

# FINAL REPORT

STATE OF NEW JERSEY  
GOVERNOR'S STUDY COMMISSION ON  
DISCRIMINATION IN  
PUBLIC WORKS PROCUREMENT AND  
CONSTRUCTION CONTRACTS



*February 22, 1993*

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STATE OF NEW JERSEY  
GOVERNOR'S STUDY COMMISSION ON DISCRIMINATION  
IN PUBLIC WORKS PROCUREMENT AND  
CONSTRUCTION CONTRACTS  
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February 22, 1993

Honorable James J. Florio  
Governor  
State of New Jersey  
State House CN 001  
Trenton, NJ 08629

Dear Governor Florio:

As you know, the State of New Jersey has for many years demonstrated a deep commitment to the cause of equality and justice for all of its citizens. In modern times, the pursuit of equality for racial and ethnic minorities, as well as for women, has occupied a special position in the political life of this State.

It was with this spirit in mind that, in 1985, New Jersey enacted a set-aside law designed to further advance the cause of equality. New Jersey's set-aside program was based in part on the realization that, although the civil rights movement had been profoundly successful in its efforts to dismantle legal and political inequality, our society is still characterized by enormous economic divisions that render the work of the civil rights movement unfinished. This set-aside program -- which guaranteed disadvantaged groups access to modest levels of government contracts -- was designed not only to redress pervasive, actual discrimination experienced by minorities and women in the marketplace, but also to enhance economic and entrepreneurial self-sufficiency among those who still suffer from the direct legacy of this nation's discriminatory past. The program, in this sense, represented an important leap beyond the social welfare policies of the 1960s that, by themselves, have been unable to eradicate economic inequality from our society.

These important efforts were disrupted in 1989 as a result of a United States Supreme Court case invoking the very constitutional principles that articulate this nation's absolute commitment to equal justice. In that case, City of Richmond v. J.A. Croson, the

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Supreme Court invalidated a set-aside program in Richmond, Virginia, on the grounds that it failed to meet the strict standards of scrutiny that the Constitution applies to any policies -- even policies designed to remedy past discrimination -- that rely upon distinctions based on race.

Although the narrow effect of Croson was to strike down a set-aside program that was in a broad sense similar to New Jersey's (although the numerical goals in Richmond's program were considerably more ambitious), the Court made it quite clear that it was not holding all set-aside programs to be unconstitutional. Rather, the Court merely held that, in order to pass constitutional muster, a set-aside program must be grounded in a record of evidence revealing actual discrimination against minority contractors, and it must be narrowly tailored to remedy the particular discrimination identified in that evidence. Leaving the constitutional door open to set-aside programs, the Court simply defined the criteria such programs must satisfy before passing over the threshold.

In response to Croson, New Jersey took two steps. First, because the State's set-aside program had been enacted without the benefit of a full and formal evidentiary investigation into the existence of discrimination, New Jersey's Attorney General advised Governor Tom Kean that the State's program appeared to be invalid under Croson. Acting on this advice, Governor Kean temporarily suspended the set-aside program.

Governor Kean then signed Executive Order 213, on August 14, 1989, which created the Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts. By your own Executive Orders, you have guaranteed the Commission's continued existence. The Commission's mandate was to "investigate the nature and scope of any discriminatory practices" in the public contracting arena in New Jersey, to "prepare an analysis of this information in order to develop probative evidence of any prior or present discrimination" in the awarding of State contracts, and to "identify and evaluate remedies for these practices consistent with guidelines established by the Supreme Court in Croson."

The Commission -- which is composed of men and women of many backgrounds, and who came to the Commission with broad experience in both the private and public sectors -- has worked very hard since its inception to fulfill its responsibilities and to carry out its mandate. The Report that we submit to you today chronicles the massive investigative work undertaken by the Commission. As you will see from the Report, the Commission prepared comprehensive statistical analyses, as well as extensive anecdotal evidence gathered at a series of hearings conducted throughout this State.

I will not attempt here to summarize this analysis. Suffice it to say, however, that the evidence we have collected reveals widespread exclusion of minority- and women-owned businesses from the public contracting process. This pattern exists less as a

function of conscious discrimination on the part of government officials (though that, too, still appears to be a problem) than a result of government's passive participation in deeply embedded discriminatory attitudes and behaviors in the marketplace. The statistical analysis in our report provides a compelling evidentiary basis for concluding that discrimination of this sort exists throughout the procurement process against minority- and women-owned businesses that are ready, willing, and more than able to supply goods to, and perform services for the State. Taken separately, the statistical and the anecdotal evidence would convince any reasonable person that actual discrimination exists here and now. Taken together, the case is compelling.

On the basis of this persuasive record of evidence, the Report makes a series of recommendations, chief among them that the State immediately reinstate the set-aside goals in existence prior to Croson. In addition, we are recommending that in the months to come you examine the feasibility of enacting new legislation, or taking further executive action to achieve a variety of reforms, which are set forth at length in the Report.

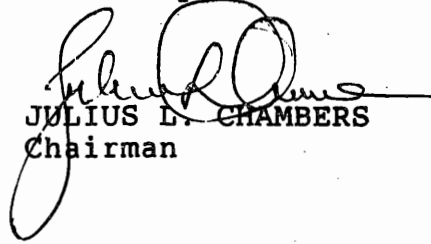
We are confident that if the State acts now to implement these recommendations, the State will see immediate results. We believe that the only way to redress the grievous wounds of purposeful exclusion is through purposeful inclusion. If the State acts now to pry open the doors of economic opportunity that have hitherto been intentionally locked shut to so many of our citizens, the injuries of past and present discrimination will be rapidly healed. New Jersey needs only to have the courage and strength to unlock the door.

I cannot let this moment pass without expressing my deepest gratitude and appreciation to those who made the work of the Commission possible. It has truly been an honor and privilege to have had the opportunity to work over the past three years with my fellow Commissioners, each of whom brought to the Commission's work a distinctive voice and unique perspective. I credit the success of the Commission to the Commissioners, whose diversity gave the Commission its insight, and whose industry gave the Commission its capacity to produce.

In addition, I would like to thank the individuals and organizations whose cooperation and devotion made the work of the Commission possible. In particular, I would like to thank the New Jersey Attorney General's Office, especially Deputy Attorney General Lynn Norcia, the Department of Treasury, including the staff at the Division of Purchase and Property and particularly its Director Lana Sims, the Department of Commerce, New Jersey Transit, the Urban Mass Transit Administration, the Port Authority of New York and New Jersey, the Consultants who contributed their hard work and creativity to our efforts, the University of Maryland Afro-American Studies Program, the Rutgers Law School Constitutional Litigation Clinic, the Rutgers Camden Political Science Department, the Rutgers Graduate School of Business Management's Interfunctional team, our

Outreach Coordinator William S. McEwen, our Executive Director Lora Liss, her assistants Joan Forcet, Sulia Mason, Charlotte Tomaszewski, and Shakira Abdul Ali.

Sincerely,



JULIUS L. CHAMBERS  
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In addition to appropriations made by Governors Kean and Florio, the studies conducted by the Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts were made possible in part by generous grants from the Port Authority of New York & New Jersey and the Urban Mass Transportation Administration.



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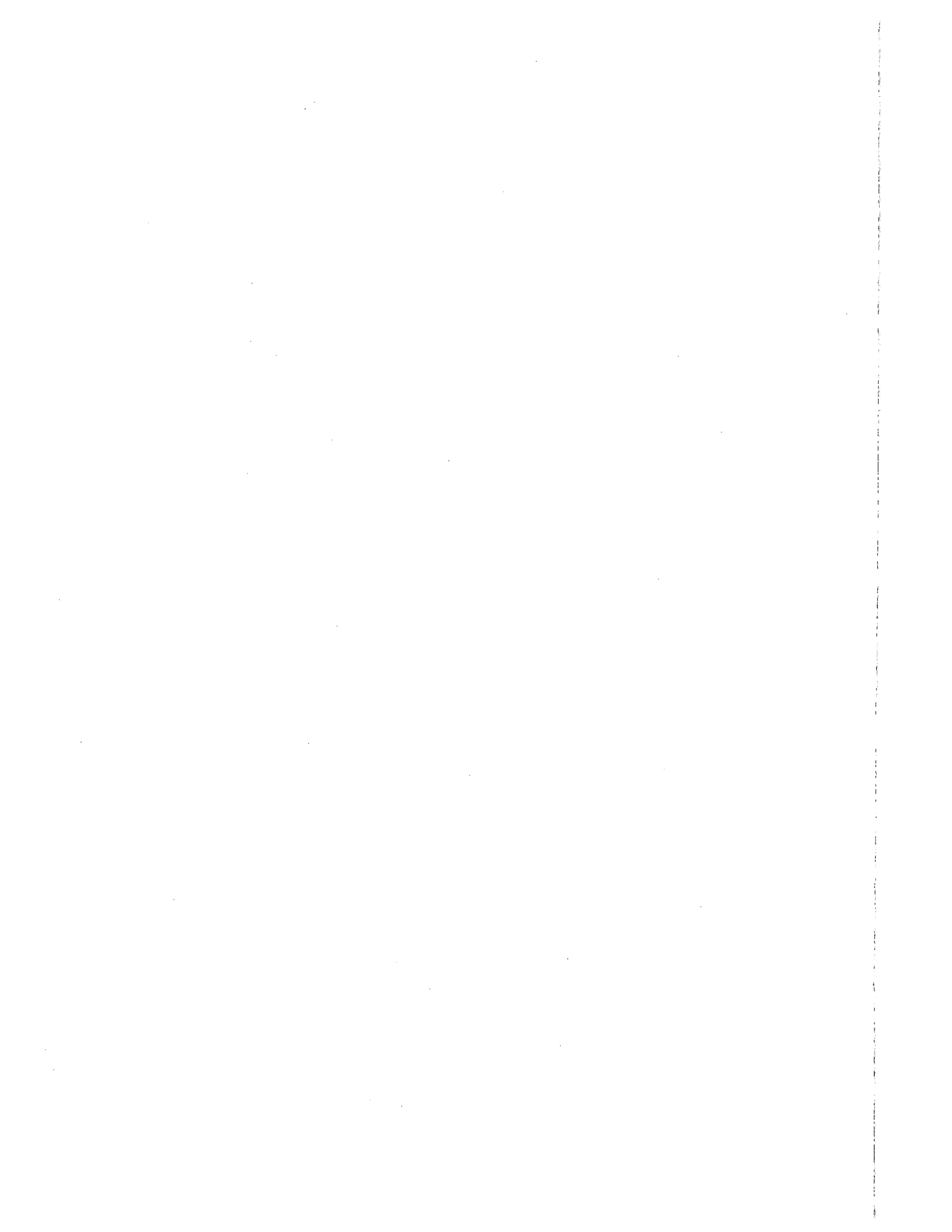
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## **EXECUTIVE SUMMARY**

Over a period of three and a half years, the Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts has investigated the existence of discrimination in public contracting in the State of New Jersey. The Commission has also looked at discriminatory barriers that prevent minorities and women from becoming contractors in the first place, and barriers that cause minority- and women-businesses to be financially weaker than their nonminority, male counterparts. Based on its record — including 18 volumes of expert reports, 4 days of hearings, and testimony from 88 witnesses—the Commission finds that there is substantial evidence of discrimination against women and minority contractors, and that race- and gender-neutral programs alone will not suffice to eliminate this pattern of exclusion. Immediate and forceful action is needed to reverse the pattern of discrimination and insure that minority- and women-owned businesses (M/WBEs) are fully included in the economic life of this State. What follows is a brief summary of the evidence and the Commission's recommendations.

Expert statistical studies revealed that when the State purchases goods and services, a disproportionately small percentage of its contracting dollars go to women- and minority-businesses that are capable and available to do the job. By the most conservative method of calculation, M/WBEs comprise between 14.7% and 18.5% of the suppliers of goods and services available to contract with the State. Yet between 1984 and 1989, the State spent only 1.5% of its contracting dollars with women- and minority-businesses. In 1991 the Division of Purchase and Property spent only .7% of State contracting dollars with minority businesses and 2% with women-owned businesses. Hence minority and women businesses are being drastically underutilized by the State.

The Commission also found that M/WBEs are underutilized by the State in construction contracting. M/WBE construction firms comprise over 25% of the firms on the State lists of bidders offering construction services to the State. Yet even the Departments of Transportation and Environmental Protection and Energy and New Jersey Transit, which have the most aggressive, federally-mandated goals programs of any State agencies, utilized between 7.9% and 18.1% (a one-year high) M/WBE firms between 1984 and 1989. Following the suspension of State M/WBE set-asides, however, the percentage of utilization on State-funded projects dropped dramatically. At DOT, for example, the MBE share of State-funded construction projects dropped from 9.8% in 1988 to 3.3% in 1990.

Moreover, a survey of minority-, non-minority male-, and women-business owners who had submitted bids on State contracts revealed differences in the likelihood of their receiving State contracts. Some of these differences could be explained by differences in qualifications of the contracting firms. However, for each group — African-American, Hispanic, Asian and women business owners—the author found that some proportion of the difference was attributable to discrimination.

In addition to underutilizing women and minority prime contractors, the State has passively participated in discrimination practiced by some members of the construction industry in New Jersey. In a study of prime contractors working on construction projects for the Department of Transportation, a research team from Rutgers University found that non-minority male prime contractors refused to use M/WBE subcontractors unless they were required to do so by federal mandates. When the same prime contractors worked on federally-funded contracts with M/WBE goals, and on State-funded construction contracts without such mandates, many refused to use minority and women subcontractors for the State contracts, although they had used M/WBEs on the federally funded contracts.

Over four days of hearings the Commission also heard testimony from minority- and women-business owners, business groups, and industry witnesses, corroborating the statistical and other expert evidence of discrimination and persistent exclusion of women and minorities from contracting opportunities. The Commission also heard complaints about discrimination against women- and minority-businesses in obtaining credit and surety bonding. Access to credit and bonding are essential to the ability to be a successful State contractor.

To remedy this pattern of discrimination and promote inclusion of M/WBEs in the economic life of the State, the Commission makes the following recommendations:

1. The State should immediately revive the Set-Aside Act for Small Businesses, Female Businesses, and Minority Businesses, N.J.S.A. 52:32-17, with its goals of 7% MBE utilization and 3% WBE utilization. Based on the availability data discussed above, the Commission believes that the record established may justify set-aside goals of 15% MBE and 10% WBE participation on construction contracts and 10% participation each for MBEs and WBEs in the State's procurement of goods and non-construction related services. However, given the urgency of the problem facing M/WBEs, an immediate revival of the Set-Aside Act is recommended. Any goal or set-aside program must include effective sanctions for non-compliance, including penalties for prime contractors who obtain State contracts by promising to use M/WBE subcontractors and then fail to use them. To pass constitutional muster, goal and set-aside programs must permit waivers where contractors can show that they made maximum good faith efforts to meet the goals but were unable to do so. Goals should also be continuously evaluated and, when necessary, adjusted to ensure that they accurately reflect availability. Moreover the program must be limited in time so that set-asides do not continue indefinitely, beyond the point when identified discrimination has been remedied.
2. The State should ensure that minority- and women-owned businesses receive a fair share of the benefits from economic development programs, such as those run by the Economic Development Authority, the Housing Mortgage Financing Agency, the Wastewater Treatment Trust, and similar programs. Where feasible, target goals should be set for participation by M/WBEs in such programs.
3. The State should vigorously enforce the section of the Law Against Discrimination, N.J.S.A. 10:5-12(1), which prohibits discrimination in public and private contracting, and should take steps to ensure that State contractors do not discriminate against M/WBEs. Sanctions should be imposed on contractors that discriminate.
4. The responsibility for implementing the State goals programs must be placed in a central oversight body, which will coordinate and oversee all of the State's efforts to expand contracting opportunities for minority- and women-owned businesses. An oversight committee with citizen members should also be established to ensure that all units of State Government incorporate equal opportunity concerns into their policies and to ensure that all State agencies effectuate the recommendations made in this report.
5. A uniform reporting system should be implemented for all State agencies, requiring them to keep records of both contracting and subcontracting activity by the race, ethnicity, and gender of those who bid on or receive State contracting work. Only through accurate record-keeping can the State determine the effectiveness of its set-aside and goals programs. Likewise, all State economic benefit or development programs (EDA, HMFA, etc.) should keep records of applicants and beneficiaries by race, ethnicity and gender, so that the State will know who is benefitting by (or being excluded from) its programs. The State should also require lending institutions, insurance companies and surety companies to keep records and file reports on their loan, equity and bonding activities by race, gender and ethnicity. Recordkeeping is critical to any meaningful enforcement of laws against discrimination in credit and bonding.
6. The State should strengthen and expand its uniform certification program for M/WBEs, and expand the voluntary registry of eligible firms. This will assist State agencies and State prime contractors to locate available M/WBE contractors and subcontractors. The State should conduct random sampling of the registry list to ensure that those businesses listed are in fact minority- or woman-owned. Severe penalties should be imposed for false statements or "fronting."
7. The State should reduce or eliminate unnecessary bonding requirement. The State should eliminate bid, performance and payment bonds for all contracts under \$200,000. The Port

Authority has been able to successfully eliminate bonding requirements for contracts under \$250,000; such requirements are a barrier to participation by M/WBEs and small businesses generally. The State should review all other bonding requirements, eliminate those that are unnecessary and reduce those that are excessively high. Bonding requirements should be uniform across State agencies for similar types of projects unless there is a demonstrable need for variation. Procurement agencies should be able to waive bonding requirements on a case by case basis where a determination has been made that bonding is not necessary for the specific project. The State should promote low cost bonding for M/WBEs and should begin to evaluate innovative options to reduce bonding costs for all small businesses while continuing to protect the State's fiscal interest. The State should strengthen and enforce laws against discrimination by bonding and surety companies, and require them to keep records and report on their lending and bonding activities by race, ethnicity and gender of applicants.

8. The State should authorize county and municipal governments to reinstitute M/WBE goal and set-aside programs where those entities have found substantial evidence of discrimination in their jurisdictions.
9. The State should vigilantly enforce its requirement for prompt payment to prime contractors, and should also require its prime contractors to make prompt payment to subcontractors. This measure will assist all small businesses, including M/WBEs.
10. The State should develop an expedited procedure for dispute resolution between prime and subcontractors on State contracts.
11. The State should strengthen and expand its programs of technical assistance to minority- and women-owned businesses.
12. The State should consider other innovative programs to assist M/WBEs, such as "stepped sheltered markets" (special programs of technical and financial assistance, combined in some instances with set-asides) for fledgling M/WBEs, and possibly programs of bid preferences for M/WBEs.
13. The State's anti-redlining statute, *N.J.S.A. 17:16F-3*, should be amended to include race, gender, color, religion, etc., to mirror the anti-discrimination provisions of the Federal Equal Credit Opportunity Act.
14. To root out discrimination in the construction industry at its inception, the State should vigorously monitor apprenticeship programs to ensure that women and minorities are not excluded. Disparities between the participation of minorities and females in the programs, compared to their availability in the population, should trigger immediate investigation.



## INTRODUCTION

In recent years, the State of New Jersey has experimented with a variety of policies to insure fair and equal participation in its programs and services by all of its citizens. In the economic area, these efforts are incorporated throughout state and local law — in ordinances, regulations, statutes and executive orders. The State adopted one of the most significant of these policies in 1985, when the Legislature amended the Small Business Set-Aside Act to insure greater participation by minority and women businesses in state contracts. *N.J.S.A. 52:32-17 et seq.* As amended, the Act provided that at least 15% of state contracts would be set aside for small businesses, at least 7% for minority-owned businesses and 3% for businesses owned by women. As such, the Small Business Set-Aside Act increased minority and women participation in state contracting.

This program was called into question, however, in 1989 by the U.S. Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed. 2d 854 (1989). In *Croson* the Supreme Court questioned the constitutionality of race-based programs in the absence of a persuasive evidence that discrimination had been practiced or supported by the state, or that the continuing effects of such practices adversely affected the opportunities of minority and women businesses to participate in state contracting programs.

It was because of *Croson* and its possible applicability to the State's set-aside program that Governor Thomas Kean on August 14, 1989 created the Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts.

Governor Kean directed the Commission to investigate State contracting practices to determine whether these practices have denied minority and women a fair and equal opportunity to participate in state contracts. In carrying out its mandate, the Commission assembled historical data on the State's contracting practices, the growth and development of minority and women businesses in the State, and the effect state contracting practices have had on participation by minority and women businesses in state contracts.

This Report describes the method by which the Commission collected its data, and it sets forth a variety of findings and recommendations that arise from the Commission's extensive work over the last three and a half years. In short, the Commission found that various historical and present practices of the State have discriminated against and adversely affected minority and women businesses. Its limited recommendations, we believe, are consistent with *Croson* and are designed to address the discriminatory practices we have noted.

Part I of the Report traces the origins, purpose and authority of the Commission. It describes the earlier set-aside programs for minority and women business enterprises, the reason the previous program was implemented, how and why it was changed following the United States Supreme Court's decision in *Croson*, and the State's objectives in the appointment of the Governor's Study Commission.

Part II presents an overview of the studies conducted by and for the Commission, the methodologies employed and the two major issues addressed.

Part III addresses the issue of whether New Jersey has engaged in practices that have prevented or deterred minority and women business owners from participating fairly and equally in the State's purchasing and contracting opportunities. It discusses the interest of the State in attempting to do business with the minority and women business community and sets out the Commission's factual findings of discrimination.

Part IV discusses the need for narrowly tailored remedies. It describes the State's race-neutral efforts to eliminate barriers identified as impediments to minorities and women who attempt to do business with the State. It examines affirmative action programs which targeted assistance to minori-

ties and women business owners and problems encountered with such programs. It also evaluates the effectiveness of existing anti-discrimination laws.

Our recommendations to the Governor are set out in Part V of the Report. The recommendations seek to remedy the problems identified and to enhance the growth and development of all businesses in the State. Although the Commission believes that race- and sex-based remedies, including set-asides, are necessary, we also discuss supplemental measures we believe are essential in order to promote the development of minority- and women-owned businesses.

## I. THE PURPOSE AND AUTHORITY OF THE COMMISSION

On August 14, 1989, then Governor Thomas Kean signed Executive Order 213, which created the Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts ("Study Commission").<sup>1</sup> The Executive Order directed the Commission: (1) to investigate the extent to which the effects of past or present discrimination, either active or passive, by the State, its departments, divisions, agencies or authorities, have denied minority- and women-owned businesses opportunities to obtain a fair share of State business; and (2) to make recommendations concerning measures that should be adopted to overcome the effects of any identified discrimination.

This Report summarizes the data collected by the Commission in its effort to carry out its mandate. The data consist of several written studies and reports prepared for the Commission, as well as testimony presented during the Commission's hearings.

As indicated below, the Commission found that a number of State practices, and private practices passively supported by the State, adversely affected the contracting opportunities of minority and women businesses. The effect of these practices are reflected in the statistically significant disparities between the volume of State funds spent on procurement and construction and the percentage of funds going to minority and women businesses, and the availability of such firms in the market. Minority and women businesses are adversely affected as prime and subcontractors. The Commission, therefore, is recommending legislative and executive action not only to eliminate the barriers and practices uncovered in this Report, but also to assist in the development of minority and women businesses in the State. As the Commission notes, much can be accomplished simply through the vigorous enforcement of existing state laws, particularly the Law Against Discrimination ("LAD"), which explicitly prohibits discrimination in both public and private contracting. *N.J.S.A. 10:5-1 et seq.*

### A. THE *CROSON* OPINION

Throughout its investigation, the Commission has been guided by the principles enunciated in the Supreme Court's decision in *Croson*. Thus, it is useful at this juncture to summarize the key holdings in *Croson* as they relate to New Jersey's study.

*Croson* involved an equal protection challenge to a minority business set-aside<sup>2</sup> plan adopted by the City Council of Richmond, Virginia in 1983. Richmond's plan — which was adopted without any prior evidential finding of actual discrimination — required non-minority prime contractors who were awarded city construction contracts to subcontract at least 30% of the dollar amount of such contracts to minority-owned and controlled businesses. The ordinance defined minorities as Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. The ordinance imposed no geographical restriction on the plan, and it specified that it

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<sup>1</sup>The Commission was expanded and continued by Governor Florio. *See*, Executive Orders 214, 15, 16, 40. Funding of \$200,000 was provided by Governor Kean in January 1990 to begin the Commission's Study. Governor Florio provided contingency funds of \$20,000 and in-kind contributions of space, fringe benefits and office equipment through the Departments of Treasury and Commerce. The Port Authority of New York and New Jersey contributed \$100,000 in December 1990 in order to assist the Commission in its study and to insure coverage of areas relevant to the Port Authority. The Authority regularly attended the Commission's meetings and actively participated in the Commission's deliberations. The major source of funding came from a federal grant of \$500,000 from the Urban Mass Transportation Administration (now Federal Transportation Administration) through New Jersey Transit.

<sup>2</sup>"Set-aside," as used in this report, may include either the setting aside of a specific number of prime contracts for select groups or the requirement that a prime contractor subcontract a specific percentage of the dollar amount of a contract to businesses in the group. Also, as used in this report, the term "set-aside" may include goal programs, in which the prime contractor may achieve a goal by making "good faith efforts" to either subcontract work or purchase material from a designated group.

was "remedial in nature" and intended to promote wider participation by minority businesses in public construction projects. Furthermore, rules promulgated to implement the plan permitted waiver of the 30% set-aside only in exceptional circumstances. The ordinance allowed the contractor to deviate from the numerical goal only if, after diligent efforts, it was unable to achieve the set-aside goal, or if qualified minority businesses were unavailable or unwilling to participate in the project.

In the majority opinion written by Justice O'Connor, the Supreme Court struck down the Richmond plan under the equal protection clause of the Fourteenth Amendment and held that race-conscious set-asides must be scrutinized under a two part test.<sup>3</sup>

### 1. Compelling Interest

First, because all racial classifications are subject to strict scrutiny review, set-aside programs may only be justified by a compelling governmental interest which has strong evidentiary support. Although eradicating prior discrimination counts as a compelling governmental interest, a generalized claim of societal discrimination does not provide the necessary factual basis for adopting a race-conscious set-aside.

The Court was particularly critical of Richmond's statistical analysis, which focused on the percentage of minorities in the general population rather than on the percentage of businesses owned by minorities in the local construction industry who were available for City contracts. The Court explained that comparisons with the general population were inappropriate. Thus, the Court concluded that Richmond had failed to set forth the required factual showing of past discrimination against minorities through statistical, direct, or circumstantial evidence, and that the City therefore did not demonstrate a compelling interest for purposes of establishing a race-based set-aside plan.

Moreover, *Croson* appears to require separate analysis for each minority group to be included. The Court observed that Richmond had offered no evidence of discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the construction industry. It therefore concluded that the set-aside program was overinclusive. The Court noted that the inclusion of these groups impugned the City's claim that the plan was remedial. The Court also rejected the City's reliance on Congress's findings that there had been nationwide discrimination in the construction industry.<sup>4</sup> Such findings were found to be unpersuasive because they had little bearing on the existence of particular discriminatory practices in Richmond. Moreover, the Court noted that Congress has broader power than the states to eliminate discrimination under §5 of the Fourteenth Amendment.

The Court made it clear, however, that a "state . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction . . . . Thus, if the . . . [state] could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, . . . the . . . [state] could take affirmative steps to dismantle such a system."<sup>5</sup> Further, the Court held that "any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."<sup>6</sup> The Court

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<sup>3</sup>A majority of the Court held that strict scrutiny should be applied to any race based classification of a state even though remedial. *Croson* did not address the issue of sex-based set-asides. However, it has been previously held by the Supreme Court that an intermediate level of scrutiny applies to gender based classifications. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

<sup>4</sup>Richmond had relied to some degree on the Congressional findings cited in *Fullilove v. Klutznick*, 488 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

<sup>5</sup>*Croson*, *supra*, 488 U.S. at 491-492.

<sup>6</sup>*Id.* at 462.

had no doubt that "the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs."<sup>7</sup> This observation, however, "*standing alone* cannot justify a rigid racial quota in the awarding of public contracts"<sup>8</sup> (emphasis added). While the states "may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief."<sup>9</sup>

## 2. Narrowly Tailored Remedy

The Supreme Court further held in *Croson* that any race-conscious remedy must be narrowly tailored to redress the discrimination which has been identified. Where the existence of a compelling governmental interest is demonstrated through evidence, and the state elects to implement a race- or gender-based remedy, the state must insure that such remedies are necessary and are designed to correct the effects of the constitutional violations noted. The Court in *Croson* found that the Richmond plan was not narrowly tailored for two reasons. First, there was no evidence that the City considered race-neutral methods. Second, the Court explained that the rigidity of the 30% set-aside made it unlikely that the goal was narrowly tailored to meet any objective other than general racial balancing. The Court, therefore, held that the Richmond program was not narrowly tailored to eradicate the effects of prior discrimination.<sup>10</sup>

### B. THE CROSON STANDARD APPLIED IN NEW JERSEY

In order to determine whether remedial steps are necessary in New Jersey and, if so, whether race- and gender-based remedies can be implemented consistently with *Croson*, the Commission first sought to determine whether minority and women businesses have been disadvantaged by discriminatory practices fairly attributable to the State. Such discrimination can be established either by showing that, (a) qualified minority- and women-owned businesses have been "underutilized" as government contractors or (b) that minorities or women have been denied other opportunities which unfairly prevented them from becoming "qualified" to be government contractors because they were subjected, based on their group membership, to barriers not similarly faced by others.

In *Croson*, the Court specifically indicated that statistics may provide a basis for determining whether particular groups have been unfairly excluded. "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 the locality"<sup>11</sup> may lead to an inference of discriminatory exclusion. If the difference between the numbers of firms ready, willing, and able to contract with the State compared to the share of contracts which they receive is sufficiently large, intentional discrimination can be inferred.

Since *Croson*, set-aside programs of several states and local governmental entities have been challenged in various courts.<sup>12</sup> The defendants in these cases have primarily defended

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<sup>7</sup>*Id.* at 499.

<sup>8</sup>*Ibid.*

<sup>9</sup>*Id.* at 504.

<sup>10</sup>See also, Justice Powell's concurring opinion in *Fullilove v. Klutznick*, *supra*, 448 U.S. at 510-511, 100 S.Ct. at 2791, 65 L.Ed.2d at 945, noting other factors which are relevant in determining whether a race conscious remedy is narrowly tailored.

<sup>11</sup>*Croson*, *supra*, 488 U.S. at 509.

<sup>12</sup>See e.g., *Harrison & Burrowes Bridge Contractors, Inc. v. Cuomo*, 981 F.2d 50 (2nd Cir. 1992); *Associated General Contractors of California v. Coalition for Economic Equity, City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991) cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992) (hereafter "AGCC II"); *Contractors Ass'n of Eastern*

the programs with statistics and anecdotal evidence of discrimination to establish the compelling governmental interest necessary to permit the use of race-based preferential procurement programs. In a decision in which the Supreme Court denied *certiorari*, the Ninth Circuit commented that, "the combination of convincing anecdotal and statistical evidence is potent."<sup>13</sup>

With the Ninth Circuit's comments in mind, this Report documents persuasive statistical and anecdotal evidence of discrimination and barriers to equal opportunity for minority and women businesses (hereafter "M/WBE") that, the Commission believes, clearly supplies a constitutional justification for enacting race- and gender-based remedies such as New Jersey's Set-Aside program. Moreover, this Report also reviews evidence beyond the obvious data, which demonstrates the interconnection among historical factors which have deterred M/WBEs from forming and prevented them from surviving. We discuss these factors and their impact in the section on "passive participation and other barriers."

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*Pennsylvania, Inc. v. City of Philadelphia*, 945 F.2d 1260 (3rd Cir. 1991); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. den.* \_\_\_ U.S. \_\_\_, 112 S.Ct. 875, 116 L.Ed.2d 780 (1992); *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990). Most of the subject challenges have been dismissed on procedural grounds (the plaintiff lacked standing or the claim was moot), or because the challenge was to a federally funded and/or mandated program. The distinction between the authority of a state or local governmental entity and Congress to enact race-based preferential programs was recently reiterated by a United States District Court in *Michigan Road Builders Association v. Blanchard*, 761 F. Supp. 1303 (W.D. Mich. 1991) *aff'd*, 979 F.2d 851 (6th Cir. 1992). *See also, Croson, supra*, 488 U.S. at 490.

<sup>13</sup>*AGCC II, supra*, 950 F.2d at 13 *cert. denied*, 112 S.Ct. 1670; *see also, Coral Construction, supra*, 941 F.2d at 919, *cert. denied*, 112 S.Ct. 875.

## II. THE STRUCTURE OF THE COMMISSION'S STUDY

### A. INTRODUCTION

Over the past three and a half years the Commission collected a number of statistical and historical studies, analyzed these studies along with existing State and independent reports, and held several hearings at which it received anecdotal evidence of State contracting practices. These studies<sup>14</sup> and reports are summarized below along with the Commission's findings and recommendations.

### B. METHODOLOGY

#### 1. Statistical Evidence

##### a) Utilization

The first phase of the Commission's study consisted of a comprehensive review of the State's purchasing and contracting practices. We sought to determine, on a statistical basis, the State's utilization of M/WBEs in the purchase of goods and services and construction for the years 1984 through 1989. We obtained information from 52 contracting State agencies, including 16 county colleges.<sup>15</sup> The purpose of this analysis was to determine the extent to which the State has utilized women- and minority-owned businesses.<sup>16</sup> The tables contained in Appendix A group the contracting entities into the following five categories: (1) the 19 departments which comprise the Executive Branch for which the Department of Treasury provides centralized contracting for goods and services through the Division of Purchase and Property (DPP), as well as for construction and construction-related services through the Division of Building and Construction (DBC). Wholly state funded projects for the Departments of Transportation and Environmental Protection and Energy are also included; (2) State authorities and commissions, which have independent contracting authority, including New Jersey Transit's state funded projects; (3) State colleges (colleges did not have independent contracting authority until 1985 and most were unable to submit reports covering the years before 1987); (4) federal-ly assisted contracts which have mandatory goals for utilization of minority, women, or disadvantaged businesses (this category includes projects which require matching state funds); (5) Port Authority of New York and New Jersey (only New Jersey projects are included).

The utilization report includes contracts awarded as set-asides or as part of a goals program to M/WBEs as well as those awarded under standard contracting procedures. The New Jersey Set-Aside Act for Small Businesses, Female Businesses, and Minority Businesses became effective June 18, 1986, but rules implementing the statute were not effective until March 16, 1987. Therefore, our analysis separates the pre-set-aside period (1984-1986), the set-aside period (1987-1988), and to some extent, the post-Crosson period (1989), the latest year for which data was available when this utilization study was undertaken in May 1990. Percentages of dollars awarded to minority- and women-owned businesses are based on total dollars awarded. Since the method used to track contracting activity varies from agency to agency, the number of con-

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<sup>14</sup>All of the studies and reports are available through the New Jersey State Library. Additionally, two of the studies and reports are included as appendices to this Report.

<sup>15</sup>We later abandoned the request for information from the 16 county colleges both because that information did not reflect State contracting and because in many instances there was insufficient information. The limited county college information is not included in this analysis.

<sup>16</sup>See, *Statistical Data on the Utilization of Minority Owned and Women Owned Businesses by the State of New Jersey* (with accompanying Tables for Construction, Goods and Services and Prime Contracts), prepared under supervision of Lora Liss, the Commission's Executive Director and Lana Sims, Director of the Division of Purchase and Property, N.J. Department of Treasury, also a member of the Commission (hereafter *Statistical Data on Utilization*) (Appendix A).

tracts awarded cannot be considered uniform and for that reason, no percentages for number of contracts awarded were calculated. Most state agencies were not able to separate their contracts for goods, (i.e. commodities, equipment, and supplies) from those awarded for non-construction related services, (i.e. janitorial, computer, etc.). With the exception of DOT, departments, independent agencies, and colleges do not generally track the total number of subcontracts awarded. As part of the set-aside program, however, they did track the number of minority and women subcontracts awarded for construction contracts. Therefore, subcontracts are included in the report on Construction Contracting Activity. With these caveats in mind, the reports represent the Commission's best effort to document contracts awarded to minority- and women-owned businesses during the years 1984-1989.

#### b. Availability

The next phase of the study was to determine availability of the numbers of firms, by race, ethnicity, and gender which have done business or have registered with the State or have been certified or can otherwise be considered available and qualified. For this phase of the study, the Commission contracted with Dr. Timothy Bates, an expert on minority business development from the New School of Social Research in New York City. Dr. Bates produced his availability analysis in August, 1991.<sup>17</sup> In September 1991, the Commission created a composite database, drawn primarily from the potential bidders' lists of the Departments of Treasury, Commerce and Economic Development, and Transportation, as well as New Jersey Transit and The Port Authority of New York and New Jersey. This list was referred to by Dr. Bates as the SAVI II<sup>18</sup> "state bidders list" and was used to supplement the U. S. Census Bureau data for New Jersey self-employed persons and minority- and women-owned businesses which he also used for his availability study.

#### c. Disparity

The third phase of the statistical study was a comparison between the availability data and the utilization data. Dr. Bates produced a disparity report<sup>19</sup> which relied upon two measures of availability of minority- and women-owned businesses: (1) the Commission-created "state bidders' list" and (2) 1982 Census Bureau statistics on the M/WBE share of New Jersey small business.

### 2. Historical Study

In May 1990, the Commission joined with New Jersey Transit in responding to a nationwide announcement by the Urban Mass Transit Administration which requested proposals to develop histories of discrimination on which minority business enterprise programs had been based. A grant of \$500,000 was awarded to New Jersey Transit for this study. This grant enabled New Jersey Transit, with project supervision by the Commission, to contract with the University of Maryland Afro-American Studies Program to conduct two of the three major components of our historical study: (1) a survey comparing minority- and women-owned businesses to non-minority owned businesses doing business in New Jersey and (2) an investigation and analysis of the nature and scope of possible discrimination affecting minority- and women-owned businesses in areas including employment, unions, education, housing,

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<sup>17</sup>Bates, *Discrimination and the Capacity of New Jersey Area Minority and Women-Owned Businesses*, August 1991. (hereafter Bates, *Availability*).

<sup>18</sup>The Selective Assistance Vendor Information System (SAVI II) was originally created to track and monitor small, women, and minority businesses who register with the State as interested in State contracting. See further discussion, *infra*, at §III.C. (11).

<sup>19</sup>Bates, *Availability, Utilization and Disparity: An Analysis of New Jersey Procurement Data in Light of Minority and Women-Owned Business Availability* (hereafter Bates, *Disparity*) (Appendix B).

finance, public accommodations, as well as state purchasing. (The third component of the UMTA-funded studies is described under anecdotal evidence).<sup>20</sup>

### 3. Anecdotal Study

The third project funded by the Urban Mass Transportation Administration through New Jersey Transit was an anecdotal study which included witness preparation for the public hearings conducted by the Commission. The Rutgers University Constitutional Litigation Clinic assisted with the witness preparation and hearings.<sup>21</sup> Interviews of minority and women businesses — many of whom were identified following the Commission's public notices of proposed hearings — were conducted by Rutgers law students, political science, and public policy students under the supervision of the Clinic's staff. The students were trained in interviewing skills, and anti-discrimination and contracting law in New Jersey. Over 90 minority and women business owners were interviewed and 37 participated in the hearings while numerous others submitted written statements.

The Commission conducted four public hearings — in Newark, March 25, 1992, Camden, March 27, 1992 and in Trenton, on April 8, and 10, 1992 — and received reports on each component of the overall study.<sup>22</sup> Scholars and experts who conducted research for the

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<sup>20</sup>All consultants were instructed to conduct their research with separate analyses of the impact on women and each minority group covered in the previous set-aside statute (Blacks, Asians, Hispanics, Portuguese and Native Americans), but data limitations have sometimes interfered. For example, Census data until 1970 did not break out Hispanics and inconsistent definitions between 1970 and 1980 made trend comparisons invalid.

These studies consist of the following:

- (1) *Historical Record of Minority and Women-Owned Business Enterprises in Public and Private Contracting*, Dr. Samuel L. Myers, Jr. Principal Investigator

Volume I SUMMARY OF FINDINGS	Roberta Y. Wright
Volume II STUDY OF LAWS AND COURT DECISIONS	Roberta Y. Wright
Volume III DEMOGRAPHIC TRENDS	Samuel L. Myers, Jr.
Volume IV HISTORICAL TRENDS	William A. Darity
Volume V STATE PURCHASING	Stanley Van Ness
Volume VI EMPLOYMENT	Samuel L. Myers, Jr.
Volume VII UNIONS AND CONSTRUCTION INDUSTRY	Edward Montgomery
Volume VIII FINANCE	Samuel L. Myers, Jr.
Volume IX PUBLIC EDUCATION	Paul Tractenberg
Volume X HOUSING	John Payne
Volume XI PUBLIC ACCOMMODATION	Carla D. Gary & Georgia Sorenson
Volume XII HISPANICS	Lisa Mojer-Torres
Volume XIII GENDER	Susan Cavin
Volume XIV POST-CROSON PROGRAMS	Lynn Claytor
ANNOTATED BIBLIOGRAPHY	

(Hereafter referred to by author and subject, e.g., Van Ness, *State Purchasing*)

- (2) *Survey Comparing Minority/Women Owned Business Enterprises to Non-minority Owned Businesses*, Dr. Samuel L. Myers, Jr., Principal Investigator

SURVEY - FINAL REPORT	Samuel L. Myers, Jr.
CROSS TABULATIONS OF ALL RESPONSES TO QUESTIONNAIRE BY INDUSTRY, RACE, HISPANIC ORIGIN, AND SEX	Samuel L. Myers, Jr.

<sup>21</sup>Report on the Study of Anecdotal Witnesses, Rutgers University Constitutional Litigation Clinic, Professors Russell Harrison, Jonathan M. Hyman, Judith Levin. May 28, 1992 (hereafter *Anecdotal Study*).

<sup>22</sup>There are seven volumes of transcripts of the Commission's public hearings. They are designated as follows and are available at the State Library:

"1T" refers to Newark Public Hearing, March 25, 1992.

"2T" refers to Camden Public Hearing, March 27, 1992, morning session.

Commission presented their reports and minority and women business owners described their experiences in attempting to contract with the State and in the private sector. Additionally, the Commission heard from organizations representing minority and women business owners, majority trade associations, and major corporations. A total of 88 witnesses presented testimony.

4. Department of Transportation Study of M/WBEs by Rutgers Interfunctional Team

The Commission also contracted with the Rutgers University Graduate School of Business Management Team to investigate the existence or absence of discrimination in awarding state construction contracts by the New Jersey Department of Transportation (DOT), focusing on the relationship between prime and subcontractors.<sup>23</sup> The study compared how non-minority prime contractors utilize minority and women contractors with and without mandatory goals.

5. Literature Search

In addition to the formal studies produced by the Commission, staff conducted an exhaustive review of literature, clipped relevant articles from the print media (primarily the New York Times, Newark Star Ledger, and Trenton Times) and reviewed relevant books, reports, articles, and unpublished materials.

C. ISSUES ADDRESSED

The Commission addressed two major issues:

1. Has New Jersey engaged in practices that have prevented or deterred minority and women business owners from participating fairly and equally in the State's purchasing and contracting opportunities?
2. If so, what remedies should the Commission propose that would be consistent with *Croson* and would eliminate the discrimination identified and would prevent current and future discrimination?

Specifically, the Commission sought to determine, based on all available, relevant data, whether there has been discrimination in New Jersey against existing M/WBEs which has in the past, or continues to, prevent or deter them from doing business with the State. We have, therefore, looked at current as well as continuing effects of past discrimination by the State (including each of the three branches of government,<sup>24</sup> independent agencies or authorities, and subordinate local governments over which the State has some contracting authority); and by private industry where the State is, or has been, a passive participant.<sup>25</sup>

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"3T" refers to Camden Public Hearing, March 27, 1992, afternoon session.

"4T" refers to Trenton Public Hearing, April 8, 1992, morning session.

"5T" refers to Trenton Public Hearing, April 8, 1992, afternoon session.

"6T" refers to Trenton Public Hearing, April 10, 1992, morning session.

"7T" refers to Trenton Public Hearing, April 10, 1992, afternoon session.

<sup>23</sup>DOT Study, *Prime Contractors' Use Of Subcontractors*, by Rutgers University Graduate School of Business Management Team: Steven Jeffords, Elizabeth Joseph, Joel Leon, Richard Menta, Sreya Oza, John Tevebaugh, April 2, 1992 (hereafter *DOT Study*).

<sup>24</sup>The study focused predominantly on the Executive Branch, but included statutory review and relevant findings of a judicial task force.

<sup>25</sup>The State passively participates in discriminatory acts of private industries when State money is spent with an industry, such as construction, manufacturing, or services, and the State is, or should be, aware of a pattern of discrimination in that industry; and when State-regulated industries such as banking and insurance discriminate by not contracting with or buying from M/WBEs as well as when they discriminate in delivery of credit or bonding opportunities and the State is or should be aware of discrimination in that industry.

The Commission has weighed all of the evidence provided through its studies against *Croson's* standards and determined that New Jersey *has a compelling interest to eliminate the prior and current discrimination uncovered*. The Commission has investigated the connections between State behavior, identified discriminatory practices, and the status of M/WBEs. We have not relied upon any "generalized history of societal discrimination." We have — through these studies and hearings — identified specific mechanisms by which the State contributed, actively or passively, to the denial of business opportunities to minorities and women. Finally, we are proposing narrowly tailored remedies based on the findings we have made that the State of New Jersey may constitutionally implement.

### III. HAS NEW JERSEY ENGAGED IN PRACTICES THAT HAVE PREVENTED OR DETERRED MINORITY AND WOMEN BUSINESS OWNERS FROM PARTICIPATING FAIRLY AND EQUALLY IN THE STATE'S PURCHASING AND CONTRACTING OPPORTUNITIES?

In order to answer this question it is necessary to provide background information about New Jersey — its demographics, its purchasing and contracting procedures and the evolution of business assistance programs including race- and gender-neutral and race- and gender-based set-aside programs.

#### A. DEMOGRAPHICS

According to the 1990 census, New Jersey has the second highest per capita income in the nation, although it is the third smallest state geographically. It is located between the New York City and Philadelphia metropolitan areas. North Jersey is oriented to and is affected by neighboring New York City<sup>26</sup> and South Jersey by Philadelphia.<sup>27</sup> The State's position, not only as the "corridor" between these cities, but as the link between all of the country south and west of New York City; and from all the world through the New York-New Jersey ports to the rest of the country gives New Jersey a commercial importance far larger than its size.

Based on this history, the Commission asked Dr. Timothy Bates to review the development and participation by M/WBEs in the State's contracting practices. Through this study, we wanted to determine the availability of qualified minority and women businesses in New Jersey.<sup>28</sup> Bates relied upon four sources of U.S. Bureau of the Census data for his availability study.<sup>29</sup>

The small business universe in the New Jersey area in 1982, the most recent years for which uniform census reports were available for African-Americans, Hispanics, Asians and women, totaled 464,148 firms: the number of small businesses owned by minorities was 10.3%; the non-minority women's share was 19.7%. Among MBEs, African-American-owned firms were the most common, Asian businesses second, and Hispanic businesses third.<sup>30</sup>

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<sup>26</sup>North Jersey is home to New York workers; its road and rail systems are targeted toward New York; its television comes from New York. North Jersey became one of the heaviest industrialized areas in the world because of its proximity to the New York City and its ports.

<sup>27</sup>South Jersey is similarly dominated by Philadelphia. Its views on slavery tended to follow that of the anti-slavery Quakers; southern Jersey's institutions of slavery were said to be less harsh than those to the north which followed New York's pro-slavery harshness, according to historian Clement Price, *Freedom Not Far Distant: A Documentary History of Afro-Americans in New Jersey* (New Jersey Historical Society, 1980). Although the plantation type farming was common in South Jersey, emancipation was more common than in the northern part of the State. One consequence was several all African-American towns with long histories of independence.

<sup>28</sup>Bates defined the New Jersey Area as "the geographic area where the State of New Jersey awards most of its procurement contracts. This area includes all of the State of New Jersey, as well as the Philadelphia metropolitan area and the New York City metropolitan area." Bates, *Availability*, at 10, n. 2. Dr. Bates estimated that in the weighted sample he used for his analysis the regional distribution of his observations consists of 37% from New Jersey, 35% from New York, and 27% from Pennsylvania. See, Darity, *Historical Trends*, at 5.

<sup>29</sup>Bates, *Availability*, at 144-154. Note that sole proprietors, partnerships and S corporations are included. The definition of "small" business he favors, however, is drawn from the Survey of Minority-Owned Business Enterprises (SMOBE) series. By limiting his statistical tables to those firms with over \$5000 sales revenues annually he eliminated the overestimation of small businesses that would result from counting individuals with small amounts of self-employment income from e.g., hosting a Tupperware party, fixing a neighbor's plumbing, honoraria from public speaking, etc.

<sup>30</sup>Bates, *Availability*, at 10. Census CBO data provided overly small sample sizes for the following subgroups: Native Americans (eight firms), Portuguese (eighteen observations), both much below the thirty minimum requirement to produce reliable statistics and avoid Census Bureau disclosure standards designed to protect confidentiality. Sample sizes were sufficient to analyze African-American, Asian and Hispanic groups but not to break down each minority by sex, particularly for specific industry groups and for bank borrowers. See Bates' letter to Lora Liss dated March 23, 1992.

