards for the methodology employed in a disparity study. **Step two** is to collect utilization records and determine the extent to which an agency has used minority, woman-owned, and other businesses to secure its needed services and commodities. Utilization records are also used to determine the geographical area in which companies that have received agency contracts are located. Identification of the agency market area is **step three**. Once the market area is defined, the **fourth step**, the availability analysis, identifies businesses willing and able to provide a service or commodity needed by the agency. In the

fifth step, the utilization and availability analyses are used to determine whether there is disparity or statistically significant underutilization according to industry type. In **step six**, anecdotal analysis, the contemporary experiences of business owners in the agency's market

area are reviewed. In **step seven**, the agency's race-neutral efforts are reviewed to determine their scope and effectiveness in including all agency businesses in its contracting. Finally, in **step eight**, the statistical and anecdotal analyses are reviewed and recommendations are written to enhance the agency's efforts in contracting with businesses in its market area.

B. Study Chapters

The Disparity Study findings were issued in three volumes and 17 chapters. The contents of the three volumes are briefly described below:

Volume 1: New Jersey Construction Services Disparity Study

- *Chapter 1:* Legal Analysis presents legal cases applicable to business affirmative action programs and the methodology based on those cases required for the Disparity Study
- *Chapter 2:* Anecdotal Analysis presents the business community's opinions about whether barriers exist in their contracting, or attempts to contract with the State
- *Chapter 3:* Pre-Qualification Analysis describes the pre-qualification requirement set forth by New Jersey Statute § 52:35-2 and the regulations and procedures established by State Agencies and Authorities in compliance with the Statute

Volume 2: New Jersey Construction Services Disparity Study - State Agencies Authorities and Commissions

- Chapter 1: Prime Contractor Utilization Analysis presents the distribution of prime contracts by industry, ethnicity, and gender
- Chapter 2: Subcontractor Utilization Analysis presents the distribution of subcontracts by industry, ethnicity, and gender
- Chapter 3: Market Area Analysis presents the legal basis for geographical market area determination and defines the State's market area
- Chapter 4: Availability Analysis presents the distribution of available businesses in the State's market area
- Chapter 5: Prime Contractor Disparity Analysis presents prime contractor utilization, compared to prime contractor availability, by industry, ethnicity and gender, and whether the comparison is statistically significant

- Chapter 6: Subcontractor Disparity Analysis presents subcontractor utilization, compared to subcontractor availability, by industry, ethnicity and gender, and whether the comparison is statistically significant
- Chapter 7: Disparity Study Recommendations presents best management practices

Volume 3: New Jersey Construction Services Disparity Study - State Colleges and Universities

- Chapter 1: Prime Contractor Utilization Analysis presents the distribution of prime contracts by industry, ethnicity, and gender
- *Chapter 2:* Subcontractor Utilization Analysis presents the distribution of subcontracts by industry, ethnicity, and gender
- *Chapter 3:* Market Area Analysis presents the legal basis for geographical market area determination and defines the State's market area
- *Chapter 4:* Availability Analysis presents the distribution of available businesses in the State's market area
- *Chapter 5:* Prime Contractor Disparity Analysis presents prime contractor utilization, compared to prime contractor availability, by industry, ethnicity and gender, and whether the comparison is statistically significant
- *Chapter 6:* Subcontractor Disparity Analysis presents subcontractor utilization, compared to subcontractor availability, by industry, ethnicity and gender, and whether the comparison is statistically significant
- *Chapter 7:* Disparity Study Recommendations presents best management practices

VII. NOTABLE FINDINGS

A. Introduction

The objective of the disparity analysis is to determine if M/WBEs were underutilized at a statistically significant level on State contracts. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to M/WBEs should be approximate to the proportion of available M/WBEs in the relevant market area.⁴ If a

⁴ Availability is defined as willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 4 of Volumes 2 and 3.

disparity exists between these proportions, a statistical test can determine the probability that the disparity is due to chance. If there is a very low probability that the disparity is due to chance,⁵ the finding is considered statistically significant, and according to *Croson* an inference of discrimination can be made. This analysis should be applied to M/WBEs by race and gender.

B. Disparity Findings

Tables 3 and 4 below summarize the Disparity Study's prime contractor disparity findings for informal and formal contracts, and subcontractor disparity findings for formal contracts. Informal contracts were small purchases that had a maximum size threshold and did not require advertising. Formal contracts were advertised solicitations above the informal threshold.

