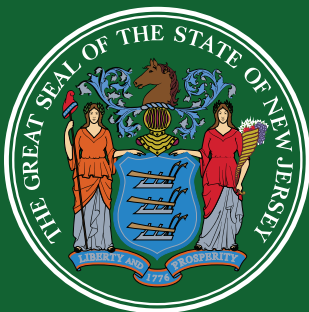




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NEW JERSEY DISPARITY STUDY

A Study on the Availability and Utilization of Small, Minority,
Women, and Service-Disabled Veteran-Owned Businesses

January 2024



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CHAPTER 1: Legal Review

I. Introduction

Two United States Supreme Court decisions—*City of Richmond v. J.A. Croson Co. (Croson)*¹ and *Adarand v. Peña (Adarand)*²—established the standard of review for both local and federal government minority business enterprise and disadvantaged business enterprise contracting programs. This chapter discusses the federal law applicable to public contracting affirmative action programs. It also includes a discussion of the United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) regulations.

The United States Supreme Court’s 1989 decision in *Croson* sets forth the strict scrutiny constitutional analysis applicable to race-conscious remedies for public contracting programs. *Croson* dealt with non-federally funded programs and established an evidentiary standard of review for race-based programs. The Court announced that programs employing racial classification would be subject to “strict scrutiny,” the highest legal standard. Broad notions of equity or general allegations of historical and societal discrimination against minorities fail to meet the requirements of strict scrutiny.

As set forth in *Croson*, a state or local government may adopt race-conscious programs as a remedy only “where it has actively discriminated in its award of contracts or has been a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.”³ The predicate for race or gender-conscious measures is typically referred to as a “disparity study.” Such a study is done by comparing “the number of qualified minority contractors” available for contract awards [“availability”] to the number of public contracts awarded by the State or local government to such firms, and the number of subcontractors engaged by the prime contractors [“utilization”].⁴ The disparity study must find a “significant disparity” between availability and utilization in contracts funded by the government to justify the use of race-conscious measures.⁵

There have been several cases post-*Croson* that have addressed the definitions of availability and utilization, and computation of disparity. The relevant Third Circuit case law will be discussed herein, since New Jersey is in its jurisdiction. Case law pertaining to minority and women business enterprise (M/WBE) programs and the DBE regulations adjudicated outside of the Third Circuit, although not binding on the State, is also discussed to the extent it may be instructive when implementing race-conscious public contracting programs, albeit not binding authority.

¹ 488 U.S. 469 (1989).

² 515 U.S. 200 (1995).

³ *Contractors Ass’n of Eastern Pennsylvania v. City of Philadelphia (“Philadelphia IF”)*, 6 F.3d 990, 1002 (3d Cir. 1993) (quoting *Croson*, 488 U.S. at 492).

⁴ *Id.* (quoting *Croson*, 488 U.S. at 492).

⁵ *Id.* at 1007-08 (quoting *Croson*, 488 U.S. at 509).



In *Adarand*, which directly challenged the federal statute that enabled the USDOT’s DBE program as set forth in statute and regulations, the Court found a compelling interest for a DBE program but ruled the particular program that USDOT adopted through regulations was not narrowly tailored. In response to *Adarand*, USDOT amended the DBE regulations in 1999 to include a race-neutral component to the DBE goal.

In one of the most significant affirmative action decisions since *Croson* in decades, on June 29, 2023, the United States Supreme Court decided *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and University of North Carolina et al. (SFFA)*.⁶ The question presented to the Supreme Court did not address public contracting but whether the admissions systems used by Harvard University (Harvard) and University of North Carolina (UNC) violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*⁷ The United States Supreme Court in a six-three decision held that the Harvard and UNC admission programs could not be reconciled with the guarantees of the Equal Protection Clause of the Fourteenth Amendment and therefore, are unconstitutional.⁸

Specifically, the Court held that Harvard and UNC’s consideration of race in the admission process failed to satisfy the strict scrutiny standard and violated the Equal Protection Clause of the Fourteenth Amendment and Title VI. The Court reaffirmed that Title VI applies to public and private colleges and universities that receive federal assistance. Further, the Court reaffirmed that the colleges and universities must comply with the requirements imposed by the Equal Protection Clause.