New Jersey's relatively dense population of 7.73 million people and its 15 electoral votes gives it political significance beyond its size in presidential election years. Although in 1989 slightly more than half the population were women, they held only 15.6% of the elected offices in the State (583 positions), but that was almost double the 237 women elected to office in 1975 (6.16% of elected offices). Even though female political participation has increased over the years, it has not kept up with the national average of 8.0% in 1975 and 16.9% in 1989. Of the 120 State legislators in 1985-89, 11 were women.<sup>31</sup>

Similarly, African-Americans and Hispanics are underrepresented in the political process. African-Americans in New Jersey in 1990 numbered 1.037 million out of a total population of 7.73 million, 13.4% of the total.<sup>32</sup> African-American elected officials increased from only 73 in 1973, representing less than 1% of the total elected officials, to 196 by 1984, or 2.08%, of elected officials in the State.<sup>33</sup> This percentage (2.08%) remained constant through 1988, although the percentage of voting age African-Americans in the population showed a slight increase.<sup>34</sup> In 1990, there were a total of 65 Hispanics holding public office.<sup>35</sup> For example, in Hudson County, where the number of Hispanic residents tripled between 1980 and 1990 to 183,000, a third of the population, the largest concentration of Hispanics in any New Jersey county, Hispanic men and women held 8 of 87 electoral offices. One Hispanic was elected to the State Legislature in 1992.

While there have been many predominately African-American communities in the State, neither African-Americans nor other minorities have ever constituted a majority of the electorate in New Jersey. Nor has any minority group or women ever exercised political control over the Executive, Legislative, or Judicial branches of State government. In the State judiciary only 20 African-Americans and four Hispanics (6.6%) were among the 365 State judges in 1990.<sup>36</sup>

#### B. THE NUTS AND BOLTS OF PUBLIC CONTRACTING IN NEW JERSEY: CONCEPTS AND PROCEDURES

The Commission conducted a descriptive study and analysis of New Jersey's purchasing and contracting procedures as part of the historical study. The Van Ness study (Volume V of the Historical Record) affords a useful context for understanding the barriers encountered by M/WBEs that have attempted to do business with the State. It helps explain why more of the small, fledgling firms hesitate to enter the arena seeking public sector business.

According to Van Ness, three basic categories of statutes regulate purchasing and contract-

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<sup>31</sup>Myers, *Demographic Trends*, at 108-111.

<sup>32</sup>*Ibid.*

<sup>33</sup>*Id.* at 108-111. This did include the Mayor of Newark, the largest city in the State, which in 1980 had more than 150,000 African-Americans. While African-American Mayors have been elected in cities like Newark and Trenton, such elections have occurred at a point when African-American ascendancy is much less relevant than urban political power was for earlier ascending ethnic groups because of declining revenues, near bankruptcy conditions, massive unemployment of blacks, etc. Darity, *Historical Trends*, 34, citing Curvin, *The Persistent Minority: The Black Political Experience in Newark* (Unpublished Dissertation, Princeton University, 1975).

<sup>34</sup>Myers, *Demographic Trends*, pp 108-111.

<sup>35</sup>Felix Cruz, Director of the Governor's Office of Minority Affairs quoted in *New York Times*, August 30, 1992 at 13A.

<sup>36</sup>*Newark Star Ledger*, September 1, 1992, feature page Herb Jaffe, "The Law". Minorities and women have not and do not have the political influence in the state to enact or adopt targeted programs which Justice O'Connor questioned in *Crosby*, 488 U.S. at 495-496. Therefore, the policies and programs New Jersey has adopted to include and to assist minorities and women have not resulted from "racial politics;" rather, they have been considered in the best interest of the State.

ing by the State of New Jersey, State authorities, and local public bodies.<sup>37</sup> These statutes require public bidding under most circumstances and define permissible exceptions to public bid requirements.<sup>38</sup> With minor variations in language, each statute requires that contracts be awarded to the "lowest responsible bidder."<sup>39</sup>

Within the Department of Treasury the Division of Purchase and Property (DPP)<sup>40</sup> has primary responsibility for State purchasing of goods and services, while the Division of Building and Construction (DBC) is responsible for contracting for construction and construction related services.<sup>41</sup> The other major category of heavy public works construction is roads, bridges, and highways, which is handled primarily through the Department of Transportation and the various highway authorities.<sup>42</sup>

Under current law the contracting agencies have considerable discretion within areas that are not required to be competitively bid. Van Ness pointed out:

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<sup>37</sup>Van Ness, *State Purchasing*, at 5-6. (1) Department of The Treasury, *N.J.S.A. 52:25-1, et seq.* (the 19 Departments comprising the Executive Branch); (2) State Authorities and Commissions such as: the Hackensack Meadowlands Development Commission (*N.J.S.A. 13:17-6.1*), the Sports and Exposition Authority (*N.J.S.A. 5:10-21.1*), the New Jersey Highway Authority (*N.J.S.A. 27:12B-5.2*); (3) Local government units follow the Local Public Contracts Law, applicable to municipalities (*N.J.S.A. 40A:11-3 et seq.*). The State Colleges follow the State model (*N.J.S.A. 18A:64-52 et seq.*). Several statutes do not fall into any of the three broad categories, e.g., the Department of Transportation.

<sup>38</sup>*Id.* at 5-6. Usual exceptions to bidding requirements include: (1) contracts below specified amounts - currently \$9,800 for Division of Purchase and Property (DPP) and \$32,000 for the Division of Building and Construction adjusted every two years based upon the consumer price index - may be negotiated and awarded without advertisement; (2) services of a technical or professional nature; (3) purchase of perishable foods or subsistence suppliers; (4) lease of office space, office machinery, specialized equipment, buildings or real property "as required to conduct the State's business," *N.J.S.A. 52:34-9*. Additional exceptions are available when (1) a public exigency requires; (2) only one source of supply is available; (3) more favorable terms can be obtained from a primary source of supply; (4) articles of wearing apparel are to be purchased which are styled or seasonal in character; (5) commodities traded on a national market are to be purchased and fluctuations of the market require immediate action; or (6) the public interest requires technical equipment which is standardized and provides interchangeable parts.

<sup>39</sup>*Id.* at 1-3. Language varies on the standard for bids: (1) the State category mandates that the award shall be made to "that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the [awarding agency]"; (2) State Authorities must also make awards to the "lowest responsible bidder"; the Authority may, however, reject any bid if it is for "public convenience"; (3) local governments award to the lowest responsible bidder; local governments generally have less discretion to reject the lowest bid than State instrumentalities. In addition, the Transportation Act grants the Department of Transportation (DOT) "the means whereby the full resources of the State can be used to assist in the solution of the problems of all modes of transportation for the State. . ." *N.J.S.A. 27:1A-1 et seq.*

<sup>40</sup>The DPP has exclusive authority to purchase all articles for the State and its 19 using agencies. In addition, DPP may also make purchases on behalf of any county, municipality or school district. *N.J.S.A. 52:15-16.2*. Local governments, colleges, etc. thus can buy supplies at State contract prices under the State multi-source contracts. Thus if Newark decides to buy a Xerox copier, they can contact the Xerox vendor who won the State contract for that copier. Finally the DPP may delegate purchasing authority to individual using agencies for purchases not in excess of a specified dollar amount; however, the using agencies may not divide purchases or contracts in order to circumvent bidding requirements, *N.J.S.A. 52:25-23A*.

<sup>41</sup>The DBC awards contracts relating to the erection, construction, alteration, or repair of any public building or facility, *N.J.S.A. 52:34-7*. Such contracts which exceed the statutory threshold must go out for bid. Under this threshold, using departments or agencies may make, negotiate or award contracts without advertising for bids.

<sup>42</sup>Construction contracts may be bid either as a single unit for the erection, or alteration of a project or by specialties, or both. In the former case, bids are requested from general contractors. The award makes the general contractor responsible for scheduling and hiring specialty subcontractors for the entire project. Generally, road building construction in New Jersey follows this model: a single prime contractor who contracts out various parts of the job to subcontractors. On the other hand, DBC generally takes another tack, getting separate bids for specific construction specialties, such as electrical work, heating and air-conditioning, plumbing, etc. In this sense, DBC to some extent acts as a general contractor, and the specialty contractors - who in the other mode would be subcontractors - are DBC prime contractors. There is, therefore, more opportunity for M/WBE to be prime contractors for DBC.

[T]he Director of the Division of Purchase and Property or the Director of the Division of Building and Construction is granted the discretion to award contracts without advertisement with the written approval of the State Treasurer. (Citations omitted). Therefore, while the bidding statute is intended to encourage vendor participation in the bidding process, the exceptions provide the Director with the authority to bypass the public bidding process in certain situations. Any programs designed to promote access to the bidding process for women and minority business entities would not reach or impact contracts which are awarded outside the bidding process.<sup>43</sup>

However, the Commission has uncovered numerous examples of “institutional headwinds,” a term graphically used in an interview with Earl Josephson, a former Director of the Department of Treasury’s Division of Purchase and Property.<sup>44</sup> Some of those “headwinds” include:

Reform of leasing practices led to more complex procedures for obtaining government contracts. Prior to reforms “old boy” networks excluded M/WBEs; reforms created new obstacles.

Awarding contracts for professional services, such as architecture, engineering and auditing, had been done through waivers of bidding. Attempted reforms which established committees to determine professional competence of bidders still left room for subjective considerations.<sup>45</sup>

Also, more emphasis has historically been placed on experience and demonstrated competence which has made entry for new M/WBEs more difficult.<sup>46</sup> Furthermore, Van Ness found that the New Jersey Supreme Court has interpreted the exception from bidding for “professional services” far more broadly than limiting it to the traditional professions of law, engineering, accounting and architecture.<sup>47</sup> For example, the Court, in *Autotote Ltd. v. Sports and Expo Authority*,<sup>48</sup> upheld the installation and servicing of betting machines as a professional service. The Director of the Division of Purchase and Property therefore has more discretion, with the approval of the Treasurer, to bypass the bidding process than was formerly the case.

Requirements for bid and performance bonds, though reduced, still impact more severely on small businesses, including M/WBEs.<sup>49</sup>

### C. BUSINESS ASSISTANCE

New Jersey has implemented a number of programs to assist small businesses. A review

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<sup>43</sup>Van Ness, *State Purchasing*, at 6. Van Ness also reviewed areas of discretion which still remain in purchasing and contracting which provide opportunities for discrimination. For example, exceptions to public bidding are permitted for using agencies (State agencies for which the Department of Treasury does centralized purchasing) for any contract up to \$2,500 on the basis of telephone quotes; three written quotes are required for contracts between \$2,500 and \$7,500 (currently \$9,800); and, over \$7,500 (currently \$9,800), requests for waivers may be authorized where statutory exceptions permit. None of these exceptions mandate review of their impact on M/WBEs. In practice, they tend to maintain the status quo, limited opportunities for new businesses and M/WBEs.

<sup>44</sup>*Id.* at 20.

<sup>45</sup>*Ibid.*

<sup>46</sup>*Id.* at 22.

<sup>47</sup>*Id.* at 28.

<sup>48</sup>85 N.J. 363 (1981).

<sup>49</sup>Van Ness, *State Purchasing*, at 21-23. Van Ness also found other State practices which adversely affect M/WBEs. For example, the prolonged certification process for eligible businesses; the delay by the State in paying its bills to small businesses. (Even the recently enacted “prompt payment” statute requiring payment within 60 days has not corrected the problem. Small businesses would like payment within 30 days).

of these programs is helpful in assessing the effect of State practices on minority- and women-businesses.

### 1. History of Business Assistance in New Jersey

In attempting to trace the evolution of business assistance programs and to identify credit and banking problems, the Commission staff compiled two reports — a report on Business Assistance in New Jersey and a report on Discrimination by Financial Institutions.<sup>50</sup>

The earliest business assistance program we reviewed was the post-World War II veterans business assistance loans conceived and implemented under then Governor Walter Evans Edge.<sup>51</sup> Governor Edge created a low-interest loan program under which veterans could obtain up to \$3000 from banks to establish a profession or small business. The loans were repayable within six years with the State guaranteeing up to 90% of the loan. New Jersey became the first state to extend this type of preference to newly-returned veterans of World War II. At the end of World War II, only 4% of the returning veterans were minorities.<sup>52</sup> Fewer than 2% of the veterans were women.<sup>53</sup>

New Jersey did not offer any form of assistance to small businesses generally until the early 1960's when The State adopted the Area Redevelopment Authority Loan Program. This program was set up in the Department of Labor and Industry (as it was then called) to provide matching funds necessary to receive federal funds. These loan programs were not race or gender conscious, according to former State officials familiar with the program.<sup>54</sup> According to Thomas Kelly, the federal government enacted the Community Reinvestment Act<sup>55</sup> in 1977 because "there was a prejudicial environment against blacks and women who weren't even able to get into business." But the Act only applied to private banks, not to the public sector.<sup>56</sup> He recalled that women were still having a problem trying to get loans from banks on their own signature and on their own credit rating. The only loan guarantees that helped M/WBEs at that time were offered by the federal Small Business Administration.

The Small Business Development Unit in the Department of Labor and Industry was established in 1979 and, through the SBA mini-loan program for women, provided loans up to \$20,000 and eased some of the federal Small Business Administration requirements for financing.

The Urban Loan Authority had been in the Department of Community Affairs until 1977 when EDA took over the administration of the program. According to Robert Powell, who

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<sup>50</sup>Both reports were prepared under the supervision of Lora Loss, Executive Director of the Commission and are available at the State Library. The Department of Commerce and Economic Development assisted with the Business Assistance report. The Division of Development for Small Business and Women and Minority Business (SWMB) participated in a series of meetings with Dr. Liss in collecting information from current staff of SWMB. The SWMB Division also testified during the Commission's public hearings. Charles A. Jones (5T at 7-12). Additionally, Bette Benedict of SWMB staff was assigned to conduct telephone interviews with former State officials who were responsible for the early business assistance programs. See Transcript of Interviews between Bette Benedict and Herman Simonse, Tom Kelly and Robert Powell, April 28, May 5 and 11, 1992 (hereafter referred to, for example, as "Kelly Tr. at 10").

<sup>51</sup>*A Jerseyman's Journal, Fifty Years of American Business and Politics*, Princeton University Press (1948), at 272-274, 298.

<sup>52</sup>Census of Population:1960, Volume 1, Characteristics of the Population, Part 32, New Jersey.

<sup>53</sup>Historical Statistics of the Veteran Population, 1865-1960 — A Compendium of Facts About Veterans, House Committee Print No. 69 Table 10 (1961).

<sup>54</sup>Herman Simonse, Director of the Division of Economic Development in the Department of Labor and Industry from 1970-1974, Thomas Kelly from 1974-1977 and Robert Powell, Director of the Economic Development Authority from 1974-1980.

<sup>55</sup>12 U.S.C. § 2901.

<sup>56</sup>Kelly Tr. at 11.

headed the EDA from 1974 through 1980, the Authority kept no records of racial or gender breakdown of the loans issued, but he had the impression that the Urban Loan Authority “made a very high percentage of their loans to small urban minority-owned businesses.”<sup>57</sup> Powell pointed out, however, that the statutory authority was not aimed at minority businesses, but was geographically based.

By 1980, a series of EDA programs targeted funds to urban based businesses, but these programs did not single out minorities or women. These included direct loans, loan guarantees, and tax-exempt bond transactions. The loan applications did not request factors such as race or gender. In the late 1970’s, however, EDA had an aggressive Affirmative Action Program, which called for general contractors working on NJEDA construction projects to meet the affirmative action employment guidelines. This was not the same as providing direct assistance to minority-owned businesses but it had some of the same effects.<sup>58</sup> EDA had a tax exempt bond financing program which historically has had a \$1,000,000 limitation although exceptions permitted up to \$10 million for projects such as pollution control which went to larger oil and chemical companies.<sup>59</sup> But Powell doubts whether there were many minority- or women-owned firms in the period to 1980, that were in the \$1 million category, and few participated in the tax exempt bond financing program.

The Urban Centers Small Loan Program of the NJEDA directed loans to commercial businesses in Urban Aid cities’ downtown districts. But the principal purpose was to create jobs and tax ratables in distressed areas; therefore, no records were kept of M/WBE participation, according to Powell.

In summary, the early business assistance programs were generally race- and gender-neutral and had only limited minority and women participation. The one exception was the Small Business Development Unit which provided assistance specifically to minorities and women.

## 2. Small Business Set-Asides

In 1981, New Jersey enacted the Small Business Assistance Act.<sup>60</sup> The Act provided for the establishment of the Office of Small Business Assistance and gave the Commissioner of the Department of Commerce authority to determine what constitutes a small business. That office defined a small business as one “with 500 or fewer employees.”<sup>61</sup>

It was not until 1983 that the Legislature focused on encouraging small business participation in the State procurement process by authorizing the Department of Treasury to specify certain contracts — or parts of contracts — to be bid on only by firms which qualified as small businesses.<sup>62</sup>

## 3. Inter-Agency Procurement Committee

In 1983 Governor Kean issued Executive Order No. 46, establishing the Inter-Agency Procurement Committee (IAPC). Until that point, no mandates, either executive or legislative, had addressed a State effort to insure that women and minorities would have an effective opportunity to be awarded State contracts. Procurement methods had been based solely on

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<sup>57</sup>Powell Tr. at 3. No other information about these loans was submitted, therefore the Commission was unable to determine their quantity, size and impact.

<sup>58</sup>Powell Tr. at 3.

<sup>59</sup>Powell Tr. at 7.

<sup>60</sup>PL 1981, Ch. 283.

<sup>61</sup>However, the Small Business Set-Aside Act (PL 1983, Ch. 482) discussed below, limits a small business to one with 100 or fewer employees. Until this size limitation was adopted, M/WBEs had difficulty in competing because so many of the bidding companies were much larger.

<sup>62</sup>This was a race- and gender-neutral set-aside with “Small business” defined as having a principal place of business in New Jersey and independently owned and operated. *N.J.S.A. 52:32-17 et seq.*

"low bid" contracts without any knowledge or mechanisms to determine whether the bid was submitted by a minority or a woman. The Deputy Commissioner of the Department of Commerce and Economic Development was selected to chair the Committee, monitor the establishment of goals for small businesses, including minority- and women-owned businesses, and to receive annual reports. The chair was to submit to the Governor within 90 days after the close of each fiscal year a full report on the IAPC's activities.<sup>63</sup>

In the first annual report of the IAPC for Fiscal Year 1985, the initial review of State government procurement revealed that no system was in place which permitted identification of vendors as small, minority-owned, or women-owned. Therefore, no data existed from which quantitative summaries could be prepared except for those few departments which received federal money and had federally-established goals for purchases from minority- and women-owned vendors.

The Department of Commerce created a "vendor" questionnaire, which was sent out to all 21,185 vendors known to the State in 1984. The questionnaire asked for the present number of full-time permanent employees and whether the businesses were minority- or women-owned. The definition of small business limited size to 100 or fewer full-time employees but did not limit the definition to New Jersey based businesses as the Small Business Set-Aside Act did. The definitions of minority-owned small businesses included 51% owned by one or more socially and economically disadvantaged individuals or, in the case of a publicly owned business, those where one or more socially and economically disadvantaged individuals owned at least 51% of the stock. The defined groups included black Americans, Hispanic Americans, Native Americans (American Indians, Eskimos, Aleuts, and Native Hawaiians) Asian Pacific Americans (persons from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands, Northern Marianas Islands, Laos, Cambodia, Taiwan), and Asian American Indians (persons from Pakistan, India, Bangladesh). Women-owned businesses were defined only as 51% owned and controlled by a woman or women.

The results of the vendor data questionnaire indicated that availability was 7% minority and 8.5% women for firms supplying goods and services, and 4.7% minority and 7% women for construction related services.<sup>64</sup> The report indicated that purchases made through the DPP (goods and services) were approximately .4% for minority-owned and 2.1% for women-owned businesses.<sup>65</sup> Thus, the disparity between availability and utilization of M/WBE was abundantly evident at least from 1985 forward. Goals were set, based on the 1984 data for FY 1985 of 3% each for minority- and women-owned businesses.<sup>66</sup> The report indicated that the goals for all small businesses had been met and exceeded: with a 27.7% goal, the percent of actual payments was 32.5%.<sup>67</sup>

No similar utilization report was produced for construction contracts. However, goals were set for FY 1985 as follows: small business - 65%; MBEs - 10%; WBEs - 1/2 of 1%.<sup>68</sup> The report noted that there was a steady improvement in the number of approved minority- and women-

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<sup>63</sup>IAPC Background Information, July 30, 1990 by Sonia Fitzsimmons, Secretary to then Commissioner of Commerce Henry Blekicky.

<sup>64</sup>First Annual Report of the Inter-Agency Procurement Committee, FY 1985.

<sup>65</sup>*Id.* at 2.

<sup>65</sup>*Id.* at 2.

<sup>66</sup>*Id.* at 3.

<sup>67</sup>*Ibid.*

<sup>68</sup>*Id.* at 5.

owned contractors from 1982 to 1984.<sup>69</sup>

Among the recommendations that flowed from the first IAPC report were: increase the bidding threshold from \$2500 to \$7500; set aside a percentage of contracts for M/WBEs, so that greater opportunity for economic equity can be achieved; establish a new system within DBC to direct more contracts toward M/WBEs; develop a computer based system to help department buyers locate M/WBEs by commodity code; enact prompt payment legislation; and establish a single statewide certification system for M/WBEs. By 1989, most of these recommendations had been accomplished.

Finally, the first IAPC report noted that the New Jersey DOT's construction program and the Department of Environmental Protection's programs where 12% of approximately \$200 million were targeted for M/WBEs and predicted that over 1/2 billion federal and state dollars in contracts would go to small businesses, \$90 million to minority-owned vendors and \$45 million to women-owned businesses. That projection proved to be attainable by 1989, when minority businesses received contracts for \$48,347,495 in construction projects, including primes and subcontracts and \$32,965,985 in goods and services, for a total of \$81,313,480.<sup>70</sup>

After *Croson*, the total DPP payments awarded by the centralized purchasing system to minority businesses for all State departments was \$5,058,952 in FY 1990 and \$15,273,105 to women businesses. Small businesses (100 employees or less) received \$175,022,462. In fact, the year that *Croson* was decided, 1989, before the emergency regulations were adopted and implemented<sup>71</sup>, minority businesses received their highest total dollars — \$11,942,904 — and women businesses similarly received their highest total dollars — \$26,384,602. Thus, just as the focal point of the State purchasing system, DPP, was getting better organized, the entire effort was placed on hold pending the Commission's study.

The IAPC became inoperative, when, in the wake of *Croson*, the Executive Orders creating it were rescinded in June 1990. However, reports continue to be produced by the Department of Commerce, based on data received from each State department.

#### 4. Set-Asides For Minority- And Women-Owned Businesses

The Small Business Set-Aside Act was amended in 1985 to include set-asides for female and minority businesses<sup>72</sup> with no employee size limitations. Despite the Small Business Set-Aside Act, M/WBEs received far less percentage of State procurement dollars than the approximately 30% of the small businesses in New Jersey which they represented.<sup>73</sup> Therefore, the Legislature expanded the Small Business Set Aside Act to allow additional set-asides for firms

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<sup>69</sup>MBEs increased from 8 firms in 1982, receiving \$5,800,000 to 13 firms in 1983 receiving \$10,125,000 to 39 firms in 1984, receiving \$40,940,000. Similarly, WBEs increased from 3 firms in 1982, receiving \$4,350,000 to 6 firms in 1983, receiving \$10,375,000 to 10 firms in 1984, receiving \$8,910,000.

<sup>70</sup>*Statistical Data on Utilization*, (Summary of Goods and Services and Construction Contracting Activity for 1989, totals of Categories 1 through 4). A substantial portion of this sum was federally funded and under federal M/WBE mandate.

<sup>71</sup>See description of the emergency regulations, *infra*, at § III C.5.

<sup>72</sup>*N.J.S.A. 52:32-17 et seq.*

<sup>73</sup>*Bates, Disparity*, at 1. Although M/WBEs accounted for 30% of all New Jersey small businesses in 1982, they received only 1.5% median share of New Jersey goods and services procurement dollars over the 1984-1989 period. It is noteworthy that the purchasing power of the State had grown immensely over the decade from 1976 when the federal Local Public Works Program II first tried a targeted goal program for minority firms. In 1988, DPP awarded approximately \$930 million in total purchases for State agencies. Approximately 50 to 60% of State expenditures go to large corporate vendors and contractors. This amount includes some purchases which are inherently non-competitive such as purchase of utilities, rights of way or where vendors are limited such as airplane tickets and some commodities or contracts which cannot easily be divided. Thus, about 40 to 50% of New Jersey expenditures remains available to be spent with relatively small businesses.

owned by minorities and women. In enacting the Set Aside Act the Legislature declared:

The existence of a strong and healthy free enterprise system is directly related to the well being and competitive strength of small business, female business and minority business concerns and to the opportunity for small business, female business, and minority business to have free entry into business and to expand; and finds that the State must ensure that a fair portion of the State's total purchases and contracts for construction property and services is placed with small business, female business and minority business concerns.<sup>74</sup>

The Set-aside Act provided that State contracting agencies fix goals awarding at least 15% of their contracts for goods, equipment, construction, or services to small business, plus at least 7% to minority businesses and at least 3% to female businesses. The Act permitted contracting agencies to set aside contracts, or portions thereof, for bidding by each group where there was reasonable expectation that bids could be obtained from three qualified businesses.<sup>75</sup> A contract designated as a set-aside could be rebid if acceptance of the lowest responsible bid on such contract would result in the payment of an unreasonable price or in a contract otherwise contrary to the governing statutes or regulations, or the agency did not receive bids from three qualified bidders. A certification process was established to identify eligible businesses. Although these laws have not been rescinded by the Legislature since *Croson*, they are not being implemented as to the minority- and women-business set-asides.

#### 5. Post-*Croson* Status of Set-Asides

As a result of *Croson*, the Attorney General of New Jersey advised that those provisions of *N.J.S.A. 52:32-21 et seq.* and *N.J.A.C. 17:12-6* establishing set-asides based on race were so similar to the provisions challenged in *Croson* that the State should review its programs to determine whether there was a sufficient compelling State interest for set-asides.<sup>76</sup> Based on the Attorney General's advice, the Department of Treasury proposed and adopted changes in the regulations implementing the Set-Aside Act to eliminate race and gender goals.<sup>77</sup> For procurement of goods and services, the amendments targeted urban development enterprises (UDE) and micro businesses, and established new goals; 7% for urban development enterprises and 3% for micro businesses.

Size of business replaced race and gender as the basis for set-asides.<sup>78</sup> Urban Development enterprises were defined as independently owned and operated businesses having no more than 50 full-time employees whose principal place of business is located in a municipality qualified under the Urban Development Corporation. A micro business was defined as an independently owned and operated business having no more than 20 full-time employees. To date, no contracts have actually been set aside as micro or urban development contracts, according to Department of Commerce sources.

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<sup>74</sup> *N.J.S.A. 52:32-18.*

<sup>75</sup> Thus, if it was likely that bids could be obtained from three minority-owned firms, a request for bid could be designated a set-aside contract for minority firms. *N.J.S.A. 52:32-20; 52:32-21.* Only minority businesses were then eligible to bid on a contract so designated. Similar requirements applied to set-asides for women-owned firms.

<sup>76</sup> 21 *N.J.R.* 2811.

<sup>77</sup> *N.J.A.C. 17:13.*

<sup>78</sup> Under the previous rule, projects receiving assistance from the New Jersey Urban Development Corporation under the Urban Small Business Incubator Program were required to set aside 10% for small, minority and female businesses. *N.J.A.C. 12A:80-1.10.* Similarly, neighborhood development corporations approved to receive financial assistance from the Urban Development Corporation set aside 10% of the aggregate construction cost. *N.J.A.C. 12:82-1.7(a).* Among firms on the State bidders' list, 20,519 firms have 25 or fewer employees; 17,307 firms (49.4%) have 10 or fewer employees.

For construction contracts following *Croson*, a different approach was taken. Instead of set-aside contracts, targets for subcontracts were to be established. The new construction rules, adopted in October 1989,<sup>79</sup> established a procedure to guarantee that State construction contractors engage in market outreach to find minority and women subcontractors. Construction contractors were also prohibited from discriminating against minority or women businesses in awarding construction subcontracts.

Under the 1989 construction regulations, however, implementing procedures were not established until February 1992. These procedures call for each construction contract to be reviewed and target levels set for WBE and MBE subcontractor utilization. In addition, reasonable market outreach efforts are to be identified. The subcontractor target levels are not to serve as goals, but rather as screening mechanisms to determine whether further scrutiny is warranted. These regulations are triggered when a low bid requires the State to determine if the bidder is "responsible." If a review reveals discriminatory contracting practices or failure to engage in appropriate outreach efforts, the bidder is to be disqualified from bidding on the particular contract.

The rules also prescribe eligibility criteria, registration and approval procedures for minority and women contractors. As Van Ness says, the construction program "is essentially aimed at eliminating present discrimination by prime contractors. It is not designed to remedy prior discrimination and does not require a fixed number of subcontracts be awarded to female or minority businesses." Further, it is not designed to address the awarding of contracts to women and minority businesses as a prime contractor.<sup>80</sup>

No report on the implementation of these construction subcontractor utilization targets has been presented as of this writing, except for the Department of Transportation. The State DOT reports an increase from \$2.5 million or 1.9% in 1991 to minority- and women-owned businesses to \$7 million, or 16.5% in 1992 as a result of the new subcontractor targets.<sup>81</sup>

## 6. Certification

Certification requirements include proof of source of capital and investments to prove that the minority or woman business owner substantially invested in the firm's growth and that the shares were not gifts or owned by a nonminority. Major equipment must be owned, rented, or leased by the minority owner. Auditing decisions are based primarily on the degree of ownership and control. The entire process is designed to assure that minorities and women are not being used as "fronts" by nonminority business owners.

*Small* businesses in New Jersey are not required to be certified, unless they wish to be certified as bona fide minority- or women-owned businesses. Small businesses, plus woman- or minority-owned businesses, must be *registered* with the SWMB Division in order to be eligible for any purchases by or contracts with the State.<sup>82</sup> Neither registration nor certification establishes qualifications or capacity to perform a particular type of work.

As of May 1992 the numbers of Certified Businesses were as follows: total businesses certified-1228; total WBEs 485; total MBEs 682. Prior to March 1990, only 711 total businesses

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<sup>79</sup>N.J.A.C. 17:14.

<sup>80</sup>Van Ness, *State Purchasing*, at 18-19. Procedures supporting the regulations became effective in 1992.

<sup>81</sup>Correspondence dated July 16, 1992 from Commissioner Irving Biddell to Executive Director Liss.

<sup>82</sup>Department of Commerce, Division of Development For Small Businesses and Women and Minority Businesses Set-aside and Certification Office, Outline of New Jersey's Set-Aside and Certification Programs. Separately from the Department of Commerce program, prequalification is required by the Department of Transportation for highway-related construction and the Division of Building and Construction in the Department of Treasury, which contracts for building construction and related professional services.

were certified, of which 248 were WBEs, 398 were MBEs. Thus the increase has been 96% for WBEs and 71% for MBEs.<sup>83</sup>

#### 7. Technical Assistance to Small Businesses

The types of assistance the State has provided include start-up and expansion counseling, managerial and technical assistance, problem-solving and referral services for small, minority and women businesses. In addition to the types of assistance to these groups outlined earlier, the Small Business Development Unit utilized the services of the New Jersey Small Business Development Center, SBA's Service Corps of Retired Executives (SCORE) and Small Business Institutes. Conferences for potential and established M/WBEs began with women's conferences in 1978 and continued through 1988, when other organizations sponsored annual women's conferences.<sup>84</sup>

All of this race and gender conscious structure has been neutralized since *Croson*, with the office titles OMBE, BHE, OWBE now under the Office of Technical Assistance (OTA), utilizing "point persons" to provide assistance to women and minorities as well as small businesses. Three race/gender-based councils still exist: the Women's Business Advisory Council, the Minority Business Advisory Council, and the Governor's Advisory Council on Minority Business Development. In addition, the Small Business Advisory Council continues to provide advice and assistance to the umbrella Office of Small Business Assistance (OSBA). Currently it is involved in writing recommendations to make bonding more accessible to SBEs, MBEs and WBEs and is considering statewide seminars on bonding.

#### 8. Port Authority of New York/New Jersey Programs

The Port Authority of New York and New Jersey initiated affirmative action policies over the past two decades. Since 1989 the M/WBE goal program has been 12% MBE and 5% WBE. The Port Authority suspended use of mandatory contracting procedures pending the completion of the study required by *Croson* but continued to operate a good faith subcontracting program.

The current program includes race-neutral small business set-asides for prime construction contracts as well as business development programs which provide financing and technical assistance.<sup>85</sup> In construction, most contracts under \$250,000 are set aside for certified SBEs. Bid performance bonds are not required on any contract under \$250,000. Bonds are also waived on contracts over \$250,000, with no maximum limit, on a case-by-case basis. No charges have been made against the Port Authority self-insurance fund, which covers contracts over \$250,000, in the past eight years.<sup>86</sup> The Port Authority has found that M/WBEs are more

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<sup>83</sup>Department of Commerce and Economic Development - Hank Diaz Report, May 11, 1992.

<sup>84</sup>In 1981, the first Governor's Conference on Small Business was held and continued in 1982, 1984, 1985, 1986, and 1988. The conferences focused on such topics as taxes, minority business enterprise, homebased business, management assistance, regulatory reform, exports, economic development and government procurement. Recommendations emerged from the SBEs, MBEs, and WBEs who attended these conferences and were forwarded to the Governor and Legislature.

In 1986, OMBE sponsored the first Governor's Minority Business Development conference for MBEs. Similar two-day conferences followed sponsored by SWMB in 1987 and 1988. No recommendations were made but workshops and exhibits were attended particularly by MBEs.

In 1987, legislation created the Division of Development for Small Businesses and Women and Minority Businesses (SWMB) comprised of the Office of Small Business Assistance (OSBA), the Office of Minority Business Enterprise (OMBE), the Bureau of Hispanic Enterprises (BHE) and the Office of Women Business Enterprise (OWBE). In 1989, the Division held a two-day conference for SBEs, MBEs and WBEs.

<sup>85</sup>A Small Business Enterprise (SBE) is defined as a firm which has earned less than \$5 million in gross annual revenues, is headquartered in New York or New Jersey, and has been in operation for at least three years.

<sup>86</sup>Memorandum from Barry Glick to Rebecca Doggett, Port Authority, August 19, 1992.

likely to compete successfully in this restricted arena than in the open bid market. The Port Authority has certified 1,396 SBEs, a population which includes 400 MBEs, 210 WBEs and 700 non-M/WBEs. The Port Authority's inability to use M/WBE set-asides in construction has affected most adversely those contractors who are too large to qualify as SBEs yet are too small to compete with the largest contractors in the industry.

The Port Authority provides business development services through its sponsorship of the Regional Alliance for Small Contractors. Initiated in 1989 by the Port Authority and a small group of public agencies, the Regional Alliance was organized as a not-for-profit corporation in 1991 by leading construction management companies and public-development agencies in the New York-New Jersey area. Its public partners include New Jersey Departments of Labor, Commerce and Economic Development and Transportation, as well as New Jersey Transit and the New Jersey Turnpike Authority. The private partners include Deloitte & Touche, Ebasco Constructors Inc., Lehrer McGovern Bovis, Inc., and O'Brien - Kreitzberg & Assoc., Inc. The M/WBEs are represented by Evanbow Construction Co., Inc., among others.<sup>87</sup>

### 9. Relevance of Federal Business Assistance Programs

The federal Small Business Administration (SBA) is the only source for start-up capital for potential entrepreneurs in the State, with the exception of direct bank loans which are difficult to obtain. Applicants must have required equity and capital, a good business plan and good personal financial statements, plus detailed projections and estimated balance sheets. SBA loan guarantees may not exceed \$750,000. Direct loans are limited to \$150,000. Interest rates are 3% per year.

SBA also has a Certified Development 504 program for financing fixed assets (not in excess of 40% of the project cost) through a Certified Development Company. For those counties without a Certified Development Company, the New Jersey Economic Development Authority supports the Corporation for Business Assistance as a lender.<sup>88</sup>

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<sup>87</sup>The Regional Alliance operates the following key program components:

**Managing Growth:** A series of 24 management training classes led by leading private sector executives and experts which has helped build the skills of more than 600 participants from 554 small companies. M/WBE comprise 82% of the companies enrolled in Managing Growth. Classes are offered in Newark and Atlantic City, New Jersey, as well as in the World Trade Center in New York.

**Loaned Executive Assistance Program (LEAP):** Free consulting services provided by 58 construction practitioners from the private partners to S/M/WBE to address management and operational problems, and to improve their ability to obtain and manage construction contracts effectively. To date, more than 90 small contractors – including 83 M/WBE – have benefitted from LEAP.

**Financing Small Contractors (FISC) Program:** Involves public and private lenders in providing financing for participating M/WBE companies. Twenty loans for \$5.9 million have been approved for M/WBE since the program's inception. The Regional Alliance is working with the New Jersey Development Authority to expand this program in New Jersey.

**Access to Bonds and Sureties:** Development of a "bond-ready" program in conjunction with several sureties to provide increased bonding for Alliance contractors with opportunities to compete for work on large projects.

**Policy Development:** Examining and seeking to change public policies and industry practices in construction which impede M/WBE participation. Through continued dialogue with industry leaders and financial institutions, the Alliance has developed and initiated new approaches to make contracting, bonding and financing opportunities more accessible for M/WBEs.

<sup>88</sup>In June, 1992, SBA announced a pilot project of "microloans" targeted to poor, minority and female entrepreneurs. Federal support for such "microenterprises" was included in the emergency aid package for riot-torn Los Angeles. The SBA announced \$15 million in loans and grants to 35 non-profit groups in 30 states. Those groups will in turn make 10-year loans as large as \$25,000 to new or fledgling entrepreneurs unable to get business credit in amounts that most commercial lenders consider too small. However, New Jersey was not among the pilot groups because no non-profit emerged to apply, according to a Department of Commerce spokesperson.

## 10. Casino Control Commission

One additional component of the State's minority/women business development program was the Casino Control Act, established in 1977.<sup>89</sup> In 1987 goals were set for certified M/WBEs as follows: The first three years each casino was expected to make good faith efforts awards of 5% of all disbursements for goods, services and bus business to M/WBEs; in the fourth through sixth years, the percentage was to reach 10%; in the subsequent three years, 15%.<sup>90</sup> As of December, 1991, the twelve casinos met combined M/WBE goals ranging from 4% to 11.7% for goods and services and from 4% to 19.6% for bus business.<sup>91</sup> 1991 was the third year for eleven casino licensees, many of whom failed to meet their goals and escaped any sanctions.<sup>92</sup> The casinos represent an example of affirmative action goals being applied to the private sector with some effectiveness. However, monitoring is necessary to assure compliance with goals.

## 11. SAVI II Database and Program

Originally created to track and monitor small businesses and women and minority businesses that register with the State as interested in State contracting and contracting with casinos, the Set-Aside Vendor Inquiry automated system was later expanded and renamed Selective Assistance Vendor Information system, SAVI II, after *Croson* and new regulations in 1989 changed set-asides from minorities and women to micro and urban enterprises. Data regarding the race and gender of contractors was not maintained prior to the set-aside programs.<sup>93</sup> It was not possible, therefore, to determine with accuracy the share of procurement and construction contracts obtained by M/WBEs before that time. The SAVI II data enables the State and private contractors to obtain ready access to available M/WBEs and to assess more accurately their participation in state contracts.

## 12. Housing and Mortgage Finance Agency

Another agency that provides business assistance in the form of financial incentives to spur private homeownership and rental housing development is the Housing and Mortgage Finance Agency (HMFA). The HMFA has been operating as a nonprofit state agency for more than 22 years. Its purpose is to finance housing for both renters and home buyers, with emphasis on promoting safe, attractive and affordable housing for the State's low- and moderate-income residents. It represents a public-private partnership to encourage new housing ventures and to stimulate commercial investment. The agency implements federal programs, such as the National Affordable Housing Act and the Low-Income Housing Tax Credit Program, as well as the tax-exempt Mortgage Revenue Bond Program. For example, in 1990 the HMFA allocated nearly \$5.5 million of the State's share of federal credits.<sup>94</sup> These credits

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<sup>89</sup> N.J.S.A. 5:12-1 *et seq.*

<sup>90</sup> N.J.S.A. 5:12-184 through 190.

<sup>91</sup>Memorandum and accompanying charts from Gustave R. Thomas, Chief AA/EEO Unit, Division of Compliance, Casino Control Commission to Executive Director Liss dated July 30, 1992.

<sup>92</sup>In 1989 and 1990, total disbursements were over \$2 billion, of which almost \$60 million was awarded to M/WBEs. Memorandum to Members of the Casino Control Commission from Gustave R. Thomas dated May 29, 1991, subject: An Analysis of the Performance of the Casino Industry to Comply with the Intent of the Set-Aside Provisions of the Casino Control Act - The Role of the Casino Control Commission.

<sup>93</sup>Prior to the advent of SAVI I and II, the State Department of Treasury, Division of Purchase and Property maintained an automated bidders list (PIMS) with approximately 35,000 potential vendors registered by commodity codes, but without any identification of minorities or women. In 1988 a new automated system, MACS, replaced PIMS and contained data on whether the bid was advertised as a set-aside. Also, the set-aside program within the Division of Purchase and Property did not include subcontracting elements because the State does not itself contract with subcontractors. Lana Sims Report, *Preliminary Information On Public Contracting in the State of New Jersey*, November 17, 1989.

<sup>94</sup>Annual Report, New Jersey Housing and Mortgage Finance Agency, 1990.

enabled the State to sell a \$4.9 million taxable bond issue to finance the construction and permanent mortgage of 60 apartments in East Orange. In fact, Mayor Cardell Cooper of East Orange credited the HMFA, through the Housing Assistance Corporation (HASCO), a subsidiary, with being instrumental in rehabilitating a development of 39 apartments.<sup>95</sup> The Agency sold \$3.4 million in tax-exempt bonds to finance affordable housing in Montclair and financed a \$4 million loan fund for transitional housing for homeless families. In addition, the New Jersey Department of Community Affairs Urban Multifamily Production Program (JUMPP) provided a \$4.1 million construction loan and permanent mortgage to rehabilitate apartments in Newark.<sup>96</sup>

However, the State estimates that 100,000 housing units are necessary over the next five years to ease the housing burden on low- and moderate-income families.<sup>97</sup> In 1991, the Agency added to its basic homebuying programs workshops, counselling and technical assistance to promote increased homeownership. The latter programs include assisting nontraditional sponsors, such as the NAACP in Jersey City, with development and managerial training so that the nonprofit can manage the building upon completion. Outreach programs, particularly to Hispanic residents and community leaders, are expanding to increase the number of Hispanics who benefit from the Agency's programs.

Similarly to EDA programs, it is difficult to trace the impact on minorities and women of the billions of dollars the State has expended on home mortgage finance assistance, which is largely race- and gender-neutral. Monthly reports reveal the number of loans to African-Americans and Hispanics, but this is a small portion of the total funding by HMFA. In a report to the Assembly Housing Committee on March 26, 1992, the Agency stated that from 1991 to 1992, 288 (20%) of 1442 loans had gone to minority home buyers. The Agency noted that the increase from the 1990 to the 1991 figures (8%) was attributable to affordable housing fairs and other minority outreach efforts.<sup>98</sup>

No breakdown was provided in the report to the Assembly Housing Committee between African-Americans and Hispanics. However, the monthly reports for April through September 1992 reflected that 36 loans were made to African-Americans and 14 loans to Hispanics.<sup>99</sup> No other statistics were available to determine the extent to which minorities have benefitted from HMFA financing programs. However, the 100% Financing Program is entering its third year, and more than \$8.3 million in 100% loans have been issued, of which a "significant number of single mothers are becoming homeowners."<sup>100</sup>

In a statement sent to the Commission in lieu of testifying, the HMFA recommended the following:

1. Provide bonding assistance programs that will enable minority, female and small business enterprises an opportunity to obtain bonding to compete within the construction industry.
2. Establish uniform certification procedures acceptable by all contracting State

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<sup>95</sup>Letter to the Editor, Trenton Times, September 10, 1992.

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

<sup>97</sup>Annual Report, New Jersey Housing and Home Mortgage Financing Agency, 1991.

<sup>98</sup>The need for vigorous outreach efforts was also discussed by Dean Payne's Housing report, which noted the underrepresentation of minorities, particularly African-Americans, among those who are benefitting from the *Mount Laurel* development program. Payne, *Housing*, at 37 and 40.

<sup>99</sup>Memoranda from Debra L. Wentz, Director, Planning and Intergovernmental Relations to Kevin Quince, Executive Director, Subject: Number of Loans to African Americans and Hispanics for March (through August) 1992. Totals prepared by Executive Director Lora Liss.

<sup>100</sup>News Release, New Jersey Housing and Mortgage Financing Agency, April 26, 1990 and 1991 Annual Report.

departments that will identify and certify qualified small, minority, and women-owned firms.

3. Implement scheduled pre-bid conferences to identify and select contractors for upcoming projects. This will create fairness on contract allocation by opening up the process to include more M/WBEs.<sup>101</sup>

### 13. Economic Development Authority

The New Jersey Economic Development Authority (NJEDA) is an independent authority of the State, created in 1974 to provide for "the construction, acquisition, financing, selling and leasing of manufacturing, industrial, commercial and other employment promoting facilities."<sup>102</sup> NJEDA's primary mission is to encourage business development and growth in the State that will result in more jobs, more tax ratables and a stronger, more diversified economy. It acts as both a financier and a real estate developer in carrying out its mandate.

A partial listing of the various activities of NJEDA includes: bond financing, economic growth bonds, loan guarantees, statewide loan pool for small businesses, direct loans, SBA 504 Program for fixed asset financing, export working capital loans, recycling loans, underground storage tank improvement loan program, real estate development program, consulting assistance for manufacturers impacted by imports, local development financing fund, urban centers small loan program, financing for urban development projects and financing for small businesses, minority and women's enterprises. Some of these projects are specifically targeted to minorities and women.

In 1985, the New Jersey Urban Development Corporation (NJUDC) was created to widen the range of financing techniques for revitalization of urban communities.<sup>103</sup> Also in 1985, the New Jersey Development Authority for Small Businesses, Minorities and Women's Enterprises (NJDA) was created by the Legislature to deliver financial and overall assistance to small businesses and businesses owned by minorities and women. These programs, NJUDC and NJDA, were created to fill a void in the activities of the NJEDA.<sup>104</sup> The void was that minorities and women did not have access to the NJEDA's financing. NJEDA assumed the responsibility of administering the newly targeted programs. Staff was not operational until 1988 for NJUDC and 1990 for NJDA. These programs were coordinated through a new division, the Urban Programs Division, whose function was to reach out to urban areas and minority- and women-owned businesses in an effort to provide financial and, to a lesser extent, technical assistance to them in seeking financing from public and private sources.

As of March 31, 1992, the Urban Programs Division had been involved in twelve loan approvals totalling almost \$3.9 million spread among the three independent authorities, NJUDC, NJDA, and NJEDA. Six loans were made through NJDA to minorities (4 to African-Americans, 1 Hispanic and 1 Asian); three loans were made through NJUDC (1 African-American); one loan through the Local Development Financing Fund, and two loan guarantees through NJEDA (1 African-American woman).

The NJEDA also issues tax-exempt private activity bonds (PABs) which enable a business to secure low-interest rate financing through a private source for real estate acquisitions, equipment, machinery and building construction or renovations. Eligible businesses are manufacturing companies, nonprofit 501(c)(3) organizations, including training facilities, nursing

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<sup>101</sup>Memorandum from Executive Director to Commissioners, May 8, 1992.

<sup>102</sup>N.J.S.A. 34:1B-1 *et seq.*

<sup>103</sup>N.J.S.A. 55:19-2 *et seq.*

<sup>104</sup>Mark Quinn, Director, Urban Programs Division, NJEDA (7T at 141-146) Exhibit I at 4.

homes, etc., exempt facilities, such as airports, sewage disposal and solid waste disposal facilities, etc., and first time farmers.

NJEDA has also made available over \$8 billion since 1974 to help eligible businesses undertake worthwhile projects. Most beneficiaries of its programs have been small businesses. However, no data was provided indicating the percentage of the \$8 billion that went to minority- or women-owned businesses. Data was provided at the Commission hearings that revealed that the proportion of minority and women that benefitted from direct loans and guaranteed loans through NJEDA in 1991 was 16% of the total number of projects financed (63 of 393 loans) but only 6.9% of the dollar value of direct loans (\$6.2 million of \$89 million). Similarly, minorities and women received 13.6% of the total number of guaranteed loans, (35 of 257) and 10% of the total dollar value of guaranteed loans, (\$14 million of \$140 million) for a combined total of 15.1% of all projects, but only 8.8% of the dollar value of all projects totalling \$229 million.<sup>105</sup>

Aside from the direct purchases and contracts made by State departments, the NJEDA report represents the best measure available of the share of business assistance that has gone to M/WBEs.