Informal Contracts

The informal level for State Agencies, Authorities, and Commissions is less than \$41,100 for construction services and less than \$25,000 for construction-related services. The informal level for State Colleges and Universities is less than \$19,500 for both industries.

- *State Agencies, Authorities, and Commissions*: Statistically significant disparity was found for African Americans, Asian Americans, Hispanic Americans, and Caucasian Females in both industries' informal prime contracts.
- *State Colleges and Universities*: Statistically significant disparity was found for African Americans, Asian Americans, and Hispanic Americans in construction services informal prime contracts and for African Americans and Asian Americans in construction-related services informal prime contracts.

Formal Contracts

The formal level analyzed in this study is contracts under \$500,000. The formal contracts were capped at \$500,000 for both industries because there was demonstrated capacity within the pool of willing M/WBEs to perform contracts at this level.

- *State Agencies, Authorities, and Commissions*: Statistically significant disparity was found for African Americans in construction services prime contracts, and for African

⁵ 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 95 percent confidence level.

Americans, Asian Americans, Hispanic Americans, and Caucasian Females in construction-related services prime contracts.

- *State Colleges and Universities*: Statistically significant disparity was found for African Americans, Asian Americans, and Hispanic Americans in construction services prime contracts and for African Americans and Asian Americans in construction-related services prime contracts.

Tables 3 and 4 also summarize the Disparity Study's subcontractor findings. Subcontracts were analyzed at all prime contract dollar levels. The subcontractor remedies apply to formal contracts funded by local and federal dollars.

Subcontracts

- *State Agencies, Authorities, and Commissions*: Statistically significant disparity was found for African Americans and Asian Americans in construction services subcontracts only.
- *State Colleges and Universities*: Statistically significant disparity was found for African Americans, Asian Americans, and Caucasian Females in construction services subcontracts, and for African Americans, Asian Americans, and Hispanic Americans in construction-related services subcontracts.

Table 3: Disparity Findings: State Agencies, Authorities, and Commissions

Ethnicity and Gender	Construction Services	Construction-Related Services
Informal Contracts	Contracts less than \$41,100	Contracts less than \$25,000
African Americans	Yes	Yes
Asian Americans	Yes	Yes
Hispanic Americans	Yes	Yes
Native Americans	---	**
Caucasian Females	Yes	Yes
Formal Contracts	Contracts less than \$500,000	Contracts less than \$500,000
African Americans	Yes	Yes
Asian Americans	**	Yes
Hispanic Americans	No	Yes
Native Americans	---	**
Caucasian Females	**	Yes
Subcontracts	All Formal Contracts	All Formal Contracts
African Americans	Yes	No
Asian Americans	Yes	**
Hispanic Americans	**	**
Native Americans	---	---
Caucasian Females	**	**

- 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

Table 4: Disparity Findings: State Colleges and Universities

Ethnicity and Gender	Construction Services	Construction-Related Services
Informal Contracts	Contracts less than \$19,500	Contracts less than \$19,500
African Americans	Yes	Yes
Asian Americans	Yes	Yes
Hispanic Americans	Yes	No
Native Americans	---	---
Caucasian Females	No	**
Formal Contracts	Contracts less than \$500,000	Contracts less than \$500,000
African Americans	Yes	Yes
Asian Americans	Yes	Yes
Hispanic Americans	Yes	No
Native Americans	---	---
Caucasian Females	**	No
Subcontracts	All Formal Contracts	All Formal Contracts
African Americans	Yes	Yes
Asian Americans	Yes	Yes
Hispanic Americans	No	Yes
Native Americans	---	---
Caucasian Females	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

C. Disparity Ratios

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 respective 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 a given ethnic/gender group and the **actual contract amount** received by that group. This difference is a disparity ratio.

Disparity ratios are a concept that is used in equal employment law. However, *Croson*, in bringing the disparity concept to government contracting, imposed a more rigorous standard. This Croson standard, statistically significant underutilization, is the test that must be met before race conscious remedies can be employed in contracting.

Disparity ratios can be used as a measure of the degree of disparity. A disparity ratio less than 0.80 indicates a relevant degree of disparity. In other words, if M/WBEs have a disparity ratio of less than 0.80, it means that M/WBEs have received less than 80 percent of what would be expected in the absence of discrimination. Therefore the closer this disparity ratio gets to 0.00 the greater the disparity. It has to be noted that disparity ratios are not informative in the following situations:

- When the ethnic/gender group in question has low availability. For example if availability is 2 percent and utilization is 1 percent, the disparity ratio is a low 0.5, but the difference of only 1 percent is not substantial.
- When the total number of contracts is low. In that case, the presence of disparity may be statistically significant, while the degree of disparity may be a result of random occurrences that play a major role in small samples.