In reaching this conclusion, the Supreme Court started with what it considered an essential principle:

Our acceptance of race-based state action has been rare for a reason. “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Rice v. Cayetano*, 528 U. S. 495, 517, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943)). That principle cannot be overridden except in the most extraordinary case.⁹

The Supreme Court reasoned, first, that the compelling interests in considering race in admissions proffered by Harvard and UNC¹⁰ were too amorphous for meaningful judicial review, and required

⁶ 143 S. Ct. 2141 (2023).

⁷ Justice Jackson took no part in the decision or consideration of the Harvard University appeal.

⁸ *SFFA*, 143 S. Ct. at 2175. The above styled action concerns a constitutional challenge to college admissions programs, but its reasoning has application beyond the facts discussed in the Harvard opinion.

⁹ *Id.* at 2162-63.

¹⁰ The Court explained: Harvard identifies the following educational benefits that it is pursuing: (1) “training future leaders in the public and private sectors”; (2) preparing graduates to “adapt to an increasingly pluralistic society”; (3) “better educating its students through diversity”; and (4) “producing new knowledge stemming from diverse outlooks.” 980 F. 3d, at 173-174. UNC points to similar benefits, namely, “(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3)



instead, compelling interests that could be measured.¹¹ Second, the Court concluded that there must be a meaningful connection between the means and the goal if race is to be used as a factor in college admissions.¹² Third, the Court held that race-conscious programs must not use race as a negative.¹³ Fourth, the Court also opined that race-conscious admissions programs must not use race in a manner that reinforces racial stereotypes.¹⁴ Finally, the Court concluded that race-conscious admission programs must have a logical end point.¹⁵ The Court found the Harvard and UNC college admission programs were deficient on each of these points and therefore unconstitutional.

Although the *SFFA* decision specifically addresses the use of race-conscious measures in college and university admissions, the opinion raises fundamental questions about the future of affirmative action and the use of the race-conscious measures in public contracting. To be constitutional, a race-conscious affirmative action program must meet the compelling interest prong of the strict scrutiny standard, with the clear goal of eliminating disparities attributed to discrimination. The Supreme Court makes clear in *SFFA* that the only constitutional justification to use race in college admission cases is to address specific, identified past discrimination that violates the Constitution or a statute. Accordingly, the evidence proffered to substantiate a compelling state interest in the admissions context must relate to such identified past discrimination. But in *Croson*,¹⁶ which *SFFA* did not purport to disturb, the Supreme Court recognized availability/disparity studies and statistical evidence as a means of establishing the evidentiary predicate for race-conscious measures in public contracting. While *SFFA* suggests that there must be a specific nexus to past discrimination for a government program to pass constitutional muster, that decision does not alter the *Croson* holding that government entities have a compelling interest to address discrimination, as a plurality of the Court put it in *Croson*:

We think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute 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.¹⁷

Thus, the predicate evidence must be clear that any use of race-conscious measures is to address discrimination either by the governmental entity directly or as a passive participant in private discrimination, i.e., by prime contractors. *SFFA* reaffirmed that racial balancing and general assertions of industry discrimination or societal discrimination will not satisfy the compelling

fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”

¹¹ *Id.* at 2166-67.

¹² *Id.* at 2167-68.

¹³ *Id.* at 2168-69.

¹⁴ *Id.* at 2169-70.

¹⁵ *Id.* at 2170.

¹⁶ *Croson*, 488 U.S. 469.

¹⁷ *Croson*, 488 U.S. at 492 (O'Connor, Rehnquist and White, JJ.).



interest prong.¹⁸ Availability/Disparity studies, however, may still be employed to determine if there are significant statistical disparities in the State’s contract awards to M/WBE firms, establishing an inference of discrimination. Under those circumstances, the State has a compelling interest not to perpetuate that disparity in future contract awards, and race-conscious measures may be appropriate. Even then, any race-based government program, once instituted, must be measurable and capable of judicial review—a standard that the goal of eliminating discrimination in public contracting is likely to meet. Unlike the achievement of sufficient diversity, evidence of a statistically significant disparity in contract awards is both objectively measurable and capable of meaningful judicial review. Further, unlike the goal of achieving diversity, which is much more subjective, the goal of eliminating a statistically significant disparity in public contracting provides an objective measure to implement race-conscious affirmative relief and an end date for race-conscious public contracting programs. The natural end date for such a race-based program would be when there cease to be significant statistical disparities in contract awards.