#### D. FACTUAL FINDINGS OF THE COMMISSION

##### 1. Summary of Statistical Evidence Reflecting Minority And Women Participation in State Contracts

###### a. Availability

###### i. Goods and Services Firms

Based on the 1982 Census Bureau statistics, Dr. Timothy Bates concluded that "minority and women-owned businesses accounted for 32.6% of the service firms and 23.4% of the goods firms operating in the New Jersey area. Overall, minority and women-owned businesses accounted for 30% of all New Jersey small businesses in 1982."<sup>106</sup> The availability of small businesses owned by minorities was 10.3% and the non-minority women's share was 19.7%.<sup>107</sup> These figures are based on the census publications entitled Survey of Minority-Owned Business Enterprises (SMOBE) and a companion Survey of Women-Owned Business Enterprises series added in the 1970s. The problem, according to Bates, with using the SMOBE data, is that it is of limited use to identify or analyze the specific portion of the M/WBE universe that is relevant to the procurement operations of the State of New Jersey. The SMOBE and related volumes rely on tabulations of income tax returns, supplemented by a nationwide survey of approximately 600,000 small businesses. Bates believes that very few serious small businesses gross under \$5000 in sales revenue annually. Therefore, he excluded firms whose reported annual sales in 1982 were less than \$5000.<sup>108</sup> The U.S. Census also excludes corporations, other than subchapter S corporations, which are limited to less than 35 shareholders. Thus, many large corporations that are indeed MBEs and WBEs are excluded.

Although Dr. Bates stated that "ideally we would like to know the proportions of MBE and WBE firms on the bidders list each year over the 1984-1989 period," he concluded that "a conservative estimate of the combined MBE, WBE small businesses available in 1989 would be 25% of the goods firms and 34% of the service providers."<sup>109</sup> This conservative estimate was

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<sup>105</sup>Mark L. Quinn, Director, Urban Programs Division, NJEDA, (7T at 141-146) Quarterly Minority Loan Report as of December 31, 1991, Exhibit IV, at 7.

<sup>106</sup>Bates, *Disparity*, at 1.

<sup>107</sup>Bates, *Availability*, at 10.

<sup>108</sup>Bates notes that the concept of small business ownership is never functionally defined in any useful fashion in U.S. Bureau of the Census databases that describe self-employment and business ownership. *Id.* at 11-13.

<sup>109</sup>Bates, *Disparity*, at 16.

based on the rapid growth of M/WBEs after the 1982 census data pending the 1987 figures.

Bates also relied upon the SAVI II bidders' list to measure availability. SAVI II is a list of only those businesses which have affirmatively indicated a willingness to do business with the State and which provide a service or goods that the State purchases. Therefore, SAVI II is a more limited measure of availability than the other sources upon which Bates relied. Bates determined that of the total vendors registered on SAVI II, 8.1% were MBEs and 10.4% were WBEs, for a combined availability of 18.5%.<sup>110</sup>

The Commission also requested an updated computer run on July 7, 1992, because many more firms had completed registration forms since the September 1991 database was created. As of that date, MBEs were 17% of the vendors who identified themselves as non-construction related and 19% were WBEs, or 36% combined. However, the remainder of the firms on the database are assumed to be non-construction related as well because construction firms need to be prequalified and tend not to register on the State bidders' list. Using that assumption, the number and percentage of M/WBEs on the SAVI II database, who are not construction related, is 14.7% of the total 30,600 vendors registered.

In stark contrast to the even more conservative measures of availability of M/WBE goods and services firms, Dr. Bates determined that the median share of New Jersey goods and services procurement dollars paid out to MBEs and WBEs over the 1984-1989 period was only 1.5% according to the Division of Purchase and Property (DPP) data. Dr. Bates concluded, "This huge disparity is, in my professional opinion, statistically significant at the highest levels of statistical significance."<sup>111</sup>

In making his analysis, Dr. Bates focused largely upon the Division of Purchase and Property (DPP) data because: (1) DPP provides centralized contracting for all 19 departments of the executive branch of State government; (2) DPP handles the majority of all State goods and services procurement, far exceeding the combined total of all other State entities that purchase goods and services independently of DPP; (3) DPP measures actual payments to vendors which is more accurate than reports that reflect only awards.<sup>112</sup>

#### ii. Construction Firms

To determine M/WBE availability of construction firms in the New Jersey area, Dr. Bates relied upon three sources.<sup>113</sup> First, Bates relied upon the previously described SAVI II bidders'

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<sup>110</sup>The actual numbers upon which these statistics were based were 27,219 total vendors registered, 2,211 MBEs and 2,832 WBEs. More importantly, since it has been determined, based on a study conducted by the DPP, that 95% of the contracts awarded by the DPP went to vendors on the SAVI II bidders list, Bates concluded that, "the universe of interested vendors is comprehensively represented by this State of New Jersey list." Bates, *Disparity*, at 15-16, citing the "Walk-In Report," dated April 24, 1991.

<sup>111</sup>Bates, *Disparity*, at 16. See also, "This huge disparity is in my professional opinion highly significant." *Id.* at 2.

<sup>112</sup>Contract awards do not guarantee that actual payments will be made under the contract and therefore relying only on contract awards, rather than actual payments, results in the overstating of the M/WBE share of State dollars. Dr. Bates concluded that this "slippage," disproportionately impacts minority businesses in two ways. First, because "MBEs in particular are smaller firms — newer firms, firms with less experience in selling to the State, and firms with less access to financial resources, compared to all vendors." Second, slippage disproportionately impacts upon minority subcontractors because non-minority prime contractors often negotiate to switch subcontractors after a contract has been awarded, despite the prime contractor's pledge to use minority subs. See Bates, *Disparity*, at 5-6. Evidence of this second example of "slippage" has been abundant throughout the Commission's investigation of public contracting. See also, further discussion, *infra* at §III.D.2(e); III.D.3(a).

<sup>113</sup>For analysis of construction procurement in New Jersey, the superior sources of data are the Department of Transportation (DOT), Department of Environmental Protection and Energy (DEPE) and N.J. Transit. These agencies consistently track the subcontracts awarded by non-minority prime contractors to minority and women subcontractors. In contrast, few other State units track subcontractors. Thus, as Bates points, New Jersey has no way of accurately tracking the complete M/WBE share of construction procurement. Bates, *Disparity*, at 7. It is, therefore, likely that

list. Of the construction firms on the SAVI II list, which did not at that time (September 1991) include DOT prequalified construction bidders, 44% of those who indicated they were construction related vendors were MBEs or WBEs<sup>114</sup>

Second, Bates drew upon the more selective DOT bidders' list, noting that MBEs and WBEs who work as subcontractors may not sign up on the DOT bidders' list because they are "not interested" in bidding for prime contracts.<sup>115</sup> Bates determined that "[o]f the eligible vendors on the DOT bidders' list [totalling 2171], 166 (7.6%) are certified MBEs and 129 (5.9%) are certified WBEs.<sup>116</sup> However, Bates notes that the DOT bidders' list is made up of only those firms which seek prime contracts with the State and which have been prequalified to determine the dollar limit and the type of work they are qualified to perform. "MBEs and WBEs seeking subcontracts only, tend not to go through the prequalification process and, hence, they are not on the DOT bidders' list."<sup>117</sup> Based on the SAVI II and DOT construction firm availability, Bates concluded "well over 25% of the total from both lists are MBEs and WBEs."<sup>118</sup>

Third, Bates relied upon the 1982 Census Bureau Data, which indicates that MBEs constituted 4.2% of all New Jersey small businesses in construction at that time, while WBEs constitutes 4.3%. Bates then estimates that given the very rapid growth of M/WBE construction firms in the 1980s, "a conservative estimate" of the M/WBE share of small New Jersey construction firms would be 10%.<sup>119</sup>

Construction data also reinforce the perception that targeted programs are necessary to insure fair participation by M/WBEs in the State's construction contracts. First, the State has most heavily utilized M/WBE vendors in the construction field. Even though overall availability of M/WBEs in the construction industry is relatively low, a very high level of availability is manifested in the State bidders' lists. This relatively high availability of M/WBEs for public work contrasts sharply with the number generally available in the New Jersey construction market. A breakdown of the construction related vendors currently on the State bidders' list indicates the following:

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tracking the complete M/WBE share of construction procurement. Bates, *Disparity*, at 7. It is, therefore, likely that their share of DBC expenditures was actually greater than the .5% high between 1984 and 1989 if all subcontract dollars had been counted. However, DBC (and some of the other units) usually do not put buildings out for bid as a single unit. Buildings are often bid by construction specialty— plumbing, electrical work, etc. *i.e.* as separate *prime* contracts. DBC records are therefore more reflective of dollars received by M/WBEs than if DBC requested bids on the building as a single project on which all specialties would be subcontracted.

<sup>114</sup>See, Bates, *Disparity*, at 18-19 for further description. Of the 1720 construction firms on the SAVI II list, MBEs are most heavily represented with 469 firms listed, including minority women and 311 non-minority WBEs.

<sup>115</sup>Bates, *Disparity*, at 18.

<sup>116</sup>*Id.* at 19.

<sup>117</sup>*Ibid.*

<sup>118</sup>*Ibid.*

<sup>119</sup>*Ibid.*

	Count	Percent	Women Owned Count
TOTAL CONSTRUCTION RELATED VENDORS	2313	100	553
MINORITIES	587	25	
BLACK	297	13	39
HISPANIC	152	7	26
ASIAN	109	5	16
INDIAN	3	1	1
PORTUGUESE	26	1	5
OTHER	347	15	
UNKNOWN	1379	59	
WOMEN-OWNED (NON-MINORITY)	466	20	
OTHER	145	6	
UNKNOWN	321	13	
TOTAL M/WBEs	1053	45	

Source: SAVI II July, 1992.<sup>120</sup>

Second, reflecting primarily the long and consistent influence of federal policies and requirements particularly of the U.S. Department of Transportation designed to encourage M/WBE utilization, three New Jersey agencies, the Department of Transportation (DOT), the Department of Environmental Protection and Energy (DEPE), and New Jersey Transit (NJT) have consistently tried to increase utilization of minority- and women-owned construction firms to meet their federal mandates and have adopted effective goals programs to do so. These agencies spend the bulk of the State's construction money, assisted by federal funds.

The finding of increased availability of M/WBEs when M/WBE goals are present has a dual significance for the Commission: it underscores the importance of aggressive implementation for successful outreach and it suggests that minorities and women will respond to increased opportunity. Uneven implementation between the programs impacted by federal dollars and policies — which tend to be aggressive — and those promulgated by the State, may skew the market just as badly as discriminatory practices.

#### b. Utilization

The data reflecting procurement by those State agencies which have been subject to federal mandatory goals (DOT, DEPE and NJT), demonstrates the higher utilization by those agencies than when only State funds, without goals, are used. The combined M/WBE construction procurement share of those agencies ranged from a low of 7.9% to a high of 18.1% over the six years 1984 through 1989.<sup>121</sup> In five of the six years, the combined M/WBE share was over 12% of the total construction dollars awarded to vendors. These few agencies aside, the State has consistently underutilized MBE and WBE contractors.<sup>122</sup> For example, prior to the enactment of the amendments to the Small Business Set-Aside Act in 1985, it is estimated that DBC's com-

<sup>120</sup>Vendors who are both minority and female account for 3.8% of the total construction vendors (87 of 2313), a level significantly lower than the percentage for MBEs or WBEs overall.

<sup>121</sup>Bates, *Disparity*, at 11-13. With respect to these three agencies, in 1989, which was the lowest year for the combined M/WBE share (7.9%), the MBE share was 4.9% and WBEs received 3%. The 18.1% high was obtained in 1986 when MBEs received 7.8% and WBEs 10.3%.

<sup>122</sup>*Ibid.*

bined utilization of M/WBEs in construction was only 1.3% in 1984 and .4% in 1985. It was not until 1988, when the Set-Aside Act was receiving full implementation, that the M/WBE utilization reached an estimated high point of 9.1%.<sup>123</sup>

The heavy utilization of M/WBE firms by New Jersey Transit, DOT and DEPE indicates that State agencies, when operating under mandatory goals, have been able to operate effective M/WBE procurement programs. The less than impressive record — absent federal compulsion — also suggests that even set-asides may not be effective without aggressive implementation by the user agency. Dr. Bates noted,

The efforts of the State of New Jersey in the realm of procurement from MBE and WBE firms — in the absence of federal compulsion — are not impressive. There is a wide and striking gap between the active affirmative procurement efforts of the few agencies, such as New Jersey Transit, and the MBE, WBE procurement track record of most New Jersey state agencies, authorities, commissions, colleges and universities.<sup>124</sup>

Bates also found that because of federal programs mandating utilization of minority- and women-owned firms, New Jersey Transit was successful in increasing its wholly State funded expenditures for goods and services procurement. He determined that the combined M/WBE procurement share for New Jersey Transit “ranged from a low 2.9% in 1984 to a high of 17.7% in 1989.”<sup>125</sup>

Bates was not as impressed with the DPP data which was not affected by mandatory federal goals for M/WBE utilization. That data indicated that the range of combined M/WBE utilization was only 1.1% to 3.9% over the 6 year period for the DPP combined M/WBE share. In four of the six years the M/WBE share was only 1.5% or less of the total procurement dollars paid out to vendors.<sup>126</sup> Dr. Bates also observed a slight upward trend in 1988 and 1989 of the M/WBE share based on the DPP data. The year that *Croson* was decided, 1989, before the race- and gender-neutral procurement regulations were adopted and implemented, minority- and women-owned businesses received the highest share of DPP procurement dollars of the six year period.<sup>127</sup> He concluded that this upward trend reflects the enactment and implementation of set-asides by the State of New Jersey.<sup>128</sup>

To illustrate the current dimensions of State purchasing activity, and the overall share minority- and women-owned businesses are currently deriving, Senator Wynona Lipman (D-Essex) provided a summary of that activity at one of the Commission’s Public Hearings. During fiscal year 1991, the DPP expended \$805,000,000 on vendor purchases of goods and services. Of that amount an estimated \$5,671,000 (.7%) was spent with minority-owned businesses and an estimated \$15,908,000 (2%) with women-owned businesses.<sup>129</sup> The DBC’s total awards

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<sup>123</sup>*Ibid.*

<sup>124</sup>Bates, *Disparity*, at 3-4.

<sup>125</sup>Bates, *Disparity*, at 8. Although both the DOT and the DEPE were also impacted by mandatory federal regulations requiring M/WBE utilization, these agencies relied upon the DPP for all of their goods and nonconstruction related services procurement, whereas New Jersey Transit purchased goods and services independently.

<sup>126</sup>Bates, *Disparity*, at 7-8.

<sup>127</sup>Bates, *Disparity*, Table One, at 11.

<sup>128</sup>As indicated above, minority and women business set-asides were adopted in December 1985 but did not become effective until June 1986; moreover, rules implementing them were not effective until 1987. Bates, *Disparity*, at 8. See also, *Statistical Data on Utilization*, Table One “Summary of Goods and Services Procurement Contracting Activity for State Agencies, Authorities, Commissions, Colleges and Universities” at 9 (Appendix A).

<sup>129</sup>Senator Wynona Lipman, Newark Public Hearing (1T at 14).

for 1991 were \$44,288,562; of this amount an estimated \$1,452,391 (3.3%) was awarded to minority- and women-owned businesses. Senator Lipman also stated that the DOT in its combined federal and state funded road building activities awarded a total of \$369,530,461 in construction contracts — an estimated \$23,258,979 (6.3%) went to minorities as prime or subcontractors; an estimated \$17,748,771 (4.8%) went to WBEs as prime or subcontractors. During the same year DOT awarded a total of \$31,953,237 in contracts for construction related professional services. Of that amount, approximately \$1,818,264 (5.7%) was awarded to MBEs and \$391,894 (1.2%) to WBEs.<sup>130</sup>

c. Disparity

Dr. Bates found a “wide disparity” between the availability of MBE and WBE firms in New Jersey and their utilization. For goods and services procurement, Bates found this “huge disparity” to be “highly statistically significant.”<sup>131</sup> In every area of state procurement, Dr. Bates found “that the data suggest the MBE and WBE firms are effectively being denied the opportunity to compete on an equal basis for their fair share of New Jersey’s procurement business.”<sup>132</sup> Since this measure of “availability” was based primarily on the State’s bidders’ lists of firms known to be ready, willing, and able to do business with the State,<sup>133</sup> we believe these statistics provide compelling evidence that minority- and women-owned businesses are intentionally excluded or do not share fairly and equally in State contracts.<sup>134</sup>

Another statistical method, the survey, was undertaken to determine the existence of discrimination attributable to the State.<sup>135</sup> The Commission provided its database (the “State bidders’ list”) to the University of Maryland, from which samples were drawn of African-American-, Hispanic-, Asian-, women- and nonminority-owned businesses. Dr. Samuel J. Myers, Jr., the Director of the program and chief investigator on the survey, conducted a regression analysis, based on a theory of disparate treatment.<sup>136</sup> Dr. Meyers’ analysis did not account for discouraged firms or firms which no longer existed because of discrimination. Findings from the survey therefore represent a conservative measure of discrimination.<sup>137</sup>

The focus for the survey analysis was a comparison between minority and non-minority firms and male-owned and women-owned firms of the probability of an award of a New Jersey contract, given the submission of a bid. The analysis examined the number and dollar value of bids submitted and awarded and attempted to determine the extent to which equally qualified firms were treated equally by the State’s contracting practices. Dr. Meyers established criteria

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<sup>130</sup>*Id.* at 9-15. Although DOT had generally higher expenditures for minority- and women-owned businesses, M/WBE participation was still substantially below their availability. Moreover, the figures concerning DOT expenditures are impacted by federal M/WBE goals.

<sup>131</sup>Bates, *Disparity*, at 1-2.

<sup>132</sup>*Id.* at 1.

<sup>133</sup>Bidders’ list indicates an explicit willingness to do business with the State, and is limited to firms which are selling goods or services which the State purchases. However, it provides limited information on the kinds (industry types) of businesses operated by M/WBEs, other than listing all the commodity codes for which a potential bidder seeks opportunities to bid. Therefore, Dr. Bates utilized Census Bureau data that identified M/WBEs and non-minority male owned firms by goods industries, including manufacturing, wholesale, auto dealers, retail building materials, and furniture stores, and service industries, including professional services, business services and finance, insurance and real estate services. Bates, *Availability*, at 55.

<sup>134</sup>See, e.g., *Croson, supra*, 488 U.S. at 502; *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed. 2d 768 (1977).

<sup>135</sup>The Commission contracted with the Afro-American Studies Program at the University of Maryland for a survey to compare the experiences of non-minority businesses and M/WBEs.

<sup>136</sup>Survey Comparing Minority/Women-Owned Business Enterprises To Non-Minority-Owned Businesses, at 5.

<sup>137</sup>*Ibid.*

for identifying current discrimination (1990), past discrimination (1980-1990), and continuing discrimination (both). Dr. Meyers found a "persistent pattern of discrimination against minority firms in the sample since 1980."<sup>138</sup>

Dr. Meyers projected the success rate for each minority group — African-American, Hispanic, Portuguese, and Asian and for women — and concluded that African-American, Asian-, Hispanic-, and women-owned firms have experienced lower rates of prime contract and subcontract awards in the past decade than they would have experienced in a discrimination-free environment. On the basis of probabilities of contract awards in 1990 to firms that actually bid on contracts, he found "there were statistically significant levels of discrimination" against African-American, Hispanic and Asian MBEs; WBEs were underrepresented among firms receiving contracts, but "were not discriminated against in 1990."<sup>139</sup>

In addition to the studies by Dr. Bates and Dr. Meyers, the Commission also considered Rutgers University's study of the DOT's awards of state funded contracts. The study found that on federally funded programs with mandatory goals, prime contractors utilized M/WBEs to a greater extent than they did on wholly State-funded projects with or without M/WBE requirements, even though DOT awarded all contracts.

After *Croson* and the suspension of State requirements, the WBE subcontractor share of DOT construction contracts dropped to 2.5% in 1989 and 0.4% in 1990. WBE subcontractors that had performed almost \$7 million dollars in contracts in the peak year of 1988 (12%) received less than \$1 million (.4%) in 1990 contracts. During the same period, the MBE subcontractor share of state funded projects dropped from a peak of 9.8% in 1988 to 4.2% in 1989 and even further to 3.3% in 1990. Federally-funded contracts with mandatory goals resulted in \$8,082,000 (3%) to MBE subcontractors and \$9,194,000 (3.4%) to WBEs in 1990.<sup>140</sup> Since all MBEs and WBEs available for either federal or State funded projects come from the same subcontractor's pool and there is a disparity in the participation between projects which require M/WBE utilization and those that do not, the study concluded that "unless there is an enforceable policy of inclusion for M/WBE these business enterprises will not obtain a significant share in dollars of government contracts."<sup>141</sup>

## 2. Anecdotal Evidence of Discrimination

One of the major components of the Commission's study was conducted by a team headed by the Director of the Rutgers University Constitutional Litigation Clinic. The Rutgers team assisted the Commission in preparing and receiving evidence from a number of witnesses regarding their experiences in trying to obtain State contracts. The Rutgers team also submitted a "Report on the Study of Anecdotal Witnesses" (hereinafter "Anecdotal Study") which summarized some of the testimony received and witness statements. We summarize here our findings from the witness testimony, the Anecdotal Study and the witness statements.<sup>142</sup>

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<sup>138</sup>*Id.* at iii.

<sup>139</sup>Dr. Meyers' test for "current discrimination", examined whether the number of firms in existence (as represented by the sample respondents) received about the same ratio of awards to bids made as did nonminority males. His test for statistical significance is the test to prove intentional discrimination. He did not test for disparate (or adverse) impact.

<sup>140</sup>DOT Study, Table A. These figures represent subcontracting dollars spent on M/WBEs. Any funds spent on M/WBE prime contractors is not included.

<sup>141</sup>DOT Study, at 26. In fact, one interviewee in the DOT study estimated his firm's loss after the *Croson* decision was issued, to be between 30 and 40% of his business.

<sup>142</sup>Although the Commission questioned the witnesses at the hearing and accepted exhibits in evidence, it did not conduct an independent investigation into each witness's allegations.

**a. Purchasing And Contracting For Goods and Services**

Witnesses, including individuals, group representatives, representatives of economic development organizations and local government units, testified to the existence of discrimination in purchasing and contracting for goods and services. For example, Shirley Rutherford, the Director of Jersey City's Minority and Women's Business Enterprise Program, testified that without M/WBE requirements in place, procurement officials tend to utilize the contractors they are accustomed to dealing with rather than reach out to minority and women vendors, particularly in the large percentage of contracts which fall under the required public bidding threshold.<sup>143</sup> A similar example was presented by Shirley Suttles Marsh, the former municipal manager of Lawrence Township. Ms. Marsh testified that she was told by at least one contractor that he would not be utilizing any minority subcontractors because he was no longer required to do so under the law in New Jersey.<sup>144</sup> In addition, Tina Watson of the University of Medicine and Dentistry testified that since M/WBE vendors of goods and services were no longer covered by set-asides or utilization requirements, she was unable to contract with M/WBEs because they were rarely the low bidders and she, by law, was now restricted to the lowest bid. She also could not convince her suppliers, such as Johnson & Johnson, to use M/WBE vendors because her suppliers were no longer required to do so.<sup>145</sup>

**b. Overt Sex Discrimination Including Sex Harassment**

Bidding practices can be manipulated to permit prime contractors to give contracts to friends or relatives, thereby closing out minority or women contractors who are not yet established in the field. A white woman engineer reported that her firm was forced off a surveying job by a general contractor who replaced her with a friend who took longer and charged more to do the work.<sup>146</sup> Another woman testified about sexual harassment by an electrical contractor. When, as a sales representative for a card access manufacturer, she sought to bid on an electrical contract, the electrical contractor told her that her company would have a better chance of getting the job if she slept with him. She did not agree to his proposition. Her company did not get the job.<sup>147</sup>

Women business owners have been subjected to biased statements, indicating a startling degree of acceptance of overtly sexist conduct. A white woman who is the sole proprietor of a company that owns and leases buildings testified that when she attempted to lease her buildings to the State she was told by a State leasing official that "we do not lease from women, Janice."<sup>148</sup>

A white woman residential real estate appraiser who owns an appraisal business with her husband has noticed that some lending institutions treat her husband with more respect. The lenders listen to his requests and comments more seriously. She is so accustomed to subtle differences in the treatment of women and men business owners that she has learned to take these occurrences for granted.<sup>149</sup>

**c. Overt Race Discrimination**

The testimony before the Commission also disclosed that the absence of aggressive moni-

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<sup>143</sup>Shirley Rutherford (5T-28).

<sup>144</sup>Shirley Suttles Marsh (6T-31).

<sup>145</sup>Ernestine Watson (5T-13).

<sup>146</sup>Noel Jablonski, *Anecdotal Study*, at 24.

<sup>147</sup>Karen King (1T-77 to 83).

<sup>148</sup>Janice Baykal (1T at 84-90).

<sup>149</sup>Kathleen Gage (1T at 312-313); Witness Statement.

toring and targeting programs enable contractors to exclude minority and women subcontractors and to award work to their friends and business associates. For example, an African-American man reported that one of his employees, who had formerly worked for his well-established chief competitor, told him that the competitor was secure in the knowledge that the witness's firm would never win the contract so long as the "right people were still in place."<sup>150</sup>

A witness who is the president of a 100% minority-owned company which operates pile driving machines in marina construction, testified that he found it difficult to get work because the union put pressure on the general contractors not to subcontract with his company. The union members would only take orders from the hiring hall, not from the witness, and the union hall would order workers to walk off the job. A retired union official told the witness that the union was controlled by pile driving contractors, and that these contractors put pressure on the union to cause these problems. The witness also testified that the union refused to accept his workers as members of the union. A union member who worked on a job with the witness told the witness that the union did not want the worker as a member because he was black, and the union had blacks in their own union and didn't want any more. The witness testified that these problems have resulted in a slow down of work. Furthermore, the union's hostility to his firm has been such that it has contacted potential clients to warn them not to award bids to the witness's company.<sup>151</sup>

Another witness, an Hispanic man, testified that he had worked for many years as an electrical engineer for large construction companies owned by white males. He had always been highly regarded and he gained valuable experience in these positions. He expected to be able to capitalize on his good reputation and experience when he set up his own firm. Instead, he discovered that the firms he used to work for did not want to let his fledgling business into the inner circle. Doors were closed to him when he sought subcontracting jobs with these firms.<sup>152</sup>

An African-American male car dealer testified that when the State wishes to purchase vehicles, the "old boy" network operates to exclude him from the bidding process. He maintains that one of the so-called "mega" car dealers in New Jersey actually helps to write the bid specifications for the State. Not surprisingly, this particular white male owned car dealership manages to win the right to supply the State with vehicles under these contracts.<sup>153</sup>

An African-American woman who owns a real estate appraisal business testified that in an effort to obtain experience as a commercial appraiser she sought a volunteer position with a commercial appraising firm. No white-owned appraisal firm would hire her. One firm told her that she should talk to an African-American appraiser, as if to acknowledge that no white company would hire her. This witness, the sole owner of a real estate appraisal business, was unable to get appraisal jobs from banks, including banks that had used her successfully, then stopped using her. Furthermore, despite the fact that she was the only minority appraiser at a meeting in which Prudential Mortgage Company said that it needed appraisers, she was never contacted by Prudential after she submitted her application. Finally, she has been unable to obtain internship positions at mortgage companies to learn commercial appraising. The lenders involved included banks that work with the HMFA through programs such as the First Time Homeowners Program.<sup>154</sup>

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<sup>150</sup>Stanley Matthews (2T at 112-124).

<sup>151</sup>Sylvester Thompson (2T at 9-12).

<sup>152</sup>John Vera (1T at 295-300).

<sup>153</sup>John Givens (1T at 324-326);(2T at 90-97).

<sup>154</sup>Almeta Walker (1T at 31-35).

**d. Race And Sex Discrimination In The Bidding System**

An African-American male who owned a bus company reported that although he submitted bids to New Jersey Transit for park and ride services that were lower than bids submitted by a large competitor (who received one of the contracts), his bids have always been rejected. This held true even after the witness offered to change the circumstance that New Jersey Transit claimed was the basis for one of the rejections.<sup>155</sup>

Another Hispanic male witness testified that he submitted the low bid for a contract with the housing authority four times. Each time he submitted the low bid, the housing authority did not award the contract. Instead, it put the job out for bids again with minor changes in the specifications. When he finally tired of useless bidding, a white male contractor got the job.<sup>156</sup>

A further example of a problem with bidding was presented to the Supreme Court Task Force on Minority Concerns through its public hearings. An African-American businessman, with expertise in the area of sludge disposal, complained that he was the low bidder before the Ocean County Solid Waste Management Plant and the Burlington County Solid Waste Management Plant but was denied contracts which he believed were in the public interest. He sought an injunction and was denied relief by municipal courts. He claims that despite the State's policy in 1988 to assist minority businesses, he experienced a concerted effort to reject his services. The witness testified that he had support for his innovative method of sludge removal from the Department of Agriculture and Rutgers University experts.<sup>157</sup>

An African-American-owned architectural firm experienced difficulty after working on a project for New Jersey Transit for four years when new staff at New Jersey Transit began demanding information not required by the contract, processing invoices more slowly and generally giving the firm a hard time. The owner of the firm heard that someone in management of New Jersey Transit allegedly said he wanted to "get those guys." The owner believes that this is because his business is a African-American firm.<sup>158</sup>

An Hispanic male civil and structural engineering consultant, reported that although his bid to the Newark Housing Authority for engineering design services was lower than the bid submitted by a firm owned by a white male, his bid was rejected and the white-owned firm won. This witness chose not to pursue a claim against the Housing Authority because the cost of litigation would have been prohibitive.<sup>159</sup>

A civil engineering company owned by an Asian woman was not seriously considered for a traffic counting project despite submitting the low bid on the project. The owner testified that, when she pressed for an explanation the appropriations officer told her the competing firm, owned by a white man, had submitted a more detailed proposal. She later discovered from the owner of the successful firm that he and the appropriations officer had been friends for many years.<sup>160</sup> In another incident, the witness's inability to obtain a contract for traffic survey services might have been as much attributable to her national origin as to her gender. The contract went to a company owned by a white man.<sup>161</sup>

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<sup>155</sup>Arthur McClendon (1T at 18-25).

<sup>156</sup>Edward Rubio (1T at 307).

<sup>157</sup>Mr. Lewis' testimony was forwarded to the Commission by Dr. Yolanda P. Marlowe, staff of the Task Force. Neptune Public Hearing at 439-441 (February 27, 1990).

<sup>158</sup>Larry Johnson (1T at 274-294).

<sup>159</sup>August Lozano (1T at 179-184).

<sup>160</sup>Esty Parlanti (1T at 72-76).

<sup>161</sup>Esty Parlanti (1T at 72-76).

This testimony as well as other testimony before the Commission leads the Commission to conclude that when the bidding system rewards inside knowledge and private contacts, minorities and women in business are more likely to be excluded than are white males. Moreover, M/WBEs develop expectations that the process will be manipulated to exclude them. With that expectation, M/WBEs often conclude that further efforts on their part will not succeed and therefore, there is evidence that those M/WBEs do not compete in certain markets as vigorously as they otherwise would.

e. Prime Contractors Abuse Of M/WBE Subcontractors

Minority and women contractors have been used by companies to get prime contractors to lower their bids. One Asian woman who owns an engineering and surveying firm testified that it is common knowledge that M/WBEs are asked by contractors to bid on a job but then never get the contract. She was told that the big companies ask for minority bids because they use the inevitably lower bid price to pressure the subcontractor they already have lined up to submit a lower price.<sup>162</sup>

An African-American male witness noted that it is not uncommon for a prime contractor to require multiple combination bids from each subcontractor for a single job. A painting contract for a complex of water towers required that subcontractors submit separate bids for using different grades of paint and painting different portions of the towers. The witness explained that the contractor collected five or six separate bids from each subcontractor for essentially the same work. The witness was the low bidder in the majority of individual categories, but did not receive an award of any portion of the contract. The prime contractor was apparently able to award the contract to a member of the prime contractor's extended family, by electing to proceed with the one category in which that subcontractor was the lowest bidder.<sup>163</sup>

The Commission was also told that prime contractors sometimes manipulate the bid process by modifying the contract specifications subsequent to the initial release of the bid specifications. One African-American male witness explained that shortly after issuing bid specifications, the prime contractor released amendments which had a material effect on subcontractors' final bids. Only selected, white subcontractors received the revised specifications and as a result enjoyed a substantial advantage when bids were submitted.<sup>164</sup> Witnesses complained that it is not uncommon for prime contractors to discard initial bids, which in some cases the witnesses had been the lowest bidders, and readvertise the contract with almost the same specifications as the initial project. As one white woman witness explained, once the first bids become a matter of public record it is easy for friends of the primes who are also vying for the contract to resubmit bids which assure success in the second round. In effect, this practice defeats the benefits of closed bids. Competing subcontractors can simply wait until the job is readvertised to underbid the minority contractor who should have won the bid in the initial round.<sup>165</sup>

Alternatively, prime contractors can, with apparent ease, assure that minority and women subcontractors will never even have the opportunity to submit timely bids for projects. One Hispanic male reported that it is common for him to receive invitations to bid on projects just one day before bids are due or, even worse, after bids have expired.<sup>166</sup>

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<sup>162</sup>Esty Parlanti (1T at 72-76).

<sup>163</sup>*Anecdotal Study*, at 17.

<sup>164</sup>*Id.*

<sup>165</sup>Sylvia Farro (1T at 176-178).

<sup>166</sup>Esteban Kiguelman (1T at 221-225).

Thus, when unwilling contractors feel compelled to solicit the participation of minority- and women-owned businesses to comply with legal requirements or company policies, additional tactics have emerged which permit the appearance of compliance, but not actual compliance.

Similarly, subcontractors report that they are often invited to submit bids or participate in contracts for which they do not have sufficient bonding. With assurances that their bonding deficiencies will not pose a problem, the minority and women business owners agreed to participate. After the prime contractors won the contracts, they inform the minority businesses that on further consideration the bonding deficiencies will, in fact, preclude their participation.<sup>167</sup>

#### f. Credit Discrimination

Evidence of discrimination against M/WBEs regarding denial of financial assistance is illustrated by the white woman who is the sole owner of an engraving company. Despite an established business track record she was denied a loan. She was certain that her gender was the reason a bank required her to put up her house as collateral to obtain a loan to purchase a \$10,000 piece of engraving equipment.<sup>168</sup>

A woman with a chemical engineering degree and a Ph.D in Business Management was not taken seriously by banks when she applied for funding to set up a business in a distressed economic area, despite her education, her experience with successful contracts for projects in Indonesia, and offers of financial support from foreign banks.<sup>169</sup>

An additional example of such discrimination was the testimony of a white woman contractor was told by a loan officer that she was denied a loan because it was possible for her to become pregnant and therefore her business would fail.<sup>170</sup>

An African-American woman, who is a pediatric dentist in Camden, faced serious difficulties when trying to secure a loan for \$125,000 to establish her practice in 1989, despite her extensive academic and professional credentials. Ultimately, she received a loan for half the amount requested and was required to have her husband co-sign the loan. She maintains that her race and gender caused her difficulties with lenders and believes that similarly situated white males would not have had difficulty securing at least as much financing as she originally requested.<sup>171</sup>

An African-American woman who owns a liquor store and delicatessen felt that she was a victim of unfair treatment when she tried to get a loan to start her business five years ago. The bank refused to accept the business property as collateral and insisted that she put up her home to secure the loan. She is certain that the bank denied the loan because she is African-American.<sup>172</sup>

A certified public accountant and the Chief Executive Officer of an accounting and investment services firm in Camden described the myriad problems he faces on behalf of his largely Hispanic and women clients. According to him, minority business owners in Camden have great difficulty securing financing from either state agencies or banks because of their minority status and because of depressed market valuations for real property in Camden. He also tes-

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<sup>167</sup>*Anecdotal Study*, at 19.

<sup>168</sup>Mary Ellen Connell (2T at 86-89).

<sup>169</sup>*Anecdotal Study*, at 31.

<sup>170</sup>Ellen Moody (3T at 108).

<sup>171</sup>*Anecdotal Study*, at 32.

<sup>172</sup>*Id.* at 29-30.

tified that although many of his clients were unable to obtain HUD residential mortgages because their buildings were in disrepair, the same banks were hesitant, if not absolutely unwilling, to lend money to minorities to make home improvements that would increase the equity in their home and support mortgage financing.<sup>173</sup>

An Hispanic man who owns two retail jewelry stores successfully secured a loan from a bank for his first store in Camden in 1989. Although the store has enjoyed strong sales, outperforming all projections, and has easily met all loan payments, he faced difficulty when he tried to secure a loan for a second store to be opened in Pennsauken. Although the bank's loan officer was very encouraging and the witness left the bank with the impression that the loan would be approved, many months later, without any intervening communication, the loan was denied. The bank did not give any adequate explanation for the decision. Another commercial lender had no problem lending him the full \$175,000.<sup>174</sup>

An African-American man who owned a restaurant in Camden testified that his business was denied a \$250,000 loan he needed despite the fact that he had \$150,000 in cash and a half million dollar business. The local financing agency informed him that it would not provide the loan because of his lack of experience in the restaurant business. Instead, it gave a large loan to a similarly situated white businessman who was opening a restaurant only ten doors away. The witness was forced to resort to an alternative lending institution, at a much higher interest rate, for the financing he needed.<sup>175</sup>

An African-American man who founded and is the major shareholder of a travel agency also had problems obtaining a bank loan when he began his business in 1985. He was told that his business lacked liquidity. When he tried to secure another loan from a bank in Philadelphia, he was told that the bank was not investing money in Camden. He was also refused a loan from a bank on the asserted grounds that he was not taking out a large enough loan.<sup>176</sup>

An African-American male owner of a trucking services company felt that he was treated unfairly when he attempted to secure credit at a New Jersey bank in Bromley, New Jersey. After reviewing his loan application, a subordinate bank official told him that he qualified for a small business loan. The loan was then denied by the official's supervisor after he met the witness and was able to see that the witness was African-American.<sup>177</sup>

The African-American male owner of a new car dealership in East Orange found that some banks did not want to provide retail financing even though he deposited a substantial sum with them. Although he was told this was because his business had been established for less than three years, in fact, he has been in the car dealership business for 28 years. Many banks that refused to deal with him indicated that they do not engage in unfair treatment due to the fact that he is African-American and that his business is in an inner-city minority neighborhood.<sup>178</sup>

An Hispanic male sole owner of a general construction firm has had to prove his capability every time he applies for a loan. He believes that commercial credit would be extended to him more readily if he were not Hispanic. His attorney for the past ten years stated in a letter that:

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<sup>173</sup>Jose De Jesus (2T at 16-22).

<sup>174</sup>*Anecdotal Study*, at 31-32.

<sup>175</sup>Roger Crawford (3T at 118-125).

<sup>176</sup>*Anecdotal Study*, at 31.

<sup>177</sup>*Id.* at 28.

<sup>178</sup>John Givens (1T at 324-326); (2T at 90-97).

Despite his success [Mr. Fernandez] has never been able to break into the financial circles which would have permitted him to construct multi-unit or multi-family developments. I have had other developer/builders who I have introduced to various financial sources and after a two or three year track record with that institution they could virtually obtain financing for any project they desired to purchase and develop.

By way of contrast, Richard Fernandez always seemed to get the odd spot lot and cast offs of other developers and was not considered for the larger projects when that type of financing was available during the 1980's.

There is no explanation except those feeble excuses given by the bankers . . . or other similar non-answer excuses.

In my opinion if Mr. Fernandez had changed his name to Ferdinan he probably would have obtained the loans.<sup>179</sup>

g. Stereotyped Perceptions of Women and Minorities

Many witnesses testified that they had been wrongly accused of acting as fronts for non-minority businesses. These false accusations appear to have been based on the discriminatory stereotype that minority and women contractors are unable to manage businesses. One African-American man had his certification application denied, even though he was a 51% shareholder of his business, because the 49% shareholder was a nonminority person. When he went to a meeting to discuss his certification, he found the State's consultant to be condescending and demeaning. The consultant said he would have granted certification if the business were all African-American, and suggested that the witness go to a bank for financial assistance, rather than obtain an investment from a white partner.<sup>180</sup>

One witness described her experience in trying to obtain a contract with a male partner. She was the sole owner of a construction corporation and was asked by a white man to go into partnership. When she approached an official of the Port Authority of New York and New Jersey, he informed her that even if she owned a majority of the jointly held company her certification as a woman-owned business would never be approved. He said that the Port Authority would never believe that a woman was "calling the shots" if her partner was a male contractor. She therefore abandoned the plan of joining with a male partner.<sup>181</sup>

A white woman appraiser stated that private clients blatantly stated that they assumed she would be incompetent as an appraiser because of her gender.<sup>182</sup>

Another white woman, who owns a photography studio, testified about discrimination by men in advertising agencies. When they review her photography portfolio they sometimes express doubt about the legitimacy of her work. She has heard statements such as "Oh, dear this is a technical thing, did you take this picture?" and "Oh, you do architecture too. Did you take this picture?" One agent asked, "How long have you and your husband had your photography business?" The agent evidently assumed, falsely, that the witness could not have done the work without the participation of a man. The witness understands that she and other women would not have been subjected to such disbelief and questioning if they had been men.<sup>183</sup>

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<sup>179</sup>Richard Fernandez (1T at 220); Witness Statement.

<sup>180</sup>Roger Pollard (1T at 91-133).

<sup>181</sup>*Anecdotal Study*, at 15.

<sup>182</sup>Kathleen Gage (1T at 312).

<sup>183</sup>Andrea Kraus (2T at 106-111).

An African-American woman, who sells fuel, testified that she was treated with derision and inaction by the fuel buying agencies, even though she showed evidence of successfully landing contracts for other projects in Indonesia. According to her, there are no other women in the fuel business in New Jersey. She is very dismayed at being let down by her country when she was taken seriously abroad.<sup>184</sup>

The African-American male owner of an electrical mechanics company testified that his competence was doubted because he was a minority contractor. When he received a subcontract to install telephones, closed circuit televisions, and fiber optic relay equipment for New Jersey Transit, he hired a nonminority consultant to assist on the job. New Jersey Transit's representatives began dealing exclusively with the witness's consultant, rather than with the witness himself, directing all questions and change orders to the consultant. When the witness severed his association with the consultant, New Jersey Transit suggested that the consultant be rehired. The engineer from New Jersey Transit apparently believed that the witness's minority-owned firm was incapable of completing the work without the nonminority consultant. When it became clear that he was not willing to reinstate the consultant, the general contractor terminated the witness's contract and New Jersey Transit Police escorted the witness's employees off the work site. Although New Jersey Transit had earlier told the witness that it would assist him in securing bonding, the bonding suddenly became a stated reason to dismiss the witness from the work.<sup>185</sup>

An interviewer from New Jersey Transit asked an Hispanic male witness if all people in Puerto Rico consider themselves white. The interviewer added that if the witness changed his last name he would not experience discrimination because he does not look Hispanic. The witness experienced delay in obtaining certification as a Disadvantaged Business Enterprise. When he told the Department of Commerce about this questioning he was immediately certified. He was told that had he been applying for the classification in janitorial service rather than in construction he would not have had a problem.<sup>186</sup> This witness also told an interviewer that he established his business in his wife's first name, rather than his own last name, so that potential customers would not reject his firm for being Hispanic-owned.

Another male Hispanic witness had the unpleasant experience of listening to a business acquaintance, who mistook him for Italian, refer to Hispanics in condescending and stereotypical terms.<sup>187</sup>

Another Hispanic man in the construction business described a site inspector who continually harassed him with anti-Hispanic slurs and insinuations.<sup>188</sup>

#### h. Problems with Set-Asides

The Rutgers Study Team was struck by the prevalence of complaints about the operation of the New Jersey's system of MBE/WBE set-asides. Notwithstanding their obvious need for assistance, many minority and women business owners complained to the Rutgers Team about the procedures and enforcement of existing affirmative action programs. In particular, almost everyone who has sought any kind of certification reported having been overwhelmed by the inordinate paper work. They are all exasperated with the absence of a single, uniform certification procedure for New Jersey and interstate agencies.<sup>189</sup>

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<sup>184</sup>*Anecdotal Study*, at 14.

<sup>185</sup>*Anecdotal Study*, at 12.

<sup>186</sup>Richard Fernandez (1T at 235).

<sup>187</sup>*Anecdotal Study*, at 9.

<sup>188</sup>Edward Rubio, (1T at 307).

<sup>189</sup>*See, e.g.* Roger Pollard (1T at 92).

Ironically, during the same period in which the burdens of the certification process discouraged bona fide minority and women business owners from seeking desperately needed assistance, loopholes permitted some nonminority business owners to subvert the system by establishing minority- and women-owned fronts. The existence of fronts underscores the need for meaningful assistance to minority and women business owners. If established nonminority businesses can exploit and exclude minority- and women-owned businesses even in situations where they are supposed to have benefits, it will be extremely difficult for them to compete effectively in an uncontrolled market.

**i. Wage and Sex Discrimination**

Several women who started their own businesses testified about discrimination they suffered in their fields when working as employees of others. A white woman testified that she discovered that the company she worked for employed a man in the same position but at \$75 a week more. When she confronted her boss he said he would give her a \$25 a week raise, but would not consider her for the same rate the man was receiving. Shortly after that episode she decided to open her own business.<sup>190</sup>

Another white woman testified that a fire protection company paid her, its only woman sales representative, less than her male counterparts. When she asked for increased compensation, she was told that she did not have to worry about money because she was married.<sup>191</sup>

**3. Passive Participation and Other Barriers**

**a. The State Has Passively Participated In Private Discrimination Insofar as State Prime Contractors In Construction Have Refused To Use Minority or Women Subcontractors.**

As one statistical analysis shows, the State has underutilized women and minority businesses in construction practice. Evidence from the Rutgers Study and from witnesses who appeared before the Commission strongly suggests that this underutilization is due in part to the refusal of white prime contractors to use women and minority subcontractors. This finding is supported by a number of Commission witnesses, both minorities and women, who testified about this form of discrimination.

**i. The State Has Been Aware of Discriminatory Practices in the Construction Industry – the Denial of Equal Employment and Other Opportunity to Minorities and Women – But Has Continued to Contract with Discriminatory Contractors.**

In a study conducted for the Commission, “Unions and the Construction Industry in New Jersey: Barriers to Entrepreneurship,” Professor Edward Montgomery examined the role of discrimination in limiting the number of women and minorities in the construction industry. Montgomery’s study found that women and minorities are in fact “substantially underrepresented” as owners of construction firms.<sup>192</sup> He then traced the connection between this underrepresentation as business owners, and discrimination against women and minorities in construction employment and construction apprentice programs.

Montgomery found that women, African-Americans and other minorities were substantially underrepresented as workers in the construction industry, and particularly in the high paying craft jobs. This is significant not only as evidence of ongoing discrimination in the industry, but also because, as further discussed below, access to the skilled craft trades is a sig-

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<sup>190</sup>Deborah Ayres (2T at 98-105).

<sup>191</sup>Karen King (1T at 77-83).

<sup>192</sup>Montgomery, *Unions and Construction Industry*, at 6.

nificant factor in entering into contracting business as an entrepreneur. While 90% of white males in the construction industry are in skilled trades, only 72% of African-American males and 80% of Hispanic males so employed are in the craft trades. He also found that 86% of white women and 75% of African-American women in construction are employed in craft trades.<sup>193</sup> It must be remembered that an extremely disproportionately small number of women and minorities are employed in the construction industry to begin with. Women, for example, comprise 43% of the population in New Jersey, but in 1980 only comprised 7% of all construction workers. Likewise in 1980, African-Americans comprised approximately 10.4% of the population but only 3% of all construction workers. Hispanics and other minorities comprised 7.4% of the New Jersey population but only 2.8% of the construction workforce.<sup>194</sup>

The evidence that there was pervasive discrimination in the construction industry in New Jersey is substantial. As one commentator put it:

The construction industry long has been among the most notorious segments of the economy in which employment discrimination was an almost universally practiced tradition. The high hourly pay rates in this industry made this situation that much more insidious. By tradition, women were excluded from all of the construction trades. Many trades were dominated by different ethnic groups with blacks being relegated to the lowest paying trades and most menial work — when allowed into the trades at all.<sup>195</sup>

Most of the basic patterns followed in the industry have been declared illegal and for almost twenty years the industry has been under court orders to take affirmative action in employment and — for more than 10 years — in subcontracting and purchasing of goods and services. Through it all, the State has been aware of the problems and has attempted through litigation, law and regulations to deal with it. Yet, the State has continued to expend State moneys with the industry, using a labor force and contractors which it knew were the product of discrimination. In this way, the State passively participated with private industry in a system of race- and gender-based exclusion and failed to take adequate steps to dismantle such a system.