Tables 5 and 6 below summarize disparity ratios for those groups of prime contractors and subcontractors where statistically significant underutilization was found. For all other groups the disparity ratio is not applicable.

Table 5: Disparity Ratios: State Agencies, Authorities, and Commissions

Ethnicity and Gender	Construction Services	Construction-Related Services
Informal Contracts	Contracts less than \$41,100	Contracts less than \$25,000
African Americans	0.08	0.10
Asian Americans	0.11	0.00
Hispanic Americans	0.38	0.09
Native Americans	Not Applicable	Not Applicable
Caucasian Females	0.64	0.18
Formal Contracts	Contracts less than \$500,000	Contracts less than \$500,000
African Americans	0.02	0.06
Asian Americans	Not Applicable	0.61
Hispanic Americans	Not Applicable	0.45
Native Americans	Not Applicable	Not Applicable
Caucasian Females	Not Applicable	0.35
Subcontracts	All Formal Contracts	All Formal Contracts
African Americans	0.40	Not Applicable
Asian Americans	0.21	Not Applicable
Hispanic Americans	Not Applicable	Not Applicable
Native Americans	Not Applicable	Not Applicable
Caucasian Females	Not Applicable	Not Applicable

Table 6: Disparity Ratios: State Colleges and Universities

Ethnicity and Gender	Construction Services	Construction-Related Services
Informal Contracts	Contracts less than \$19,500	Contracts less than \$19,500
African Americans	0.29	0.00
Asian Americans	0.49	0.00
Hispanic Americans	0.25	Not Applicable
Native Americans	Not Applicable	Not Applicable
Caucasian Females	Not Applicable	Not Applicable
Formal Contracts	Contracts less than \$500,000	Contracts less than \$500,000
African Americans	0.03	0.00
Asian Americans	0.42	0.00
Hispanic Americans	0.66	Not Applicable
Native Americans	Not Applicable	Not Applicable
Caucasian Females	Not Applicable	Not Applicable
Subcontracts	All Formal Contracts	All Formal Contracts
African Americans	0.07	0.10
Asian Americans	0.09	0.41
Hispanic Americans	Not Applicable	Not Applicable
Native Americans	Not Applicable	Not Applicable
Caucasian Females	0.57	Not Applicable

D. Anecdotal Findings

In *Croson*, the United States Supreme Court 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.⁶ 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.”⁷

Seventy-two business owners in the State were interviewed about their experiences during the July 1, 2000 to June 30, 2002 study period. Included were businesses in both of the Disparity Study industries. Members of all ethnic groups, except Native Americans, were interviewed. The anecdotes provide evidence of both active and passive forms of discrimination, and business barriers implemented by State officials and the business community. The following is a brief summary of their anecdotes:

- Many M/WBEs reported having difficulty getting State bid information
- Many M/WBEs believed the State’s contracts were too large, effectively excluding M/WBEs and small businesses from the bid process
- M/WBEs reported that certification was too costly and time consuming
- M/WBEs believed that the State gives insufficient lead time to submit bids
- M/WBEs believed that procurement standards are inconsistent
- Many M/WBEs expressed frustration at what they believe is the State’s failure to consistently maintain policies, procedures, and enforcement penalties pertaining to its M/WBE Program
- Many business owners reported receiving egregiously late payments from State agencies, some owners waiting years to receive payments
- Many M/WBEs reported having difficulty breaking into contracting networks
- Trade unions were also reported as barriers for M/WBEs in the State by excluding minorities and women from job opportunities at several points in the hiring process

⁶ *Croson*, 488 U.S. at 509.

⁷ *Id.*

- Agency managers were perceived to have questionable bid and contracting related practices
- Many business owners hoped the State will show leadership and a renewed commitment to implementing its M/WBE Program

In conclusion, it should also be noted that many business owners described M/WBE Programs as valuable and a major factor in keeping their businesses solvent. Additionally, numerous positive comments were made praising the State's employees for their helpfulness and hard work.