Given the history of the *Croson* decision, due diligence must be taken to ensure that the methodology employed in disparity studies meets the legal standards set by case law. The relevant and instructive federal circuit court decisions that address the application of race in public contracting following *Croson* are summarized in the sections below. This legal review is not to be understood as legal advice to the State of New Jersey but as background and support for the methodology employed in conducting this study.

II. Standard of Review

The standard of review used represents the measure by which a court evaluates whether a particular legal claim meets a certain statute, rule, or precedent.

A. Race-and Gender-Conscious Programs

In *Croson*, the United States Supreme Court affirmed that, pursuant to the Fourteenth Amendment, the proper standard of review for state and local MBE programs, which are race-conscious, is strict scrutiny.¹⁹ Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.²⁰ The Court recognized that a state or local entity may take action in the form of an MBE program to rectify the effects of identified, systemic racial discrimination within its jurisdiction.²¹ Justice O’Connor, speaking for the majority, articulated various methods for demonstrating that systemic discrimination existed within a jurisdiction and set forth guidelines for crafting MBE programs so that they are “narrowly tailored” to address systemic racial discrimination.²²

¹⁸ *SFFA*, 143 S. Ct. at 2173.

¹⁹ *Croson*, 488 U.S. at 493-95.

²⁰ *Id.* at 493.

²¹ *Id.* at 509.

²² *Id.* at 501-02. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting—compelling interest and narrowly tailored remedies. The Supreme Court, in *Croson* and in subsequent cases, provides fairly



Gender preferences in the Third Circuit are governed by a different standard of review—intermediate scrutiny. Under intermediate scrutiny, the gender preference is valid if it was “substantially related to an important governmental objective.”²³ In *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia II)*, the Third Circuit stated that “affirmative action programs survive intermediate scrutiny if the proponent can show it was the a product of analysis rather than a stereotypical reaction based on habit.”²⁴

B. Burden of Proof

The procedural protocol established by *Croson* imposes an initial burden of proof on the government to demonstrate that the challenged MBE program is supported by a strong factual predicate (i.e., documented evidence of past discrimination). Notwithstanding this requirement, the plaintiff bears the ultimate burden of proof to persuade the court that the MBE program is unconstitutional. As set forth in *Philadelphia VI*, the plaintiff may challenge a government’s factual predicate on any of the following grounds:²⁵

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

Thus, a disparity study must be analytically rigorous, at least to the extent that the data permit, if it is to withstand legal challenge.²⁶

C. Strong Basis in Evidence

Croson requires a government to produce a “strong basis in evidence” that the objective of the challenged MBE program is to rectify the effects of discrimination.²⁷ Whether or not the government has produced a strong basis in evidence is a question of law.²⁸ Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be

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

²³ *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990, 1009 (3rd Cir. 1993).

²⁴ *Philadelphia II*, 6 F. 3d at 1010. (citing *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582-83, 110 S.Ct. 2997, 3018 – 19, 111 L.Ed. 2d 445 (1990)).

²⁵ These were the issues on which the district court in *Philadelphia* reviewed the disparity study before it in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia II)*, 6 F.3d 990, 1005 (3rd Cir. 1993), *on remand*, 893 F. Supp. 419 (E.D. Penn. 1995), *aff’d*, 91 F.3d 586 (3rd Cir. 1996).

²⁶ *Croson*, 488 U.S. at 469.

²⁷ *Concrete Works of Colorado v. City and County of Denver (Concrete Works II)*, 36 F.3d 1513, 1522 (10th Cir. 1994), (citing *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 292 (1986); see *Croson* 488 U.S. at 509 (1989)).

²⁸ *Id.* (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 944 (D. Conn 1992)).



drawn.²⁹ In 1996, the Third Circuit in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia* (“*Philadelphia IV*”) carefully examined each aspect of the Philadelphia’s race, ethnicity, and gender-based program, finding the City’s disparity study in the absence of statistical evidence did not establish a strong basis in evidence as applied to firms owned by women, Native Americans, Hispanic Americans, and Pacific Islanders.³⁰

In *Philadelphia IV*, the Third Circuit recognized that a government may rely upon less evidence in enacting gender preferences. That intermediate scrutiny standard requires a government to present “probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.”³¹

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

The adequacy of the government’s evidence is “evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction].”³² The onus is on the jurisdiction to provide a factual predicate that is sufficient in scope and precision to demonstrate that contemporaneous discrimination necessitated the adoption of the M/WBE program.