The patterns of participation (or lack of it) by minorities and women in construction employment carries over to limit the number of minority- and women-owned construction firms. According to Bates only 4.2% of the State's construction firms were owned by women and only 4.3% were owned by minorities.<sup>196</sup> African-Americans and Hispanics accounted for the vast majority of minority-owned firms and they had average sales that were twice those of Asian contractors. Nonetheless, these firms tended to be quite small, with average gross receipts of less than \$100,000 for women-owned and \$50,000 for minority-owned firms.

In examining the barriers to women and minorities in construction, Dr. Bates demonstrated that formal education has not been a barrier handicapping minorities or women from forming construction firms.<sup>197</sup> In fact, among the self-employed nonminorities in construction, he found that over 70% have no formal education beyond high school. Similarly, 80% of New Jersey self-employed minorities working in construction have not gone beyond high school. Dr. Bates noted that skills specific to running construction firms are acquired through work experience in the industry, often in conjunction with apprenticeship training programs.

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<sup>193</sup>*Id.* at 15.

<sup>194</sup>*Id.* at 11-19.

<sup>195</sup>Alvin Goldman, *Labor Law and Industrial Relations in the United States of America*, §907 at 348 (2d ed. 1984).

<sup>196</sup>Bates, *Availability*, at 51-52.

<sup>197</sup>Bates, *Availability*, at 72.

He suggests that “[t]he major barrier to MBE and WBE firm progress in the New Jersey construction industry lies in the restricted access that minorities and women have faced when they sought employment and training in the industry.”<sup>198</sup>

## ii. Women in Construction

By 1985, 10.1% of workers in the construction industry in New Jersey were women. However, this percentage includes clericals in the construction industry, who are largely women, as well as women in the trades.<sup>199</sup> In 1987, the National Commission on Working Women found that women held less than 2% of construction jobs and about 7% of the engineering positions in New Jersey.<sup>200</sup> That year, New Jersey ranked 44th among the 49 states for which there were data on the percentage of women working in heavy construction on federally-aided bridge and roadbuilding projects with 2.9% or 106 women – up from 33 women – or 1.3% – a year earlier and up substantially from 1983 when only 14 of 1,939 tradespeople (or 0.7%) were women.<sup>201</sup> Thus, construction was, and remains, an overwhelmingly male industry in New Jersey. However, women in the construction pipeline have increased eightfold in four years.

Most of the increase of women in the trades has occurred since April, 1980 when the Presidential Executive Order 11246 was expanded to require affirmative action goals for women. The federal government requires private contractors on federally funded highway projects to make “good faith efforts” to hire 6.9% women per craft, per job. Despite the federal employment goals, in 1987 only 21 states had greater than 6% women in their construction workforce. The increase in New Jersey was largely due to the work of the Women in Construction Task Force, a coalition of union, contractor, and New Jersey government representatives, organized by then Commissioner of Transportation Hazel Frank Gluck. In 1988, New Jersey had moved from 50th when Gluck took over to 40th, with 3.1% women working in roadbuilding construction. The New Jersey Department of Transportation increased the number of women within its own maintenance crews from 25 to 95 in 1989 (8% of the Department workforce in 1989).<sup>202</sup>

The Gluck Report describes the problem of sexual harassment of women construction workers.<sup>203</sup> Moreover, the Gluck Report also reports that in a survey of construction contractors, two-fifths of those surveyed expressed overtly discriminatory attitudes toward women construction workers, asserting that women construction workers cannot do the job as well as men.<sup>204</sup>

## iii. History of discrimination in construction in New Jersey

The exclusion of women and minorities particularly from the high paying craft jobs in

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<sup>198</sup>*Ibid.*

<sup>199</sup>Cavin, *Gender*, citing Stanwick, “Women in Construction: Moving Women into New Jersey’s Roadbuilding Industry” (1988), at 43 (hereafter the *Gluck Report*) (Appendix D to Cavin, *Gender*).

<sup>200</sup>Cavin, *Gender*, citing Adrienne Scerbak, “Promoting the Entrance and Retention of Women in Engineering and the Construction Trades,” Program for Women in Engineering and Construction, N.J. Institute of Technology Report (1990).

<sup>201</sup>Cavin, *Gender*, at 19-21, citing Dr. Louis Pignatoro and Adrienne Scerbak, “Report on the Six Month Study for the Establishment of the Program for Women in Engineering and Construction,” submitted to NJDOT and Port Authority of New York and New Jersey (March 1, 1990).

<sup>202</sup>African-American employment in construction also tripled between 1940 and 1980, from 3,258 to 10,309. The share of total employment accounted for by the construction industry declined, however, from 4.3 to 3.0 for African-American males.

<sup>203</sup>*Gluck Report*, at 56-58.

<sup>204</sup>*Id.* at 45.

New Jersey has a long history. From the original protests at Barringer High School in Newark in the early 1960's the evidence of discrimination in construction in New Jersey includes: (1) the case of Rutgers University against several contractors and the unions which represented their workers;<sup>205</sup> (2) findings of the U.S. Department of Labor's investigation of discrimination in the New Jersey construction industry<sup>206</sup>; (3) the decision in *Joyce v. McCrane*,<sup>207</sup> upholding an affirmative action plan by the State requiring contractors before bidding on the construction of the New Jersey University of Medicine and Dentistry to agree to require unions to admit minority workers to membership because of the "discriminatory practices of the unions in the past"; (4) suits by the U.S. Attorney General against various unions, associations of contractors and apprenticeship committees<sup>208</sup> finding patterns of discriminatory selection, referral, training, etc. against 4 craft unions; (5) the decision in *United States v. International Union of Elevator Constructors, Local No. 5*,<sup>209</sup> and (6) results of EEO-1 and 3 reports submitted to the Equal Employment Opportunity Commission.<sup>210</sup>

The patterns of discrimination found in those reports and cases, and cases elsewhere, were typical of construction industry practices in New Jersey: recruitment, hiring, training, referral and access to union membership all discriminated against minority groups and women on the basis of race, color, sex, and national origin. This pattern of discrimination was founded in the structure of the industry. The construction industry is made up of many relatively small contractors who combine in associations through which they conduct many of the chores of management, most notably those connected with recruiting, training, managing, and compensating their workforce.

Contractors — both general and specialty — typically have few permanent employees. For the general contractor, the subcontractors (who supply their own workers) in effect, take the place of the general contractors' work force. Despite the fact that the law has generally recognized the business relationship between general and subcontractors in the construction industry as being separate and independent, these independent contractors fulfill the function — and take the place — of those who, in other industries, would be middle management. Their employees — hired for the job — come from the union. Thus, subcontractors work for a general contractor over a relatively short time: their employees' jobs last only as long as the work, and construction workers usually work for many different employers during a year. The industry

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<sup>205</sup>*Rutgers, The State University of N.J. v. International Association of Bridge, Structural and Ornamental Iron Workers, et al.*, before the N.J. Division of Civil Rights, Docket No. E 7 UR- 2419.

<sup>206</sup>See *U.S. Department of Labor Report*; Hearings held March 18 and 20, 1970.

<sup>207</sup>320 *F.Supp.* 1284 (D.N.J. 1970)

<sup>208</sup>*U.S. v. United States Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada Local Union No. 24*, 364 *F.Supp.* 808 (D.N.J. 1973), (racial discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Executive Order 11246 forbidding employment opportunities by government contractors). Suit was brought against the "plumbers"; the "electricians" (Local 52, IBEW, the Electrical Joint Apprenticeship and Training Com. of Local 52; the Essex Div. New Jersey Chapter National Electrical Contractors Assoc.; the "Ironworkers" (Locals 11, 45, 373, 480 and 483, Ironworkers; Ironworker District Council of Northern N.J.; Ironworkers Joint Apprenticeship Com.; Building Contractors Assoc. of New Jersey, Associated General Contractors of N.J., Rigging Contractors of N.J. Structural Steel and Ornamental Iron Assoc.); and the "Operating Engineers" (Local 825, Operating Engineers; Assoc. General Contractors; Building Contractors Assoc.), Structural Steel and Ornamental Iron Assoc. Local 825 Apprentice Training and Re-training Fund). The Ironworkers, Plumbers, and Operating Engineers entered into consent decrees in 1972; the Electricians went to trial, a decree ordering change of practices and affirmative action was entered in 1973.

<sup>209</sup>538 *F.2d* 1012 (3rd Cir. 1976), action against union local and contractors whose jurisdiction included 10 counties in N.J. In granting relief to overcome the present effect of past discrimination, the Court found the Local 5 has never referred an African-American as a new probationary worker, and that Local 5 had exercised its partial control of work opportunities in the trade to the complete exclusion of African-Americans.

<sup>210</sup>The EEOC publishes annually an analysis of union membership in referral unions which covers the construction industry.

has therefore been structured around unions and contractor associations.

Contractors join contractors' associations which bargain collectively with the various craft unions. Contractors who do not wish to join the association often agree to the terms reached by the union and the association. These agreements set the rules and the pay for the industry in that area. Agreements usually provide for and result in the operation of joint contractor-union apprenticeship training programs and exclusive hiring arrangements which are the sole or primary source for employees in the trades.

Construction craft unions, thus, allocate the work, usually based on seniority with the union hiring hall, and pay out benefits. As a result of these arrangements with the contractors, training, referral or approval by the unions has been a virtual necessity for obtaining employment on unionized projects. Most heavy commercial construction, and public works are unionized projects. Moreover, as the courts found, minorities and women having been excluded and discriminated against in connection with apprenticeship and other training programs, and having been excluded through discriminatory practices from access to union membership and referral opportunities, have been discouraged from applying for employment in the construction trades because of the reputation which the industry has among women and in the minority community for the practices of exclusion and discrimination against them.

The effects of the unions' discriminatory practices in the construction industry have been exacerbated by certain additional factors. Because of the integrated nature of the construction process, often all work must stop if employees in any specialty trade strike. Unions tend to strike when non-union workers are employed. This has had two consequences: (1) even if a minority contractor were engaged in public works, the workers would probably be white since the minority firm would have to get its workers from the same union; and, (2) the threat of strike if non-union workers are used without union approval, has been a major factor in confining non-union minority firms to the residential construction market.

In addition to discrimination by the unions themselves, discriminatory practices in apprenticeship programs have served to exclude women and minorities from the construction industry. The gatekeepers for the construction industry are basically the apprenticeship programs, which, in construction, are usually run by a joint union-management apprenticeship committee. The construction industry alone enrolls 50% of all apprentices. Under federal law, apprenticeship programs are administered, registered and certified by the Bureau of Apprenticeship Training (BAT), part of the Department of Labor at the federal level and by the State apprenticeship council in New Jersey.<sup>211</sup> The State thus participates in apprenticeship training. The U.S. Department of Labor has determined that apprenticeships, like other entry level jobs, do not require any particular training or qualifications other than the capacity to be trained.<sup>212</sup>

Not every craftworker goes through an apprenticeship, but those who do tend to have higher wages, lower unemployment, and enhanced productivity than workers who get their training from other methods; whether they ultimately end up in union or non-union jobs.<sup>213</sup>

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<sup>211</sup>National Apprenticeship Act of 1937 (Fitzgerald Act). These agencies register and certify apprenticeship programs but do not actually run them. Private apprenticeship programs can be run by either unions, management or both. Studies have also shown that private-sector training (on the job, off the job, and apprenticeships) raises wages significantly; but women and minorities are much less likely to receive training, especially on the job, therefore their wages are lower. Lynch, "Race and Gender Differences in Private-Sector Training for Young Workers," Proceedings of 41st Annual Meeting, Industrial Relations Research Assoc. (1988).

<sup>212</sup>See, Rules and Regulations on Equal Employment Opportunity in Apprenticeship and Training, 42 *Fed. Reg.* 20760 (1978).

<sup>213</sup>See, Montgomery, *Unions and Construction Industry*, at 25; citing, Cook and Cairnes, "The Impact of Participation in Apprenticeship," Proceedings of 42d Annual Meetings of the Industrial Relations Research Assoc., at 379-386 (1989).

Montgomery stated that “[F]ormal apprenticeships appear to serve as a mechanism for acquiring superior training or access to better jobs within construction.”<sup>214</sup> Minorities have consistently been excluded from craft apprenticeships, and either entry to apprenticeship or other training as ways around an apprentice requirement has been a major part of most affirmative action plans in the construction industry. By 1972, 10.4% of apprentices registered with New Jersey BAT were minority, of which 8.5% were black, the rest Hispanic. Less than 1% were women.<sup>215</sup>

There is, however, considerable variability in the share of minority apprentices that are in specific trades. In 1990, over half the roofer (84%) and painter (73%) apprentices were non-white, though less than 10% of the carpenters, plumbers, pipefitters and electricians were non-white. Hispanics seem to have even lower representation than African-Americans in craft programs. Women are still so underrepresented that their numbers hardly count. In 1972, there was only one woman apprentice in the listed trades, a sheetmetal worker. By 1990 many trades still had no female apprentices and only the operating engineers had more than 6% - almost one third (31) of their apprentices were women.

Exclusion from apprenticeships and jobs in construction is likely to foreclose opportunities to become construction contractors. Montgomery points out that:

(1) in New Jersey plumbers and electricians are required to be licensed. In order to gain this license a worker without a college degree must have graduated from an accredited technical school or been an apprentice and have practical experience in the field. Thus, unless one goes to college, serving an apprenticeship becomes a prime way - or in some cases - the only way to garner the necessary experience to become a licensed contractor. Only licensed contractors can become state contractors.

(2) Without access to apprenticeship or union membership, it is unlikely that a person would be able to get experience in the commercial, road and government sponsored types of construction dominated by unions. Commercial construction accounts for about 50% of the expenditures on construction in New Jersey. Without access to this market, women and minorities are relegated to the lower paying, less profitable housing market. This constrains the range of experiences or projects they will have had so they will not be able to meet the “track record” requirements needed to qualify as a responsible bidder or for bonding.

(3) A survey conducted by BAT suggests that many apprentices follow a career path which includes promotion to supervisor and ultimately to contractor. The BAT study found that two-thirds of those who finished their apprenticeships in 1950, a time when minorities and women were excluded, were working as journeymen six years later, but 19% had already become supervisors, and 8% were self-employed. However, they found that in construction, 15% of those finishing apprenticeship training had become contractors within this relatively short time.

While not every apprentice becomes a contractor, most contractors have been apprentices or work in the business before they become an owner; therefore, exclusion from the opportunity for apprenticeships, union membership, and the opportunity to work construction jobs because of discrimination by construction

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<sup>214</sup>Montgomery, *Unions and Construction Industry*, at 26. Montgomery points out that one way this manifests itself is that under the Davis-Bacon Act only apprentices in registered programs can work on federal construction programs.

<sup>215</sup>*Apprenticeship Training in New Jersey*, at 32. Fairleigh Dickinson University, Teaneck, New Jersey (June 1973).

industry unions and contractors will have directly impacted on those turned down and those discouraged from applying who might otherwise today be state contractors.<sup>216</sup>

During the Commission Hearings representatives of both the Associated General Contractors and the Utility and Transportation Contractors Association of New Jersey, two of the largest and most prestigious contractor associations, told the Commission that most contractors in business today had been an apprentice or had come up through trades. They said it was highly unlikely that anyone could or would become a contractor without "hands on experience."<sup>217</sup>

Based on the foregoing and on other information available to the Commission through its studies, hearings, and review of federal and state reports, administrative and court decisions and relevant literature, the Commission finds that:

1. There has existed in the construction industry in New Jersey a pattern of recruitment, hiring, training, referral and access to union membership and construction jobs which has discriminated against minorities and women because of race, color, sex, and national origin.

2. There has been improvement since the 1960s in the access to apprenticeships, union membership, and construction jobs available to minorities and women, but not only do the effects of the past discrimination still disadvantage minorities and women in construction, but there is evidence that some discrimination continues in employment, contracting, and in access to apprenticeship and craft jobs which lead to the opportunity to become a contractor.

3. There is a direct relationship between access to apprenticeships, union membership and jobs in construction and the opportunity to become a contractor. The denial of access to training, and work experience based on race, color, sex, or national origin has deprived minorities and women who would now be contractors, that opportunity. The State participated in administering apprenticeship programs, certifying such programs and continued to rely on those unions to refer workers to State and locally funded construction projects.

4. The State of New Jersey has infused tax dollars into a discriminatory industry by contracting with the construction industry which has, both historically and currently, excluded women and minorities from employment, apprenticeship programs and subcontracting opportunities.

**b. Depressed Availability**

**i. Historical and Continuing Discriminatory Barriers, Apart From State Contracting Practices, Have Depressed The Availability Of Minority And Women Contractors**

In addition to discriminatory practices in the construction industry, which we have just noted, the Commission was advised that a number of barriers continue to affect minorities and women and to depress their availability as potential State contractors. The Commission believes that it is important to consider these factors, particularly if the State plays a contributing role in their perpetration or can act to eliminate them. Addressing these barriers is crucial if the State is to insure fair and equal opportunities for minorities and women in State contracting programs. The Commission therefore asked Dr. Timothy Bates to look at depressed availability of minority and women businesses in New Jersey.

The Commission reviewed and analyzed Dr. Bates' depressed availability report, along

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<sup>216</sup> Montgomery, *Unions and Construction Industry*.

<sup>217</sup>Richard L. Forman, Executive Director of Associated General Contractors of N.J.; Robert Briant, Sr., Executive Director of the Utility and Transportation Contractors Association of N.J. (7T at 96-97).

with other reports and testimony discussed below, not to determine whether a sufficient predicate existed, within the holding in *Croson* to warrant race and gender targeted remedies, but to develop a greater understanding of the difficulties facing minority and women businesses and to assess whether the State must address these barriers as well so that all of its citizens would be included equally and fairly in State programs.<sup>218</sup>

Dr. Bates found, as does the Commission, that a number of historical and present factors continue to disadvantage minorities and women in their attempts to develop viable businesses and to contract with the State. Dr. Bates noted that “[b]arriers to education and training, limited access to financial capital and markets, entrenched old boy networks . . . have discouraged or prevented many minorities from pursuing self-employment. These factors have contributed to a rate of minority self-employment in 1980 of 2.01 percent . . . The corresponding self-employment rate for nonminority males was 8.55 percent in 1980: 4.25 times higher than the minority rate.”<sup>219</sup>

Additionally, even when Dr. Bates performed a statistical analysis of the disparity in minority, nonminority self-employment rates, he concluded that, “endowments of factors identified with self-employment (wealth, education, and so forth) do not explain all of the differential in minority, nonminority self-employment rates. . . . [E]ven when the impact of societal discrimination in determining education backgrounds and household wealth holdings among minorities is *completely ignored*, the evidence indicates that further discrimination — directly applicable to small business entry and operation — severely represses New Jersey’s minority business community.”<sup>220</sup> Examples of additional barriers include less access to loan funds, limited access to customers, as typified by old boy networks that make it difficult for minority and women subcontractors to get work from nonminority firms in industries such as construction; higher rates of failure and discontinuance.

Thus, Bates’ study is important for two reasons. First, he documents which discriminatory barriers exist for minority entrepreneurs, concluding that different barriers impact MBEs disproportionately in different industries.<sup>221</sup> Second, Dr. Bates concludes that even if wealth and education were the only factors constraining pursuit of self-employment by minorities, “minorities do not face the same barriers to self-employment as nonminority males; they face higher ones . . . Incremental barriers have discouraged or prevented many minorities from pursuing self-employment.”<sup>222</sup>

After examining the extent to which discrimination affects each determinant of self-employment entry, Dr. Bates was able to conclude that “but for discrimination, manifested as

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<sup>218</sup>*Croson* rejected the City of Richmond’s argument that its pool of available minority businesses should be higher for its disparity analysis and for its remedy because minority businesses had been depressed or their numbers were smaller because of historical discrimination. The Court conceded that the “sorry history” of private and public discrimination had contributed to the limited number of minority entrepreneurs. This evidence, however, standing alone with no connection to those actually affected would not justify the “rigid racial quota” involved in *Croson*. “It is sheer speculation how many minority firms there would be in Richmond absent past society discrimination.” *Croson*, *supra*, 488 U.S. at 499, 109 S.Ct. at 724, 102 L.Ed.2d at 885. But nothing in *Croson* bars the State from a more systemic review of barriers which adversely affect minority and women businesses and from taking appropriate steps to address them.

<sup>219</sup>Bates, *Availability*, at 2.

<sup>220</sup>*Id.* at 3.

<sup>221</sup>Minorities and women attempting to succeed in the construction industry are impeded most by limited or no access to training and work experience, (*see also*, §III.D.3(a), *supra*); access to financial capital is most constraining in the goods industries, both manufacturing and wholesale; and possession of advance education is most relevant to survival in the skills services industries. Bates, *Availability*, at 1-2.

<sup>222</sup>*Id.* at 3-5.

discouraged businesses, the level of minority self-employment in the New Jersey area would have been at least 45 percent higher.”<sup>223</sup> Discouraged businesses have been measured in a conservative fashion that disregards completely the societal processes that have restricted minority access to educational credentials for New Jersey area minorities. Educational disparities restrict employment opportunities, thus resulting in lower personal incomes for many minority labor force participants. These lower incomes, in turn, retard household wealth accumulation. Yet the impact of such “societal discrimination” has been completely ignored in his statistical analyses that have quantified self-employment discouragement.

Dr. Bates’ analysis determined that household wealth is a key factor in whether self-employment of an individual is probable.<sup>224</sup> Significantly for this study, the connection between home ownership, accumulation of wealth and rate of self-employment was demonstrated by Bates. Simply stated, Bates concluded that discrimination in access to home mortgages depresses minority home ownership. And depressed levels of home ownership cause minority households to accumulate less wealth than they would possess at higher rates of home ownership. This, in turn, reduces the rate of minority entry into self-employment because wealth levels are key determinants in entering self-employment.<sup>225</sup>

Throughout his report, Dr. Bates repeatedly points to the diminished equity and access to debt capital as “clearly caus[ing] creation of smaller, less viable black-owned businesses.”<sup>226</sup> When the factors associated with small business longevity are considered, firm size, firm age, owner human capital and financial capital, it is the gap in financial capital investment which “explains, most decisively, the lagging sales of the black-owned business.”<sup>227</sup>

Dr. Bates also noted that Hispanic-, Asian-, and nonminority women-owned firms had much lower average sales than white male-owned businesses. He found that New Jersey area firms followed the national pattern: the group of firms that generates the highest mean sales volume is the one that invests the most financial capital into their business ventures; the converse is true for the groups investing the least capital into their firms.<sup>228</sup>

This measure was also associated with business discontinuance rates. Among New Jersey area firms operating in 1982, discontinuance rate differentials between nonminority male-owned firms and firms owned by minorities; African-Americans had the highest discontinuance rate. Asian-owned and Hispanic-owned firms had lower rates than African-American firms, but still higher than nonminority males and females.<sup>229</sup>

In his later analysis of the Characteristics of Business Owners (CBO) data about firms operating in 1982, Dr. Bates identified explanations for the survival rates by 1986 of each minority group and women-owned businesses. Regarding nonminority females, 57.2% of the owners still operating had a background of family business ownership compared to 51% for nonminority males, 37% for Asians, 33% Hispanics and 21% for African-Americans. The family background trait is associated disproportionately with business survival among nonminority female owners and is lowest among African-American owners, among whom this trait is not strongly associated with firm survival. Thus, Asians, Hispanics and African-Americans who have had no exposure to small business ownership within their families are just as likely to

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<sup>223</sup>*Id.* at 114.

<sup>224</sup>*Id.* at 2.

<sup>225</sup>*Id.* at 4.

<sup>226</sup>*Id.* at 29.

<sup>227</sup>*P.* at 33.

<sup>228</sup>*Id.* at 41.

<sup>229</sup>*Id.* at 43.

survive in business as those whose parents were self-employed. For African-Americans and Hispanics, the intractable barriers to business progress are education and wealth.<sup>230</sup> For Asians, the key inhibiting factors are the age of the owners and the newness of the firm. Dr. Bates concludes this analysis with the prediction that "in light of the strong educational background of many nonminority female owners, this group appears capable of rapid progress in the small business milieu."<sup>231</sup> He further predicts that "unless gaps in wealth and education become worse than those observed to exist in 1980, . . . these younger (minority) groups will, by 1990, be entering self-employment at rates much closer to parity than those observed in 1980."<sup>232</sup>

Bates attributes this to the higher incidence of wealthier, better educated minorities creating more substantive firms, particularly in manufacturing where minority business progress has traditionally been thwarted by financial capital constraints. African-American business growth in New Jersey was most pronounced among the larger scale firms utilizing paid employees who increased by 95.9% between 1982 and 1987. These are the firms likely to be strong enough, he notes, to consider pursuing government procurement business.<sup>233</sup> Bates further notes that the lure of market opportunity in the 1980s has induced minority entrepreneurs to create larger firms that are oriented toward corporate and government clientele. "Opportunities created by set-asides, preferential procurement policies, and the like have induced better educated, younger entrepreneurs to create and expand firms. . ."<sup>234</sup>

In addition to discrimination which minorities experience which impact upon the ability to acquire homes, and thus their ability to accumulate capital, Dr. Bates concluded that banks discriminate against minority businesses, which limits the ability of minority-owned firms to compete for procurement contracts in New Jersey.<sup>235</sup> Moreover, although Dr. Bates concluded that emerging African-American-owned businesses with better educated owners and higher capital investments are expanding, "[m]ajor barriers to black business progress in emerging lines of business nonetheless remain."<sup>236</sup> Dr. Bates states,

The most widely cited barrier to black business formation, growth, and diversification in the 1980s has been rooted in capitalization problems. Lack of personal wealth holdings, combined with discriminatory treatment by commercial banks, spell continuing obstacles to firm formation, survival, and growth for many potential and actual black entrepreneurs.<sup>237</sup>

Dr. Bates also concludes that of the ratio of equity to debt capital, the financial capital disparity between white male-owned firms and African-American-owned firms is strongest in the case of debt. Commercial banks are the main source of debt capital.<sup>238</sup> Dr. Bates considered that one possible explanation for the disparity between the loan size between African-American and white firms was that they reflect differing endowments of owner education, experience, and equity capital. He tested this hypothesis by estimating multiple linear regression equations that explain debt capital levels as a function of several legitimate factors which

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<sup>230</sup>*Id.* at 123.

<sup>231</sup>*Id.*

<sup>232</sup>*Id.* at 125.

<sup>233</sup>*Id.* at 126.

<sup>234</sup>*Id.* at 131-132.

<sup>235</sup>*Id.* at 6.

<sup>236</sup>*Id.* at 18.

<sup>237</sup>*Ibid.*

<sup>238</sup>*Id.* at 34.

may have influenced banks loan decisions. His hypothesis instead demonstrated that discrimination in lending practices against minority firms is occurring. Dr. Bates concludes, "[t]he regression equations indicate that blacks get smaller bank loans than whites who possess otherwise identical education, age, and equity capital traits . . . Commercial banks, the major source of . . . debt, provide smaller loans to black-owned firms than to white businesses *possessing identical measured characteristics*" (emphasis added).<sup>239</sup>

This finding was corroborated by the recent disclosure under the federal Home Mortgage Disclosure Act of lending institutions' discriminatory rejection rates of minorities for home mortgages. The New Jersey bank rejection rates were analyzed for the Commission by Dr. Myers and are included in this report.

An additional indicator of small business success is education. Dr. Bates demonstrates that this factor is an additional impediment to African-American and Hispanic business development.<sup>240</sup> His report points out that African-Americans and Hispanics are the least educated groups in New Jersey. Of particular interest to this Commission, Dr. Bates concludes that "[o]wner educational background serves as the main entry barrier to the skill intensive . . . industries."<sup>241</sup> This finding is significant since the State actively purchases "skill intensive" services. Thus, relatively poor educational qualifications of African-American and Hispanic business owners impedes their ability to succeed in service businesses with which the State contracts.

Dr. Bates concludes that all of the aforementioned barriers handicap minority self-employment in a number of ways. First, societal barriers result in smaller, less profitable, and generally less viable firms. Second, societal barriers cause higher failure rates among minority-owned businesses. Third, barriers discourage some potential entrepreneurs from ever taking the plunge into self-employment.<sup>242</sup>

Dr. Bates employed a statistical technique, discriminant analysis, to measure the relative importance of various factors, such as education and age that delineate those entering self-employment from the rest of the population. He used the 1984 Survey of Income and Program Participation (SIPP) database, collected from over 15,000 households over the October 1983 through July 1986 period. This analysis helps explain why the male nonminority rate of self-employment is 4.25 times higher than the minority rate of 2.01%.

When analyzing the disparity between M/WBE availability in New Jersey and their utilization, Dr. Bates concluded:

Disparity is, in fact, much more pronounced when we recognize the relevance of the discouraged firms, described in [Bates, Availability]. Discriminatory barriers have repressed the supply of MBEs and WBEs in the New Jersey area, pushing some firms into failure as well as discouraging potential entrepreneurs from creating small businesses. Removal of these discriminatory barriers would increase the number of MBEs and WBEs operating in the New Jersey area [Bates, Availability] and this, in turn, would of course increase the measured availability of MBEs and

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<sup>239</sup>*Id.* at 35-36.

<sup>240</sup>*Id.* at 33.

<sup>241</sup>*Id.* at 51.

<sup>242</sup>Bates, *Availability*, at 1. Although much of Dr. Bates' analysis throughout his report focused on African-American firms, which he noted had much lower average sales than WBEs, Asians or Hispanic firms, he states that "available evidence suggests that Latinos and Asians have faced similar barriers to their entrepreneurial ambitions." *Id.* at 40-41. He also acknowledges that studies of WBEs "to date have not been substantive [but that his] operating hypothesis is that WBEs face the same sorts of constraints to business progress as MBEs," *Id.* at 40.

WBEs. If we recognize the latent availability of MBEs and WBEs, then the disparity measures [referred to in the Disparity report] would increase accordingly.<sup>245</sup>

Thus, although the Commission's study shows that minority- and women-owned firms are underutilized, Dr. Bates' study indicates that the disparity would be even greater if the Commission considered minority and women who would be in business and available to contract with the State but for the barriers noted. While these factors may not be cognizable under *Crosbon*, we believe they provide an independent basis for advancing policies — such as educational reform, and urban aid — that are designed to reverse these discriminatory barriers. These factors also underscore the need for the State to develop an awareness of the impact of its policies and programs on minorities and women.

ii. Discrimination by Financial Institutions<sup>244</sup>

(a) Bonding

Surety bonding is another barrier to minority and women businesses.<sup>245</sup> The Commission's ability to make findings of discrimination in this area is limited, however, due to the lack of statistical evidence. The reason for this evidentiary gap is the total lack of any recordkeeping requirements in the surety bonding industry concerning the granting or refusal of bonds to M/WBEs. Van Ness described the subjective criteria:

Securing a surety bond is similar to obtaining a bank line of credit. The surety company must be satisfied that the contractor/vendor has met certain criteria. The firm must:

- Be of good character;
- Have the capacity to meet the requirements of the project;
- Have the necessary capital to support expected project costs;
- Be in good standing with a bank, i.e. have an established line of credit; and
- Be a business that is well managed.<sup>246</sup>

Witness testimony before the Commission included numerous complaints about discrimination by the surety bonding industry against minority- and women-owned businesses. The record also suggests that in the area of construction contracting, bonding requirements are set excessively high.

Very little research has been conducted about the contract surety bond business in general and the difficulties experienced by minority and women contractors in particular in obtain-

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<sup>245</sup>Bates, *Disparity*, at 21-22.

<sup>244</sup>As part of the Commission's Study, Executive Director Lora Liss prepared a report on Bonding, Banking and Credit. That report is available at the New Jersey State Library with the consultant reports listed in footnote 20. The following two sections on bonding and credit discrimination are some of the highlights from that report.

<sup>245</sup>A surety bond is a three-party contract. The parties are: the surety, the principal and the obligee. The surety provides a financial guarantee to the obligee that the principal will perform some duty owed to the obligee. Under construction contract bonds, the principal is a contractor, and the obligee is the owner to whom the principal is submitting a bid or for whom the principal has contracted to do construction work. The surety may be a corporation, usually an insurance company, or an individual. If a corporation, the practice of providing bonds is known as corporate suretyship. If an individual, it is known as personal suretyship or individual suretyship. Corporate suretyship is by far the more common of the two. While the State, by legislation, requires bonding on certain contracts, it conducts no oversight of the surety industry as to their policies or lack of inclusiveness in either employment of minority persons or in the discrimination in bond issuance to minority or women businesses. The New Jersey Chapter of the National Association of Minority Contractors estimated that bond premiums paid by contractors on State funded contracts may well exceed \$60,000,000 per year. The issuance of bonds is similar in operation to credit discrimination described in the next section.

<sup>246</sup>Van Ness, *State Purchasing*, at 30.

al and the difficulties experienced by minority and women contractors in particular in obtaining surety bonds. This report therefore describes the few studies in detail.<sup>247</sup>

One major study was conducted in 1989 by Georgia State University, funded by the Prudential Foundation.<sup>248</sup> Its findings, based largely on interviews and a mail survey to members of the National Association of Minority Contractors, included the following:

Small contractors, whether minority or nonminority, are experiencing substantial problems in obtaining surety bonds. Several federal governmental programs attempt to ameliorate problems, some particularly for minority contractors. Many contractors have difficulties in their search for a source of surety bonds because of the complexity of the surety bond market.

It is not necessarily desirable for all contractors to be bonded. The risk of default is so high for many contractors that providing bonds for them would increase the bonding cost for other, more qualified, contractors.

The federal government and some state and local governments require bonds on small contractors for which they can afford to bear the risk of default by the contractor. Waiving bond requirements in these cases would result in substantial savings in bond premiums, possibly enough to offset the losses from defaults.

Personal surety bonds serve a useful purpose and should be accepted in lieu of corporate surety bonds. Letters of credit from sound financial institutions can serve essentially the same purpose.

The Prudential Study directed its recommendations to the surety industry, the project owners and contractors, as follows:

1. A market assistance plan (MAP) should be established in each state to assist small and minority contractors in finding sureties that will provide bonds for them. Any surety that rejects an application would be required to give the contractor reasons for the rejection.
2. Surety companies, especially the standard sureties (usually provide bonds for large contractors, compared to specialty sureties, usually provide bonds for small contractors) should appoint more minority agents.
3. Surety companies should undertake loss control measures to reduce contractor defaults and the cost of bonds and to make bonds available to more contractors.
4. Surety companies should advise contractors who have been refused bonds of the reasons for refusal.

In New Jersey, following the enactment of the Small Business Set-Aside Act in 1984, at workshops conducted by the Office of Small Business Assistance of the Department of Commerce and Economic Development, potential vendors expressed frustration at their inability to obtain surety bonding for bid and performance bonds in order to bid on State government contracts.

In order to help New Jersey's small, women-, and minority-owned businesses prepare themselves for bonding, a survey was conducted in 1985 among 114 set-aside workshop atten-

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<sup>247</sup>There are three kinds of contract bonds: bid bonds, performance bonds and payment bonds, to be supplied at each stage of the contract relationship the name implies.

<sup>248</sup>Center for Risk Management and Insurance Research, *The Problems Of Small And Minority Contractors In Obtaining Surety Bonds* (hereafter the Prudential Study).

dees and a separate survey of 17 surety bond insurers.<sup>249</sup> While the responses were too few in number to generalize to the universe of SBEs, MBEs and WBEs or surety companies, it did provide useful insights, such as:

Contrary to the licensed surety underwriters who responded to the survey, SBEs, MBEs and WBEs wanted state, local or federal governments to establish revolving bonding assistance programs.<sup>250</sup>

Business owners and surety underwriters agree that SBEs, etc. can increase their chances of being bonded by completing smaller jobs and by developing bond-readiness prior to need.

Only two underwriters reported zero default rates with SBEs, etc. The remaining underwriters did not know or did not keep statistics by these categories.<sup>251</sup>

Of the 20 SBEs, etc. who applied for a bond, 7 have been rejected.

Unfortunately, no distinction was made in the analysis between small and minority- or women-owned businesses. Follow-up telephone calls to nonrespondents revealed that many insurers have chosen not to offer surety coverage due to increased risks and not wanting to deal with small, inexperienced businesses.<sup>252</sup> In 1991, the Department of Commerce and Economic Development found that there were only eight bonding companies serving the State of New Jersey, two of which are headquartered in Pennsylvania.<sup>253</sup> The Port Authority does not require bid and performance bonds for contracts under \$250,000 including those set aside for SBEs.<sup>254</sup> Current recommendations from the Division of Development for Small Businesses, Women and Minority Businesses include a State Surety Bond Guarantee Program that should fill the gap faced by small businesses that are required to secure performance and bid bonds when competing for government contracts, particularly in construction contracts.<sup>255</sup>

In addition to the testimony received by the Commission, respondents to the University of Maryland survey conducted for the Commission stated that they had applied for bonding in various dollar amounts and had been rejected or approved as follows: African-Americans were rejected four times as frequently as whites; Hispanics twice as frequently; and women applied for much smaller bonds and were approved almost as frequently as men.<sup>256</sup>

#### b. Credit Discrimination

New Jersey has a long history of discrimination by lending institutions against minorities. For example, Professor Richard Marshall described the migration of savings and loan associations (S&L's) to the suburbs in the 1970's.<sup>257</sup> As a result, he noted that inner-city resi-

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<sup>249</sup>Norma Chandler Brown, *The Effectiveness of Statewide Set-Aside Workshops and Small, Women-Owned and Minority-Owned Businesses and Licensed Surety Agencies and Companies: Attitudes Toward the Availability of Surety Bonding* (1987) (hereafter the Brown Study).

<sup>250</sup>*Id.* at 7.

<sup>251</sup>*Id.* at 33.

<sup>252</sup>*Id.* at 8.

<sup>253</sup>Doing Business in New Jersey, Trenton, N. J.: Department of Commerce and Economic Development, July 1991, at 39.

<sup>254</sup>Memoranda from Rebecca Doggett to Executive Director Lora Liss, September 2, 1992 and September 4, 1992.

<sup>255</sup>SWMB Division recommendations, June, 1992.

<sup>256</sup>Myers, *Survey Appendix G*, at 46-48 (race), 44-46 (Hispanic), 46-48 (sex). Calculations performed under the supervision of Executive Director Liss.

<sup>257</sup>Richard D. Marshall, *The Flight of the Thrift Institution: One More Invitation to Inner-City Disaster*, 28 Rutgers L. Rev. 1, 113-125 (1974).

dents lost home mortgage money, major banking services, and their most visible symbols of thrift. Newark itself lost revenues desperately needed to rebuild and revitalize the city. He cited a study conducted by the Rutgers University Graduate School of Business Administration (GSBA) on the mortgage lending activity in Newark-based S&L's.

The study contrasted the 1464 (57%) mortgage loans made in 1956 with the 562 (25%) mortgage loans made in 1972 to finance homes within Newark. The remaining 43% in 1956 were made for homes in the surrounding towns, compared with 75% of the remainder made on homes in the bordering suburbs in 1972. He concluded that the investment policies of S&L's had adverse effects on the residents of the city of Newark, and the actual flight of the S&L's to the suburbs created most serious problems. Those problems included a depressed effect on local home mortgages and on home values themselves. Without S&L's to finance home mortgages and home improvements, the inner-city property further deteriorated.

The shift to the suburbs also added a serious constraint on all economic proposals and developments in Newark. It signalled that an area - a whole city - was to be redlined or written off as a risky investment area.<sup>258</sup> The visible absence of any investment in an area leads to a "herd complex" reaction by all financial and banking institutions, according to Marshall, and initiates a general blacklisting of the area by all institutional investors with the justification that such areas are poor investment risks. Marshall noted that New Jersey S&L's are regulated by the State's Savings and Loan Act and enforced by the Commissioner of Banking and Insurance. The Commissioner has the power to approve proposed relocations based on criteria that exhibit concern for the rights and social welfare of the people and institutions of the new, but not the old, neighborhood.<sup>259</sup>

In response to a Commission inquiry to the Department of Banking seeking information on lending to women and minorities and especially how that relates to public contracts, and how State and federal laws and regulations interact on the subject, the Commission received the following reply:

The State Department of Banking has no enforcement rule concerning lending to women and minorities. Consequently, the Department does not maintain nor have access to data on these lending practices. The Anti-Redlining Law does fall under the purview of the Department of Banking, but that is concerned strictly with neighborhood lending, not specific commercial lending practices.<sup>260</sup>

The memorandum listed the respective federal agencies that conduct compliance examinations for each group of banks, i.e. National Commercial Banks, State Chartered Banks that are members of the Federal Reserve, all Savings & Loans, Credit Unions, and entities not covered by other categories.

The Department of Banking representative also explained that the federal Community Reinvestment Act (CRA) at that time did not provide for public disclosure of the results of compliance examinations conducted by federal regulators. However, since then, the Financial Institutions Reform, Recovery and Enforcement Act of 1989, (FIRREA)<sup>261</sup> amended the CRA to require the federal agencies to make public certain portions of their CRA performance assessments of financial institutions.

Other federal laws impacting CRA compliance include the Equal Credit Opportunity Act,

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<sup>258</sup>See G. Sternlieb, *The Tenement Landlord*, at 107 (1966).

<sup>259</sup>Marshall, *Flight of the Thrift*, *supra*, at 120.

<sup>260</sup>Memorandum from Christopher W. Cooney, Legislative Liaison/Public Information Officer, Department of Banking, to Executive Director Lora Liss, July 12, 1990.

<sup>261</sup>Pub. L. No. 101-73.

the Fair Housing Act, the Fair Credit Reporting Act and the Home Mortgage Disclosure Act (HMDA). To date, only the HMDA requires public disclosure of loan data. In January 1990 Regulation C of the HMDA, which implements the Act, was revised. One revision, effective March 31, 1991 includes applicant information regarding race or national origin, sex and income.<sup>262</sup> These reports should enable the State Department of Banking to monitor the specific impact on minorities and women of home mortgage rejection rates.

In 1977 New Jersey passed a stringent "anti-redlining" law, supplementing the decade-old "Anti-Redlining Act."<sup>263</sup> This law went beyond the federal Home Mortgage Disclosure Act, enacted two years earlier, and the federal CRA which was then pending, by establishing specific penalties against discrimination, requiring specific information on each loan application and aggregating the data on statistically meaningful geographic levels.<sup>264</sup> The purpose of the federal Community Reinvestment Act of 1977<sup>265</sup> is to encourage each financial institution to help meet the credit needs of the communities in which it operates. The Act requires that in connection with the examination of a financial institution, each federal financial supervisory agency shall: (1) assess the institution's record of helping to meet the credit needs of the entire community, including *low and moderate-income* neighborhoods [emphasis added], consistent with safe and sound operation of the institution, and (2) take that record of performance into account when deciding whether to approve an application of the institution for a deposit facility.

The State Anti-Redlining Act prohibited home mortgage lenders with assets in excess of \$10 million from discriminatory lending practices based on the geographic location of the property. The Act also required that reports be kept detailing the number and size of mortgages by census tract or zip code.

While the original state Act required aggressive "anti-redlining" actions by the State, lawsuits brought against the State by commercial banks, thrifts and the Federal Home Loan Bank Board significantly reduced the effective power of the legislation.<sup>266</sup> The suits limited the legislative authority of the Act to gathering information and lender reports. The Department of Banking continued to do an extensive amount of work through an "anti-redlining" unit that created a series of procedures for ameliorating mortgage discrimination.

After 1980, however, the anti-redlining unit was disbanded and Department of Banking activities were limited to serving merely as a depository for lender reports on Community Reinvestment Act performance. As a result, the Department of Banking was not involved between 1986 and 1990 when community groups and housing advocacy organizations negotiated a series of CRA agreements with lenders by threatening to use the federal review process to challenge proposed bank mergers or expansions. Beginning in 1986, community groups in New Jersey dramatically increased their CRA-related activities.<sup>267</sup>

According to a spokesperson for the Department of Banking, the main reason the

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<sup>262</sup>Regulation C - Home Mortgage Disclosure Act.

<sup>263</sup>N.J.S.A. 17:9-16F et. seq.

<sup>264</sup>*Reinvesting in Communities: Policy Options for New Jersey*, July 1991, at 2 (hereafter "Reinvesting"). Produced by the Community Reinvestment Advisory Committee and the project funders, N. J. Housing and Mortgage Finance Agency (consultants were the Center for Policy Alternatives, Washington, D.C. and the American Affordable Housing Institute at Rutgers University, New Brunswick).

<sup>265</sup>12 U.S.C. §2901.

<sup>266</sup>*Reinvesting*, at 2. See also, *National State Bank, Elizabeth, New Jersey v Long*, 630 F.2d 981 (3d Cir. 1980).

<sup>267</sup>Stephen Tumolo, *A Guide to the Community Reinvestment Act and CRA Programs in New Jersey*, Prepared for the New Jersey Community Loan Fund under a grant from the Department of Community Affairs (December 1991)(hereafter "Guide").

Department could not enforce the CRA anti-discrimination provisions is that the Legislature stopped funding the anti-redlining unit. The lawsuit that challenged enforcement of the State anti-redlining law did not prevent the enforcement of anti-discrimination requirements with regard to State-chartered lending institutions.<sup>268</sup> In fact, in 1991 the State was beginning to re-examine its role in supporting community reinvestment through linked deposit and reinvestment disclosure legislation.<sup>269</sup>

The anti-redlining State law does not, however, address race and sex directly and needs to be expanded if the State is to increase financial opportunities for M/WBEs. The State Department of Banking now issues a monthly report showing the rating of each bank and thrift institution located in New Jersey. There are four CRA performance ratings: outstanding, satisfactory, needs to improve, and substantial noncompliance. In the most recent reports most institutions had not yet been examined since public disclosure was made mandatory. Of a total of 126 banks listed, 42 had been examined and 5 were found in substantial noncompliance.<sup>270</sup>

The major flaw in the CRA data is that it is not based on race or gender, but rather geographic territories. Therefore, it is impossible to determine precisely how it impacts on minorities or women. However, in reviewing a sample Performance Evaluation conducted by the Federal Deposit Insurance Corporation (FDIC) of a New Jersey bank, there is some limited reference to race in the evaluation report, for example:

There was no evidence of any contacts with representatives of civic, religious, neighborhood, *minority*, small business and commercial and residential real estate development . . . The bank does not appear to utilize or be aware of the existence of demographic data and does not use it to analyze its lending activities.<sup>271</sup>

There is no explanation of what demographic data would be desirable.

The evaluation also stated, "While 33% of the entire delineated community consists of low-to moderate-income areas, only 15% of the bank's loans were originated within these areas." However, the failure to reach the targeted low-income population was not deemed to be discrimination.

The *Reinvesting* Report noted that states can provide direction and support through regulatory measures, including state community reinvestment acts and interstate banking provisions and non-regulatory innovations, such as linked deposit programs, public subsidies, and structures for financial consortia. Any or all of these options can be used to facilitate reinvestment in New Jersey's poorest communities. Although the report produced by the American Affordable Housing Institute focused on lending for affordable housing, it noted that a state reinvestment policy can also provide support for other types of community lending, including small business, commercial, industrial, and community service financing.<sup>272</sup>

The Report identified barriers to lending, including the persistence of "redlining" in cities with significant African-American and Hispanic populations where loan activity was highest in nonminority neighborhoods, next highest in Hispanic neighborhoods and lowest in African-American neighborhoods.<sup>273</sup> The factors contributing to racial imbalance include cul-

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<sup>268</sup>*National State Bank, supra*, 630 F.2d at 989.

<sup>269</sup>*Reinvesting*, at 3.

<sup>270</sup>CRA Public Disclosure Reports filed with the Department of Banking as of August 22, 1992.

<sup>271</sup>Public Disclosure, Community Reinvestment Act Performance Evaluation, Bergen Commercial Bank, Paramus, N. J. by FDIC, July 19, 1991 (emphasis added).

<sup>272</sup>*Reinvesting*, Introduction.

<sup>273</sup>*Id.* at 25.

tural stereotypes which affect lenders' assessments of individual borrowers, rigid underwriting standards that do not reflect actual risk, passive marketing programs relying on real estate agent loan referrals, appraisal standards that are ill-equipped to evaluate mixed-use neighborhoods and lack of branches in minority areas and loan officers with neighborhood specific knowledge. The Report noted that anti-discrimination laws alone are insufficient to overcome these barriers. State CRAs and interstate banking provisions can be used to evaluate, monitor, and publicize bank performance, and thereby ensure that financial institutions provide economically equivalent projects with equal access to capital. The Report recommended a state CRA for the following reasons:

A state CRA can clarify the definition of community reinvestment to reflect special conditions in New Jersey, such as *Mount Laurel* housing obligations (see Housing section of Report).

State regulation can focus on how lenders utilize public development programs, such as housing mortgage bonds and can encourage lenders to participate in reinvestment initiatives, such as consortia.

A state CRA can be structured to shift attention from lending promises to actual lending performance and productive activities which can lead to lending, including affirmative marketing, public accountability, and risk management.

A state CRA can increase the frequency of reinvestment evaluations of state-chartered banks since federal evaluations occur at intervals as large as two to three years.

A state CRA can discourage bank practices which lead to racial bias in lending.<sup>274</sup>

In an interview with the Banking Commissioner, the Commission's Executive Director learned that New York City and New York State have their own CRA's and that New Jersey had legislation proposed in 1991 to establish a State CRA.