VIII. RECOMMENDATIONS

Race and gender-conscious and race and gender-neutral recommendations are offered to remedy the statistically significant underutilization of minorities identified in the industries studied. The race and gender-conscious measures include prime contracting and subcontracting remedies for the ethnic and gender groups where disparities were found. The race and gender-neutral recommendations are offered as strategies to increase equity in contracting without regard to race.

Several remedies are proposed to address both the statistically significant prime contractor and subcontractor underutilization of minority groups. It is critical that race and gender-conscious remedies recommended to correct documented statistically significant underutilization are narrowly tailored. Therefore the remedies are recommended to address the underutilization of those race and gender groups with a disparity.

IX. RACE AND GENDER-CONSCIOUS RECOMMENDATIONS

A. Prime Contractor Remedies

The prime contractor remedies apply to both formal and informal contracts. However, remedies for formal contracts are limited to construction-related contracts as these contracts are awarded based on qualifications. Construction awards, on the other hand, are based on the lowest bid. Remedies for informal contracts apply to both industries since awards are based on quotations and the selection need not be determined by price. The recommendations below apply only to those groups with identified disparity.

- Provide incentive credits to statistically underutilized groups on construction-related contracts
- Establish a weighted criterion for the utilization of groups with a disparity in the evaluation of construction-related services statements of qualifications and proposals
- Provide bid discounts to construction bids submitted by the groups with identified disparity
- Provide joint venture incentive credits among the statistically significant underutilized groups
- Establish a Sheltered Market program for all informal contracts to limit competition between firms from the statistically underutilized groups and other firms of comparable capacity
- Document for all contracts the Good Faith Effort of State staff to solicit quotes from statistically significant underutilized groups

B. Subcontractor Remedies

The subcontractor remedies apply to formal contracts funded by State and federal dollars. The M/WBE remedies apply only to the statistically significant underutilized groups.

- Overall M/WBE subcontracting goals for the participation of statistically significant underutilized groups should be established for all subcontracts

Overall goals should be established as a target for the participation of the statistically significant underutilized groups on the State's subcontracts. The goal should reflect the availability of the statistically significant underutilized groups as calculated in the Study. The overall goals should be reviewed periodically. Tables 7, 8, and 9 depict the subcontractor availability of the statistically significant underutilized groups by ethnicity and gender. For example, as depicted in Table 7, the overall construction subcontract goals for State Agencies, Authorities, and Commissions would be 6.30 percent for African Americans and 4.34 percent for Asian Americans.

**Table 7: Construction Subcontractor Availability-
State Agencies, Authorities, and Commissions**

Underutilized Group	Percent Availability
African Americans	6.30%
Asian Americans	4.34%

**Table 8: Construction Subcontractor Availability-
State Colleges and Universities**

Underutilized Group	Percent Availability
African Americans	6.30%
Asian Americans	4.34%
Caucasian Females	12.67%

**Table 9: Construction-Related Services
Subcontractor Availability-State Colleges and
Universities**

Underutilized Group	Percent Availability
African Americans	4.51%
Asian Americans	7.11%
Hispanic Americans	4.09%

- Contract-specific M/WBE subcontracting goals can be established on all construction contracts for racial groups with an identified disparity
- Weighted Good Faith Effort criteria that define and quantify the minimum behavior required to demonstrate an attempt to meet the subcontracting goal should be developed

C. Disadvantaged Business Enterprise Programs

Federal Disadvantaged Business Enterprise (DBE) subcontracting goals should be utilized whenever the contract is funded by federal dollars. The U.S. Department of Transportation's Disadvantaged Business Enterprise Program and the U.S. Environmental Protection Agency's Fair Share Program, require subcontracting goals to achieve disadvantaged businesses participation (which includes M/WBEs). These federal programs,

used in combination with State-funded programs, will help to alleviate the identified disparity.

- Utilize federal Disadvantaged Business Enterprise subcontracting goals whenever federal dollars are used to procure services

X. RACE AND GENDER-NEUTRAL RECOMMENDATIONS

Croson case law requires that New Jersey consider (but not exhaust) race and gender-neutral initiatives before resorting to race conscious remedies. The State operated a race-neutral Small Business program from October 1984 to July 10, 2003 in conjunction with a race-conscious M/WBE program. This Disparity Study found disparities, as noted above, during the July 1, 2000 to June 30, 2002 study period. Since July 10, 2003, the State consented to its M/WBE program being enjoined. Only the race-neutral Small Business Enterprise Program continued. In meeting this *Croson* requirement, the State has undertaken an evaluation to determine whether documented M/WBE participation in this Small Business Enterprise Program, since the elimination of the M/WBE Set-Aside Program, was a sufficient response to the findings of disparity discussed earlier in this document.