D. Ultimate Burden of Proof

The party challenging an M/WBE program will bear the ultimate burden of proof throughout the course of the litigation—despite the government’s obligation to produce a strong factual predicate to support its program.³³ The plaintiff must persuade the court that the program is constitutionally flawed by challenging the government’s factual predicate for the program or by demonstrating that the program is overly broad.

Justice O’Connor explained the nature of the plaintiff’s burden of proof in her concurring opinion in *Wygant v. Jackson Board of Education (Wygant)*.³⁴ Although *Wygant* specifically concerned a challenge to a school district’s race-based lay-off plan designed to avoid terminating under-represented minority staff, the case is informative in the context of race-conscious contracting because it involved allegations of “reverse discrimination” asserted by non-minority plaintiffs. Justice O’Connor addressed the burden of proof in such reverse discrimination cases by stating that following the production of the factual predicate supporting the program:

²⁹ *Concrete Works II*, 36 F.3d at 1522.

³⁰ *Philadelphia IV*, 91 F.3d 586 (3rd Cir. 1996).

³¹ *Philadelphia II*, 6 F. 3d at 1010.

³² *Id.* (citing *Croson* 488 U.S. at 498).

³³ *Id.* (citing *Wygant*, 476 U.S. at 277-278). (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 944 (D. Conn 1992)).

³⁴ *Wygant v. Jackson Board of Education*, 476 U.S. 267, 293 (1986).



[I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently “narrowly tailored.”³⁵

In *Philadelphia IV*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether or not facts constitute a “strong basis” in evidence.³⁶ The Third Circuit wrote that the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered (e.g., on the basis of race or gender).³⁷ For example, if the plaintiff’s theory is that an agency has adopted race-conscious preferences with a purpose other than remedying past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else³⁸

The situation differs if the plaintiff’s theory is that an agency’s conclusions as to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, the agency comes forward with evidence of facts alleged to justify its conclusions, and the plaintiff has the burden of persuading the court that those facts are not accurate. However, the ultimate issue of whether or not a strong basis in evidence exists is an issue of law, and the burden of persuasion in the traditional sense plays no role in the court’s resolution of that ultimate issue.³⁹ In *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado (Concrete Works III)*, the Tenth Circuit concluded that, as the plaintiff’s burden is an evidentiary one, it cannot be discharged simply by argument.⁴⁰ The court cited its opinion in *Adarand Constructors Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000): “[g]eneral criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity study, is of little persuasive value.”

III. Croson Evidentiary Framework

Government must construct a strong evidentiary framework to stave off legal challenges and to ensure that an adopted MBE program complies with the requirements of the Equal Protection clause of the United States Constitution. The framework must comply with the stringent requirements of the “strict scrutiny” standard. Accordingly, there must be a strong basis in

³⁵ *Id.*

³⁶ *Philadelphia IV*, 91 F.3d 586, 596 (1996).

³⁷ *Philadelphia IV*, 91 F.3d at 597.

³⁸ *Id.* at 597.

³⁹ At first glance, the position of the Third Circuit does not square with what the Eleventh Circuit announced as its standard in reviewing whether a jurisdiction has established the “compelling interest” required by strict scrutiny. The Eleventh Circuit said the inquiry would be reversed only if it was “clearly erroneous.” However, the difference in formulation may have had to do with the angle from which the question was approached: If one starts with the disparity study—whether a compelling interest has been shown—factual issues are critical. If the focus is the remedy, because the constitutional issue of equal protection in the context of race comes into play, the review is necessarily a legal one.

⁴⁰ *Concrete Works IV*, 321 F.3d at 979.