As part of outreach by the State Departments of Banking and Community Affairs, in April 1992 two workshops were held as part of the second annual Community Reinvestment Workshop series. Additionally, the New Jersey Bankers Association has developed a videotape, "Community Reinvestment: Good Business for Good Neighbors," to sensitize its loan officials in dealing with the community.<sup>275</sup>

In 1991, when State legislation was introduced to strengthen reinvesting in New Jersey's communities, the only legislative success was the establishment of a Community Financial Services Advisory Board. The Banking Commissioner, Jeff Connor, chairs that Board. Under Commissioner Connor's leadership, an advisory was sent in May 1992 to every State and federally chartered commercial bank, savings bank, savings and loan, credit union, mortgage banker, mortgage broker, and second mortgage licensee, warning them to stop engaging in racial inequities.<sup>276</sup> He cited the 1990 Home Mortgage Disclosure Act data which revealed that lenders rejected minorities at a rate far greater than whites. Among other positive steps recommended, he included the following:

*The Pursuit of the Minority-owned Small Business:* Minority-owned small businesses are the economic life-blood of the minority community. To ignore that aspect of

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<sup>274</sup>*Id.* at 32-33.

<sup>275</sup>Letter from Commissioners of Banking and Community Affairs to Bank Managing Officers, March 12, 1992; New Jersey Bankers Association (1991).

<sup>276</sup>Advisory from Commissioner Jeff Connor, Department of Banking (May 11, 1992). The Commissioner's authority is limited to "advisory" only with regard to federal institutions. The term is understood by State-chartered banks to carry more weight in State audits.

your market area is to ignore the needs of your community. Even though the Federal Reserve data did not touch upon small business lending, any evaluation of your lending standards to minorities has got to include this vital sector of the local economy. There are many financial institutions which have developed effective small business lending programs, and there's help through various government agencies, such as the federal Small Business Administration and the New Jersey Department of Commerce through its Division of Development for Small Businesses & Women & Minority Businesses. Developing proactive relationships with this part of the business community will help provide economic opportunity to the minority community while enhancing and strengthening your overall presence in your market area. Considering these factors in an honest assessment of your organization's lending practices will go a long way toward integrating New Jersey's minority population into the mainstream of economic opportunity and prosperity.<sup>277</sup>

Other factors stressed in the Advisory to the banks included the Credit Decision-Making Process which urges the objective review of the criteria for underwriting standards.<sup>278</sup> The Commissioner urged a review of all rejected applicants by a senior lending officer, not just for consumer loan applications, but commercial loan applications as well. He further urged that before rejecting someone for financing a thorough review of the applicant's strengths be conducted as an offset of any noted weaknesses. He also noted the Community Integration factor, to let the communities know of the bank's commitment to providing credit opportunities to minorities and to market their services in areas with heavy minority populations.

A national study released in the fall of 1991 under the Home Mortgage Disclosure Act (HMDA) revealed that African-Americans and Hispanics were more than twice as likely to be rejected for home loans as white applicants. Commissioner Connor noted that "credit history and debt ratios were absent from the HMDA report, which would be critical bits of data to have in order to reach solid conclusions."<sup>279</sup> He said there are still some bankers who claim that discrimination has not been proven by the HMDA data and that the report is not conclusive but the disparity itself was sufficient evidence to show discrimination in lending. He noted that "there is a voluntary provision that lenders give a reason for credit denial, but when a white is turned down the lender is more likely to give the reason than when a African-American is rejected for a loan." Commissioner Connor suggested requiring that the reason be given. He proposed that "credit history" be divided into poor credit history and lack of credit history.<sup>280</sup>

The Commission obtained from the Commissioner of Banking a computer tape containing the HMDA data referenced above concerning loan application rejections of minorities. The tape was provided to the University of Maryland Afro-American Studies Program to be analyzed as part of the history study. Dr. Myers compared the data with census tract data for New Jersey and reached a conclusion similar to that of the Department of Banking. Dr. Myers found wide racial and ethnic disparities in loan amounts, loan acceptance rates, and loan to income ratios.<sup>281</sup>

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<sup>277</sup>*Id.*

<sup>278</sup>*Id.*

<sup>279</sup>Newark Star Ledger, June 17, 1992, Byline: John Harding.

<sup>280</sup>*Id.*

<sup>281</sup>Myers, *Finance*, Executive Summary, at ii. (82% of white applicants were approved for loans; 65% of African-Americans and 70% of Hispanics). No statistically significant differences between approval rates for Asians and whites were found, nor between males and females. However, women have much lower average incomes (males - \$80,308,

The survey conducted by the University of Maryland revealed that African-American and Hispanic respondents who applied for loans in 1990 were approved at a far lower rate than white or Asian respondents. In fact, African-Americans were rejected four times more frequently and Hispanics twice as frequently as whites.<sup>282</sup> Women, who applied for smaller loans (under \$50,000) in much higher proportions than did males, were approved for these small loans but not for loans over \$50,000.<sup>283</sup>

The survey also revealed another facet of discrimination: minorities and women were charged higher interest rates when a line of credit was approved:

The mean interest rate paid by white males respondents was 4.92% compared to 5.12% for females, (including minority females) 7.56% blacks, 6.73% Asians, 7.29% Hispanics.<sup>284</sup>

Several innovative programs have been developed to facilitate access to capital for minority- and women-owned firms. Illinois, for example, has initiated innovative programs to assist in financing for small to medium sized women-owned businesses. Technical assistance centers will help business owners complete applications, including business plans, for expansion or emerging business loans. Participating banks will be encouraged to consider non-traditional collateral such as accounts receivable, signed contracts and purchase orders and collection/payment records. The advantages for financial institutions are that they can tap into new markets through the network of women business owners developed and they will promote good will in the community while improving their CRA rating.<sup>285</sup>

In addition, Illinois has other targeted financial assistance programs, such as Economically Targeted Investment, in which the Treasurer deposits state funds in an approved financial institution contingent on the financial institution making a corresponding "linked" loan to a qualified business. The program particularly targets historically underutilized women and minority owned businesses. Businesses must maintain operations in the state, demonstrate how the local community will benefit from the loan and show that the financing will result in retention or creation of jobs. The New Jersey report, *Reinvesting in Communities*, listed 18 states that had linked deposit programs as of December 1990.<sup>286</sup>

The Report stated that competitive linked deposit programs hold the greatest potential for leveraging community lending and cited Massachusetts, Chicago and New York to show that lenders will disclose and improve their community lending performance in order to compete for public linked deposits. It recommended that New Jersey could deposit its funds with lenders that reinvest more in developmental lending, which in turn creates new jobs, new housing and expanded productivity. Thus, the State would benefit from increased tax receipts from new economic activity.

### iii. Impact of Housing Discrimination and Residential Segregation in New Jersey on Minorities and Women

The relationship between housing discrimination and the development and success of minority businesses in New Jersey has been demonstrated by Dr. Bates — access to equity and

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females - \$56,797), are much more likely to apply for smaller loans (females' requests averaged \$86,084 compared to males' requests averaging \$106,180). Myers, *Finance*, at 12,13.

<sup>282</sup>Myers, *Survey*, Appendix G at 33-35 for Frequencies Crosstabs by Race, Sex and Hispanic origin. Calculations prepared under the supervision of Executive Director Liss.

<sup>283</sup>*Ibid.*

<sup>284</sup>Myers, *Survey*, at 90 and 141, Responses to Question 15(c).

<sup>285</sup>Patrick Quinn, Treasurer of the State of Illinois, brochure describing the Women's Finance Initiative, 1992.

<sup>286</sup>*Reinvesting*, at 28, 31.

debt capital are key determinants in the success of a small business. Moreover, depressed levels of home ownership correlates to the reduced rate of minority entry into self-employment.<sup>287</sup> Thus, the Commission undertook a study of the history of housing discrimination in New Jersey to trace the links between housing segregation, discrimination in the real estate industry and the impact on minorities and women seeking to go into business.<sup>288</sup> The existence and extent of segregation and discrimination in housing and the real estate market has been well documented in New Jersey. African-Americans have lived in New Jersey since the 17th century. In the majority of places during most of that time their housing has been segregated, sometimes into all African-American towns, more frequently into African-American quarters or parts of a town.<sup>289</sup>

In modern times, the African-American population in New Jersey took shape as a result of two waves of migration from the South stimulated by the two World Wars. The Jim Crow era-Post World War I African-American population jumped from 89,760 in 1910 to 208,828 in 1930, though this increase was much less than the influx from the South to Chicago or Harlem during these years. By 1940 housing segregation was well defined. Three cities with populations over 50,000 had almost no African-Americans<sup>290</sup> and in every city of that size, African-Americans were disproportionately found in a single ward. The four cities with the largest African-American populations were also largely segregated. Ward 3 of Atlantic City, which housed 50% of the city's 15,668 African-Americans was 60% African-American; Ward 7 of Camden, which housed one-third of the city's 10% African-American population was 40% African-American; Ward 8 of Jersey City, which had only a 4.5% African-American population, housed 60% of the city's African-Americans even though the ward itself was not quite 20% African-American. And in Newark, with the largest African-American population, more than 45,000 African-Americans, Ward 3 housed more than one-third of the city's African-American population and it was 63% African-American. The highly rigid pattern of segregation that affected African-American housing options did not similarly constrain the options of foreign-born whites.<sup>291</sup> Dr. Myers found not a single instance where a ward housed the majority of a city's foreign-born white population. The rates of home ownership in the 1980's reflect the degree of racial and ethnic residential segregation.<sup>292</sup> The racial gap evident in home ownership prevailed from 1950 until 1980 (the latest data available), with whites nearly twice as likely to own their own homes as African-Americans and more than twice as likely as Puerto Ricans or Vietnamese.<sup>293</sup> In a study designed to compare rates of home ownership for African-Americans with the rate that would have been "expected" had they owned homes to the same extent as whites of comparable socioeconomic status, the Newark SMSA was used. In the Newark area in 1980 the actual African-American home ownership rate was 25%, compared to an "expected" rate of 50% derived from whites of comparable status.<sup>294</sup>

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<sup>287</sup>See, discussion, *supra*, at §III.D.3.b(i).

<sup>288</sup>Payne, *Housing*.

<sup>289</sup>In South Jersey, a number of African-American settlements arose including, ironically, one in Mount Laurel township. It was the dispersal of this historic community in the 1960s by exclusionary devices that led African-American citizens of Mount Laurel to initiate the litigation that has come to exemplify the modern attempt to eradicate housing discrimination in New Jersey. *Id.* at 39-44; Joseph, "A Community Remembers," in *Blacks in New Jersey - 1983: Perspectives on Mount Laurel II*, 4th Annual Report of the New Jersey Public Policy Research Institute, pp. 51-67 (1983) (history of African-American settlement in Mount Laurel).

<sup>290</sup>In Hoboken, Irvington and Union City, African-Americans accounted for a fraction of one percent: 69 people in Irvington, 260 in Hoboken and 29 in Union City. See, Myers, *Demographic Trends*, at 18-20.

<sup>291</sup>Myers, *Demographic Trends*, at 20.

<sup>292</sup>*Id.* at 24.

<sup>293</sup>*Id.* at 22, 24 and 27.

<sup>294</sup>*Id.* at 4, citing, Kain & Quigley, *Housing Markets and Racial Discrimination: A Microeconomic Analysis*, 118 (1975).

Despite segregated housing conditions, from 1940 to 1960 the African-American population more than doubled from 226,973 or 5.5% of the population to 514,875 (9.1%).<sup>295</sup> Most of these migrants ended up in the central cities which simultaneously were being abandoned by the white population who responded to the various State and federal housing programs by moving to the suburbs.<sup>296</sup> But while whites tended to leapfrog to the older suburbs, using VA and FHA guaranteed loans to buy in the burgeoning new developments which refused to sell to African-Americans, even the more affluent African-Americans were limited in choice of housing. Areas available to African-Americans were expanded block by block into the older ring suburbs. It was not until the mid-fifties, for instance, that African-Americans were able to move to adjacent suburban cities. Once the block was "busted" however, the neighborhood became predominately African-American quite rapidly.

The New Jersey Legislature responded to block-busting and steering tactics by the real estate industry with legislation prohibiting such tactics.<sup>297</sup> The Legislature responded to the overt refusal by suburban developers to sell to minorities by prohibiting discrimination in publicly assisted housing.<sup>298</sup>

In 1960, the New Jersey Supreme Court stated:

We may note the pressing need for adequate housing for minority groups. Many more in these groups than at present would be in a position to take an active and beneficial role in the cultural, social and economic life of the community were they given an opportunity, and a vital factor in affording this opportunity is access to normal housing accommodations.<sup>299</sup>

Two years later, the Court described the complex of pernicious evils that flow from housing discrimination in New Jersey.

Discrimination against Negroes in the sale and rental of housing accommodations results in inadequate housing for them and in segregation in housing. They are thus compelled in large numbers to live in circumscribed areas under substandard, unhealthy, unsanitary and crowded living conditions. These conditions in turn produce disease, increased mortality, unstable family life, moral laxity, crime, delinquency, risk of fire, loss of tax revenue and intergroup tensions. . . . All of these things imperil the tranquility of a community. In addition, substandard and segregated housing seriously complicates the problem of public school integration.

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<sup>295</sup>Payne, *Housing*, at 17.

<sup>296</sup>Payne, *Housing*, at 12.

<sup>297</sup> *N.J.S.A. 10:15-12 g, h, k, and l*. The real estate industry itself tended to be segregated. White realtors usually refused to show African-American buyers houses in "white areas," steering them instead to areas where African-Americans had already bought, or, more often referring them to African-American real estate sales people who had access only to listings in African-American areas. Blockbusting was practiced by both white and African-American realtors. The usual tactics were a combination of calling white owners of housing in the path of African-American expansion, both threatening that African-Americans would move in, and offering higher than usual prices for the first property sold. Often, as soon as the first sale had been made, further calls notified owners how fast prices were dropping to encourage whites to flee. A phenomena called the "tipping point" helped "turn" a neighborhood. Once a block, neighborhood or development became about 30% African-American it was considered "black"; most whites who were left would rush to sell to avoid further fall in prices, which became a self-fulfilling prophecy. Unscrupulous realtors hastened white flight and sold housing to African-Americans at higher than white prices by "tipping" an area.

<sup>298</sup>New Jersey extended its prohibition on discrimination in public housing to cover publicly assisted housing just before Levitt, the largest developer in the nation, announced that he would build a 17,000 house development (to be known as Levittown—now Willingboro) in which he would continue his well-known sales policy of selling only to whites. Earlier, Levitt had successfully defended federal court actions intended to require him to sell to African-Americans. Payne, *Housing*, at 20.

<sup>299</sup>*Levitt and Sons v. Division Against Discrimination*, 31 N.J. 514, 533 (1960).

Manifestly, in their totality these conditions reveal an evil which it is within the competence of the lawmakers to correct.<sup>300</sup>

The thrust of the legal efforts to combat housing segregation was primarily preventative. It was to prevent discrimination from spreading into newly developing areas.<sup>301</sup> In 1980, when African-Americans were 12.6% of the state's population, more than 95% of the white population lived outside of the central city areas. In contrast, one out of three African-Americans in New Jersey lived in the central cities.<sup>302</sup>

While the state's African-American population grew at a rate nearly double that of New Jersey's total population, the Hispanic population grew at a rate nearly double that of African-Americans.<sup>303</sup> The consultant to the University of Maryland, Lisa Torres, demonstrated that Hispanics are the fastest growing group in the state.<sup>304</sup> Moreover, it is a young group: two of every five are under twenty, while only one in twenty is elderly. Fifty-five percent of all Hispanics in the tri-state region are of working age (between 20 and 65). The total estimated Hispanic-American population of the State in 1990 was 740,000.<sup>305</sup>

Hispanics, like African-Americans are also concentrated in relatively few municipalities. More than half (51.3%) of the State's Hispanic population live in only nine municipalities. Almost one-third of all New Jersey Puerto Ricans — the largest group of Hispanic origin — reside in three cities: Newark - 45,545; Jersey City - 30,950; and Paterson - 27,580. The State's Cubans are the least likely to settle in large cities, although Union City, the largest Cuban city in the country after Miami, houses 17.6% (15,054) of the State's 85,378 Cubans. Hispanics are also residentially isolated from the State's non-Hispanic population. Three-fifths (61%) of the Hispanic population live in communities where the proportion of Hispanics to non-Hispanics is twice as high as in the State as a whole. More than 35% live in communities where the proportion of Hispanics is four times as high as in the State as a whole, and more than one-sixth (16.8%) live in communities where a majority of the population is Hispanic. Among the various Hispanic groups, the rates of home ownership are lower than the average for whites. Their units are generally more crowded than white housing, and the median value of their homes falls short of that of whites. While these measures are worse for Puerto Ricans than for Mexicans and Cubans, the pattern of disparity is uniform among Hispanics.<sup>306</sup>

Among Asian-Americans, the pattern of home ownership differs by ethnic group. For example, Chinese reside in housing units with more persons per unit than found among whites.<sup>307</sup> However, Chinese have nearly identical home ownership rates to those of whites and the value of their homes exceeds that of white homes by more than 40%.<sup>308</sup> In contrast,

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<sup>300</sup>*Jones v. Haridor Realty Corp.*, 37 N.J. 384, 392 (1962).

<sup>301</sup>The Supreme Court was also active in other ways. In *DeSimone v. Greater Englewood Housing Corp. No. 1*, 56 N.J. 428 (1970), for instance, it interpreted New Jersey's complex zoning variance laws in a way that permitted a non-profit housing corporation to obtain a variance for a subsidized housing development in an all-white section of the City of Englewood. The Court was explicit in recognizing that the proposal would help to relieve racial segregation in the city's predominantly African-American Fourth Ward.

<sup>302</sup>Wagenheim, *Puerto Ricans in the U.S.*, The Minority Rights Group, Report No. 58 (1983), Table 4.

<sup>303</sup>Hughes, J.W., "What We Can Expect from the 1990 Census: New Jersey's Changing Demography and Economy", paper presented at the Tenth Annual New Jersey State Data Center Conference, cited in Torres, *Study of Hispanics in Business Participation*, (hereafter Torres, *Hispanics*) at 4.

<sup>304</sup>Torres, *Hispanics*, at 76.

<sup>305</sup>Darity, *Historical Trends*, citing, *Statistical Abstract of the United States: 1991*, note 14, Table 27.

<sup>306</sup>Myers, *Demographic Trends*, at 23.

<sup>307</sup>*Id.*

<sup>308</sup>*Id.* at 24-25.

Asian Indians also live in units with large numbers of persons per unit yet have lower than average rates of home ownership.<sup>309</sup> Only 49% of Asian Indian housing units were owner-occupied. Koreans, Filipinos and Japanese also have lower rates of home ownership compared to whites.

The differential exclusion from home ownership burdens those minorities forced into renting, which has been documented as 30% more expensive than owning, in part because of tax incentives under the Internal Revenue Code.<sup>310</sup> Not only does this divert income from capital formation, so necessary to business entry, but it deprives the minority households of a major hedge against inflation and contributes significantly to the problems of wealth and capital that handicap minorities in business competition.<sup>311</sup>

Payne also noted the discriminatory effects of massive federal subsidies through the Interstate Highway system and other roadbuilding programs which created the network of expressways and through roads that made the suburbs feasible. State government contributed to suburbanization through improved water, sewer systems and other infrastructures.

While there is much discussion in the literature about the *cause* of residential segregation, there is absolutely no doubt that segregation exists, against African-Americans<sup>312</sup> and other minorities.<sup>313</sup> There is also general agreement that the experience of African-Americans has not been, and will not be in the near future, the same as that of European immigrant groups, whose experience with severe discrimination diminished over time. The inexorable characteristic of skin color renews the badge of discrimination for each generation.<sup>314</sup>

The prognosis for Hispanic-Americans is less clear, the suggestion being that these groups may have a better chance of replicating the traditional American immigrant experience. Hispanic-Americans, however, and particularly Puerto Ricans, experience poverty in much greater numbers than others.<sup>315</sup> Median family income for Hispanic-Americans in the northeast in 1989 was \$22,627, compared to \$25,391 for African-Americans and \$40,990 for whites. Almost one quarter (23.3%) of these families had income of less than \$10,000, compared to 19.5% for African-Americans and 6.6% for whites. More than a quarter (27.6%) lived below the poverty line, compared to 21.4% for African-Americans and 6.5% for whites.<sup>316</sup> The disproportionate poverty of Hispanic-Americans operates to exclude them from suburban housing markets, suburban schools and suburban jobs just as effectively, whether or not it is combined with overt discrimination based on ethnic heritage.

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<sup>309</sup>*Id.*

<sup>310</sup>Payne, *Housing*, at 6, citing, Kain and Quigley, *Housing Markets and Racial Discrimination: A Microeconomic Analysis*, 118 (1975).

<sup>311</sup>Payne, *Housing*, at 6.

<sup>312</sup>Huttman and Jones, *American Suburbs: Desegregation and Resegregation*, in Huttman, Blauw and Saltman, eds., *Urban Housing Segregation of Minorities in Western Europe and the United States*, at 344-354 (1991); Keating, *Open Housing in Metropolitan Cleveland*, at 367-373.

<sup>313</sup>Payne, *Housing*, at 17, citing, *inter alia*, Jones, *The Puerto Rican in New Jersey*, at 46 (1955).

<sup>314</sup>Hawley and Rock, eds., *Segregation in Residential Areas* at 8 (1973). See also, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442-43 (1969) ("Just as the Black Codes enacted after the Civil War to restrict the free exercise of those rights were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skins, then it too is a relic of slavery").

<sup>315</sup>See Payne, *Housing*, at 18.

<sup>316</sup>*Ibid.*

#### iv. Impact of Discrimination in Education in New Jersey on Minorities and Women

Dr. Bates' availability study clearly establishes that educational qualifications are also key determinants to small business success. For this reason, the Commission requested a study of discrimination in the education system in New Jersey.<sup>317</sup> In addition, a study of Hispanics in business participation which included education and a study of gender discrimination in education were conducted for the Commission.<sup>318</sup> The following section is drawn primarily from the Tractenberg report.

A large proportion of New Jersey's minority citizens have been denied fundamental rights and services guaranteed to them by the New Jersey Constitution in the area of public education. These rights are intended to enable citizens to compete on equal terms in the contemporary marketplace and to otherwise function in a multi-racial society.

For more than twenty years, New Jersey's failures in this regard have been the subject of judicial, legislative, and administrative findings. In two cases — *Robinson v. Cahill*<sup>319</sup> and *Abbott v. Burke*<sup>320</sup> — the State Supreme Court documented New Jersey's systematic failure to provide children in poor, urban districts an education that meets constitutional standards. In a series of enactments prompted by the Court's decisions, the Legislature has acknowledged the unconstitutionality of the State's educational system and has attempted to fashion remedies to rectify the problem. Yet each legislative response, from 1975 to the present, has been challenged as insufficient.

The pattern could not be clearer and more consistent. There have been longstanding and egregious disparities in the funding of public education between poor urban school districts, disproportionately populated by minority students, and wealthy suburban districts. These disparities cause, or at least are strongly correlated with, grossly inadequate educational opportunities and results. No matter what measure is used, the education afforded students in New Jersey's cities is demonstrably inferior than the education afforded to suburban students. The importance of schooling to entrepreneurship is pointed up by Dr. Bates' findings that education and access to wealth are the two vital factors for business owners.

The situation is different, but may prove as compelling, regarding the State's failure to assure that New Jersey's public school students are educated in a multi-racial, multi-ethnic environment. Since at least 1965, the New Jersey Supreme Court has made clear that the State Constitution requires administrative authorities to assure, wherever feasible, that such a learning environment is provided. Since 1971, however, this power has not been used, and our schools are becoming increasingly segregated as a result.<sup>321</sup>

The State has offered constitutional, statutory, and regulatory guarantees of quality education. New Jersey's legal structure assures all students a "thorough and efficient system of free public schools," providing them with educational opportunities designed to equip them to be effective citizens and competitors in the contemporary labor market, and a racially-diverse educational experience designed to enable them to function in a multi-racial soci-

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<sup>317</sup>Tractenberg, *Education*.

<sup>318</sup>Torres, *Hispanics* and Cavin, *Gender*. The Tractenberg study's findings, conclusions and remedial recommendations apply to Hispanics and to women to the extent that these groups have experienced limited opportunities to compete equally in employment and government contracting. Tractenberg, *Education* at n.1.

<sup>319</sup>62 N.J. 473 (1973).

<sup>320</sup>100 N.J. 269 (1985) (Abbott I).

<sup>321</sup>The above statements are taken from Tractenberg's Executive Summary.

ety.<sup>322</sup> Moreover, New Jersey's students are guaranteed protection under law from discrimination and segregation in the schools.

These provisions have been construed many times over the years by the New Jersey courts as well as by the Commissioner and State Board of Education in their quasi-judicial functions. Most recently, the New Jersey Supreme Court addressed this issue in June 1990 in *Abbott v. Burke*.<sup>323</sup> *Abbott* is the culmination of a series of high court decisions dating back to 1895 which emphasize that a central purpose of the constitutional clause is to provide students with a public education designed to equip them to enter and compete in the marketplace. Notwithstanding this longstanding constitutional right, a total of eight New Jersey Supreme Court decisions since 1973 document that the State and the Legislature consistently have failed to afford many of the State's urban, poor, and minority students with an adequate education, and that as a result generations of these students have been denied the skills to compete in the marketplace.

Despite the constitutional provision, education has historically been a matter of local concern in New Jersey, supported primarily by local property taxes. Until recently, the State took no part in local school financing. One result of this policy has been to encourage exclusionary zoning to protect the local tax base. Exclusionary zoning, in turn, has pushed tax rates up in cities such as Newark, rendering the real estate market in urban areas even more disadvantaged. This process becomes cyclical, and contributes to the problems of overcrowding, neglect, and abandonment that characterize the urban housing market. Meanwhile, the city schools have become overcrowded, understaffed, and neglected as the tax base has eroded. By the time the Supreme Court stepped in, conditions were seriously deficient. *Abbott v. Burke* emphasized in the strongest terms that New Jersey has denied a substantial percentage of its minority citizens that public service most directly intended to equip them to compete on equal terms for jobs, entry to higher education and professional opportunities. The quality of the education historically available to minorities has limited their opportunity to go into business, or to become a State contractor.

The inability of students in poorer urban districts to enter the same market as their peers was not simply a generic one. The Court noted how it affected their ability to compete in the mainstream of the contemporary marketplace. For example, adequate "exposure to computers is necessary to acquire skills to compete in the workplace."<sup>324</sup> Yet, the court carefully documented the inadequacies in computer equipment, space, and courses available in poorer urban districts.<sup>325</sup> Precisely the same was found regarding science education and foreign language instruction, among many others.<sup>326</sup>

Finally, the Court predicted that:

While the constitutional measure of the educational deficiency is its impact on the lives of these students, we are also aware of its potential impact on the entire state and its economy—not only on its social and cultural fabric, but on its material well-being, on its jobs, industry, and business. Economists and business leaders say

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<sup>322</sup>The primary educational right of New Jersey's students derives from Article VIII, Section 4, Paragraph 1 of the State Constitution. Dating from 1875, it provides that:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

<sup>323</sup>119 N.J. 287 (1990) (*Abbott II*).

<sup>324</sup>119 N.J. at 359.

<sup>325</sup>119 N.J. at 359-60.

<sup>326</sup>119 N.J. at 360-61.

that our state's economic well-being is dependent on more skilled workers, technically proficient workers, literate and well-educated citizens. And they point to the urban poor as an integral part of our future economic strength. In short, they urge the state to go about the business of substantially improving the education of the very subjects of this litigation, the students in poorer urban districts. So it is not just that their future depends on the state, the state's future depends on them. That part of the constitutional standard requiring an education that will enable the urban poor to compete in the marketplace, to take their fair share of leadership and professional positions, assumes a new significance.

... Soon, one-third of our citizens will be black or Hispanic, and many of them will be undereducated . . . The fact is that a large part of our society is disintegrating, so large a part that it cannot help but affect the rest. Everyone's future is at stake, and not just the urban poor's. <sup>327</sup>

Furthermore, the Court acknowledged that it will take years to phase in a funding scheme that will begin to provide students in poorer urban districts with a level of educational funding that approximates the level afforded to students in wealthier districts.<sup>328</sup>

Hispanics have also been deprived of equal educational opportunities. A recent study confirms that New Jersey public schools rank among the several most segregated public schools in the Nation.<sup>329</sup> Moreover, since 1970, the percent of whites in schools with Hispanic students has fallen by 12% while the level has remained relatively stable for African-Americans. In 1989, New Jersey Hispanic students were about 12% of total student enrollment; approximately 30% of the children in New Jersey's 591 operating school districts are African-American or Hispanic.<sup>330</sup> The concentration and isolation of Hispanics is not limited to a few large cities. There are 39 districts in which more than half of the enrollment is African-American or Hispanic. Most of the 39 majority Hispanic districts are geographically isolated: "they are islands surrounded, or virtually surrounded, by districts that have only small Hispanic enrollments but that are at least as large as them in total enrollment." For most African-American or Hispanic students, only 12% of classmates are white. There are 26 school districts in which 70% or more of the students are African-American or Hispanic.<sup>331</sup>

In addition, many Hispanics experience an added impediment: English is not their native language. New Jersey is one of 11 states requiring bi-lingual education. Under New Jersey law, a district must provide bi-lingual education when it has 20 or more students who speak the same foreign language and cannot speak English. If a district has fewer than 20 students it can provide classes on English as a second language. Approximately 35,000 students were enrolled in bi-lingual educational programs throughout the State during 1988; a majority of these were Hispanics. Half of all adult Hispanics in the tri-state region have not completed high school, with Puerto Ricans and Dominicans generally receiving less schooling. Low test scores, low college entrance and attendance and dropout rates as high as 47% and 58% (Camden) were cited by New Jersey courts as evidence of the State's failure to meet the constitutional standards.

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<sup>327</sup>119 N.J. at 392-93.

<sup>328</sup>119 N.J. at 387-89.

<sup>329</sup>Gary Orfield and Franklin Monfort, *Status of School Desegregation: The Next Generation, Report to the National School Boards Assoc. Metropolitan Opportunity Project*, (Harvard University, January 8, 1992) (pre-publication copy) (hereafter *The National School Board Report*); G. Orfield, *School Desegregation Patterns in the States, Large Cities and Metropolitan Areas, 1968-80*, pp. 6-7 (Joint Center for Political Studies 1982); Orfield, Monfort and George, *School Desegregation in the 1980's; Trends in States and Metropolitan Areas* (Joint Center for Political Studies 1987). Most of the statistics in this section are derived from Tractenberg and Torres at 35-44.

<sup>330</sup>Torres, *Hispanics*, at 36.

<sup>331</sup>Torres, *Hispanics*, at 37.

Dr. Cavin's report summarized data regarding the ongoing effects of past and present gender discrimination in education among women in New Jersey. The goal was to identify factors that inhibit the growth and success of women-owned businesses in New Jersey. She found sexual harassment in educational institutions, the lack of adequate and affordable childcare for mothers furthering their education in State institutions, the advisement and placement of girls and women into "pink curricula" in schools and colleges which later locked women out of a chance at the higher paying science and engineering fields, a long history of segregating girls and women out of predominantly male technical schools and technology universities where entrepreneurship is encouraged by faculty mentorships with students and networking with alumni. She also found mandatory curricula which channeled females into typing and home economics, thereby channeling women into low paying jobs while males were channeled into "shop" courses, which lead to trades traditionally associated with contracting. Dr. Cavin found that women suffer a severe disadvantage in business start-ups due to these past inequities which still linger in New Jersey. She also concluded that the State has enacted some good laws in an attempt to address gender inequity in education, but has failed to enforce adequately these statutes and the Department of Education, in particular, has failed to collect systematically data on sexual harassment of women of all colors, necessary to measure progress.

We want to reiterate here that this evidence of discriminatory factors that disadvantage minorities and women — while not necessarily pertinent for *Croson* purposes — should serve as a compelling basis for the State to advance policies that, in the long term, will begin to redress inequalities that have been allowed to develop in this State.

v. Impact of Discrimination in Employment in New Jersey on Women and Minorities

The Commission has received compelling evidence of discrimination against minorities and women in various aspects of the labor market in New Jersey. There are race and gender disparities in occupational opportunity, status, and wages. These historical inequalities are central to our understanding of current disparities in ownership of business enterprises and, thus, in access to contracting and procurement opportunities with the State.

Few people go into business without first gaining skills, experience, and knowledge of an industry and field through employment. Moreover, certain kinds of employment from which women and minorities are excluded, particularly managerial, sales, and executive positions not only hone the same skills needed to run a business but develop reputations which open access to capital and credit. Additionally, they provide resources, savings, and access to capital that accompanies employment in well-paying jobs.

The vast majority of all managers and executives in New Jersey are white males, underscoring a significant racial and gender disparity among executives and managers in New Jersey. A statistical study done for the Commission concludes that 57% of the difference in male and female chances of holding professional or managerial jobs is due to discriminatory differentials in treatment.<sup>332</sup> Altogether, 9.1% of all white men in New Jersey were executives and managers, though only 4.2% of white women were, and a mere 3.6% of African-Americans were executives or managers. Still, these percentages far exceed those for African-American females: only 1.5% of African-American females in New Jersey held managerial or executive positions.

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<sup>332</sup>See Myers, *Employment*, at 28-33, "Occupational Disparities by Race and Gender". Dr. Myers estimated employment equations for separate groups and compared the outcomes. One outcome is based on a group's actual characteristics and treatment. The other outcome is based on a group's characteristics but as compared to the other group's treatment. The difference is a measure of discrimination. This method is called the "Blinder-Oaxaca-Duncan" residual difference method. Some analysts believe that this method provides an underestimate of the degree of discrimination because it ignores the impacts of previous discrimination on inequalities of characteristics.

Women in New Jersey must have twice as much education in order to have the same promotion prospects into the ranks of professional, managerial, or executive occupations. The age factor also disadvantages women. Whereas older men are rewarded with promotions up the occupational ladder, older women are not. The disadvantage of being African-American is smaller for women than for men. Among men, being African-American lowers the probability of having a managerial job by eight percentage points. A smaller fraction of the racial gap in these probabilities is due to labor market discrimination. Much of the African-American/white difference in professional, managerial, and executive positions is the result of pre-labor market discrimination, which manifests itself in unequal educational attainment.<sup>333</sup>

The history of professions is different. Although the professional fields have and continue to be largely segregated by gender women have been able to attain professional status in the traditional "female professions," elementary school teaching, nursing, and social work. Thus, when all professions are aggregated into a single category — professional — the gender disparity is less severe than the gender disparity among executives and managers. About 46.9% of all professionals are white males, while 44.4% of professionals are white females.

There is, however, a major racial disparity in the professions. African-Americans are two to three times less likely to be professionals as they are to be found in the general populations. Whereas African-American males and females make up 9 to 10.7% of the population respectively, they comprise only 3.1 and 5.6% of the professional workers in the State. Asians, on the other hand, are among the most highly educated groups in New Jersey. They have also had a history of successful business ownership in retail and wholesale trade which has translated into mobility into professional occupations that offer further opportunities for business development.<sup>334</sup> Hispanics' entry into the professions is a recent phenomena and they are still found in only minuscule proportions in professional and related services — education, engineering and other professional services, in public administration and communications. They are nearly absent from many lucrative industries such as finance, real estate, legal, engineering, and professional services.

Job segregation by race and gender remains a major characteristic of industrial life. For the most part, men and women do not do the same kind of work and minority males do not do the same kind of work as white males.<sup>335</sup> Furthermore, these segregated jobs are concentrated in the lowest paying of the occupations. It is this concentration in lower paying segregated jobs which accounts for most the wage differentials between men and women, minorities and whites.

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<sup>333</sup>Myers, *Employment*, at 2; *See also, id.* at 11.

<sup>334</sup> Myers, *Employment*, at 3 and 94. Many recent arrivals such as Vietnamese and other Southeast Asians have been refugees from troubles and war at home, have worked at the lowest paying jobs in the depressed New Jersey labor market, and are found in disproportionate numbers in private households and textile mills and in the garment industry.

<sup>335</sup>Blumrosen, "Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964," 12 *University of Michigan Journal of Law Reform* 401,402 (1979); Cavin, *Gender Report*. Job segregation is the occupational result of race and gender stereotyping.

#### IV. DEVELOPING NARROWLY TAILORED REMEDIES

The Commission believes that the findings in this Report demonstrate that the State has passively participated in, and sometimes engaged in or assisted discriminatory practices, which have adversely affected opportunities for minorities and women to participate in state contracts. The recommendations that follow are designed to address the problems we have noted. And we believe that our recommendations are consistent with *Croson*.

First, it should be noted that only in instances of race-conscious remedies does *Croson* come into play. Several of the recommendations we make are race-neutral. But even as to those that are race- or gender-specific, they are made only after a determination that a sufficient predicate exists under *Croson*, namely that race and gender discrimination has been practiced or supported by the State. These recommendations are limited – they are designed to address the discrimination we have found, and are proposed only after examining whether other race- and gender-neutral steps would be effective.

##### A. EFFORTS AT RACE- AND GENDER-NEUTRAL REMEDIES TO CORRECT EXCLUSION OF MBEs AND WBEs FROM STATE CONTRACTING

###### 1. Early Economic Development Programs Had No Minority Contracting Requirements

Like the federal government, New Jersey has used its power of the purse to counter cyclical downturn. In 1977, the United States Congress passed the Public Works Employment Act which contained a provision requiring 10% minority business participation in each Local Public Works II construction grant.<sup>336</sup> The 1974 New Jersey Economic Development Authority Act<sup>337</sup> (EDA), described earlier in the section on Business Assistance, created the Economic Development Authority charged with providing for the construction, acquisition, financing, selling and leasing of manufacturing, industrial, commercial and other employment promoting facilities. The EDA was in part a response to the loss of manufacturing employment in New Jersey and, in part, a counter-cyclical economic/employment stimulus. The New Jersey Economic Development Authority was strengthened in 1981<sup>338</sup> to provide for the redevelopment of industrial and commercial centers in urban areas in order to induce private investment, but there was no provision that part of that investment be spent with either small or minority businesses despite the relative success of the federal Local Public Works Program experience; nor did the 1983 Local Development Financing Act<sup>339</sup> contain any special provisions for minority- or women-owned enterprises.<sup>340</sup>

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<sup>336</sup>Greater Newark Urban Coalition, *The Local Public Works II Minority Participation Program (A Congressional Afterthought)* at 3, 1980 (hereafter LPW II Report). This study was initiated to determine how effectively the minority participation requirement of LPW II was carried out in New Jersey. It explores questions regarding the intent and concerns of Congress; the impact of time constraints on implementation; monitoring incentives of grantees; effectiveness of Minority Business Enterprise utilization by grantees and prime contractors; eligibility of participating minority business enterprises; and whether the implementation of the social goal impacted negatively on the primary purposes of the LPW II program which were to create an economic stimulus to counter the effects of the 1974 recession, stimulate the nation's construction industry and reduce unemployment. (See, LPW II Report, at 2).

<sup>337</sup> *N.J.S.A. 34:1B-1 et seq.; N.J.A.C. 19:30-1.1 et seq.*

<sup>338</sup> A Supplement to the New Jersey Economic Development Authority Act, L. 1981, c. 505; *N.J.S.A. 34:1B-7.1 et seq.*

<sup>339</sup> P.L. 1983, c. 190, as amended; *N.J.S.A. 34:1B-36 et seq.; N.J.A.C. 19:30-1.1 et seq.*; Focused on urban municipalities, the Amendment created a State fund to provide direct State financial assistance to local commercial and industrial projects. Financial assistance includes, but is not limited to, loans, loan guarantees, grants, secondary mortgages, and equity participation. It also includes waiver of bond requirements under some circumstances.

<sup>340</sup> One New Jersey program that was developed specifically to encourage and assist minority business enterprises was the Rutgers Minority Enterprise Small Business Investment Company, (MESBIC), located in the University of Rutgers Graduate School of Management, Newark.

## 2. Lack of Data about Race, Ethnicity, and Sex

The section on Business Assistance in this Report traces the evolution of the race- and gender-based initiatives, including minority- and women-owned business set-asides, beginning with Governor Kean's Executive Order No. 46, which established the Inter-Agency Procurement Committee. As the Report points out, race- and gender-neutral programs largely failed to reach the minority- and women-owned businesses who most needed the assistance. As this awareness developed, the State began to respond. At first, the Executive Department attempted to have each department set goals, but the lack of a database identifying M/WBEs was a serious obstacle. Next, the Legislature opted to encourage contracts to be set aside first for small businesses, and when that failed to impact favorably on M/WBEs, then specifically for minorities and women.

## 3. Previous Set-Aside Programs Faced Obstacles

Unfortunately, the true measure of effectiveness of set-asides for M/WBEs was prevented by the short span of time from mid-1987 to mid-1989 when the full range of rules to implement the law were in place. This Report has documented the extent to which minorities and women fall through the cracks when mainstream programs seek to assist businesses in general, and small businesses in particular, but fail to target M/WBEs. This Report has also documented the trend toward minority- and women-owned businesses obtaining an increased share of New Jersey's purchasing and contracting that, despite the obstacles, had begun before *Croson* caused the suspension of the set-aside program. It also documented the dramatic difference between mandatory goals imposed by federal programs, which has been upheld by the Supreme Court, and State programs without goals or set-asides to aid M/WBEs.

Clearly, one of the most serious obstacles is the lack of record-keeping required of State departments, independent agencies, commissions, authorities, local municipalities, counties, and colleges in order to determine the pattern of purchasing and contracting engaged in by each. Implementation cannot even seriously begin unless monitoring and record-keeping systems are in place. Without the ability to track the use of minority and women subcontractors by prime contractors, the State is blind. For example, in 1988, DEPE awarded 57 construction contracts for \$355.1 million. None of these prime contracts went to MBEs or WBEs. M/WBEs rarely become prime contractors on wastewater treatment or toxic waste disposal projects. However, because DEPE tracks subcontracts, we know that these 57 prime contractors awarded 121 subcontracts (for \$19.3 million) or 5.4% of the \$355.1 million to minority subcontractors.<sup>341</sup>

Not only is the State prevented from accounting for moneys spent with M/WBEs without a tracking system, it also cannot monitor good faith efforts or compliance with its anti-discrimination laws. For instance, the State needs to be able to follow the subcontracting process so that when prime contract bidders pledge to use certain minority subs or a certain number of M/WBEs, the contracting unit can ascertain whether the minority is actually used. As Dr. Bates explained, "once the contract is in hand, the prime contractors often negotiate to switch subcontractors, shift dollar amounts between subs, and so forth; minority subs frequently lose awarded contract dollars as a result."<sup>342</sup> The State dollars expected to go to a minority- or women-owned firm end up in other pockets to the detriment of the State and the law.

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<sup>341</sup>Bates, *Disparity*, at 7.

<sup>342</sup>*Ibid.*

**B. RACE- AND GENDER-BASED REMEDIES ARE WARRANTED TO CORRECT PURCHASING AND CONTRACTING PRACTICES THAT DISCRIMINATE AGAINST M/WBES**

For the reasons specified above, race- and gender-neutral remedies have been tried, and have failed to correct the discriminatory impact that New Jersey's purchasing and contracting practices have had. The evidence garnered by the numerous components of the Commission's overall study point to the need for narrowly tailored race- and gender-specific programs to remedy the overt and covert forms of discrimination identified.

**1. Race- and Gender-Neutral Business Assistance Programs Have Not Been Effective**

All of the statistics collected by the Commission demonstrate that the MBE and WBE share of State contracts, which was low to begin with, dropped dramatically when the set-aside and goal programs were suspended in 1989.

As discussed above, before M/WBE set-asides were instituted, the State's small business set-aside program resulted in M/WBES receiving less than 1% of total State payments to all vendors. According to Dr. Bate's Disparity study, for example, when set-asides were in effect, the Division of Purchase and Property spent 1.4% of its contracting dollars with MBE in 1988 and 1.2% with MBE in 1989. Recent figures provided by DPP show that in 1990 and 1991, respectively, the MBE shares were 0.5% and 0.7%; and the WBE shares were 1.6% and 2%.<sup>343</sup>

The remaining small business set-aside has continued, with 118 bidding opportunities which led to 835 small business multi-source contracts in 1992. No micro or Urban Development Enterprise set-asides have been utilized. No information was available about what contracts went to M/WBES. Since there was substantial underutilization even when set-asides were in effect, it is clear that without some form of race- and gender-based set-aside program, minority- and women-owned businesses will continue to experience discrimination.

It is also abundantly clear from the evidence in our record that at the present time, non-minority prime contractors are resistant to using minority and women subcontractors, absent the compulsion of set-asides. The Rutgers DOT study showed that nonminority prime contractors who used WBEs and MBEs as subcontractors when required to do so by federal mandate, did not use those same M/WBES on projects which were not covered by federal set-aside requirements. The State's early experience with the federal LPW II program also revealed resistance by nonminority prime contractors to using minority subcontractors.<sup>344</sup>

Perhaps the clearest example of the positive effect of race- and gender-based programs is DOT's recent experience with the "target" construction program. In 1991, M/WBES received 1.9% of DOT contracts. After the targets were set, the figures rose dramatically to 16.2%.<sup>345</sup>

Moreover, it is clear that neutral remedies alone cannot eradicate the effects of the long-standing history of discrimination against women and minorities revealed in this study. The combination of statistical evidence of underutilization of minorities<sup>346</sup> and women, the Myers study showing intentional discrimination against minorities and women, the Rutgers study of discrimination by prime contractors against M/WBE subcontractors, and the anecdotal evi-

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<sup>343</sup>Senator Wynona Lipman, Newark Public Hearing (1T at 14).

<sup>344</sup>New Jersey's experience is similar to the experience of other governmental entities which have tried to increase M/WBE share of contracting without set-aside programs. *See, e.g.,* Federal SBA Study.

<sup>345</sup>Memorandum from Commissioner Irving Briddell to Executive Director, dated July 16, 1992.

<sup>346</sup>The Bates study included as minorities the following groups: African-American, Hispanic, Asian, and to a lesser extent, Portuguese and Native American.

dence of witnesses, all combine to produce sufficient evidence of discrimination by the State against women and minority contractors to warrant State action. In particular, the evidence of long-standing overt discrimination in the construction industry and the State's continuing infusion of public funds into that industry support the view that the State has passively participated in private discrimination.

We therefore find that there is sufficient evidence of discrimination against women and minority businesses in State contracting to support the need for race- and gender-based measures tailored to redress and eliminate the discrimination we have found. Race- and gender-neutral measures alone have not solved this current problem nor remedied the effects of past discrimination. Nor do we believe such remedies will.

Based on Dr. Bates' study of actual availability versus utilization of minority and women in construction, we believe that a set-aside of at least 7% for MBEs and 3% for WBEs would be legally justifiable. Higher goals may be justifiable based on the underutilization of M/WBEs and the percentage of existing availability. However, due to the urgency of the problem facing M/WBEs today, we are recommending an immediate revival of New Jersey's existing Set-Aside Act with its goals of 7% for MBEs and 3% for WBEs. As further data is accumulated, and when legislative action is appropriate, we recommend that the percentage in the existing Set-Aside Act be raised accordingly. We anticipate that this goal will be reviewed periodically and adjusted as circumstances warrant.

According to Dr. Bates, MBEs and WBEs have comprised at least 4.2% and 4.3% of the construction industry in New Jersey based on Census data. However, the 1990 Census data was not yet available and is expected to show continued growth in the numbers and capacity of minority- and women-owned firms. Using his alternate measure, based on the New Jersey construction bidders' list, M/WBE would constitute more than 45% of the available pool. We consider an availability figure of 15% for MBE and 15% WBE in construction to be a conservative figure because the evidence before the Commission demonstrates that minority and women firms constitute at least 20% of those available for construction contracts.

## **2. Affirmative Action Programs with Respect to Public Contracting are Necessary to Dismantle Discriminatory Systems and to Eliminate the Continuing Effects of These Systems in Order to Avoid Continued Passive Participation in Patterns of Discrimination**

An affirmative action approach based on the experience with eliminating discrimination in employment is particularly appropriate. Affirmative action programs can work, and have worked in New Jersey. Three New Jersey agencies,<sup>347</sup> reflecting primarily the long and consistent influence of federal policies, have consistently tried to increase utilization of minority- and women-owned construction firms and have adopted effective goal programs to do so. These agencies spend the bulk of the State's construction money. The combined M/WBE construction procurement share ranged from a low of 7.9% to a high of 18.1% over the six years 1984-1989. These few agencies aside, the State of New Jersey has been consistently underutilizing MBE and WBE contractors.<sup>348</sup>

The efficacy of affirmative action requirements is also demonstrated by the DOT study reported by the Rutgers Interfunctional Team. On projects with minority utilization requirements, prime contractors hired minority and women subcontractors. On projects without such requirements, the same minority pool was used significantly less often. The report con-

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<sup>347</sup>Department of Transportation (DOT), Department of Environmental Protection and Energy (DEPE), and New Jersey Transit.

<sup>348</sup>Bates, *Disparity* at 2-3.

cluded that “unless there is an enforceable policy of inclusion for WBEs and MBEs these business enterprises will not obtain a significant share in dollars of government contracts.”<sup>349</sup> Witnesses from contracting units also testified that when utilization is required, M/WBEs are available and utilized. When there are no requirements M/WBEs are not used.<sup>350</sup> Officers of several large corporations doing business in New Jersey also testified about their programs of equal contracting. Johnson & Johnson, PSE&G, and G.E. Aerospace all have affirmative buying programs which have been successful.