Mason Tillman makes specific race and gender-neutral program recommendations for future contracting programs. They incorporate an examination of a number of best management practices of similarly situated jurisdictions. As such, they can serve as a guide for State contracting efforts.

- Unbundle large procurement into smaller contracts where feasible to maximize small business participation
- Eliminate pre-qualification standards in all but large and complex projects to provide otherwise capable firms the opportunity to compete for State contracts
- Directly award construction support services contracts, which are normally included within the general contract, as a means to award small contracts
- Evaluate bonding and insurance requirements to ensure that smaller contracts do not carry a disproportionately high level of coverage
- Phase bonding requirements to increase a small firm's access to credit and promote business growth

- Phase retainage requirements to reduce the cash flow burden experienced by small construction subcontractors
- Post quarterly project forecasts on the Internet to provide firms with adequate notice and lead time
- Consider Reducing SBE size standards to enable M/WBEs to compete with similarly situated businesses
- Allow certified M/WBEs to register their interest as subcontractors for State projects via the Internet
- Require prime contractors to list all subcontractors with their bids and proposals to ensure compliance with State standards
- Debrief unsuccessful bidders and proposers to help businesses learn about their areas of strength and weakness and how to create a more successful bid or proposal
- Establish uniform bid and proposal protest procedures to minimize the time and resources needed by all parties to respond to a protest
- Develop an expedited payment program to remove a major barrier to small business participation in public contracting by improving cash flow and to provide additional incentives for businesses to compete for State contracts by establishing the State as a preferred public sector client
- Provide for partial payment of invoices to enable small businesses that contract with the State to maintain a positive cash flow while providing goods or services to the State
- Assess the contract dispute resolution process to ensure it does not unduly disadvantage or burden M/WBEs
- Avoid overly complex or restrictive specifications to minimize the degree of expertise and resources needed to prepare bids
- Develop subcontractor substitution standards so that subcontractors are not removed from a project without due process
- Post prime contractor payments to the internet to allow subcontractors to monitor the progress of their project and to track when the prime contractor receives payment
- Conduct routine post-award contract compliance to ensure that M/WBE goals are met throughout the duration of a contract

- Publish M/WBE utilization reports to measure the success of the M/WBE program's efforts and determine if the program needs modification

XI. ADMINISTRATIVE RECOMMENDATIONS

These recommendations offer best management practices regarding a Statewide M/WBE program and tracking subcontractors. They include the development of a Statewide M/WBE program manual, recognizing State staff who utilize M/WBEs on informal contract solicitation, enhancing outreach and marketing strategies, electronically tracking subcontract bidders, and electronically tracking all subcontractor payments.

A. Organizational Recommendations

- Establish a centralized M/WBE office with adequate staff to assume responsibility for the design, implementation, and operation of the business equity programs
- Provide formal recognition to State staff who comply with program requirements to utilize M/WBEs on informal contract solicitations
- Develop a Statewide M/WBE Program Manual to streamline the contract compliance process and provide one source that is applicable to all State contracting
- Conduct outreach and implement marketing strategies to attract more bidders and proposers and inform them of new requirements

B. Data Management Recommendations

- Track all subcontract bidders electronically on a Statewide basis
- Consistently track all subcontractor payments to ensure appropriate contract compliance and to identify problematic areas in contract compliance and project management
- Code contracts by industry classification in the New Jersey Comprehensive Financial System (NJCFIS) to facilitate compliance reporting and aid in producing utilization reports
- Consolidate all payment tracking into the NJCFIS to streamline payment monitoring and financial reporting

XII. CONCLUSION

Race and gender-conscious and race and gender-neutral recommendations are offered to remedy the statistically significant underutilization of minorities identified in the industries studied. The race and gender-conscious recommendations include prime contracting and subcontracting remedies for the ethnic and gender groups where disparities were found. The race and gender-neutral recommendations are offered as strategies to increase equity in contracting without regard to race.

The race and gender-neutral and administrative recommendations are presented as best practices applicable to all units of State government. These recommendations are detailed in Volume 2, Chapter 7 for State Agencies, Authorities, and Commissions and in Volume 3, Chapter 7 for State Colleges and Universities.