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

A. Active or Passive Discrimination

Croson recognized that the government need not be an active perpetrator of racial discrimination to have a basis to create an affirmative action program. Instead, it is sufficient that the government seeking to adopt a program is a passive participant in the discrimination by infusing tax dollars in an industry in which there are significant statistical disparities in the utilization of minorities that did not receive the number or dollar value of contracts that would have been expected based on their availability in the marketplace. Thus, passive participation was found in *Croson* to satisfy this part of the Court’s strict scrutiny review.⁴¹

An entity will be considered an “active” participant if the evidence shows it has created barriers that actively exclude MBEs from its contracting opportunities. In addition to examining the government’s contracting record and process, MBEs that have contracted or attempted to contract with that entity can be interviewed to relay their experiences in pursuing that entity’s contracting opportunities.⁴²

An entity will be considered to be a “passive” participant in private sector discriminatory practices if it has infused tax dollars into that discriminatory industry.⁴³ A plurality in *Croson* emphasized a government’s ability to passively participate in private sector discrimination with monetary involvement, stating:

[I]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice.⁴⁴

Such passive participation in discrimination in an industry remains a compelling interest even after *SFFA* and is distinguishable from the general interest in diversity or even the interest in addressing societal discrimination because it involves the expenditure of public funds.⁴⁵

In *Concrete Works II*, the Tenth Circuit Court of Appeals considered an appeal involving the sufficiency of purely private sector evidence to support a passive discrimination predicate. That analysis was driven by the fact that Denver did not offer evidence of any studies focusing on government-funded contracts, relying instead on industry discrimination in the awarding of privately funded contracts. This raised the issue of whether, in a challenge to a government program, analyzing private contracts and thus purely private sector discrimination was likely to be

⁴¹ *Croson*, 488 U.S. at 509.

⁴² *Wygant*, 267 at 275.

⁴³ *Croson*, 488 U.S. at 492; *Coral Construction*, 941 F.2d at 916.

⁴⁴ *Croson*, 488 U.S. at 492 (O’Connor, Rehnquist and White, JJ.).

⁴⁵ *Id.*



a fruitful line of inquiry.⁴⁶ On remand, the district court rejected the three disparity studies offered to support the continuation of Denver’s M/WBE program, because each focused on purely private sector discrimination. The district court concluded that the City of Denver had not documented a firm basis of identified discrimination derived from the statistics submitted.⁴⁷

However, the Tenth Circuit on appeal of that decision completely rejected the district court’s analysis. The district court’s queries required Denver to prove the existence of discrimination. Moreover, the Tenth Circuit explicitly held that “passive” participation included private sector discrimination in the marketplace. The court, relying on *Shaw v. Hunt*,⁴⁸ a post-*Croson* Supreme Court decision, wrote as follows:

The *Shaw* Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 910. The City can satisfy this condition by identifying the discrimination “public or private, with some specificity.” *Id.* (quoting *Croson*, 488 U.S. at 504 (emphasis added)). Second, the governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.”⁴⁹

The Tenth Circuit therefore held that the City of Denver was correct in its attempt to show that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against M/WBE subcontractors in other private portions of their business.”⁵⁰ The court emphasized that its reading of *Croson*⁵¹ and its own precedents supported that conclusion. Also, the court pointed out that the plaintiff, which had the burden of proof, failed to introduce conflicting evidence, and merely argued that the private sector was out of bounds and that Denver’s data were flawed.⁵²

⁴⁶ *Concrete Works II*, 36 F.3d at 1529. “What the Denver MSA data do not indicate, however, is whether there is any linkage between Denver’s award of public contracts and the Denver MSA evidence of industry-wide discrimination. That is, we cannot tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that ‘it had essentially become “a passive participant” in a system of racial exclusion practiced by elements of the local construction industry’ [citing *Croson*]. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program. The record before us does not explain the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and this may well be a fruitful issue to explore at trial.”

⁴⁷ *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado*, 86 F. Supp. 2d 1042, 1071 (*Concrete Works III*) (D. Colo. 2000).

⁴⁸ 517 U.S. 899, 519 (1996).

⁴⁹ *Concrete Works IV*, 321 F.3d at 975-76.

⁵⁰ *Concrete Works IV*, 321 F.3d . at 972.

⁵¹ See also *Shaw v. Hunt*, 517 U.S. 899 (1996).

⁵² Whether Denver had the requisite strong basis to conclude there was discrimination was a question of law; it was for the Tenth Circuit to decide. The standard by which the factual record before it was reviewed was “clearly erroneous.”