What the Commission has found, in essence, is that a multitude of practices currently taking place in New Jersey contribute to the barriers that minorities and women face in contracting with the State in both the public and private sectors. Many of these practices are traceable to the State directly or are tolerated and supported by State governmental units. The primary mechanism which the State uses to address discrimination — the complaint process — has been remarkably ineffective in protecting opportunities. A healthy, equal opportunity posture for doing business in New Jersey would itself assure that public contracting opportunities are fairly afforded. Without that posture, neither the State nor private contractors, nor minority or women entrepreneurs can expect that fair treatment will be afforded.

The Commission began its work seeking to determine whether conditions justifying contract set-asides for minorities and women within the meaning of *Croson* would be constitutional. Its findings, however, are far broader, requiring State action to enforce equal opportunity rights for minorities and women to do business in the State including targeted set-asides in areas where justified by the evidence. Viewed in this light, the question of minority- and women-business set-asides in state contracting becomes but a part of a program of State action necessary to eliminate the effects of conduct in several sectors of New Jersey activity which, cumulatively, result in a denial of equal opportunity for minorities and women to participate in the business activities of the State.

### 3. Adoption and Enforcement of Anti-Discrimination Laws Has Not Been Sufficient

Twenty years ago the Kerner Commission reporting on race riots which had torn through major U.S. cities — two of them in New Jersey — during the summer of 1968, concluded that we had become “two nations, one white and one black, separate and unequal.” The New Jersey “Governor’s Select Commission on Civil Disorder” in 1968, said that:

Inherent in these problems is the virus of segregation. It cannot be treated with palliatives. It must be attacked at the source. It is rampant in urban bodies no longer healthy enough to fight disease of any kind and which will increasingly suffer frustration and disorder unless old and outdated approaches are abandoned and new solutions sought in the metropolitan and regional context . . . New Jersey has the strongest law against racial discrimination in housing of any state... The State has not yet proved effective in enforcement of the civil rights law . . . There is still reluctance to use all the tools provided by legislation and liberal judicial interpretations.<sup>351</sup>

In the early 1960’s the State was advised by the New Jersey Civil Rights Commission, based on a study of the operation of the New Jersey Division on Civil Rights, the Real Estate Commission and the Commissioner of Education that reliance on individual complaints as a

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<sup>349</sup>*DOT Study*, at 26.

<sup>350</sup>Ernestine Watson, of UMDNJ testified that the contractors who sell to the University of Medicine and Dentistry used to buy supplies and services from minorities and women vendors, but now refuse, because “they don’t have to.” Also testimony of Shirley Rutherford, Jersey City AA officer reported the same problem. *See* (5T-13;5T-28).

<sup>351</sup>Governor’s Select Commission Civil Disorder Report, at 62- 63.

basis for invoking the Law Against Discrimination would be ineffective. The reasons for this ineffectiveness was explained: What we have found, stripped of qualifications, is that during the period studied, none of the agencies utilized their powers to the full to attack discrimination. They tended to wait for a complainant, and then to construe their powers narrowly. They have not enforced the law to its full extent, either procedurally or substantively. This is not a criticism of individual administrators . . . This is a statement of fact about the governmental process in dealing with discrimination.<sup>352</sup>

Nevertheless, the Division on Civil Rights continued to rely on a complaint process. Even in 1970 when it adopted a landlord reporting rule to identify segregation in suburban apartments, it did not follow through with an implementation process to address segregation where it was identified. It has essentially continued to rely on a complaint process, knowing that it would not be utilized by victims of discrimination for a variety of reasons.

In 1979, when the legislature enacted N.J.S.A. 10:5-12(1), with its wide ranging prohibition on discrimination in business transactions, the provision remained an unknown element. Indeed the DCR's own intake staff have often been unaware that their agency was empowered to enforce this provision against contract discrimination. At the same time, during the 1980's the State was sufficiently aware of discrimination in State contracting to enact the set-aside program which the State suspended after the Supreme Court's decision in *Croson*. The evidence, both individual and statistical compiled by this Commission confirms what the Legislature believed when it enacted the New Jersey set-aside law: that there exists a pattern of discrimination against minority and women entrepreneurs who seek to do business here. It offends deeply held notions of justice to allow injustice to continue unabated while remedies are available.

New Jersey has assumed the obligation to provide its citizens with equality before the law. It has fashioned legal processes and standards to achieve this objective and then has failed to take the steps necessary to bring the State into conformity with its stated policies. *Croson* acknowledges that a State may change its historic pattern of either toleration of discrimination, or ineffective efforts at eradicating it, and adopt programs to address the consequences of its own neglect.

It is clear from the record before this Commission that progressive anti-discrimination laws have not been sufficient to prevent or eradicate discrimination in the public contracting process. It is noteworthy that virtually every MBE or WBE witness who testified at the Commission's hearings was asked whether he or she was aware that New Jersey law prohibits discrimination in contracting. The majority of the witnesses were unaware of this fact.<sup>353</sup> The overwhelming majority, however, also testified that even when they did experience discrimination, they would not file a complaint for fear of reprisal, such as being blackballed or black-listed in the industry. Consequently, it is clear that the absence of complaints about contract discrimination is *not* probative evidence of the absence of discrimination. It is also clear that this is an area in which enforcement of the anti-discrimination laws through a complaint process is likely to be ineffective.

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<sup>352</sup>Report of the New Jersey Commission on Civil Rights to the Honorable Richard J. Hughes, Governor and to the Legislature of New Jersey on Matters Relating to the Work of the Division on Civil Rights (undated), at 9, quoting, Blumrosen, Alfred, *Securing Equality: The Operation of the Laws of New Jersey Concerning Racial Discrimination* (1963-1964), at 16.

<sup>353</sup>Not only are complainants unaware that the Law Against Discrimination prohibits discrimination in contracting, but also New Jersey Courts are equally misinformed. Recently, the Division on Civil Rights moved to participate as *amicus curiae* in a Superior Court Law Division case and successfully persuaded the court to reconsider its prior ruling that the LAD did not apply to independent contractors alleging discrimination. See *Philip Douglas v. Bally's, et al.*, Superior Court Law Division, Atlantic County, Docket No. L-5353-91.

# RECOMMENDATIONS

## Introduction

The Commission believes that the above findings and conclusions demonstrate that minority and women businesses in New Jersey are being deprived of an equal and fair chance to contract with the State. The barriers we have identified should be addressed and remedies can be implemented consistent with the Constitution and the U.S. Supreme Court's decision in *Croson*. The State can and should take additional steps to address past discriminatory practices which continue to inhibit the ability of minorities and women to enter into business and to participate on an equal basis with others in the State's purchasing and contracting practices.

In order to eliminate some of the continuing and pervasive barriers to minority and women businesses, the Commission recommends that the State immediately revive the Set-Aside Act for Small Businesses, Female Businesses, and Minority Businesses. *N.J.S.A. 52:32-17* (Set-Aside Act). The implementation of the Act as a race and gender set-aside program was temporarily suspended following *Croson* since it had been enacted without the benefit of a full and formal evidentiary investigation into the existence of actual discrimination.

With the completion of this study, the Commission is advising the Governor and the Legislature that widespread, systematic exclusion of minority- and women-owned businesses from the public procurement process does exist. The State now has the benefit of this full scale investigation into the existence of actual discrimination. These specific findings of discrimination clearly meet the *Croson* predicate requirements and therefore, race- and gender-based set-asides in accordance with New Jersey's Set-Aside Act can be reinstated without the necessity of further legislative action. The statistical and anecdotal evidence compiled by the Commission reveals that minority- and women-owned businesses have suffered substantially as a result of the suspension of the Set-Aside Act and the resultant loss of state contracts. The State should not delay further in providing relief.

In addition to the recommendation that the State immediately reactivate the Set-Aside Act, the Commission is also recommending that the State immediately seek to implement minority- and gender-targeted goals in State programs for economic development. Race- and gender-based goals are essential if minority and women businesses are to have a fair or equal chance to participate in New Jersey's contracting practices.

Additionally, the State should redouble its efforts to enforce existing State laws against discrimination (e.g., *N.J.S.A. 10:5-12(1)*), insure that all State agencies carry out State policies prohibiting discrimination, create an oversight body to monitor and enforce State compliance with its anti-discrimination policies and set-aside goals and should take such steps as are necessary and appropriate to address the continuing vestiges of past discrimination that inhibit minorities and women from developing viable businesses and from contracting with the State.

The recommendations which follow are designed to create a "fair playing ground" for all of our citizens to participate in state contracts. In order to achieve this objective, the evidence before the Commission demonstrates that in addition to the set-aside goals and effective enforcement of the State's anti-discrimination laws indicated above, the State should (1) establish a centralized oversight body to insure the proper enforcement of the State's goals of equal participation in public and private contracting; (2) require preparation and preservation of records reflecting M/WBE participation in State contracting programs and the impact of the State's economic development programs on M/WBEs, as well as the lending and surety practices of bonding and other financial institutions; and (3) modify various contracting practices and bonding requirements which continue to affect adversely the opportunities of minorities and women to develop businesses and to participate in state contracts.

**I. THE STATE SHOULD REINSTATE M/WBE SET-ASIDES FOR STATE PROCUREMENT AND CONSTRUCTION CONTRACTS AND SUBCONTRACTS AND IMPLEMENT TARGET GOALS FOR STATE PROGRAMS FOR ECONOMIC DEVELOPMENT**

The Commission's study has clearly revealed that race- and gender-neutral remedies have been tried and have failed to correct the discriminatory impact that New Jersey's purchasing and contracting practices have had on minorities and women. The evidence garnered by the numerous components of the Commission's Study point to the need for narrowly tailored race- and gender-specific programs to remedy the overt and covert forms of discrimination identified.

**A. TO ASSURE THAT M/WBEs RECEIVE THEIR FAIR SHARE OF STATE CONTRACTS, THE STATE SHOULD IMMEDIATELY REINSTATE NEW JERSEY'S SET-ASIDE ACT WITH ITS GOALS OF 7% MBE UTILIZATION AND 3% WBE UTILIZATION**

Although the Commission believes that the record established herein can support a set-aside program of substantially more than the 7% MBE and 3% WBE authorized by New Jersey's Set-Aside Act, the urgency of the problem facing New Jersey and its M/WBEs mandates the immediate revival of the existing statutory scheme.

**B. THE STATE SHOULD CONTINUE TO EVALUATE THE DATA ON M/WBE AVAILABILITY AND UTILIZATION TO DETERMINE WHETHER HIGHER SET-ASIDE GOALS SHOULD BE IMPLEMENTED**

Based on the Commission's statistical analysis of actual availability versus utilization of minority and women in the construction industry in New Jersey, we believe that a set-aside of 15% for MBEs and 10% for WBEs in State construction contracting may be legally justifiable. Although there is evidence that actual availability figures are higher, the Commission has adopted an availability figure of 15% for MBEs and 15% for WBEs in construction. Therefore, the Commission is recommending that the State direct the centralized oversight agency (recommended herein) to continue to compile the necessary data and to evaluate and make ongoing recommendations regarding state-wide utilization goals. The specific recommendations which follow relate to both the reactivation of the Set-Aside Act and the future attainment of the recommended higher goals for M/WBE utilization as well as implementation of utilization goals in State economic development programs.

**1. Implementation of Set-Aside and Goals Program by the State**

Given the diversified purchasing and contracting performed by the State, no single solution can be expected to rectify the underutilization of M/WBEs in all areas of State contracting. Therefore, this Commission recommends that, in addition to the reactivation of the former set-aside program, the State establish overall goals to increase direct State procurement from M/WBEs to a level which more closely corresponds with their availability in the relevant geographic market and that these goals be achieved through a variety of means including, but not limited to, set-asides. Methods for achieving these goals should be developed by the contracting agencies and the operational plans should be approved and monitored by the centralized oversight agency recommended herein. This centralized oversight agency is an integral component of this Commission's recommendations for rectifying the discrimination which M/WBEs have experienced in state contracting (see Recommendation II, *infra*, for a description of the centralized oversight agency).

The methods to be utilized in achieving the proposed goals should include the setting aside of specific contracts to be bid on and awarded to minority- or women-owned businesses. In the area of construction, these set-asides should include prime contracts as well as subcontracts to enable M/WBEs to develop the experience, skills, and track record associated with performing a prime contract. The Commission is recommending the use of goals and set-asides because race- and gender-neutral programs alone have not been successful in opening

up opportunities in State contracting for M/WBEs. Nevertheless, contracting agencies should not consider race- or gender-based set-asides as the only means to achieve the proposed goals. Less restrictive means, including race- or gender-conscious but neutral methods should also be utilized in combination with set-asides, if there is reason to believe that such methods will assist M/WBEs in overcoming the effects of discrimination.

## 2. Statutory/Regulatory Amendments

a. Based on the restrictions of the *Croson* decision, this Commission recommends that the State amend the definition of "minority business" found in *N.J.S.A. 52:32-19*, and related statutes, to include only persons for which the centralized oversight agency has determined there is sufficient evidence of underutilization and discrimination based on an ongoing evaluation of statistical disparity studies. Thus the centralized oversight agency should be given the regulatory authority to continually determine which groups are eligible for inclusion in the State's goals program.

This Commission has found discrimination against African-Americans, Hispanics, and Asian Americans, and women businesses of all races and ethnic origins. Although evidence may be developed through future recordkeeping, there is currently insufficient evidence in the record to merit inclusion in this remedial program of the other ethnic groups referred to in the statute. After further recordkeeping and study, the centralized agency should reevaluate the specific groups to be included in the set-aside program.

b. In order to monitor effectively the effects of State programs on minorities and women, the Commission recommends that all contracting agencies maintain records of the race, gender, and ethnicity of the contractors with which they deal, even if race, gender, or ethnicity are not factors in determining who can bid or participate in a program or the program is race- and gender-neutral.

c. The Commission recommends the promulgation of regulations which interpret the definition of "responsible" bidder to include compliance with *N.J.S.A. 10:5-12(l)* and other affirmative action obligations.

## 3. Implementation of Set-Aside Goals Programs by Contracting Agencies

The following are suggested procedures by which agencies may implement the goals recommended by this Commission.

a. Contracting units should develop annual purchasing plans by analyzing their anticipated purchases compared to the available pool of M/WBEs and develop specific methods for obtaining recommended utilization, subject to modification, approval, and monitoring by the centralized oversight agency. Proposed plans should be tailored to the specific type of procurements in which the contracting unit engages and proposed goals should be calculated on anticipated purchases. Any proposed exclusions from the calculated percentages must be justified by the contracting unit and its affirmative action office.

b. Contracting units should continue actively to implement and enforce the "Minority and Female Subcontractor Participation in State Construction Contracts" regulations, *N.J.A.C. 17:14-1.1 et seq.*, in addition to any additional regulations enacted to implement the Set-Aside Act. Each prime contract in which there are subcontractable components should include M/WBE subcontractor utilization goals.

c. Contracting units should assess whether parts of construction contracts can be severed and then offered as separate prime contracts suitable for available M/WBEs.

d. Contracting units should assist prime contractors in finding M/WBE subcontractors. Prime contractors should be required to supply the names of subcontractors they intend to use with their bids at the time of bid openings to preclude price shopping by prime contractors to the disadvantage of minorities and women. Contracting agencies should track whether the M/WBE subcontractors indicated are used.

e. Contracting units should make affirmative efforts to utilize M/WBEs in purchases made pursuant to the statutory exemption to the bidding requirements under the State contracting laws, *e.g.*, contracts for less than the threshold amount which may be awarded on the basis of three written quotes, or in the case of contracts under \$2500, on the basis of telephone quotes.

f. Contracting units should track, monitor, and report on M/WBE utilization on a quarterly basis. This responsibility should be delegated to the affirmative action office or such other office within the unit that is primarily responsible for the enforcement of anti-discrimination policies.

g. Due to the fact that procurement officials continue to exercise some level of discretion, particularly in the area of delegated purchasing authority, the State should include fulfillment of utilization goals as a factor in the responsible contracting official's performance evaluation.

h. State goals for contracting units, such as DOT and NJ Transit, which have federally as well as state financed projects, should be carefully scrutinized to determine whether those agencies are able to establish goals on their state funded programs which match or exceed the extent of DBE utilization achieved on the federal projects.<sup>1</sup>

**C. THE STATE SHOULD SET OVERALL GOALS OF M/WBE PARTICIPATION ON EACH STATE PROGRAM FOR ECONOMIC DEVELOPMENT, SUCH AS (BUT NOT LIMITED TO) THOSE RUN BY THE ECONOMIC DEVELOPMENT AUTHORITY, THE HOME MORTGAGE FINANCE AGENCY, AND THE WASTEWATER TREATMENT AUTHORITY, WHICH ARE PRIMARILY SUPPORTED BY THE ISSUANCE OF PUBLIC BONDS OR GRANTS, AND RESULT IN THE AWARDED OF CONTRACTS, TO ASSURE THAT MINORITIES AND WOMEN ARE RECEIVING A FAIR SHARE OF SUCH FUNDS AND CONTRACT**

1. Recordkeeping: All units of state government that provide economic benefits to citizens or businesses and every program to encourage economic development, employment, business growth, urban renewal or construction and/or rehabilitation of affordable housing, through state loans, guarantees, tax policies or other direct or indirect state assistance should be required to keep records regarding the race, gender, and ethnicity of the participants in the programs.

2. Target Goals: This study has also revealed that there is a startling lack of monitoring of State-supported private enterprise programs to determine what impact or benefit minorities and women receive from these programs. If state money is being used to underwrite "private" construction projects or other development programs, it is essential that the State ensure that M/WBEs get a fair share of contracting opportunities in connection with these State-supported projects. To further assure that the State's money is not being used to foster discrimination and to confirm that M/WBEs are benefitting from programs aimed at urban and economic development, target goals for the participation of M/WBEs in such programs should be established. The oversight agency recommended herein should review all programs for economic development and bond programs, and determine whether it is feasible to establish target goals for M/WBE participation in a particular program.

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<sup>1</sup>The analysis conducted for this Commission, by the Rutgers Interfunctional Team, of the DOT's state funded projects versus the federally funded projects revealed that the same general contractors of DOT projects who utilized DBEs for federally funded work, failed to utilize DBE subcontractors on state funded work when no DBE goals were required.

**II. AN OVERSIGHT COMMITTEE WITH DIRECT ACCESS TO THE GOVERNOR SHOULD BE ESTABLISHED IMMEDIATELY TO ASSURE THAT ALL UNITS OF STATE GOVERNMENT EFFECTUATE THE CONSTITUTIONAL AND LEGISLATIVE POLICIES DISCUSSED IN THIS REPORT**

**A. OVERSIGHT COMMITTEE:** An oversight committee should be appointed to monitor and advise the Centralized Oversight Agency recommended herein. This committee should be composed of private citizens who may be drawn from existing Minority and Women Business Advisory Councils.

**B. OVERSIGHT AGENCY:** The authority to monitor and enforce these recommendations must be vested in a single office with direct access to the Governor. The chief mission of the office should be the elimination of discrimination in contracting and the inclusion of minority- and women-owned firms in the economic life of the State. In order to ensure consistency in reporting and monitoring, this proposed oversight agency should receive reports from all nineteen state departments as well as the independent authorities, commissions, and state colleges. Failure to require such reports will result in fragmentation of the program rather than consistency across contracting lines. The agency should, in addition to the functions noted below, continue to review laws and procurement processes that directly or inadvertently continue discrimination or exclusion. The oversight agency should also serve as a resource to county and local government contracting offices in the development and/or operation of their M/WBE and small business programs. This agency should determine availability of M/WBEs, set annual goals, and determine how and when the programs recommended should be modified and when they should be terminated. Contracting offices should be required to keep uniform records of prime and subcontracts by race, ethnicity, and gender of the business owners and to report this information to the oversight agency.

In summary, the oversight agency should be able to identify accurately what percentage of overall spending by the State is being received by M/WBEs. Moreover, based on the data provided, the oversight agency should be able to identify specific ethnic groups participating in the set-aside programs and modify the program consistent with the evidence received. The State, through this centralized agency, should also:

1. In conjunction with the SWMB Division of the Department of Commerce or a comparable agency, establish a method of determining the availability of M/WBEs to provide specified types of goods, services, and products for purposes of race- and gender-based set-asides and for race- and gender-neutral programs. This information should be made available to both private contractors and contracting units throughout the State to be used in developing their purchasing plans.

2. Set overall State goals for M/WBE participation based on availability. Current and depressed availability should be considered in developing both short- and long-term goals.

3. Review, modify, approve, and monitor the purchasing plans and proposed goals of each State contracting unit.

4. In conjunction with the SWMB Division, continue development and expansion of the SAVI II database. Those who seek to register should be randomly monitored for compliance with the criteria for certified M/WBEs. Registrants should be penalized for false statements made during the registration process.

5. Circulate, by electronic bulletin board or other means, the SAVI II register to State and local government contracting agencies and State contractors in order to assist those agencies and contractors in identifying, recruiting and utilizing M/WBEs.

6. Develop and monitor a uniform reporting system covering all nineteen state departments, and all independent authorities and state colleges in order to monitor State uti-

lization of M/WBEs. Reporting should include both prime and subcontracts by race, gender, and minority ethnic status,<sup>2</sup> so that programs can be modified as additional evidence is received.

7. Develop and monitor the uniform reporting systems recommended herein for state contractors, sureties and financial institutions, grant/benefit and state assisted programs and others.

8. Develop and implement procedures to certify to appropriate contracting units a bidder's compliance with equal contracting opportunity requirements and *N.J.S.A. 10:5-12(1)*.

9. Serve as a resource to county and local government contracting offices in the development and/or operation of their M/WBE and small business programs.

10. Develop guidelines, regulations, procedures and sanctions to implement and enforce the Commission's recommendations.

11. Oversee and be ultimately responsible for technical assistance programs for M/WBEs.

12. Coordinate and assume responsibility for the implementation, monitoring, and enforcement of any Commission recommendation or related program for which authority or jurisdiction is shared or has been delegated.

### **III. THE STATE SHOULD ESTABLISH A UNIFORM CERTIFICATION PROCESS FOR MINORITY- AND WOMAN-OWNED BUSINESSES**

The State should continue and strengthen its process of certifying that a business is minority- or woman-owned and controlled. Additionally, efforts to expand the voluntary registry of eligible firms should receive support. This should include the means to enable the State to conduct a random sampling of firms which have identified themselves on the voluntary registry as M/WBEs to ascertain whether such firms are bona fide. There should be severe penalties for false statements made in connection with either the certification process or the registration process. Moreover, although a uniform certification process has recently been established in the Department of Commerce which will apply to all state agencies, this uniform certification process should be expanded to include as its using agencies, the independent authorities operating within the state and other institutions. Sufficient staff must be allocated to this office to make the process effective, including the ability to investigate and aggressively prosecute "fronts." The certifying agency should have authority to enter into reciprocal agreements for certification with institutions in other states and localities and with the federal government despite minor differences in definitions or language.

#### **A. THE STATE MUST HAVE AND UTILIZE STRONG SANCTIONS AGAINST CONTRACTORS FOR WHICH THERE IS EVIDENCE OF NONCOMPLIANCE WITH M/WBE UTILIZATION GOALS AND UNDERUTILIZATION OF AVAILABLE M/WBEs.**

##### **1. Types of Sanctions**

The overall success of any proactive program to prevent and eliminate discrimination in contracting will be dependent upon the State's ability to take action against contractors who do not comply with the requirements of the programs which the State has implemented. Therefore, the State, through each contracting agency or the centralized oversight agency, as

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<sup>2</sup>This should include all minority groups previously identified in the set-aside statutes, whether or not it is determined that sufficient evidence currently exists to merit inclusion in remedial programs recommended herein.

appropriate, must have the ability to sanction contractors. The Commission recommends that the State actively utilize the full panoply of sanctions that it is already empowered to enforce. The sanctions available to the State should include, but not be limited to suspension, debarment, and termination of the contract, as well as penalties.

If contractors fail to meet goal requirements and also fail to demonstrate "good faith efforts," their bid should be rejected. If failure occurs after the contract is awarded, and good faith efforts have not been established, the State should have the authority to either suspend eligibility for further contracts until the contractor has justified failure to meet the goal requirements and/or to impose a penalty up to the amount of the contract goal which the contractor fails to achieve.<sup>3</sup>

## 2. Procedures for Enforcement

Upon the showing by either an aggrieved party, the contracting agency or the centralized oversight agency, of the contractor's unjustified failure to meet goal requirements, the burden should shift to the contractor to establish that it made good faith efforts to meet the goals or availability level. The contractor may make such a showing through an expedited submission of evidence to the agency in an informal factfinding conference. If this informal submission does not satisfy the agency or centralized oversight office that the contractor has made such good faith efforts, the contractor's eligibility to bid on state contracts may be suspended pending a formal hearing. At said hearing, the burden of going forward with evidence and of persuasion should be on the contractor to prove that it has made maximum practicable efforts to utilize M/WBEs.

The centralized oversight agency should develop and implement compliance procedures. The Commission recommends that such procedures allow contracting units who should routinely monitor and follow up on subcontractor utilization, to initiate and conduct informal compliance proceedings on their own information or on a complaint or information of underutilization. The centralized oversight agency should have the ultimate responsibility for enforcement in those cases wherein the contracting unit has not proceeded to enforce the subject requirements or where multiple agencies have jurisdiction over a complaint or contract.

### B. GOOD FAITH EFFORTS WAIVERS

Contractors should be required to make maximum practicable efforts to meet the established M/WBE utilization goals on a contract. If a contractor has been unsuccessful in fulfilling a stated goal, he must demonstrate that he made maximum practicable efforts or good faith efforts to secure M/WBEs for the contract. The concept of "good faith efforts" or maximum practicable efforts" should be defined objectively rather than subjectively and should consider such factors as whether the contractor notified, in a timely manner, M/WBEs who are available to perform the work contemplated in a contract; whether the contractor provided the M/WBEs with adequate information about the plan, specifications and requirements of the contract; and whether the contractor used the State maintained registry of available M/WBEs to locate suitable subcontractors. The State should also consider as relevant to the evaluation of good faith efforts the M/WBE utilization levels that the contractor has previously achieved.

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<sup>3</sup> For example, as part of a penalty imposed, if a contractor represents that he failed to use the identified subcontractor or an acceptable M/WBE replacement without proving that it has good reason for his failure, the State should have the authority to impose a penalty equal to the value of the subcontract which the M/WBE was identified to receive.

### **C. DURATION OF GOALS PROGRAM**

All set-asides or other race-, ethnic-, or gender-based programs must be limited in time. Sunset clauses should therefore be included in any legislation or regulations enacted pursuant to these recommendations. Provisions should be made for continuous monitoring and refinement of this program based on increased availability of data. Review and recommendation for the continuance of any programs should be based on an assessment of whether the problems identified by this Commission have been remedied.

### **IV. THE STATE SHOULD ELIMINATE OR REDUCE UNNECESSARY BONDING REQUIREMENTS FOR ALL CONTRACTORS AND IT SHOULD WAIVE BID, PERFORMANCE AND PAYMENT BONDS ON ALL CONTRACTS LESS THAN \$200,000**

Central to this Commission's recommendations is the finding that bonding requirements must be evaluated across contracting authority lines with a focus on reducing or eliminating excessive or unnecessary bonding requirements. In addition, the following recommendations are being made:

1. Reduce and eliminate all unnecessary bonding requirements.
2. Waive bid, performance, and payment bonds on all contracts less than \$200,000.
3. Make all bonding requirements for similar types of state contracting uniform, unless each contracting unit can establish a demonstrable need for exceptional requirements.
4. Waive bonding requirements on a contract-by-contract basis where a determination has been made that a bond is not necessary for the specific project.
5. Promote low cost bonding for M/WBEs and immediately begin to review and evaluate the myriad of options available to accomplish this goal.
6. Begin efforts to identify and eradicate discrimination in bonding and financing by requiring bonding and surety companies and financial institutions to keep and file reports on a standard form on their lending and bonding decisions.
7. Immediately begin to evaluate innovative options to reduce bonding costs for all small businesses while continuing to protect the State's fiscal interest.

### **V. THE STATE'S AWARENESS OF, AND RESPONSE TO, THE IMPACT ON MINORITIES AND WOMEN OF DECISIONS MADE BY FINANCIAL INSTITUTIONS MUST BE INITIATED THROUGH RECORDKEEPING AND REPORTING. BANKS AND OTHER MORTGAGE, FINANCIAL AND LENDING INSTITUTIONS, INSURANCE COMPANIES AND SURETY COMPANIES SHOULD BE REQUIRED TO KEEP RECORDS AND TO FILE REPORTS ON THEIR LOAN, EQUITY AND BONDING ACTIVITIES BY RACE, GENDER, AND ETHNICITY**

This study has revealed that there is a tremendous dearth of information regarding the lending and bonding practices of financial institutions, insurance companies and surety companies as those practices relate to minorities and women in the procurement of business loans and bonds. The State must immediately put all financial institutions on notice that continued discrimination against minorities and women will not be tolerated. It is imperative that the State begin to compile this crucial information before it can fully address the financing problems experienced by M/WBEs. Prohibitions against discrimination are virtually meaningless unless the State can adequately monitor these industries.

**VI. TO ASSURE THAT THE STATE DOES BUSINESS ONLY WITH NONDISCRIMINATORS AND THAT M/WBEs RECEIVE A FAIR SHARE OF CONTRACTS FROM STATE CONTRACTORS, THE STATE SHOULD REQUIRE ESTABLISHMENTS WHICH CONTRACT WITH THE STATE TO CERTIFY THAT THEY ARE IN COMPLIANCE WITH ALL ANTI-DISCRIMINATION LAWS**

The Commission recommends that the right to do business in New Jersey free of discrimination, already guaranteed in our Law Against Discrimination, *N.J.S.A. 10:5-12(1)* (LAD) be actively enforced.<sup>4</sup> The State should no longer contract with any person, firm, or institution which does not certify that it conducts its business affairs in compliance with equal opportunity laws. In addition, the State should use its vast purchasing power to motivate State contractors to make affirmative efforts, in all aspects of their businesses, to use minority- and women-business enterprises as subcontractors and suppliers. This will help to ensure that equal opportunity for M/WBEs reaches beyond the State contracting process and ensure that the State does not contract with enterprises which practice nondiscrimination on State contracts but engage in exclusionary practices in other, non-State, aspects of their business.

As a condition for entering into a state contract, the State should require that contractors certify that they are in compliance with all anti-discrimination laws. At minimum, contractors wishing to do business with the State should make affirmative efforts, including outreach and recruitment, to use W/MBEs as subcontractors or suppliers of goods or services in all business ventures at a level which approximates their availability in the relevant market from which the contractor is purchasing. The State should assist outreach efforts by continuing to maintain, and provide additional support for, the voluntary registry of women- and minority-owned businesses (SAVI II) which state contractors can use to locate available M/WBEs. All state contracts should contain a provision in which the contractor agrees to comply with these and other affirmative requirements.<sup>5</sup>

**VII. ADDITIONAL RECOMMENDATIONS FOR INCREASING M/WBE PARTICIPATION IN PUBLIC AND PRIVATE CONTRACTING**

The following is a brief synopsis of proposals, for increasing M/WBE development and participation in public and private contracting.

**A. THE STATE SHOULD ASSIST COUNTY AND MUNICIPAL GOVERNMENTS IN REINSTATING OR INITIATING M/WBE GOAL PROGRAMS WITHIN THEIR JURISDICTIONS CONSISTENT WITH *N.J.S.A. 40A:11-42***

This Commission's study focused on evidence of statewide discrimination against M/WBEs. However, much of the evidence obtained is applicable to all levels of state government. As long as municipal and county entities are satisfied that there is sufficient evidence of discrimination within their own jurisdictions, the State should authorize and encourage them to initiate or reinstate their own M/WBE goal programs. The centralized oversight agency

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<sup>4</sup>This section of the Law Against Discrimination (LAD) makes it illegal to refuse to do business with any person because of that person's race, color, religion, sex, national origin, marital status or other ground specified in the LAD.

<sup>5</sup>The State should consider implementing a program similar to that which is enforced by the Department of the Treasury requiring and monitoring affirmative action plans on public works contracts. *See e.g., N.J.A.C. 17:27-3.3* (requiring mandatory bid specification language and submission by the contractor prior to final approval of the contract by the public agency of evidence of an affirmative action program or the filing of an initial employee information report) *see generally, N.J.A.C. 17:27-1.1 et seq.*

should serve as a resource to municipal and county governments in the development, implementation and operation of these programs.

- B. PROMPT PAYMENT BY THE STATE TO PRIME CONTRACTORS AND OF PRIMES TO SUBCONTRACTORS SHOULD BE REQUIRED AND ENFORCED**
- C. THE STATE SHOULD DEVELOP AN EXPEDITED PROCEDURE FOR RESOLVING DISPUTES BETWEEN PRIME CONTRACTORS AND SUBCONTRACTORS**
- D. TECHNICAL ASSISTANCE AND TRAINING PROGRAMS AVAILABLE TO M/WBES SHOULD BE STRENGTHENED AND FOLLOW UP REQUIRED**

Those M/WBES who display deficiencies in business operation skills should be encouraged to participate in technical assistance and training programs. The testimony before the Commission suggests that such counseling and training can not only improve the management and viability of M/WBES, but can help in making them more bondable and creditworthy in the judgment of sureties and banks. The State should strengthen present programs to provide sufficient levels of ongoing programs to accommodate the needs of M/WBES with various backgrounds and to provide for the changing circumstances of firms. Strengthening managerial techniques, for example, is often important when a small firm expands to handle larger contracts. Training and assistance could be formal or informal and could encompass such techniques as State cooperation with community colleges for special classroom training for managers; one on one consultants; ongoing relationships with business incubator advisors, MESBICs, community or economic development advisers, or volunteers such as SCORE (Service Core of Retired Executives), or mentor programs. The state should consider teaching entrepreneurship in high schools, particularly in the heavily minority inner-city schools.

- E. STEPPED SHELTERED MARKETS PROVIDING INCREASING DEGREES OF COMPETITION AS FIRMS MATURE**

The State should consider designing special programs of technical and financial assistance, combined in some instances with set-asides, for fledgling M/WBES. Such programs would gradually decrease the levels of assistance as these business become better able to compete.

- F. BID PREFERENCES**

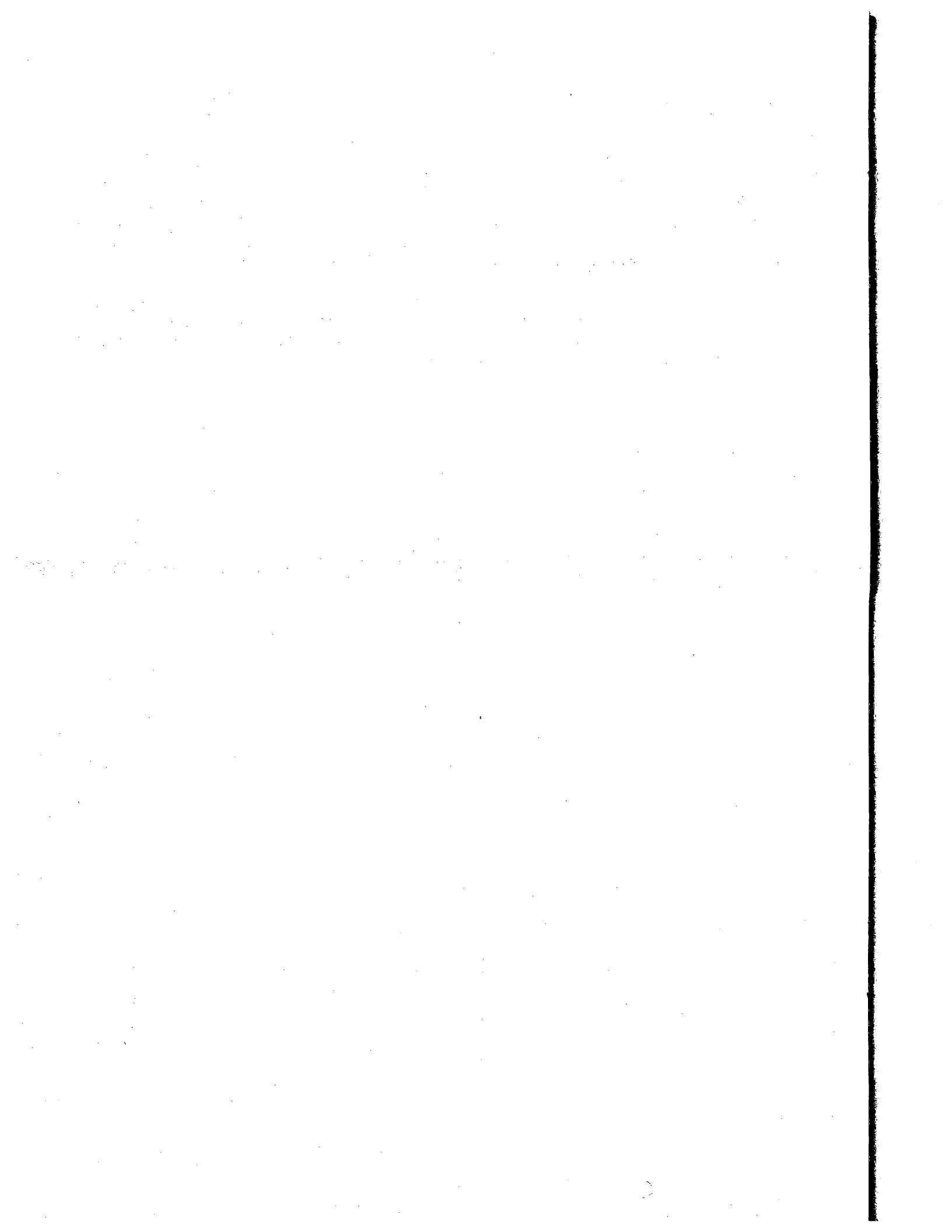
A less exclusionary proposal than a set-aside program, which seems to have been successful elsewhere, is a bid preference. Designed to compensate for the higher costs to M/WBES caused by economic, racial and gender discrimination, the bid preference applies to all contracts. The lowest qualified M/WBE bidder is awarded the contract, if that bid is within a set percent of the lowest bid. More study is necessary to determine whether such a program is feasible on a Statewide level (most bid preference programs have been implemented on the city or county level).

#### **VIII. THE STATE ANTI-REDLINING STATUTE, N.J.S.A. 17:16F-3, SHOULD BE AMENDED TO MIRROR THE FEDERAL EQUAL CREDIT OPPORTUNITY ACT ANTI-DISCRIMINATION PROHIBITION**

As was discussed in the body of this report, there is a strong correlation between home ownership and ability of obtain capital for business start-up costs. The current anti-redlining statute does not go far enough in ensuring that minorities and women are not the victims of discrimination in home mortgage lending with its focus solely on geographical area. The anti-redlining statute should be amended to include race, gender, color, religion and national origin as prohibited bases for denying home mortgages.

**IX. IN AN EFFORT TO ELIMINATE THE BARRIERS TO ENTREPRENEURSHIP WHICH MINORITIES AND WOMEN FACE, APPRENTICESHIP/TRAINEE MINORITY AND WOMEN PARTICIPATION GOALS SHOULD BE INCLUDED IN ALL STATE CONTRACTS OVER \$1 MILLION**

The evidence before the Commission established a direct link between the ability to gain experience in the skilled craft trades and likely success as an entrepreneur in the construction industry. The long history of discrimination by unions against minorities and women has provided an additional barrier to entrepreneurship which they must face. Therefore, the Commission recommends that in all state contracts over \$1 million, minority and women participation goals in apprenticeship and trainee programs should be required. If a union fails to provide sufficient minorities and women employees to meet the established goal, the contractor will be permitted to utilize other sources for qualified employees. If the contractor fails to meet the minority and woman workforce participation goal, the firm should be assessed a training fee, to be deposited into a training fund.



APPENDIX A

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STATE OF NEW JERSEY  
GOVERNOR'S STUDY COMMISSION ON DISCRIMINATION  
IN PUBLIC WORKS PROCUREMENT AND  
CONSTRUCTION CONTRACTS  
MARY G. ROEBLING BUILDING  
CN 837  
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STATISTICAL DATA ON THE UTILIZATION OF MINORITY OWNED AND WOMEN  
OWNED BUSINESSES BY THE STATE OF NEW JERSEY

Prepared under the supervision of  
Lora Liss, Executive Director  
and Commissioner Lana Sims

The attached report represents the most comprehensive data available on the contracting activity of New Jersey agencies and the Port Authority of New York and New Jersey from 1984 through 1989. Each individual contracting authority whose activity is reported herein responded to a request for data from the Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts. This report is a compilation of those responses.

FORMAT OF THE REPORT

1. The report contains three summaries of contracting activity as follows:

A. SUMMARY OF PRIME CONTRACTING ACTIVITY reports contracts awarded by agencies for construction (including construction related services i.e., architects and engineers), goods and non-construction related services. It does not reflect any subcontracts including those awarded to minority and women owned businesses. It does include the prime contracts reported in the other two summaries.

b. SUMMARY OF GOODS AND SERVICES CONTRACTING ACTIVITY reports contracts for goods and non-construction related services. It should be noted that the Department of Transportation (see DOT-State & DOT-Federal) and the Department of Environmental Protection (DEP-Federal) do not contract for goods and services directly. Their expenditures in these categories are included in Treasury's total.

c. SUMMARY OF CONSTRUCTION CONTRACTING ACTIVITY reports

contracts awarded for construction and construction related services (i.e. architects and engineers). The totals given for minority and women owned businesses in this section of the report include both prime and subcontracting activity. For example, the first section of the report shows that in 1984 DOT-State (wholly State funded) had no prime contracts with minority and women businesses but the construction summary shows \$81,149 for minorities and \$709,218 for women. These dollars were spent with subcontractors. In later years, the totals show a combination of sub contracting and prime contracting dollars. To avoid double-counting in no case are subcontracts with minority or women prime contractors counted.

2. There are five categories of agencies included in the report as follows:

a. Category 1 includes the nineteen departments which comprise the Executive Branch of the State government (Attachment 1). Department of the Treasury provides centralized contracting

for all departments for goods and services through the Division of Purchase and Property (DPP) and for construction and construction related services through the Division of Building and Construction (DBC). The Department of Transportation (DOT) is responsible for all road building activities. Projects which are wholly state funded are reported in this category. The Department of Environmental Protection and Energy (DEPE) reported only one year during the period covered by the report (1989) in which it awarded wholly State funded contracts.

- b. Category 2 includes State level authorities and commissions which have independent contracting authority (Attachment 2). New Jersey Transit Corporation's wholly State funded projects are reported in this category. Many authorities elect to use some of the Treasury awarded contracts for goods and services and therefore may have somewhat lower than expected totals in this summary.
  
- c. Category 3 includes State Colleges. Colleges did not have independent contracting authority until 1985 and most were unable to submit reports covering the years before 1987. Prior to independence, Department of the Treasury provided centralized purchasing services for all State colleges.

- d. Category 4 includes federally assisted contracts, which have mandatory goals to aid minority, women or disadvantaged businesses. As previously discussed, DOT is responsible for road building projects which may be wholly federally funded, wholly State funded, or a combination of federal and state funds. All federally assisted projects, including those requiring matching State funds, are reported in this category. Similarly, the Department of Environmental Protection and Energy (DEPE) and New Jersey Transit Corporation are responsible for federally assisted projects which may require matching State funds. All of their federally assisted projects are included in this category.
- e. Category 5 includes the Port Authority of New York and New Jersey, a bi-state agency. Their report represents only New Jersey projects.

#### GENERAL NOTES

1. This report includes contracts awarded as set-asides to minority and women businesses as well as those awarded under standard contracting procedures. The New Jersey Set Aside Act for Small Businesses' N.J.S.A. 52:32-17 et. seq., was approved December 18,

1985 and became effective June 18, 1986. Rules implementing the statute became effective March 16, 1987 and were codified at N.J.A.C. 17:12-6. Effective August 14, 1989, N.J.A.C. 17:12-6 was readopted with amendments and recodified at N.J.A.C. 17:13.

Amendments included a change in the types of businesses eligible for set-asides from female businesses and minority businesses to urban development enterprises and micro businesses.

2. The method used to track contracting activity varies from agency to agency and therefore the number of contracts awarded cannot be considered uniform. No percentages for the number of contracts awarded were calculated because of these differences.
3. Percentages of dollars awarded to minority and women owned businesses are based on total dollars awarded. Where percentages of dollars for minority and women owned businesses are too small, they were left blank but are stored in memory by the computer and are reflected in the total yearly percentages.
4. Agencies were not able to separate contracts for goods (i.e., Commodities, equipment, supplies) from those awarded for non-construction related services.

5. With the exception of DOT, agencies do not track the total number of subcontracts awarded. As a part of the New Jersey Set-Aside program, agencies did track the number of minority and women subcontracts awarded on construction contracts. Therefore, when reviewing the Summary of Construction Contracting Activity, the total number of minority and women contracts (columns 2 & 3) may exceed the total number of contracts reported in column 1.

NOTES RELATED TO SPECIFIC AGENCIES

1. Treasury DPP/DBC combines the contracting activities of the two divisions, the Division of Purchase and Property (DPP) for the summary of goods and services activities and the Division of Building and Construction (DBC) for the summary of construction activities. The summary of prime contracting combines the activities of both divisions. DBC was not able to provide the number of contracts awarded in 1984.
2. New Jersey Economic Development Authority (EDA) did not maintain information on the number of contracts awarded prior to 1987.
3. New Jersey Housing and Mortgage Financing Agency (HMFA) does not maintain the number of contracts awarded.

4. New Jersey Sports and Exposition Authority does not maintain figures on the number of contracts awarded.
5. New Jersey Institute of Technology (NJIT) did not separate construction from goods and services total dollars nor did they maintain the number of contracts for non M/WBE's in 1988 and 1989. Although the total dollars awarded in 1987 were not available, they did track and report total M/WBE dollars.
6. University of Medicine and Dentistry was unable to provide figures on overall contracting but did provide M/WBE figures associated with the set-aside reports.
7. Rutgers University had no data available for 1986, 1987 and 1988 for M/WBEs.

Attachment 1

LIST OF STATE DEPARTMENTS

1. - Agriculture
2. - Banking
3. - Commerce & Economic Development
4. - Community Affairs
5. - Corrections
6. - Education
7. - Environmental Protection and Energy
8. - Health
9. - Higher Education
10. - Human Services
11. - Insurance
12. - Labor
13. - Law & Public Safety
14. - Military & Veterans' Affairs
15. - Human Resources (Personnel)
16. - Public Advocate
17. - State
18. - Transportation
19. - Treasury

Attachment 2

STATE AUTHORITIES AND COMMISSIONS

1. Casino Control - Casino Control Commission
2. CRDA - Casino Reinvestment Development Authority
3. EDA - Economic Development Authority
4. Highway Authori - New Jersey Highway Authority
5. Investigatiion C - State Commission of Investigation
6. NJ Ed Facilitie - New Jersey Education Facilities Authority
7. NJ Expressway A - New Jersey Expressway Authority
8. NJ Health Care - New Jersey Health Care Facilities Financing  
Authority
9. NJ HMFA - New Jersey Housing and Mortgage  
Finance Agency
10. NJ Sports & Exp - New Jersey Sports and Exposition Authority
11. NJ Water Supply - New Jersey Water Supply Authority
12. Pinelands Commi - New Jersey Pinelands Commission
13. SJ Food Distrib - South Jersey Food Distribution Authority
14. Transit-State &  
NJ Transit - New Jersey Transit Authority
16. Turnpike Author - New Jersey Turnpike Authority

Attachment 3

NEW JERSEY STATE COLLEGES

1. Glassboro - Glassboro State College
2. Jersey City Col - Jersey City State College
3. Montclair State - Montclair State College
4. NJIT - New Jersey Institute of Technology
5. Ramapo College - Ramapo College of New Jersey
6. Rutgers - Rutgers, The State University
7. Stockton State - Richard Stockton State College
8. Trenton State - Trenton State College
9. U. of MD-NJ - University of Medicine and Dentistry  
of New Jersey
10. William Paterso - William Paterson College of  
New Jersey



Yr	Agy Cat	Agency Name	Total Prime		MBE Total Prime			WBE Total Prime		
			Contracts	Dollars	Contracts	Dollars		Contracts	Dollars	
84	1	DOT-STATE	16	8,908,193	0	0		0	0	
84	1	TREAS DPP/DBC	8459	630,563,896	3	1,390,449	0.2%	1	6,313,002	1.0%
** Category Totals:			8475	639,472,089	3	1,390,449	0.2%	1	6,313,002	1.0%
84	2	EDA	0	1,491,021	0	11,987	0.8%	0	8,433	0.5%
84	2	HIGHWAY AUTHORI	29	39,362,504	0	0		0	0	
84	2	NJ ED FACILITIE	66	15,070,503	0	0		0	0	
84	2	NJ EXPRESSWAY A	257	2,186,210	0	0		0	0	
84	2	NJ HEALTH CARE	111	58,169	1	2,334	4.0%	5	8,117	13.9%
84	2	PINELANDS COMMI	11	117,825	0	0		0	0	
84	2	TRANSIT-STATE	203	25,833,840	14	529,278	2.0%	6	98,080	0.3%
84	2	TURNPIKE AUTHOR	42	24,083,521	0	0		0	0	
** Category Totals:			719	108,203,593	15	543,599	0.5%	11	114,630	0.1%
84	4	DEPE	1	25,313,066	0	0		0	0	
84	4	DOT FEDERAL	128	246,120,997	4	2,790,457	1.1%	3	3,359,442	1.3%
84	4	NJ TRANSIT	329	62,563,405	21	1,041,850	1.6%	11	186,591	0.2%
** Category Totals:			458	333,997,468	25	3,832,307	1.1%	14	3,546,033	1.1%
**** Yearly Totals:			9652	1,081,673,150	43	5,766,355	0.5%	26	9,973,665	0.9%
85	1	DOT STATE	79	48,721,692	5	265,064	0.5%	1	36,762	
85	1	TREAS DPP/DBC	9040	977,550,792	5	1,955,781	0.2%	7	8,219,285	0.8%
** Category Totals:			9119	1,026,272,484	10	2,220,845	0.2%	8	8,256,047	0.8%
85	2	EDA	0	1,418,361	0	11,600	0.8%	0	4,434	0.3%
85	2	HIGHWAY AUTHORI	31	46,717,403	0	0		0	0	
85	2	NJ ED FACILITIT	11	5,812,864	0	0		0	0	
85	2	NJ EXPRESSWAY A	251	2,195,887	0	0		0	0	
85	2	NJ HEALTH CARE	140	113,182	1	3,055	2.6%	5	4,751	4.1%
85	2	PINELANDS COMMI	14	111,514	1	7,200	6.4%	0	0	
85	2	TRANSIT-STATE	151	33,974,768	8	363,311	1.0%	2	19,237	
85	2	TUPNPIKE AUTHOR	182	32,176,030	0	0		0	0	
** Category Totals:			780	122,520,009	10	385,166	0.3%	7	28,422	
85	3	RAMAPO	1450	1,450,000	0	0		12	7,800	0.5%

Yr	Agy Cat Agency Name	Total Prime		MBE Total Prime			WBE Total Prime		
		Contracts	Dollars	Contracts	Dollars		Contracts	Dollars	
** Category Totals:		1450	1,450,000	0	0		12	7,800	0.5%
85	4 DEPE	4	32,761,004	0	0		0	0	
85	4 DOT FEDERAL	116	264,981,387	5	364,073	0.1%	6	3,755,321	1.4%
85	4 NJ TRANSIT	897	123,376,019	86	2,013,828	1.6%	52	649,934	0.5%
** Category Totals:		1017	421,118,410	91	2,377,901	0.6%	58	4,405,255	1.0%
**** Yearly Totals:		12366	1,571,360,903	111	4,983,912	0.3%	85	12,697,524	0.8%
86	1 DOT STATE	72	171,826,066	3	2,415,876	1.4%	2	317,216	0.1%
86	1 TREAS DPP/DBC	7198	740,875,122	12	2,733,534	0.3%	6	9,076,377	1.2%
** Category Totals:		7270	912,701,188	15	5,149,410	0.6%	8	9,393,593	1.0%
86	2 CRDA	32	241,012	1	50		7	7,775	3.2%
86	2 EDA	0	1,258,214	0	12,004	0.9%	0	9,709	0.7%
86	2 HIGHWAY AUTHORI	5234	193,829,905	28	98,454		26	15,524	
86	2 INVESTIGATION C	481	299,013	2	1,504	0.5%	4	533	0.1%
86	2 NJ EXPRESSWAY A	170	2,535,141	0	0		0	0	
86	2 NJ HEALTH CARE	155	164,815	11	571	0.3%	11	13,241	8.0%
86	2 NJ SPORTS & EXP	0	31,458,126	0	420,041	1.3%	0	227,214	0.7%
86	2 PINELANDS COMMI	10	255,722	0	0		1	11,233	4.3%
86	2 TRANSIT-STATE	225	30,319,956	21	2,607,720	8.6%	11	506,821	1.6%
86	2 TURNPIKE AUTHOR	188	48,678,791	0	0		0	0	
** Category Totals:		6495	309,040,695	63	3,140,344	1.0%	60	792,050	0.3%
86	3 RAMAPO	1750	1,760,000	12	9,500	0.5%	32	19,000	1.0%
86	3 RUTGERS	31714	93,751,900	0	0		0	0	
** Category Totals:		33464	95,511,900	12	9,500		32	19,000	
86	4 DEPE	14	118,348,230	2	106,278		1	9,480	
86	4 DOT FEDERAL	134	379,799,151	4	2,973,595	0.7%	4	37,098,179	9.7%
86	4 NJ TRANSIT	369	154,348,630	68	9,495,098	6.1%	39	6,337,249	4.1%
** Category Totals:		517	652,496,011	74	12,574,971	1.9%	44	43,444,908	6.7%
**** Yearly Totals:		47746	1,969,749,794	164	20,874,225	1.1%	144	53,649,551	2.7%

Yr	Agy	Cat	Agency Name	Total Prime		MBE			WBE		
				Contracts	Dollars	Contracts	Dollars	%	Contracts	Dollars	%
87	1		DOT STATE	57	63,359,829	4	641,098	1.0%	4	1,620,000	2.5%
87	1		TREAS DPP/DBC	5526	960,079,213	293	7,027,209	0.7%	125	14,409,158	1.5%
** Category Totals:				5583	1,023,439,042	297	7,668,307	0.7%	129	16,029,158	1.6%
87	2		CASINO CONTROL	1503	921,116	66	10,527	1.1%	80	38,625	4.1%
87	2		CRDA	52	434,184	7	30,643	7.0%	15	12,903	2.9%
87	2		EDA	909	1,272,104	78	46,712	3.6%	110	18,311	1.4%
87	2		HIGHWAY AUTHORI	6076	67,798,372	130	136,493	0.2%	72	116,479	0.1%
87	2		INVESTIGATION C	587	503,523	0	0		8	6,265	1.2%
87	2		NJ ED FACILITIE	23	12,334,457	2	451,648	3.6%	0	0	
87	2		NJ EXPRESSWAY A	360	12,364,345	0	0		0	0	
87	2		NJ HEALTH CARE	172	341,814	15	1,194	0.3%	11	19,959	5.8%
87	2		NJ SPORTS & EXP	0	11,873,084	0	421,484	3.5%	0	317,409	2.6%
87	2		NJ WATER SUPPLY	1188	1,762,121	0	0		5	10,397	0.5%
87	2		PINELANDS COMMI	14	228,916	0	0		0	0	
87	2		TRANSIT-STATE	17278	33,109,097	769	1,384,530	4.1%	987	1,576,764	4.7%
87	2		TURNPIKE AUTHOR	209	82,261,790	0	0		0	0	
** Category Totals:				28371	225,204,923	1067	2,483,231	1.1%	1288	2,117,112	0.9%
87	3		NJIT	0	0	0	400,000		0	0	
87	3		RAMAPO COLLEGE	2050	1,950,000	80	94,000	4.8%	15	35,000	1.7%
87	3		RUTGERS	28506	110,832,750	0	0		0	0	
87	3		STOCKTON STATE	3141	2,969,501	3	1,805		21	23,800	0.8%
87	3		U. OF MD-NJ	44824	79,449,808	1062	2,046,792	2.5%	419	1,169,637	1.4%
** Category Totals:				78521	195,202,059	1145	2,542,597	1.3%	455	1,228,437	0.6%
87	4		DEPE	8	18,402,476	0	0		0	0	
87	4		DOT FEDERAL	110	197,022,065	5	748,038	0.3%	0	0	
87	4		NJ TRANSIT	17389	102,612,805	792	6,006,425	5.8%	1012	2,081,924	2.0%
** Category Totals:				17507	318,037,346	797	6,754,463	2.1%	1012	2,081,924	0.7%
87	5		PORT AUTHORITY	93	95,906,200	15	3,048,100	3.1%	0	0	
** Category Totals:				93	95,906,200	15	3,048,100	3.2%	0	0	
**** Yearly Totals:				130075	1,857,789,570	3321	22,496,698	1.2%	2884	21,456,631	1.2%

Yr	Agy Cat	Agency Name	Total Prime		MBE Total Prime			WBE Total Prime		
			Contracts	Dollars	Contracts	Dollars	%	Contracts	Dollars	%
88	1	DOT STATE	44	62,284,784	0	0		0	0	
88	1	TREAS DPP/DBC	5492	1,103,003,447	364	11,910,815	1.0%	153	17,838,411	1.6%
** Category Totals:			5536	1,165,288,231	364	11,910,815	1.0%	153	17,838,411	1.5%
88	2	CASINO CONTROL	1560	859,713	139	14,321	1.6%	79	21,116	2.4%
88	2	CRDA	24	504,031	3	83,719	16.6%	7	11,081	2.1%
88	2	EDA	760	1,020,849	127	19,297	1.8%	45	18,281	1.7%
88	2	HIGHWAY AUTHORI	4612	14,758,469	77	636,469	4.3%	70	99,180	0.6%
88	2	INVESTIGATION C	706	456,902	8	1,557	0.3%	47	15,709	3.4%
88	2	NJ ED FACILITIE	44	12,552,430	2	249,239	1.9%	0	0	
88	2	NJ EXPRESSWAY A	380	10,575,035	8	104,906	0.9%	10	46,713	0.4%
88	2	NJ HEALTH CARE	155	419,928	18	2,153	0.5%	4	4,537	1.0%
88	2	NJ HMFA	0	2,211,116	0	386,443	17.4%	0	37,263	1.6%
88	2	NJ SPORTS & EXP	0	9,913,678	0	249,261	2.5%	0	287,102	2.8%
88	2	NJ WATER SUPPLY	1270	1,259,021	29	14,627	1.1%	60	16,547	1.3%
88	2	PINELANDS COMMI	12	153,573	0	0		0	0	
88	2	SJ FOOD DISTRIB	1	200,899	0	0		0	0	
88	2	TRANSIT-STATE	37497	89,292,110	1103	3,384,401	3.7%	1362	3,998,910	4.4%
88	2	TURNPIKE AUTHOR	238	149,106,783	5	13,436		3	4,726	
** Category Totals:			47259	293,284,537	1519	5,159,829	1.8%	1687	4,561,165	1.6%
88	3	GLASSBORO	3307	6,407,164	92	464,370	7.2%	138	76,590	1.1%
88	3	JERSEY CITY COL	4419	8,764,134	1	200		88	213,954	2.4%
88	3	NJIT	0	5,000,000	161	1,216,000	24.3%	84	305,000	6.1%
88	3	RAMAPO COLLEGE	1952	3,136,637	76	98,670	3.1%	66	111,617	3.5%
88	3	RUTGERS	27595	209,554,600	0	0		0	0	
88	3	STOCKTON STATE	2928	2,301,000	86	131,000	5.6%	173	198,000	8.6%
88	3	TRENTON STATE	1098	2,801,390	78	42,597	1.5%	61	35,100	1.2%
88	3	U. OF MD-NJ	44727	135,092,234	1639	4,473,859	3.3%	514	1,873,882	1.3%
88	3	WILLIAM PATERSO	5049	7,814,000	17	17,450	0.2%	327	169,250	2.1%
** Category Totals:			91075	380,871,159	2150	6,444,146	1.7%	1451	2,983,393	0.8%
88	4	DEPE	57	355,149,892	0	0		0	0	
88	4	DOT FEDERAL	81	326,932,366	4	881,759	0.2%	3	26,245,263	8.0%
88	4	NJ TRANSIT	43534	134,597,410	268	7,006,504	5.2%	369	735,750	0.5%
** Category Totals:			43672	816,679,668	272	7,888,263	1.0%	372	26,981,013	3.3%

Yr	Agy	Cat	Agency Name	Total Prime		MBE			WBE		
				Contracts	Dollars	Contracts	Dollars	%	Contracts	Dollars	%
88	5		PORT AUTHORITY	94	285,379,900	9	63,871,200	22.3%	0	0	
** Category Totals:				94	285,379,900	9	63,871,200	22.4%	0	0	
**** Yearly Totals:				187636	2,941,503,495	4314	95,274,253	3.2%	3663	52,363,982	1.8%
89	1		DEP-STATE	1	964,480	0	0		0	0	
89	1		DOT STATE	46	217,260,355	3	271,521	0.1%	1	594,441	0.2%
89	1		TREAS DPP/DBC	6321	1,029,623,267	32	13,514,346	1.3%	31	29,471,235	2.8%
** Category Totals:				6368	1,247,848,102	35	13,785,867	1.1%	32	30,065,676	2.4%
89	2		CASINO CONTROL	1316	931,282	192	93,322	10.0%	78	25,641	2.7%
89	2		CRDA	31	481,114	3	96,085	19.9%	9	73,549	15.2%
89	2		EDA	826	3,137,378	153	83,794	2.6%	21	110,874	3.5%
89	2		HIGHWAY AUTHORT	4772	20,912,667	123	217,119	1.0%	90	97,990	0.4%
89	2		INVESTIGATION C	734	405,824	47	11,100	2.7%	124	30,783	7.5%
89	2		NJ ED FACILITIE	7	1,021,637	0	0		0	0	
89	2		NJ EXPRESSWAY A	418	5,845,526	12	246,903	4.2%	17	197,946	3.3%
89	2		NJ HEALTH CARE	126	418,096	15	4,901	1.1%	10	11,647	2.7%
89	2		NJ HMFA	0	2,042,037	0	286,839	14.0%	0	81,517	3.9%
89	2		NJ SPORTS & EXP	0	12,179,386	0	2,090,050	17.1%	0	1,139,204	9.3%
89	2		NJ WATER SUPPLY	1163	1,137,948	68	20,273	1.7%	77	22,179	1.9%
89	2		PINELANDS COMMI	9	108,903	1	2,603	2.3%	0	0	
89	2		SJ FOOD DISTRIB	1	97,602	0	0		0	0	
89	2		TRANSIT-STATE	32364	75,365,940	1268	2,274,121	3.0%	1457	6,950,599	9.2%
89	2		TURNPIKE AUTHOR	257	173,198,022	7	22,517		9	6,379	
** Category Totals:				42024	297,283,362	1889	5,449,627	1.8%	1892	8,748,308	2.9%
89	3		GLASSBORO	3124	6,896,166	126	407,321	5.9%	194	166,571	2.4%
89	3		JERSEY CITY COL	5375	7,981,608	4	12,835	0.1%	19	164,388	2.0%
89	3		MONTCLAIR STATE	5035	9,523,577	360	732,794	7.6%	152	314,579	3.3%
89	3		NJIT	0	6,854,000	363	2,054,000	29.9%	166	59,000	0.8%
89	3		RAMAPO COLLEGE	3650	3,302,385	178	457,302	13.8%	80	170,030	5.1%
89	3		RUTGERS	65496	198,620,800	745	1,571,600	0.7%	1886	5,772,000	2.9%
89	3		STOCKTON STATE	3006	2,607,872	77	118,313	4.5%	325	238,615	9.1%
89	3		TRENTON STATE	956	4,644,288	66	59,700	1.2%	60	40,000	0.8%
89	3		U. OF MD-NJ	44078	112,371,380	1756	9,775,070	8.6%	612	2,315,704	2.0%
89	3		WILLIAM PATERSO	5051	4,244,314	19	88,484	2.0%	328	448,050	10.5%
** Category Totals:				135771	357,046,390	3694	15,277,419	4.3%	3822	9,688,937	2.7%

Yr	Cat	Agency Name	Total Prime		MBE Total Prime			WBE Total Prime		
			Contracts	Dollars	Contracts	Dollars		Contracts	Dollars	
89	4	DEPE	36	240,717,282	2	44,750		0	0	
89	4	DOT FEDERAL	106	365,871,639	12	1,021,354	0.2%	2	665,689	0.1%
89	4	NJ TRANSIT	33030	167,788,920	1352	9,952,916	5.9%	1552	21,135,189	12.5%
** Category Totals:			33172	774,377,841	1366	11,019,020	1.4%	1554	21,800,878	2.8%
89	5	PORT AUTHORITY	2216	195,123,764	108	27,102,247	13.8%	40	194,451	
** Category Totals:			2216	195,123,764	108	27,102,247	13.9%	40	194,451	0.1%
**** Yearly Totals:			<u>219551</u>	<u>2,871,679,459</u>	<u>7092</u>	<u>72,634,180</u>	<u>2.5%</u>	<u>7340</u>	<u>70,498,250</u>	<u>2.5%</u>
***** Grand Totals:			607026	12,293,756,371	15045	222,029,623	1.8%	14142	220,639,603	1.8%

Yr	Agy Cat	Agency Name	Total Construction		MBE Total Construction			WBE Total Construction		
			Contracts	Dollars	Contracts	Dollars		Contracts	Dollars	
84	1	DOT-STATE	16	8,908,193	1	81,149	0.9%	4	709,218	7.9%
84	1	TREAS DPP/DBC	0	67,975,581	3	163,462	0.2%	1	50,000	
** Category Totals:			16	76,883,774	4	244,611	0.3%	5	759,218	1.0%
84	2	EDA	0	0	0	0		0	0	
84	2	HIGHWAY AUTHORI	21	38,999,017	0	0		0	0	
84	2	NJ ED FACILITIE	33	14,354,611	0	0		0	0	
84	2	NJ EXPRESSWAY A	19	804,762	0	0		0	0	
84	2	NJ HEALTH CARE	0	0	0	0		0	0	
84	2	PINELANDS COMMI	1	5,655	0	0		0	0	
84	2	TRANSIT-STATE	5	360,550	3	89,000	24.6%	3	55,000	15.2%
84	2	TURNPIKE AUTHOR	42	24,083,521	0	0		0	0	
** Category Totals:			121	78,608,116	3	89,000	0.1%	3	55,000	0.1%
84	4	DEPE	1	25,313,066	4	3,117,951	12.3%	0	0	
84	4	DOT FEDERAL	128	246,120,997	95	17,624,330	7.1%	107	8,466,879	3.4%
84	4	NJ TRANSIT	27	27,944,081	18	5,195,518	18.5%	17	2,328,432	8.3%
** Category Totals:			156	299,378,144	117	25,937,799	8.7%	124	10,795,311	3.6%
**** Yearly Totals:			293	454,870,034	124	26,271,410	5.8%	132	11,609,529	2.6%
85	1	DOT STATE	79	48,721,692	10	425,342	0.8%	7	59,860	0.1%
85	1	TREAS DPP/DBC	204	122,128,360	5	170,463	0.1%	7	104,223	
** Category Totals:			283	170,850,052	15	595,805	0.3%	14	164,083	0.1%
85	2	EDA	0	0	0	0		0	0	
85	2	HIGHWAY AUTHORI	19	45,445,593	0	0		0	0	
85	2	NJ ED FACILITIT	6	5,346,095	0	0		0	0	
85	2	NJ EXPRESSWAY A	32	695,977	0	0		0	0	
85	2	NJ HEALTH CARE	0	0	0	0		0	0	
85	2	PINELANDS COMMI	2	16,270	1	7,200	44.2%	0	0	
85	2	TRANSIT-STATE	4	429,935	2	94,207	21.9%	0	0	
85	2	TURNPIKE AUTHOR	38	22,648,349	0	0		0	0	
** Category Totals:			101	74,582,219	3	101,407	0.1%	0	0	
85	3	RAMAPO	0	0	0	0		0	0	

Yr	Agy Cat Agency Name	Total Construction		MBE Total Construction			WBE Total Construction		
		Contracts	Dollars	Contracts	Dollars	%	Contracts	Dollars	%
** Category Totals:		0	0	0	0		0	0	
85	4 DEPE	4	32,761,004	16	3,825,801	11.6%	9	2,370,537	7.2%
85	4 DOT FEDERAL	116	264,981,387	64	14,090,919	5.3%	55	8,168,734	3.0%
85	4 NJ TRANSIT	21	68,002,687	20	12,420,803	18.2%	5	9,226,850	13.5%
** Category Totals:		141	365,745,078	100	30,337,523	8.3%	69	19,766,121	5.4%
**** Yearly Totals:		525	611,177,349	118	31,034,735	5.1%	83	19,930,204	3.3%
86	1 DOT STATE	72	171,826,066	43	7,737,776	4.5%	59	5,931,193	3.4%
86	1 TREAS DPP/DBC	193	37,874,388	12	174,758	0.4%	6	377,970	0.9%
** Category Totals:		265	209,700,454	55	7,912,534	3.8%	65	6,309,163	3.0%
86	2 CRDA	0	0	0	0		0	0	
86	2 EDA	0	0	0	0		0	0	
86	2 HIGHWAY AUTHORI	39	179,173,922	1	57,320		0	0	
86	2 INVESTIGATION C	0	0	0	0		0	0	
86	2 NJ EXPRESSWAY A	10	38,987	0	0		0	0	
86	2 NJ HEALTH CARE	0	0	0	0		0	0	
86	2 NJ SPORTS & EXP	0	0	0	0		0	0	
86	2 PINELANDS COMMI	0	0	0	0		0	0	
86	2 TRANSIT-STATE	17	2,428,615	11	897,897	36.9%	2	73,665	3.0%
86	2 TURNPIKE AUTHOR	34	39,934,302	0	0		0	0	
** Category Totals:		100	221,575,826	12	955,217	0.4%	2	73,665	
86	3 RAMAPO	0	0	0	0		0	0	
86	3 RUTGERS	17	16,308,900	0	0		0	0	
** Category Totals:		17	16,308,900	0	0		0	0	
86	4 DEPE	14	118,348,230	55	11,789,624	9.9%	25	1,352,998	1.1%
86	4 DOT FEDERAL	134	379,799,151	113	20,145,272	5.3%	78	49,497,181	13.0%
86	4 NJ TRANSIT	39	58,791,842	30	11,496,662	19.5%	13	6,495,892	11.0%
** Category Totals:		187	556,939,223	198	43,431,558	7.8%	116	57,346,071	10.3%
**** Yearly Totals:		569	1,004,524,403	265	52,299,309	5.2%	183	63,728,899	6.3%

Yr	Agy	Cat	Agency Name	Total Construction		MBE			WBE		
				Contracts	Dollars	Contracts	Dollars		Contracts	Dollars	
87	1		DOT STATE	57	63,359,829	30	2,951,066	4.6%	23	2,396,211	3.7%
87	1		TREAS DEP/DBC	409	96,582,597	23	229,471	0.2%	8	168,992	0.1%
** Category Totals:				466	159,942,426	53	3,180,537	2.0%	31	2,565,203	1.6%
87	2		CASINO CONTROL	0	0	0	0		0	0	
87	2		CRDA	0	0	0	0		0	0	
87	2		EDA	0	0	0	0		0	0	
87	2		HIGHWAY AUTHORI	29	48,472,177	1	34,720		0	0	
87	2		INVESTIGATION C	0	0	0	0		0	0	
87	2		NJ ED FACILITIE	20	12,152,761	2	451,648	3.7%	0	0	
87	2		NJ EXPRESSWAY A	23	9,109,928	0	0		0	0	
87	2		NJ HEALTH CARE	0	0	0	0		0	0	
87	2		NJ SPORTS & EXP	0	0	0	0		0	0	
87	2		NJ WATER SUPPLY	0	0	0	0		0	0	
87	2		PINELANDS COMMI	1	2,534	0	0		0	0	
87	2		TRANSIT-STATE	14	2,395,713	0	0		1	88,120	3.6%
87	2		TURNPIKE AUTHOR	47	72,019,351	0	0		0	0	
** Category Totals:				134	144,152,464	3	486,368	0.3%	1	88,120	0.1%
87	3		NJIT	0	0	0	221,000		0	0	
87	3		RAMAPO COLLEGE	0	0	0	0		0	0	
87	3		RUTGERS	10	20,357,750	0	0		0	0	
87	3		STOCKTON STATE	0	0	0	0		0	0	
87	3		U. OF MD-NJ	0	0	113	1,053,641		31	60,566	
** Category Totals:				10	20,357,750	113	1,274,641	6.3%	31	60,566	0.3%
87	4		DEPE	8	18,402,476	11	1,315,980	7.1%	10	256,985	1.3%
87	4		DOT FEDERAL	110	197,022,065	99	14,163,883	7.1%	75	5,510,107	2.7%
87	4		NJ TRANSIT	46	59,832,711	41	9,656,525	16.1%	22	4,558,887	7.6%
** Category Totals:				164	275,257,252	151	25,136,388	9.1%	107	10,325,979	3.8%
87	5		PORT AUTHORITY	93	95,906,200	33	4,758,700	4.9%	1	120,000	0.1%
** Category Totals:				93	95,906,200	33	4,758,700	5.0%	1	120,000	0.1%
**** Yearly Totals:				867	695,616,092	353	34,836,634	5.0%	171	13,159,868	1.9%

Yr	Agy Cat	Agency Name	Total Construction		MBE			WBE		
			Contracts	Dollars	Contracts	Dollars	%	Contracts	Dollars	%
88	1	DOT STATE	44	62,284,784	21	5,710,913	9.1%	29	7,041,866	11.3%
88	1	TREAS DPP/DBC	447	108,055,407	26	1,427,143	1.3%	21	1,289,538	1.1%
** Category Totals:			491	170,340,191	47	7,138,056	4.2%	50	8,331,404	4.9%
88	2	CASINO CONTROL	0	0	0	0		0	0	
88	2	CRDA	0	0	0	0		0	0	
88	2	EDA	101	582,519	1	95		3	11,150	1.9%
88	2	HIGHWAY AUTHORI	11	7,401,040	1	559,026	7.5%	0	0	
88	2	INVESTIGATION C	0	0	0	0		0	0	
88	2	NJ ED FACILITIE	35	11,901,854	2	249,239	2.0%	0	0	
88	2	NJ EXPRESSWAY A	25	4,136,706	2	99,301	2.4%	0	0	
88	2	NJ HEALTH CARE	0	0	0	0		0	0	
88	2	NJ HMFA	0	0	0	0		0	0	
88	2	NJ SPORTS & EXP	0	0	0	0		0	0	
88	2	NJ WATER SUPPLY	0	0	0	0		0	0	
88	2	PINELANDS COMMI	0	0	0	0		0	0	
88	2	SJ FOOD DISTRIB	0	0	0	0		0	0	
88	2	TRANSIT-STATE	13	1,032,677	0	0		0	0	
88	2	TURNPIKE AUTHOR	44	139,788,856	5	13,436		3	4,726	
** Category Totals:			229	164,843,652	11	921,097	0.6%	6	15,876	
88	3	GLASSBORO	0	0	0	0		0	0	
88	3	JERSEY CITY COL	0	0	0	0		0	0	
88	3	NJIT	0	0	20	419,000		0	0	
88	3	RAMAPO COLLEGE	4	886,283	0	0		0	0	
88	3	RUTGERS	28	122,472,600	0	0		0	0	
88	3	STOCKTON STATE	0	0	0	0		0	0	
88	3	TRENTON STATE	5	56,977	0	0		0	0	
88	3	U. OF MD-NJ	0	0	135	587,154		114	863,299	
88	3	WILLIAM PATERSO	18	2,143,401	0	0		0	0	
** Category Totals:			55	125,559,261	155	1,006,154	0.8%	114	863,299	0.7%
88	4	DEPE	57	355,149,892	121	19,305,138	5.4%	139	10,376,168	2.9%
88	4	DOT FEDERAL	81	326,932,366	78	10,301,380	3.1%	64	42,721,062	13.0%
88	4	NJ TRANSIT	42	5,741,370	20	1,031,706	17.9%	11	240,681	4.1%
** Category Totals:			180	687,823,628	219	30,638,224	4.5%	214	53,337,911	7.8%

Yr	Agy	Cat	Agency Name	Total Construction			MBE			WBE		
				Contracts	Dollars		Contracts	Dollars	%	Contracts	Dollars	%
88	5		PORT AUTHORITY	94	285,379,900		45	74,587,600	26.1%	8	547,400	0.1%
** Category Totals:				94	285,379,900		45	74,587,600	26.1%	8	547,400	0.2%
**** Yearly Totals:				1049	1,433,946,632		477	114,291,131	8.0%	392	63,095,890	4.4%
89	1		DEP-STATE	1	964,480		1	63,351	6.5%	3	47,520	4.9%
89	1		DOT STATE	46	217,260,355		26	9,434,059	4.3%	29	6,176,993	2.8%
89	1		TREAS DPP/DBC	358	62,723,999		32	1,571,442	2.5%	31	3,086,633	4.9%
** Category Totals:				405	280,948,834		59	11,068,852	3.9%	63	9,311,146	3.3%
89	2		CASINO CONTROL	0	0		0	0		0	0	
89	2		CRDA	0	0		0	0		0	0	
89	2		EDA	7	2,030,851		3	45,000	2.2%	0	0	
89	2		HIGHWAY AUTHORI	14	12,677,660		1	48,344	0.3%	0	0	
89	2		INVESTIGATION C	0	0		0	0		0	0	
89	2		NJ ED FACILITIE	0	0		0	0		0	0	
89	2		NJ EXPRESSWAY A	18	844,417		2	206,307	24.4%	1	23,574	2.7%
89	2		NJ HEALTH CARE	0	0		0	0		0	0	
89	2		NJ HMFA	0	0		0	0		0	0	
89	2		NJ SPORTS & EXP	0	0		0	783,700		0	0	
89	2		NJ WATER SUPPLY	0	0		0	0		0	0	
89	2		PINELANDS COMMI	2	6,850		1	2,603	38.0%	0	0	
89	2		SJ FOOD DISTRIB	0	0		0	0		0	0	
89	2		TRANSIT-STATE	14	2,473,833		7	342,624	13.8%	3	353,711	14.2%
89	2		TURNPIKE AUTHOR	42	157,778,299		7	22,517		9	6,379	
** Category Totals:				97	175,811,910		21	1,451,095	0.8%	13	383,664	0.2%
89	3		GLASSBORO	0	0		0	0		0	0	
89	3		JERSEY CITY COI.	15	239,230		0	0		0	0	
89	3		MONTCLAIR STATE	35	714,929		10	116,794	16.3%	2	15,085	2.1%
89	3		NJIT	0	0		54	1,070,000		6	19,000	
89	3		RAMAPO COLLEGE	15	652,385		2	292,550	44.8%	0	0	
89	3		RUTGERS	20	55,087,800		0	0		0	0	
89	3		STOCKTON STATE	0	0		0	0		0	0	
89	3		TRENTON STATE	53	1,848,020		3	14,700	0.7%	0	0	
89	3		U. OF MD-NJ	0	0		132	3,907,106		69	152,329	
89	3		WILLIAM PATERSO	27	2,056,979		2	67,275	3.2%	1	278,800	13.5%
** Category Totals:				165	60,599,343		203	5,468,425	9.0%	78	465,214	0.8%

Yr	Agy Cat Agency Name	Total Construction		MBE Total Construction			WBE Total Construction		
		Contracts	Dollars	Contracts	Dollars		Contracts	Dollars	
89	4 DEPE	36	240,717,282	44	13,434,891	5.5%	31	2,905,001	1.2%
89	4 DOT FEDERAL	106	365,871,639	47	13,284,746	3.6%	50	14,990,544	4.0%
89	4 NJ TRANSIT	37	10,551,302	23	3,639,486	34.4%	7	717,377	6.7%
** Category Totals:		179	617,140,223	114	30,359,123	4.9%	88	18,612,922	3.0%
89	5 PORT AUTHORITY	65	121,217,000	52	11,248,700	9.2%	4	917,100	0.7%
** Category Totals:		65	121,217,000	52	11,248,700	9.3%	4	917,100	0.8%
**** Yearly Totals:		<u>911</u>	<u>1,255,717,310</u>	<u>449</u>	<u>59,596,195</u>	<u>4.7%</u>	<u>246</u>	<u>29,690,046</u>	<u>2.4%</u>
***** Grand Totals:		4214	5,455,851,820	1786	318,329,414	5.8%	1207	201,214,436	3.7%

Yr	Agy Cat	Agency Name	Total		MBE			WBE		
			Contracts	Dollars	Contracts	Dollars	%	Contracts	Dollars	%
84	1	DOT-STATE	0	0	0	0		0	0	
84	1	TREAS DPP/DBC	8459	562,588,315	0	1,226,987	0.2%	0	6,263,002	1.1%
** Category Totals:			8459	562,588,315	0	1,226,987	0.2%	0	6,263,002	1.1%
84	2	EDA	0	1,491,021	0	11,987	0.8%	0	8,433	0.5%
84	2	HIGHWAY AUTHORI	8	363,487	0	0		0	0	
84	2	NJ ED FACILITIE	33	715,892	0	0		0	0	
84	2	NJ EXPRESSWAY A	238	1,381,448	0	0		0	0	
84	2	NJ HEALTH CARE	111	58,169	1	2,334	4.0%	5	8,117	13.9%
84	2	PINELANDS COMMI	10	112,170	0	0		0	0	
84	2	TRANSIT-STATE	198	25,473,290	14	529,278	2.0%	6	98,080	0.3%
84	2	TURNPIKE AUTHOR	0	0	0	0		0	0	
** Category Totals:			598	29,595,477	15	543,599	1.8%	11	114,630	0.4%
84	4	DEPE	0	0	0	0		0	0	
84	4	DOT FEDERAL	0	0	0	0		0	0	
84	4	NJ TRANSIT	302	34,619,324	16	953,045	2.7%	6	98,080	0.2%
** Category Totals:			302	34,619,324	16	953,045	2.8%	6	98,080	0.3%
**** Yearly Totals:			9359	626,803,116	31	2,723,631	0.4%	17	6,475,712	1.0%
85	1	DOT STATE	0	0	0	0		0	0	
85	1	TREAS DPP/DBC	8836	855,422,432	0	1,785,318	0.2%	0	8,115,062	0.9%
** Category Totals:			8836	855,422,432	0	1,785,318	0.2%	0	8,115,062	0.9%
85	2	EDA	0	1,418,361	0	11,600	0.8%	0	4,434	0.3%
85	2	HIGHWAY AUTHORI	12	1,271,810	0	0		0	0	
85	2	NJ ED FACILITIT	5	466,769	0	0		0	0	
85	2	NJ EXPRESSWAY A	219	1,499,910	0	0		0	0	
85	2	NJ HEALTH CARE	140	113,182	1	3,055	2.6%	5	4,751	4.1%
85	2	PINELANDS COMMI	12	95,244	0	0		0	0	
85	2	TRANSIT-STATE	147	33,544,833	8	363,311	1.0%	2	19,237	
85	2	TURNPIKE AUTHOR	144	9,527,681	0	0		0	0	
** Category Totals:			679	47,937,790	9	377,966	0.8%	7	28,422	0.1%
85	3	RAMAPO	1450	1,450,000	0	0		12	7,800	0.5%

Yr	Agy Cat Agency Name	Total		MBE			WBE		
		Goods and Services Contracts	Dollars	Goods and Services Contracts	Dollars	%	Goods and Services Contracts	Dollars	%
** Category Totals:		1450	1,450,000	0	0		12	7,800	0.5%
85 4 DEPE		0	0	0	0		0	0	
85 4 DOT FEDERAL		0	0	0	0		0	0	
85 4 NJ TRANSIT		876	55,373,332	83	1,871,171	3.3%	50	575,884	1.0%
** Category Totals:		876	55,373,332	83	1,871,171	3.4%	50	575,884	1.0%
**** Yearly Totals:		11841	960,183,554	92	4,034,455	0.4%	69	8,727,168	0.9%
86 1 DOT STATE		0	0	0	0		0	0	
86 1 TREAS DFP/DBC		7005	703,000,734	0	2,558,776	0.3%	0	8,698,407	1.2%
** Category Totals:		7005	703,000,734	0	2,558,776	0.4%	0	8,698,407	1.2%
86 2 CRDA		32	241,012	1	50		7	7,775	3.2%
86 2 EDA		0	1,258,214	0	12,004	0.9%	0	9,709	0.7%
86 2 HIGHWAY AUTHORI		5195	14,655,983	27	41,134	0.2%	26	15,524	0.1%
86 2 INVESTIGATION C		481	299,013	2	1,504	0.5%	4	533	0.1%
86 2 NJ EXPRESSWAY A		160	2,496,154	0	0		0	0	
86 2 NJ HEALTH CARE		155	164,815	11	571	0.3%	11	13,241	8.0%
86 2 NJ SPORTS & EXP		0	31,458,126	0	420,041	1.3%	0	227,214	0.7%
86 2 PINELANDS COMMI		10	255,722	0	0		1	11,233	4.3%
86 2 TRANSIT-STATE		208	27,891,341	21	2,607,720	9.3%	11	506,821	1.8%
86 2 TURNPIKE AUTHOR		154	8,744,489	0	0		0	0	
** Category Totals:		6395	87,464,869	62	3,083,024	3.5%	60	792,050	0.9%
86 3 RAMAPO		1750	1,760,000	12	9,500	0.5%	32	19,000	1.0%
86 3 RUTGERS		31697	77,443,000	0	0		0	0	
** Category Totals:		33447	79,203,000	12	9,500		32	19,000	
86 4 DEPE		0	0	0	0		0	0	
86 4 DOT FEDERAL		0	0	0	0		0	0	
86 4 NJ TRANSIT		330	95,556,788	60	7,458,096	7.8%	34	5,139,119	5.3%
** Category Totals:		330	95,556,788	60	7,458,096	7.8%	34	5,139,119	5.4%
**** Yearly Totals:		47177	965,225,391	134	13,109,396	1.4%	126	14,648,576	1.5%

Yr	Agy	Cat	Agency Name	Total		MBE			WBE		
				Contracts	Dollars	Contracts	Dollars		Contracts	Dollars	
87	1		DOT STATE	0	0	0	0		0	0	
87	1		TREAS DEP/DBC	5117	863,496,616	270	6,797,738	0.7%	117	14,240,166	1.6%
** Category Totals:				5117	863,496,616	270	6,797,738	0.8%	117	14,240,166	1.6%
87	2		CASINO CONTROL	1503	921,116	66	10,527	1.1%	80	38,625	4.1%
87	2		CRDA	52	434,184	7	30,643	7.0%	15	12,903	2.9%
87	2		EDA	909	1,272,104	78	46,712	3.6%	110	18,311	1.4%
87	2		HIGHWAY AUTHORI	6047	19,326,195	129	101,773	0.5%	72	116,479	0.6%
87	2		INVESTIGATION C	587	503,523	0	0		8	6,265	1.2%
87	2		NJ ED FACILITIE	3	181,696	0	0		0	0	
87	2		NJ EXPRESSWAY A	337	3,254,417	0	0		0	0	
87	2		NJ HEALTH CARE	172	341,814	15	1,194	0.3%	11	19,959	5.8%
87	2		NJ SPORTS & EXP	0	11,873,084	0	421,484	3.5%	0	317,409	2.6%
87	2		NJ WATER SUPPLY	1188	1,762,121	0	0		5	10,397	0.5%
87	2		PINELANDS CMMI	13	226,382	0	0		0	0	
87	2		TRANSIT-STATE	17264	30,713,384	769	1,384,530	4.5%	987	1,576,764	5.1%
87	2		TURNPIKE AUTHOR	162	10,242,439	0	0		0	0	
** Category Totals:				28237	81,052,459	1064	1,996,863	2.5%	1288	2,117,112	2.6%
87	3		NJIT	0	0	0	179,000		0	0	
87	3		RAMAPO COLLEGE	2050	1,950,000	80	94,000	4.8%	15	35,000	1.7%
87	3		RUTGERS	28496	90,475,000	0	0		0	0	
87	3		STOCKTON STATE	3141	2,969,501	3	1,805		21	23,800	0.8%
87	3		U. OF MD-NJ	44824	79,449,808	949	993,151	1.2%	388	1,109,071	1.3%
** Category Totals:				78511	174,844,309	1032	1,267,956	0.7%	424	1,167,871	0.7%
87	4		DEPE	0	0	0	0		0	0	
87	4		DOT FEDERAL	0	0	0	0		0	0	
87	4		NJ TRANSIT	17343	42,780,094	772	1,435,730	3.3%	1000	1,625,015	3.7%
** Category Totals:				17343	42,780,094	772	1,435,730	3.4%	1000	1,625,015	3.8%
87	5		PORT AUTHORITY	0	0	0	0		0	0	
** Category Totals:				0	0	0	0		0	0	
**** Yearly Totals:				129208	1,162,173,478	3138	11,498,287	1.0%	2829	19,150,164	1.6%

Yr	Cat	Agy Agency Name	Total		MBE			WBE		
			Contracts	Dollars	Contracts	Dollars	%	Contracts	Dollars	%
88	1	DOT STATE	0	0	0	0		0	0	
88	1	TREAS DPP/DBC	5045	994,948,040	338	10,483,672	1.0%	132	16,548,873	1.6%
** Category Totals:			5045	994,948,040	338	10,483,672	1.1%	132	16,548,873	1.7%
88	2	CASINO CONTROL	1560	859,713	139	14,321	1.6%	79	21,116	2.4%
88	2	CRDA	24	504,031	3	83,719	16.6%	7	11,081	2.1%
88	2	EDA	659	438,330	126	19,202	4.3%	42	7,131	1.6%
88	2	HIGHWAY AUTHORI	4601	7,357,429	76	77,443	1.0%	70	99,180	1.3%
88	2	INVESTIGATION C	706	456,902	8	1,557	0.3%	47	15,709	3.4%
88	2	NJ ED FACILITIE	9	650,576	0	0		0	0	
88	2	NJ EXPRESSWAY A	355	6,438,329	6	5,605		10	46,713	0.7%
88	2	NJ HEALTH CARE	155	419,928	18	2,153	0.5%	4	4,537	1.0%
88	2	NJ HMFA	0	2,211,116	0	386,443	17.4%	0	37,263	1.6%
88	2	NJ SPORTS & EXP	0	9,913,678	0	249,261	2.5%	0	287,102	2.8%
88	2	NJ WATER SUPPLY	1270	1,259,021	29	14,627	1.1%	60	16,547	1.3%
88	2	PINELANDS COMMI	12	153,573	0	0		0	0	
88	2	SJ FOOD DISTRIB	1	200,899	0	0		0	0	
88	2	TRANSIT-STATE	37484	88,259,433	1103	3,384,401	3.8%	1362	3,998,910	4.5%
88	2	TURNPIKE AUTHOR	194	9,317,927	0	0		0	0	
** Category Totals:			47030	128,440,885	1508	4,238,732	3.3%	1681	4,545,289	3.5%
88	3	GLASSBORO	3307	6,407,164	92	464,370	7.2%	138	76,590	1.1%
88	3	JERSEY CITY COL	4419	8,764,134	1	200		88	213,954	2.4%
88	3	NJIT	0	5,000,000	141	797,000	15.9%	84	305,000	6.1%
88	3	RAMAPO COLLEGE	1948	2,250,354	76	98,670	4.3%	66	111,617	4.9%
88	3	RUTGERS	27567	87,082,000	0	0		0	0	
88	3	STOCKTON STATE	2928	2,301,000	86	131,000	5.6%	173	198,000	8.6%
88	3	TRENTON STATE	1093	2,744,413	78	42,597	1.5%	61	35,100	1.2%
88	3	U. OF MD-NJ	44727	135,092,234	1504	3,886,705	2.8%	400	1,010,583	0.7%
88	3	WILLIAM PATERSO	5031	5,670,599	17	17,450	0.3%	327	169,250	2.9%
** Category Totals:			91020	255,311,898	1995	5,437,992	2.1%	1337	2,120,094	0.8%
88	4	DEPE	0	0	0	0		0	0	
88	4	DOT FEDERAL	0	0	0	0		0	0	
88	4	NJ TRANSIT	43492	128,856,040	252	6,319,524	4.9%	360	583,985	0.4%
** Category Totals:			43492	128,856,040	252	6,319,524	4.9%	360	583,985	0.5%

Yr	Agy	Cat	Agency Name	Total		MBE			WBE		
				Contracts	Goods and Services Dollars	Contracts	Goods and Services Dollars	%	Contracts	Goods and Services Dollars	%
88	5		PORT AUTHORITY	0	0	0	0		0	0	
** Category Totals:				0	0	0	0		0	0	
**** Yearly Totals:				186587	1,507,556,863	4093	26,479,920	1.8%	3510	23,798,241	1.6%
89	1		DEP-STATE	0	0	0	0		0	0	
89	1		DOT STATE	0	0	0	0		0	0	
89	1		TREAS DPP/DBC	5963	966,899,268	0	11,942,904	1.2%	0	26,384,602	2.7%
** Category Totals:				5963	966,899,268	0	11,942,904	1.2%	0	26,384,602	2.7%
89	2		CASINO CONTROL	1316	931,282	192	93,322	10.0%	78	25,641	2.7%
89	2		CRDA	31	481,114	3	96,085	19.9%	9	73,549	15.2%
89	2		EDA	819	1,106,527	150	38,794	3.5%	21	110,874	10.0%
89	2		HIGHWAY AUTHORI	4758	8,235,007	122	168,775	2.0%	90	97,990	1.1%
89	2		INVESTIGATION C	734	405,824	47	11,100	2.7%	124	30,783	7.5%
89	2		NJ ED FACILITIE	7	1,021,637	0	0		0	0	
89	2		NJ EXPRESSWAY A	400	5,001,109	10	40,596	0.8%	16	174,372	3.4%
89	2		NJ HEALTH CARE	126	418,096	15	4,901	1.1%	10	11,647	2.7%
89	2		NJ HMFA	0	2,042,037	0	286,839	14.0%	0	81,517	3.9%
89	2		NJ SPORTS & EXP	0	12,179,386	0	1,306,350	10.7%	0	1,139,204	9.3%
89	2		NJ WATER SUPPLY	1163	1,137,948	68	20,273	1.7%	77	22,179	1.9%
89	2		PINELANDS COMMI	7	102,053	0	0		0	0	
89	2		SJ FOOD DISTRIB	1	97,602	0	0		0	0	
89	2		TRANSIT-STATE	32350	72,892,107	1268	2,274,121	3.1%	1457	6,950,599	9.5%
89	2		TURNPIKE AUTHOR	215	15,419,723	0	0		0	0	
** Category Totals:				41927	121,471,452	1875	4,341,156	3.6%	1892	8,718,355	7.2%
89	3		GLASSBORO	3124	6,896,166	126	407,321	5.9%	194	166,571	2.4%
89	3		JERSEY CITY COL	5360	7,742,378	4	12,835	0.1%	19	164,388	2.1%
89	3		MONTCLAIR STATE	5000	8,808,648	350	616,000	6.9%	150	299,494	3.3%
89	3		NJIT	0	6,854,000	309	984,000	14.3%	160	40,000	0.5%
89	3		RAMAPO COLLEGE	3635	2,650,000	176	164,752	6.2%	80	170,030	6.4%
89	3		RUTGERS	65476	143,533,000	745	1,571,600	1.0%	1886	5,772,000	4.0%
89	3		STOCKTON STATE	3006	2,607,872	77	118,313	4.5%	325	238,615	9.1%
89	3		TRENTON STATE	903	2,796,268	63	45,000	1.6%	60	40,000	1.4%
89	3		U. OF MD-NJ	44078	112,371,380	1624	5,867,964	5.2%	543	2,163,375	1.9%
89	3		WILLIAM PATERSO	5024	2,187,335	17	21,209	0.9%	327	169,250	7.7%
** Category Totals:				135606	296,447,047	3491	9,808,994	3.3%	3744	9,223,723	3.1%

Yr	Agy Cat	Agency Name	Total		MBE			WBE		
			Goods and Services Contracts	Dollars	Goods and Services Contracts	Dollars	%	Goods and Services Contracts	Dollars	%
89	4	DEPE	0	0	0	0		0	0	
89	4	DOT FEDERAL	0	0	0	0		0	0	
89	4	NJ TRANSIT	32993	157,237,618	1343	6,872,931	4.3%	1551	21,099,189	13.4%
	**	Category Totals:	32993	157,237,618	1343	6,872,931	4.4%	1551	21,099,189	13.4%
89	5	PORT AUTHORITY	2151	73,906,764	107	26,667,847	36.0%	40	194,451	0.2%
	**	Category Totals:	2151	73,906,764	107	26,667,847	36.1%	40	194,451	0.3%
	****	Yearly Totals:	<u>218640</u>	<u>1,615,962,149</u>	<u>6816</u>	<u>59,633,832</u>	<u>3.7%</u>	<u>7217</u>	<u>65,620,320</u>	<u>4.1%</u>
	*****	Grand Totals:	602812	6,837,904,551	14304	117,479,521	1.7%	13768	138,420,181	2.0%

Report of Small business Set-Aside bids for FY 92

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SOLIC NUMBER	CONTRACT NUMBER(S)	NUMBER OF AWARDS
20017	40007 - 40007	1
21653	41801 - 41801	1
22368	44251 - 44251	1
23322	49143 - 49143	1
23416	48097 - 50576	147
23687	3359016778 - 3359016778	1
24022	46736 - 46736	1
24072	49498 - 51029	195
24081	46677 - 46677	1
24222	3398117622 - 3398117622	1
24297	47007 - 47011	5
24491	47621 - 47625	5
24631	48902 - 48902	1
24693	48670 - 48966	20
24696	48737 - 48754	18
24768	50796 - 50812	17
24776	48446 - 48446	1
24780	50077 - 50077	1
24790	49745 - 49754	10
24811	49056 - 49094	12
24853	3430318080 - 3430318080	1
24864	3451418123 - 3451418123	1
24866	50573 - 50573	1
24920	50676 - 50679	4
24929	48903 - 48906	4
24933	48434 - 48434	1
24936	49695 - 49695	1
24937	49077 - 49077	1
25016	3435518162 - 3435518162	1
25113	51122 - 51122	1
25144	49475 - 49477	3
25173	49478 - 49484	7
25174	49714 - 49716	3
25198	48873 - 48873	1
25218	48951 - 48951	1
25242	49117 - 49119	3
25244	49141 - 49141	1
25247	49120 - 49120	1
25256	49378 - 49382	5
25275	50043 - 51868	2
25295	49044 - 49046	3
25345	49008 - 49008	1

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SOLIC NUMBER	CONTRACT NUMBER(S)	NUMBER OF AWARDS
25365	49702 - 49702	1
25368	50316 - 50316	1
25369	50534 - 50534	1
25381	50121 - 50121	1
25391	49151 - 49151	1
25422	49901 - 49901	1
25460	51038 - 51039	2
25461	50785 - 50787	3
25463	50709 - 50823	6
25491	49390 - 49390	1
25503	50579 - 50591	13
25531	50021 - 50023	3
25578	3364116678 - 3364116678	1
25585	51240 - 51336	10
25587	50600 - 50600	1
25589	50417 - 50428	12
25591	51016 - 51018	3
25705	51045 - 51050	6
25709	3392717553 - 3392717553	1
25725	50330 - 50330	1
25730	3410517860 - 3410517860	1
25738	51328 - 51328	1
25790	50412 - 50412	1
25799	50794 - 50795	2
25835	3381116933 - 3381116933	1
25849	51388 - 51391	4
25854	50539 - 50539	1
25870	51167 - 51475	23
25877	50865 - 50865	1
25882	51528 - 51539	12
25891	51025 - 51027	3
25896	50906 - 50911	5
25898	50817 - 50818	2
25904	3382817102 - 3382817102	1
25918	51224 - 51233	10
25938	52086 - 52086	1
25942	51458 - 51459	2
25961	50872 - 50872	1
25998	3396617359 - 3396617359	1
26007	51051 - 51051	1
26013	51373 - 51373	1
26019	51919 - 51989	70
26032	51031 - 51035	5
26036	51252 - 51252	1
26041	3392117111 - 3392117111	1
26045	3401617123 - 3401617123	1
26046	3403517178 - 3403517178	1
26061	51297 - 51297	1

Report of Small business Set-Aside bids for FY 92

PAGE 3

SOLIC NUMBER	CONTRACT NUMBER(S)	NUMBER OF AWARDS
26068	3427118167 - 3427118167	1
26071	51037 - 51037	1
26086	51028 - 51028	1
26090	3406917303 - 3406917303	1
26096	51015 - 51015	1
26099	3389016885 - 3389016885	1
26101	51263 - 51263	1
26116	51041 - 51041	1
26123	51308 - 51311	4
26127	51635 - 51636	2
26130	51379 - 51382	4
26144	51631 - 51631	1
26153	52074 - 52074	1
26166	51163 - 51163	1
26169	51205 - 51205	1
26189	51219 - 51219	1
26198	51344 - 51506	4
26243	52459 - 52459	1
26266	52460 - 52540	22
26275	51867 - 51867	1
26332	51856 - 51857	2
26335	51457 - 51457	1
26336	51759 - 51759	1
26350	3500617775 - 3500617775	1
26353	3435618285 - 3435618285	1
26414	52254 - 52254	1
26457	52066 - 52068	3
26460	3450517928 - 3450517928	1
26473	52118 - 52169	10
26476	52514 - 52525	12
26477	51832 - 51832	1
26495	52301 - 52301	1
26537	52495 - 52495	1
26547	52506 - 52508	3
26575	52000 - 52000	1

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SOLIC NUMBER	CONTRACT NUMBER(S)	NUMBER OF AWARDS
26620	3471918155 - 3471918155	1
26643	52101 - 52104	4
26671	3474218239 - 3474218239	1
26776	3492118412 - 3492118412	1
26821	3500218537 - 3500218537	1
26836	3508118655 - 3508118655	1
26850	3510118646 - 3510118646	1
26883	3513818671 - 3513818671	1
26979	52606 - 52606	1
26993	3533318958 - 3533318958	1

Total solicitations=	135		
Total documents =	815		
Total Contracts =	787	Solic =	107
Total Purch Orders =	28	Solic =	28

There were a total of 135 bids set-aside for small businesses in FY 1991 resulting in 815 contracts.