The Tenth Circuit court found that the disparities in MBE private sector participation, together with the rate of business formation and lack of access to credit that affected MBEs' ability to expand in order to perform larger contracts, gave Denver a firm basis to conclude there was actionable private sector discrimination. For legal reasons,⁵³ however, the court did not examine whether the consequent public sector remedy—i.e., one involving a goal requirement on the City of Denver's contracts—was “narrowly tailored.” The court took this position despite the plaintiff's contention that the remedy was inseparable from the findings and that the court should have addressed the issue of whether or not the program was narrowly tailored.

Ten months later, in *Builders Association of Greater Chicago v. City of Chicago*,⁵⁴ the District Court considered the question of whether a public sector remedy is “narrowly tailored” when it is based on purely private sector discrimination. The district court reviewed the remedies derived from private sector practices with more stringent scrutiny. It found there was discrimination against minorities in the Chicago construction industry. However, it did not find the City of Chicago's MBE subcontracting goal an appropriate remedy, because it was not “narrowly tailored” to address the lack of access to credit for MBEs, which was the documented private discrimination. The court also criticized the remedy because it was a “rigid numerical quota,” and there was no individualized review of MBE beneficiaries, citing Justice O'Connor's opinion in *Gratz v. Bollinger*.⁵⁵

The Seventh Circuit also considered whether or not evidence of private sector practices met the strict scrutiny standard that arose in *Builders Ass'n of Greater Chicago v. County of Cook*.⁵⁶ In this case, the Seventh Circuit cited *Associated General Contractors of Ohio v. Drabik*⁵⁷ in throwing out a 1988 County ordinance under which at least 30% of the value of prime contracts was to go to minority subcontractors and at least 10% to woman-owned businesses. Appellants argued that evidence of purely private sector discrimination justified a public sector program. The Court found that the County, in order to justify the public sector remedy, had to demonstrate it had been at least a passive participant in the private sector discrimination by showing it had infused tax dollars into the discriminatory private industry.

In sum, this discussion demonstrates that best practice in conducting a disparity study will involve identifying discrimination in an industry, whether funded by government dollars or private dollars,

⁵³ Plaintiff had not preserved the issue on appeal; therefore, it was no longer part of the case.

⁵⁴ *Builders Ass'n of Greater Chicago v. City of Chicago*, 298 F. Supp 2d 725, 726 (N.D.Ill. 2003).

⁵⁵ *Gratz v. Bollinger*, 539 U.S. 244, 258 (2003). *Croson* requires a showing that there was a strong basis for concluding that there was discrimination before a race-conscious remedy can be used in government contracting. In the University of Michigan cases that considered race-conscious admissions programs, a key element in the decisions is the Court acceptance of *diversity* as a constitutionally sufficient ground; it did not require a showing of past discrimination against minority applicants. If it had, the basis for a program would have disappeared. Discrimination is the historic concern of the Fourteenth Amendment, while promoting diversity is of recent origin. The Court may have been disposed therefore to apply a more rigorous review of legislation based on diversity. The Fourteenth Amendment's prohibitions are directed against “state action.” The private sector behavior of businesses that contract with state and local governments is a conceptual step away from what it does in its public sector transactions. That distinction may lead courts to apply the *Gratz* approach of more searching scrutiny to remedial plans based on private sector contracting.

⁵⁶ *Builders Ass'n of Greater Chicago v. Cty. of Cook*, 256 F.3d 642, 643 (7th Cir. 2001).

⁵⁷ *Associated Gen. Contrs. of Ohio, Inc. v. Drabik*, 214 F.3d 730, 731 (6th Cir. 2000).



with some specificity; and that the government have a “strong basis in evidence” that remedial action was necessary. In *Croson*, the plurality answered these questions emphatically:

[I]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice.

This study is designed to meet and surpass this threshold by examining whether the State’s funds were spent on past contracts in a manner that furthered existing discrimination against minority firms in the various industries.