Report of Small business Set-Aside bids for FY 91

PAGE 1

SOLIC NUMBER	CONTRACT NUMBER(S)	NUMBER OF AWARDS
20727	41661 - 41673	13
20875	46788 - 46792	4
21979	45709 - 45715	7
22044	46151 - 46152	2
22463	44199 - 44212	14
22607	46342 - 46351	10
22694	44753 - 45202	18
22729	44925 - 44938	14
22791	44055 - 44055	1
22818	44649 - 44720	11
22836	44623 - 44632	10
22939	45371 - 45373	3
22995	44891 - 44892	2
23055	44924 - 44924	1
23057	45245 - 45245	1
23073	44228 - 44228	1
23095	46823 - 46824	2
23143	44479 - 44479	1
23185	44727 - 44727	1
23245	44977 - 44982	6
23246	44943 - 44946	4
23253	45872 - 45877	6
23322	45668 - 45691	14
23366	49076 - 49076	1
23416	48154 - 48154	1
23429	46478 - 46481	4
23455	44908 - 44908	1
23475	44941 - 44941	1
23500	45659 - 45659	1
23521	45878 - 45883	6
23530	45029 - 45029	1
23542	45362 - 45362	1
23545	45244 - 45244	1
23606	46216 - 46224	9
23609	45682 - 45682	1
23611	46353 - 46355	3
23614	46158 - 46162	5
23623	46634 - 48076	3
23632	45394 - 45394	1
23701	45392 - 45392	1
23781	46640 - 46640	1
23795	46007 - 46020	14

Report of Small business Set-Aside bids for FY 91

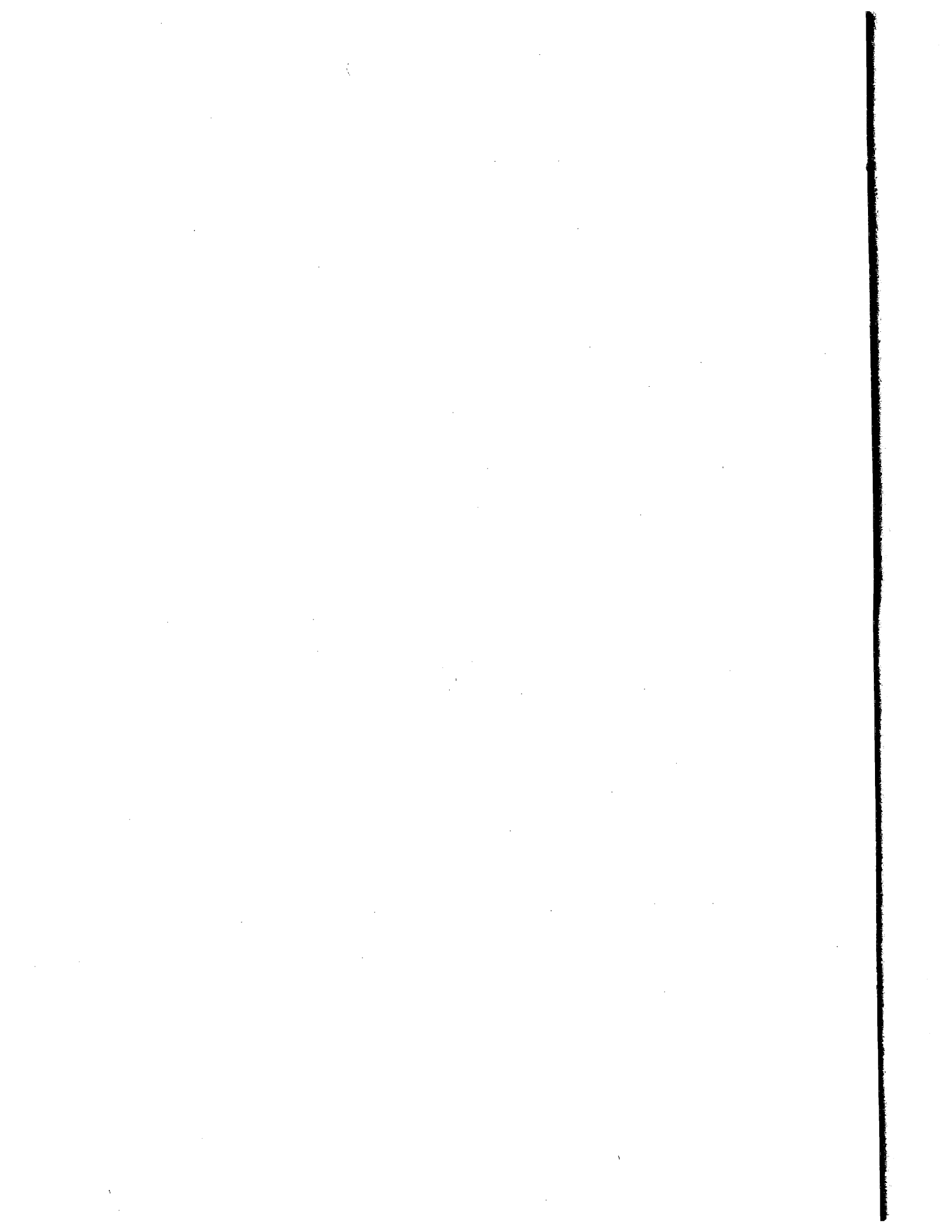
SOLIC NUMBER	CONTRACT NUMBER(S)		NUMBER OF AWARDS
23855	46033	- 46033	1
23905	46684	- 46684	1
23907	46382	- 46386	5
23933	46169	- 46169	1
23958	46997	- 47005	9
23968	46672	- 46672	1
24004	46214	- 46214	1
24009	46339	- 46339	1
24049	46764	- 46764	1
24094	46641	- 46641	1
24121	46931	- 46931	1
24134	47148	- 47148	1
24140	46717	- 46728	12
24145	46748	- 46786	11
24187	46932	- 46935	4
24207	46940	- 46943	4
24253	47214	- 47214	1
24268	47301	- 47301	1
24287	46977	- 46981	4
24288	46735	- 46735	1
24295	46758	- 46761	4
24298	46919	- 46919	1
24301	46897	- 46897	1
24302	46804	- 46804	1
24305	46882	- 46882	1
24311	47095	- 47096	2
24319	47043	- 47043	1
24352	47044	- 47044	1
24358	46898	- 46898	1
24376	48833	- 48861	29
24492	47140	- 47140	1
24521	47613	- 47619	7
24522	47452	- 47452	1
24533	47966	- 47966	1
24536	47680	- 49703	5
24543	47998	- 47998	1
24547	47182	- 47182	1
24564	47204	- 47204	1
24584	48052	- 49014	23
24675	47239	- 47239	1
24707	47504	- 47504	1
24712	48862	- 48908	7
24713	33429	- 33429	1
24715	47444	- 47444	1

Report of Small business Set-Aside bids for FY 91

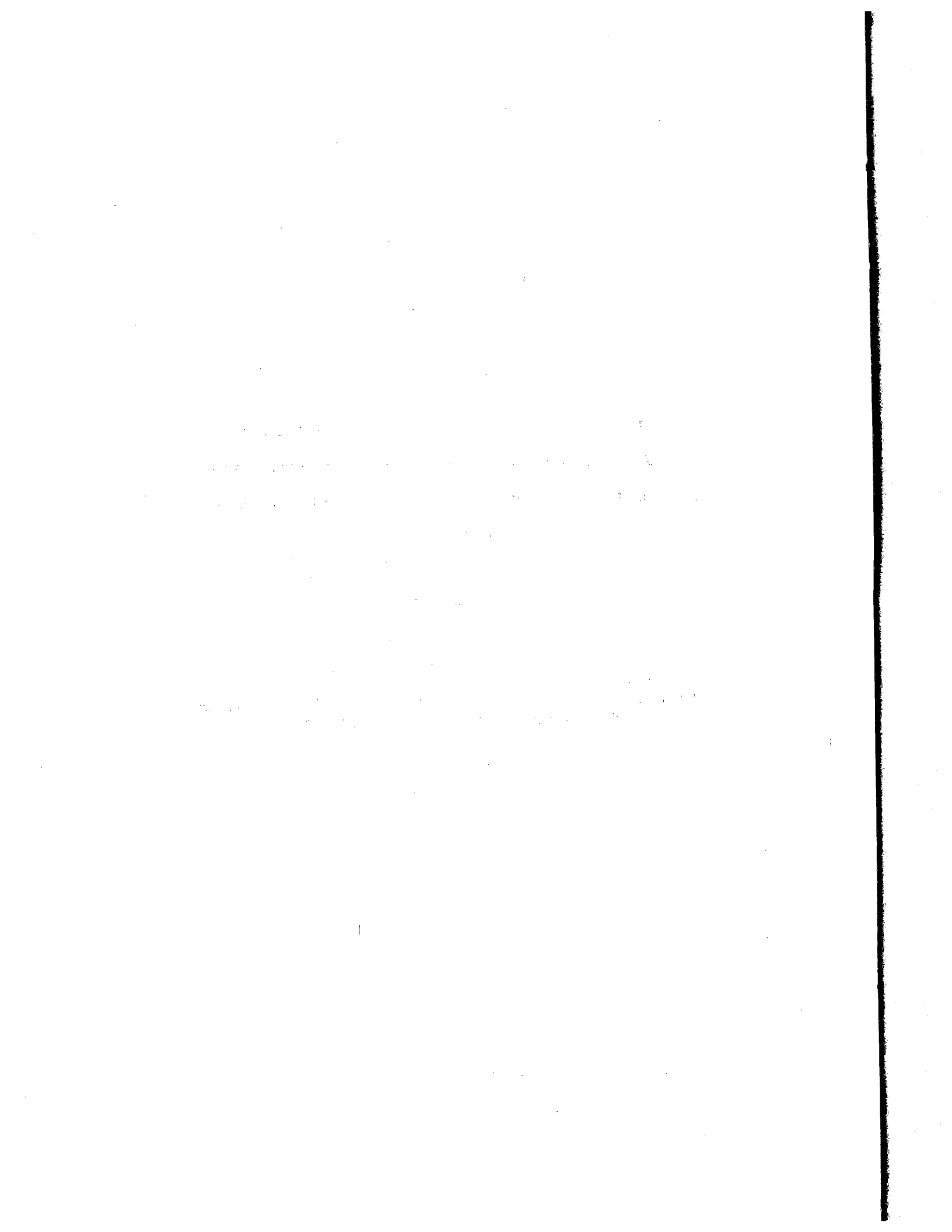
SOLIC NUMBER	CONTRACT NUMBER(S)		NUMBER OF AWARDS
24748	47505	- 47505	1
24784	48692	- 48692	1
24836	48005	- 48011	7
24865	47954	- 47954	1
24866	47694	- 50820	2
24867	47695	- 47695	1
25004	47997	- 47997	1
25006	47994	- 47994	1
25061	48437	- 48437	1
25176	33400	- 33400	1
25179	48826	- 48827	2
25200	3355316092	- 3355416092	2
25201	33482	- 33482	1
25211	33386	- 33386	1
25215	33483	- 33483	1
25248	33540	- 33540	1
25250	33454	- 33454	1
25283	33510	- 33510	1

Total solicitations=	104		
Total documents =	385		
Total Contracts =	375	Solic =	95
Total Purch Orders =	10	Solic =	9

There were a total of 104 bids set-aside for small businesses in FY 1991 resulting in 385 contracts.



APPENDIX B

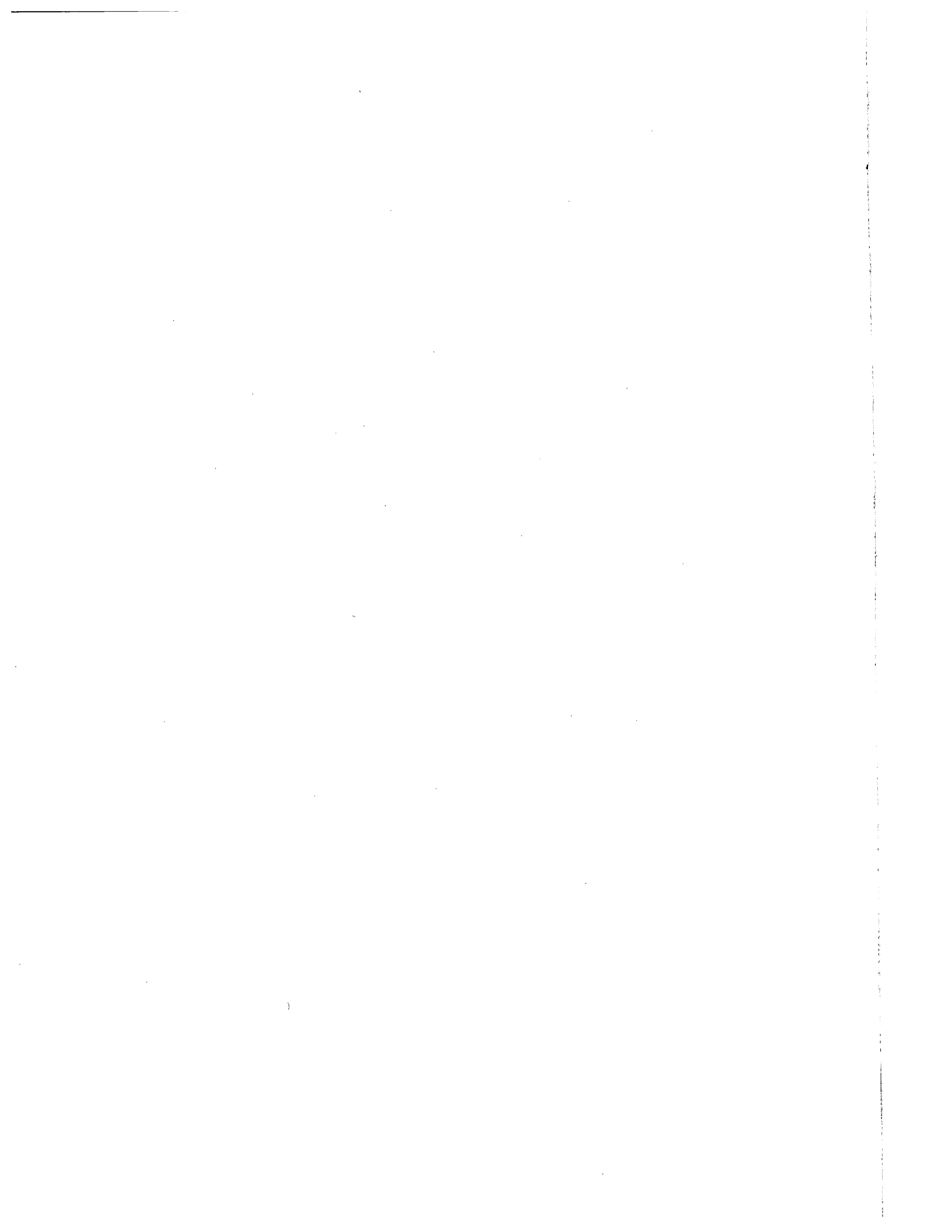


Availability, Utilization, and Disparity:  
An Analysis of New Jersey Procurement Data  
in Light of Minority and Women-Owned Business  
Availability

by

Dr. Timothy Bates, Chair  
Urban Policy Analysis Graduate Program  
Graduate School of Management and Urban Policy  
New School for Social Research

March 1992



A. Overview

The State of New Jersey has heavily underutilized minority and women-owned business vendors during the 1984-1989 time period. Broad patterns show that disparities exist between the availability of minority business enterprise (MBE) and women business enterprise (WBE) firms and their utilization in New Jersey state procurement. Key findings include the following points:

1. A wide disparity exists between the availability of MBE and WBE firms in the New Jersey area, and the utilization of these firms as vendors to the State of New Jersey. Aside from the several agencies heavily involved in federally funded construction, this disparity typifies State procurement efforts in every year during the 1984-1989 time period. The data suggest that MBE and WBE firms are effectively being denied the opportunity to compete on an equal basis for their fair share of New Jersey's procurement business.
2. Regarding goods and services procurement specifically, measures of availability indicate that minority and women-owned businesses account for 32.6 percent of the services firms and 23.4 percent of the goods firms operating in the New Jersey area. Overall, minority and women-owned businesses accounted for 30.0 percent of all New Jersey area small businesses in 1982. These and other measures of availability tower above the 1.5 percent median share of New Jersey goods and services procurement

dollars paid out to MBEs and WBEs over the 1984-1989 period. Even in 1989 when 3.9 percent of the DPP goods and services procurement dollars were paid out to MBE and WBE firms, a severe disparity is nonetheless apparent. This huge disparity is, in my professional opinion, highly statistically significant.

3. The State of New Jersey has most heavily utilized MBE and WBE vendors in the construction field, which is a field of relatively low overall availability in the relevant MBE and particularly WBE populations. Frequent utilization of MBE and WBE firms consistently typifies three New Jersey agencies: Department of Transportation (DOT), Department of Environmental Protection and Energy (DEPE), and New Jersey Transit. This pattern of MBE and WBE utilization reflects the very heavy influence of federal policies, particularly policies of the U.S. Department of Transportation designed to encourage MBE and WBE utilization in projects receiving federal funds from that agency.
4. Because of mandatory federal regulations, New Jersey has adopted an effective preferential procurement program for MBEs and WBEs in the three agencies that rely heavily upon funding from the U.S. Department of Transportation. The impacted state agencies have adopted appropriate record keeping systems for supporting their affirmative procurement efforts. These few agencies aside, the State

of New Jersey is consistently underutilizing MBE and WBE vendors in all years 1984-1989, although greater utilization is clearly apparent in 1989. Furthermore, the State has not adopted appropriate data bases and information systems necessary for the effective administration of preferential procurement programs. MBE and WBE firms represent over 18 percent on New Jersey's main bidder's list (of vendors ready and willing to contract with the State) and they comprise approximately 30 percent of the small businesses operating in the New Jersey area.<sup>1</sup> Yet only one to four percent of the procurement dollars spent by State of New Jersey agencies on goods and services accrued to MBE and WBE firms during the years 1984 to 1989; corresponding figures for construction procurement ranged from 0.4 percent to 9.1 percent. While their utilization of MBE and WBE firms rose somewhat in 1988 and 1989, the State was still underutilizing MBE and WBE firms in the construction, goods and services industries during those years. Finally, inadequate data bases and information systems make it difficult to measure with precision the level of utilization by the State of New Jersey of MBE and WBE construction firms.

5. The heavy utilization of MBE and WBE firms by New Jersey Transit, DOT, and DEPE indicates that New Jersey state agencies - when they are made to - can operate effective

preferential procurement programs benefitting minorities and women. The efforts of the State of New Jersey in the realm of procurement from MBE and WBE firms - in the absence of federal compulsion - are not impressive. There is a wide and striking gap between the active affirmative procurement efforts of the few agencies, such as New Jersey Transit, and the MBE, WBE procurement track record of most New Jersey state agencies, authorities, commissions, colleges and universities.

6. The Port Authority of New York and New Jersey has maintained comprehensive data on MBE and WBE utilization in construction contracting since 1987. MBE utilization by the Port Authority has far surpassed WBE utilization: while MBEs received five to 26 percent of the construction procurement dollars over the 1987 to 1989 period, the WBE share has remained below one percent.

#### B. New Jersey Utilization of MBE and WBE Vendors

The data summarized in the January 7, 1992 summary tables of contracting activities for State agencies, authorities, commissions, colleges, and universities describe New Jersey procurement over the 1984-1989 period.<sup>2</sup> These data suffer from certain shortcomings that complicate aggregation across state agencies: for example, some agency data refer to contracts awarded while others refer to dollars actually paid out to vendors; some of the agencies track MBE and WBE subcontractors, including

subcontract payments in MBE, WBE totals, and some don't; some agencies compile information on both number and dollar amount of contracts, while others keep records on dollar amounts only.

In light of the above, I began my analysis of utilization data by examining four large agencies that offer data that are, in certain ways, particularly appropriate for analyzing MBE, WBE utilization. Regarding goods and services procurement, I focused largely upon Division of Purchase and Property (DPP) data. The DPP data are particularly valuable for two reasons. First, DPP provides centralized contracting for all 19 departments which comprise the Executive Branch of New Jersey state government. DPP, a division of the Department of Treasury, handles all goods and services contracting for these departments, which means that DPP handles the majority of all State goods and services procurement - far exceeding the combined total of all other State authorities, commissions, colleges, and universities that purchase goods and services independently of DPP. Secondly, DPP data measure actual payments to vendors, which means that DPP information is more precise and relevant than data from other authorities, commissions, and so forth that reflect only contract awards. Contract awards do not guarantee that actual payments will be made under the relevant contracts. Further, award data tend to overstate MBE, WBE, shares of procurement dollars. MBEs in particular are smaller firms, newer firms, firms with less experience in selling to the State, and firms with less access to financial resources, compared to all vendors. For these reasons, slippage in awards to MBEs tends to be higher than it is for the average vendor; "slippage" refers to

actual payouts that are smaller than awarded contract amounts. Slippage also impacts minority subcontractors disproportionately. Nonminority prime contractors often pledge to use minority subs heavily, because this tactic improves their chances of winning procurement contracts. Once the contract is in hand, the prime contractors often negotiate to switch subcontractors, shift dollar amounts between subs, and so forth; minority subs frequently lose "awarded" contract dollars from these negotiations.

For all of the above reasons, the procurement data that accurately describe the MBE and WBE share of State spending are the data on actual dollar amounts paid out to vendors. If New Jersey in the future wants to track accurately the MBE, WBE share of procurement, then all agencies, authorities, commissions, colleges, and universities should uniformly utilize data on actual payouts to firms. Use of contract award amounts to calculate MBE, WBE shares should be completely eliminated. The fact the DPP data reflect actual payouts justifies heavy reliance upon this data source in this report.

For analysis of construction procurement, the superior sources of data are provided by DOT, DEPE, and New Jersey Transit. Because of federal regulations described above, these three agencies consistently track the subcontracts awarded by nonminority prime contractors to minority and women subcontractors. These agencies do not track the subcontracts of minority primes (except for DOT, which has an average of only one minority prime per year), largely because the minority prime contractors rarely use subs. In 1988, DEPE awarded 57 construction contracts for \$355.1 million, and none

of these 57 prime contracts went to MBEs or WBEs.<sup>3</sup> Because DEPE tracks subcontracts, however, we know that the recipients of these 57 prime contracts awarded 121 subcontracts (for \$19.3 million) to minority subs. The minority share of the \$355.1 million was 5.4 percent. Since some of the New Jersey agencies, authorities, commissions, and so forth do not track subs, MBE and WBE shares of construction procurement dollars cannot be calculated accurately. If DEPE in 1988, for example, had been using the accounting system of Rutgers University (which did not track subcontractors), they would have reported that the WBE share of construction procurement awards that year was zero. In fact, the WBE share of DEPE's construction procurement in 1988 was 2.9 percent - all of which was awarded as subcontracts - and the WBE share was accurately recorded because of DEPE's practice of tracking subcontractors.

Note that few New Jersey agencies, authorities, commissions, and so forth track subcontractors. This, of course, means that New Jersey has no way of accurately tracking the MBE, WBE share of construction procurement. Agencies engaging in major construction projects cannot administer seriously an affirmative procurement program if they do not track subcontracts. Such tracking should be an integral part of preferential procurement programs that New Jersey may choose to adopt in the future.

#### 1. Utilization of MBEs and WBEs in Goods and Service Procurement

Table one summarizes DPP utilization of minority and women-owned business vendors during the 1984-1989 period, focusing solely upon goods and services procurement. The combined MBE, WBE procurement share ranged from a low of 1.1 percent to a high of 3.9

percent over this six year period (table one); in four of the six years the MBE, WBE share was 1.5 percent or less of total procurement dollars paid out to vendors.

Table one also reports corresponding numbers on MBE and WBE procurement share over the 1984-1989 period, utilizing the less reliable data from all other reporting State agencies, authorities, commissions, colleges, and universities. Because these data reflect the practice of reporting awards (except in the case of DPP) they predictably show higher proportions of procurement accruing to MBEs and WBEs. Finally, the goods and services procurement of New Jersey Transit is reported separately in table one. Because this agency faced mandatory federal requirements regarding preferential procurement from MBE and WBE vendors and purchased goods and services independently, unlike DOT and DEPE, the resultant combined MBE, WBE procurement share for New Jersey Transit ranged from a low 2.9 percent in 1984 to a high of 17.7 percent in 1989; the corresponding median value was 7.0 percent (MBEs and WBEs received 7.0 percent of New Jersey Transit's \$42.8 million in goods and services procurement awards in 1987, which amounted to \$3.0 million in actual dollars).<sup>4</sup>

Reliance upon DPP data as the most reliable estimate of goods and services procurement dollars paid out to MBEs and WBEs indicates that their share of procurement in these fields ranged from one to four percent over the 1984-1989 period; the median MBE, WBE share was 1.5 percent during the six years. The upward trend in MBE and WBE procurement shares that is apparent in sections A and B of table one reflects the enactment and implementation of set-

Table one: Summary of Goods and Services Procurement Contracting Activity for State Agencies, Authorities, Commissions, Colleges, and Universities

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
A. <u>DPP only: State of New Jersey Agencies</u>						
1. All goods and services (\$ millions)	\$562.6	\$855.4	\$703.0	\$ 863.5	\$ 994.9	\$ 966.9
2. MBE share	0.2%	0.2%	0.3%	0.8%	1.4%	1.2%
3. WBE share	1.1%	0.9%	1.2%	0.7%	1.2%	2.7%
4. Combined MBE, WBE share	1.3%	1.1%	1.5%	1.5%	2.6%	3.9%
B. <u>State of New Jersey Independent Authorities, Commissions, Colleges, and Universities (except New Jersey Transit)</u>						
	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
1. All goods and services (\$ millions)	\$ 29.6	\$ 47.9	\$ 89.2	\$ 86.0	\$ 156.6	\$ 155.2
2. MBE share	1.8%	0.8%	3.5%	2.4%	3.2%	3.7%
3. WBE share	0.4%	0.1%	0.9%	2.5%	3.4%	6.4%
4. Combined MBE, WBE share	2.2%	0.9%	4.4%	4.9%	6.6%	10.1%
C. <u>New Jersey Transit</u>						
	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
1. All goods and services (\$ millions)	\$ 34.6	\$ 55.4	\$ 95.6	\$ 42.8	\$ 128.9	\$ 157.2
2. MBE share	2.7%	3.3%	7.8%	3.3%	4.9%	4.3%
3. WBE share	0.2%	1.0%	5.3%	3.7%	0.4%	13.4%
4. Combined MBE, WBE share	2.9%	4.3%	13.1%	7.0%	5.3%	17.7%

asides by the State of New Jersey; set-asides were adopted in December 1985; rules implementing the set-asides were enacted in 1987. The dampening effect of the Richmond v. Croson decision on New Jersey's set-aside program, finally, first began to be felt late in 1989. (U. S. Supreme Court, 1989).

## 2. Utilization of MBEs and WBEs in Construction Procurement

Table two summarizes the sum of construction awards, thus showing the utilization of minority and women-owned vendors during the 1984-1989 time period for four separate groupings: a) State of New Jersey Agencies (Treasury DPP/DBC data utilized), b) State of New Jersey Independent Authorities, Commissions, Colleges, and Universities that are not covered by mandatory federal goals to assist MBEs and WBEs, c) New Jersey Transit, DOT, and DEPE, which are covered by mandatory federal goals to assist MBEs and WBEs, and d) the Port Authority of New York and New Jersey. Sections A and B of table two describe MBE and WBE procurement shares over the 1984-1989 period, utilizing less reliable data from State agencies, authorities, commissions, colleges, and so forth.<sup>5</sup> These data suffer from inaccuracies due to the failure of some agencies, discussed above, to track subcontracts to women and minorities. Because of this deficiency, in part, and the resultant underreporting of the true MBE, WBE share of construction procurement, the data from New Jersey reporting agencies, authorities, commissions, colleges, and universities (other than DOT, DEPE, and New Jersey Transit) show consistently smaller MBE, WBE shares of construction procurement in all of the six years, 1984 through 1989. Fortunately, most construction procurement

spending (table two) was done by DOT, New Jersey Transit,

Table two: **Summary of Construction Contracting Activity for State Agencies, Authorities, Commissions, Colleges, and Universities**

A. Treasury DPP/DBC: State of New Jersey Agencies

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
1. All construction (\$ millions)	\$ 76.9	\$170.8	\$209.7	\$159.9	\$ 170.3	\$ 280.9
2. MBE share	0.3%	0.3%	3.8%	2.0%	4.2%	3.9%
3. WBE share	1.0%	0.1%	3.0%	1.6%	4.9%	3.3%
4. Combined MBE, WBE share	1.3%	0.4%	6.8%	3.6%	9.1%	7.2%

B. State of New Jersey Independent Authorities, Commissions, Colleges, and Universities (except those with mandatory federal goals to assist MBEs and WBEs)

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
1. All construction (\$ millions)	\$ 78.6	\$ 74.6	\$221.6	\$144.2	\$ 167.9	\$ 236.4
2. MBE share	0.1%	0.2%	0.4%	0.3%	0.5%	0.8%
3. WBE share	0.1%	0	0	0.1%	0	0.3%
4. Combined MBE, WBE share	0.2%	0.1%	0.4%	0.4%	0.5%	1.1%

C. New Jersey Transit, DOT, and DEPE (those impacted by mandatory federal goals to assist MBEs and WBEs)

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
1. All construction (\$ millions)	\$299.4	\$365.7	\$556.9	\$275.3	\$ 687.8	\$ 617.1
2. MBE share	8.7%	8.3%	7.8%	9.1%	4.5%	4.9%
3. WBE share	3.6%	5.4%	10.3%	3.8%	7.8%	3.0%

4. Combined MBE, WBE share	12.3%	13.7%	18.1%	12.9%	12.3%	7.9%
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D. The Port Authority (Construction contracts located in New Jersey only)

	1984	1985	1986	1987	1988	1989
1. All construction } (\$ millions) }				\$95.9	\$ 285.4	\$ 121.2
2. MBE share }				5.0%	26.1%	9.3%
3. WBE share }				0.1%	0.2%	0.8%
4. Combined MBE, WBE share }				5.1%	26.3%	10.1%

data were unavailable  
prior to 1987

and DEPE; for the residual spending by other authorities and agencies, we have absolutely no way of estimating the precise share awarded to MBEs and WBEs. We cannot assume that all other state agencies acted similarly to DOT, New Jersey Transit, and DEPE in their construction award practices because federal regulations from the U.S. Departments of Transportation and Environmental Protection were shaping DOT, New Jersey Transit, and DEPE behavior. Thus it is quite likely that other state agencies, authorities, commissions, and so forth - unaffected by affirmative federal policies - were not pursuing minority and women vendors in construction as actively as were DOT, DEPE, and New Jersey Transit.

For New Jersey Transit, DOT, and DEPE (table 2, section C: those covered by mandatory federal regulations), the combined MBE, WBE procurement share ranged from a low of 7.9 percent to a high 18.1 percent over this six years (table two); in five of the six years, the MBE, WBE share was over 12 percent of total construction awards to vendors. Total construction procurement awards from these three agencies constituted over half of construction procurement contracting by all New Jersey State authorities, agencies, commissions, colleges, and universities. The utilization of MBE and WBE firms described in table two stands in stark contrast to the situation described in table one: utilization of MBEs and WBEs in New Jersey state procurement is generally higher in construction than in goods and services.

Finally, table two reports selected construction procurement data for the Port Authority, covering the 1987 through 1989 time period. Port Authority procurement are guided by policies that are quite separate

from those governing New Jersey State agencies, authorities, commissions, colleges and universities described in table two. Port Authority procurement numbers reflect construction contracts located in New Jersey only; data on both contracts and subcontracts to MBEs and WBEs have been utilized in section D of table two.

What can be concluded about the overall MBE, WBE share of New Jersey construction procurement dollars? The table two numbers for Treasury DPP/DBC (State agencies) and independent authorities, commissions, colleges, and universities can be interpreted as a lower bound: thus a minimal estimate indicates that the MBE, WBE share of construction awards ranged from a low of 0.1 percent to a high of 9.1 percent over the 1984-1989 period. Finally, construction awards to MBEs and WBEs clearly did increase in 1988 and 1989 for all of the State agencies, commissions, and so forth that were not covered by the mandatory federal goals that shaped the procurement awards of DOT, DEPE, and New Jersey Transit. Table one documented a similar pattern of increased procurement of goods and services from MBEs and WBEs during 1988 and 1989. Increased New Jersey State procurement from MBEs and WBEs in these two years undoubtedly reflects the impact of State legislation which encouraged such procurement. Specifically, such procurement was promoted by the New Jersey Set Aside Act for Small Business (N.J.S.A. 52:32-17); rules implementing this statute went into effect on March 16, 1987.

#### C. Measuring Disparity

Disparity is defined as existing if the utilization of MBE and WBE firms in New Jersey state procurement contracting is less than the

availability of such firms. Two measures of MBE, WBE availability are utilized in this report: 1) bidders list information from New Jersey state procurement records, and 2) Census Bureau statistics on the MBE, WBE share of New Jersey area small businesses. Bidders lists provide the superior measure of availability, because they indicate an explicit willingness of vendors to do business with the State.

Supreme Court Justice Sandra O'Connor, in her opinion on the 1989 Richmond vs. Croson case, wrote that a "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 the locality..." could lead to an inference of discriminatory exclusion. In other words, a measure of MBE or WBE availability ideally indicates an explicit willingness on the part of the relevant firms to do business with the State: signing onto bidders lists indicates such an interest. Bidders list information for New Jersey, unfortunately, provides rather limited information on the kinds (the industry types) of businesses operated by the MBE and WBE firms represented on the list. Availability by industry, therefore, is additionally inferred from Census Bureau data that identifies MBE, WBE, and nonminority male-owned firms by industry of operation.

#### 1. Procurement in Goods and Services

The number of vendors on New Jersey's September 1991 SAVI II bidders list, by MBE, WBE status, is used to measure availability of firms in the goods and services procurement areas. Of the 27,219 vendors registered on SAVI II, 2,211 (8.1 percent) are MBEs and 2,832 (10.4 percent) are WBEs. DPP data indicate that 95 percent of contracts

awarded went to companies on the SAVI II bidders list, which suggests that the universe of interested vendors is comprehensively represented by this State of New Jersey list.<sup>6</sup>

In terms of MBE and WBE availability to do business with New Jersey, we therefore know that 18.5 percent of the firms on the bidders list fit into the MBE and WBE designations. Considering goods and services firms only, 16.8 percent of the firms registered on the SAVI II bidders list are MBEs and WBEs. We would ideally like to know the proportions of MBE and WBE firms on the bidders list each year over the 1984-1989 time period, but that information is unavailable. In terms of our secondary measure of availability, MBEs and WBEs accounted for 30.0 percent of all New Jersey area small businesses in 1982, as well as 32.6 percent of the service businesses and 23.4 percent of the goods firms.\* In light of the more rapid growth of MBE and WBE firms, relative to small businesses owned by nonminority males, throughout the 1980s, a conservative estimate of the MBE, WBE small business share in 1989 would be 25 percent of the goods firms and 34 percent of the service providers.

These measures of availability vastly exceed the 1.5 percent median share of New Jersey goods and services procurement dollars paid out to MBEs and WBEs over the 1984-1989 period. Even in 1989 when 3.9 percent of the DPP goods and services procurement dollars were paid out to MBE and WBE firms, a severe disparity is nonetheless apparent. This huge disparity is, in my professional opinion statistically significant at the highest levels of statistical significance.

\*These numbers are taken from Bates (1991).

The 1.5 percent median share of New Jersey goods and services procurement accruing to MBE and WBE firms, finally, is an overestimate of the participation of these firms in State procurement. Many of the procurement dollars awarded to minority-owned firms - or any small business - do not in fact accrue to the contract recipients. Particularly in goods procurement, what the State is really awarding to MBE and WBE contract recipients is the value added component of the total procurement amount. State procurement dollars targeted to small MBE and WBE firms for goods accrue mainly to the large corporations that dominate the manufacture of goods. This issue is examined in greater detail in section J of Bates (1991). Proportions of procurement dollars targeted to minorities and women should ideally be calculated with this "slippage" factor firmly in mind. In the City of Chicago, for example, only 20 percent of each procurement dollar paid out to minority business wholesale broker establishments is counted as accruing to minority-owned firms. Slippage, in this instance, is assumed to take 80 cents of every procurement dollar paid to a MBE.

The small size of many MBE and WBE firms often restricts their ability to compete for larger State contracts. In the goods industries, for example, 1982 mean sales among New Jersey area minority-owned small businesses were \$150,182, versus \$658,654 for their nonminority male cohorts. Reasons for these smaller minority business firm sizes include barriers to accessing financing, as documented in Bates (1991). The small size of MBEs handicaps their efforts to qualify for many of the larger State of New Jersey procurement contracts.

Similarly, barriers to construction industry employment were shown to restrict minority access to many of the job skills that are common prerequisites for entering self-employment in construction. Such discriminatory practices weaken the size and the scope of minority businesses and harm their ability to compete for procurement contracts. In the absence of affirmative efforts by the State of New Jersey to negate these discriminatory barriers that unfairly restrict MBE access to procurement contracts, the State perpetuates a status quo that rests on a foundation of inequality of opportunity.

## 2. Procurement in Construction

State of New Jersey bidders (also know at New Jersey DOT as pre-qualification) list information on MBE and WBE construction firms is somewhat more complicated than comparable information on goods and services procurement. In addition to the SAVI II main bidders list, the New Jersey DOT has its own bidders list containing 2171 construction firms. Many of the State construction award procurement dollars accruing to MBEs and WBEs go to firms that have received subcontracts from nonminority business prime contractors. MBE and WBE firms that work as subcontractors may not sign up on the DOT bidders list because they are "not interested" in bidding for DOT prime contracts. "Not interested" results often from limited access to commercial bank credit and other inhibitions that restrict firm size and scope. Nonetheless, DOT (which tracks subcontracts in its federally funded procurement) may award subcontracts to MBEs and WBEs that are not on the DOT bidders list. These MBEs and WBEs, however, are certified as disadvantaged business enterprises (DBEs) by New Jersey's Department of Transportation and

entered into the DOT DBE Directory provided to all bidders; after May 1992 they will enter into SAVI II.

All construction firms seeking prime contracts from the State must be prequalified by DOT or DBC to determine the dollar limit and the type of work they are qualified to do. Thus, firms seeking prime construction contracts from DOT will be prequalified and they will appear on the DOT bidders list. Further, all landscapers and all DBEs and other contractors/subcontractors seeking in excess of \$200,000 of prime contract or subcontract work must be pre-qualified. MBEs and WBEs seeking subcontracts only tend not to go through the prequalification process and, hence, they are not on the DOT bidders list. Their certification as DBEs by the State (which they need if the prime contractor is to be credited for DBE participation) concerns their MBE/WBE status only.

An examination of construction firms on the SAVI II bidders list reveals that over 44 percent of them are MBEs or WBEs. This very high level of availability - MBEs being most heavily overrepresented, accounting for 453 of the 1720 SAVI II construction firms - reflects the MBE/WBE concentration in subcontracting work. Of the eligible vendors on the DOT bidders list, 166 (7.6 percent) are certified MBEs and 129 (5.9 percent) are certified WBEs. Considering construction firms only on the two bidders lists - SAVI II and DOT - well over 25 percent of the total from both lists are MBEs and WBEs.

The very high level of MBE/WBE availability as manifested in the bidders lists, undoubtedly reflects the greater opportunity for procurement in construction, which reflects the very active procurement,

discussed previously, of DOT, DEPE, and New Jersey Transit, in response to mandatory federal requirements for affirmative MBE, WBE procurement efforts.

Our second measure of construction availability comes from 1982 Census Bureau data, which indicates that MBEs are 4.2 percent of all New Jersey area small businesses in construction, while WBEs are 4.3 percent (Bates, 1991). Given the very rapid growth of MBE, WBE construction firms in the 1980s, a conservative estimate of the MBE, WBE share of New Jersey area construction small firms in 1989 would be 10.0 percent. This measure of availability suggests a 8.5 to 10.0 percent MBE, WBE availability in construction over a time period - 1984 through 1989 - when their estimated share of construction awards (prime plus sub) was 7.9 percent to 18.1 percent of the State of New Jersey total procurement in construction in the three agencies (DOT, DEPE, and New Jersey Transit) where mandatory MBE, WBE procurement requirements were imposed by the federal government. Thus it might appear that DOT, DEPE, and New Jersey Transit were overutilizing MBEs and WBEs (relative to their frequency in the overall business universe). This conclusion of overutilization, however, is inappropriate. Availability is most directly measured by observing those firms that are "ready and willing" to undertake procurement work with the State of New Jersey. Recall that MBEs alone accounted for 26.3 percent of the construction firms on the SAVI II bidders list. What is going on here? Most likely, the very real opportunities created by the aggressive efforts of DOT, DEPE, and New Jersey Transit to do business with MBEs and WBEs (most of which was construction work) has produced a strong response: MBEs and WBEs have

aggressively sought to get onto the relevant bidders and certification lists. MBEs and WBEs in construction are responding to opportunities. Their response in construction has been so large that a disparity is present: MBE/WBE availability (measured by bidders list) exceeds utilization, even for the aggressive agencies that are responding to federal mandates.

Recall that State information on utilization of MBEs and WBEs in construction is deficient because of the failure of some agencies to track subcontracts. All of the evidence points towards a strong disparity - utilization lagging behind availability - for those State agencies, commissions, and so forth whose construction procurement is not shaped by federal regulations mandating use of MBEs and WBEs. The size of the disparity can be measured more precisely if New Jersey adopts procurement data bases and recordkeeping systems that systematically measure utilization of MBEs and WBEs in construction.

The patterns of disparity described throughout this report, finally, rely upon actual numbers of MBEs and WBEs, particularly those on State bidders lists, to measure firm availability. Disparity is, in fact, much more pronounced when we recognize the relevance of the discouraged firms, described in Bates (1991). Discriminatory barriers have repressed the supply of MBEs and WBEs in the New Jersey area, pushing some firms into failure as well as discouraging potential entrepreneurs from creating small businesses. Removal of these discriminatory barriers would increase the number of MBEs and WBEs operating in the New Jersey area (Bates, 1991), and this, in turn, would of course increase the measured availability of MBEs and WBEs. If we

recognize the latent availability of MBEs and WBEs, then the disparity measures discussed throughout this report would increase accordingly. The findings of disparity cited in this report reflect a conservative methodological approach: discouraged MBEs and WBEs are ignored and resultant disparity measures are correspondingly reduced. The problem of disparity - the underutilization of MBEs and WBEs in State of New Jersey procurement - is therefore understated. The reason for my conservative approach lies in the practical difficulty involved in measuring discouraged firms by industry grouping. If this problem can be overcome in the future, then the disparity measures should be expanded to include discouraged MBEs and WBEs.

## NOTES

1. The main bidder's list referenced here is the September 1991 SAVI II list of vendors. Certain vendors - such as those selling to DOT - are not on the SAVI II bidders list. According to recent data provided by the New Jersey Governor's Commission on Discrimination in Public Works Procurement and Construction Contracts, SAVI II contains 27,219 of the 29,669 known State of New Jersey bidder's list vendors. These SAVI II data were provided to me on September 27, 1991.
  2. These summary tables were provided by the New Jersey Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts. They also include selected information on Port Authority procurement during the 1987-1989 time period. The relevant summary reports describe procurement in construction, goods and services, as well as total prime contracting activity (in all fields).
  3. These 57 DEPE construction contracts represent a mixture of federally assisted projects, including those requiring matching state funds.
  4. The two other agencies (DOT, and DEPE) similarly impacted by mandatory federal regulations requiring MBE and WBE procurement relied upon DPP for all of their goods and services procurement, which is why results are not reported separately for these agencies in table one.
  5. Certain colleges had to be dropped from table two because their reports on procurement data for construction are inconsistent with those of most reporting agencies, authorities, and so forth. The University of Medicine and Dentistry, for example, provided figures on construction procurement awards to WBE and MBE firms associated with set-aside programs, but they were unable to report figures on total construction procurement.
- The 95 percent figure is derived from a survey, the "Walk-In Report", dated April 24, 1991, an internal memorandum in the files of the Commission on Discrimination in Public Works Procurement and Construction Contracts.

## REFERENCES

1. Timothy Bates. 1991. "Discrimination and the Capacity of New Jersey Area Minority and Women-Owned Businesses," report to the New Jersey Governor's Commission on Discrimination in Public Works Procurement and Construction Contracts, 156 pages. (August).
2. City of Richmond v. Croson Co., 488 U.S. 469 (1989)