B. Establishing Systemic Discriminatory Exclusion

Croson clearly established that if a government “had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion.”⁵⁸ Thus, it is essential for a government to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.⁵⁹ Using appropriate evidence of the entity’s active or passive participation in the discrimination, as discussed above, the showing of discriminatory exclusion must cover each racial group to whom a remedy would apply.⁶⁰ Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

Croson enumerates several ways an entity may establish the requisite factual predicate. First, a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by government or as subcontractors by the government’s prime contractors may support an inference of discriminatory exclusion.⁶¹ In other words, when the relevant statistical pool is used, a showing

⁵⁸ *Croson*, 488 U.S. at 469. See also *Monterey Mechanical v. Pete Wilson*, 125 F.3d 702, 703 (9th Cir. 1997). The Fifth Circuit Court in *W.H. Scott Construction Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 207 (1999) found that the City’s MBE program was unconstitutional for construction contracts because minority participation goals were arbitrarily set and not based on any objective data. Moreover, the Court noted that had the City implemented the recommendations from the disparity study it commissioned, the MBE program may have withstood judicial scrutiny (the City was not satisfied with the study and chose not to adopt its conclusions). “Had the City adopted particularized findings of discrimination within its various agencies and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City’s construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support the Department’s 15% DBE participation goal.” In 1996, Houston Metro had adopted a study done for the City of Houston whose statistics were limited to aggregate figures that showed *income* disparity between groups, without making any connection between those statistics and the City’s contracting policies. The disadvantages cited that M/WBEs faced in contracting with the City also applied to small businesses. Under *Croson*, that would have pointed to race-neutral remedies. The additional data on which Houston Metro relied were even less availing. Its own expert contended that the ratio of lawsuits involving private discrimination to total lawsuits and ratio of unskilled black wages to unskilled white wages established that the correlation between low rates of black self-employment was due to discrimination. Even if nexus, there is nothing in *Croson* that accepts a low number of MBE business *formation* as a basis for a race-conscious remedy.

⁵⁹ *Croson*, 488 U.S. at 509. See also *Monterey Mechanical*, 125 F.3d at 703.

⁶⁰ *Id.* at 506. As the Court said in *Croson*, “[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.” See *North Shore Concrete and Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998), which rejected the inclusion of Native Americans and Alaskan Natives in the City’s program, citing *Croson*.

⁶¹ *Croson*, 488 U.S. at 509.



of gross statistical disparity alone “may constitute *prima facie* proof of a pattern or practice of discrimination.”⁶²

Croson made it clear that both prime contract and subcontract data were relevant. The Court observed that “[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city’s construction expenditures.”⁶³ Subcontracting data are also an important means by which to assess suggested future remedial actions. Since the decision makers are different for the awarding of prime contracts and subcontracts, the remedies for discrimination identified at a prime contractor versus subcontractor level might also be different.

Additionally, “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”⁶⁴ Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion. Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.⁶⁵

In *Coral Construction*, the Ninth Circuit Court of Appeals further elaborated on the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied on in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.⁶⁶ The court explained that statistical evidence alone often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.⁶⁷

Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.⁶⁸ Nonetheless, as Justice O’Connor wrote in *Croson*, anecdotal evidence is important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”⁶⁹

⁶² *Id.* at 501 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

⁶³ *Id.* at 502-03.

⁶⁴ *Id.* at 509.

⁶⁵ *Id.*

⁶⁶ *Coral Construction*, 941 F.2d at 919.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* (quoting *International Brotherhood of Teamsters v. United States (Teamsters)*, 431 U.S. 324, 339 (1977)).



1. Geographic Market

Croson did not speak directly to how a government's geographic market is to be determined, nor has the Third Circuit. But the Eastern District of Pennsylvania has done so in the remand from *Philadelphia III*.

In *Philadelphia III*, the District Court found that for a disparity study examining whether a program could be put in place by the City, the Philadelphia Standard Metropolitan Statistical Area (SMSA), (consisting of eight counties in the Philadelphia geographic area: Philadelphia County, Montgomery County, Chester County, Delaware County and Bucks County in Pennsylvania; and Gloucester County, Burlington County and Camden County in New Jersey) was the relevant geographic market for three reasons:

1. The City's declared purpose for enacting Chapter 17-500 was to remedy racial discrimination in the Philadelphia metropolitan area.
2. In fiscal year 1982 (the fiscal year before the ordinance establishing the program was enacted), the Procurement Department analyzed City contract information to determine the geographic location of successful bidders, amounts awarded, and the percentage of "sole source" contracts. As a result of this study, the Procurement Department found that 75% of City contracts and contract dollars were awarded to firms in the five-county Philadelphia area. An additional 12% of City contracts and contract dollars were awarded to firms in New Jersey. However, less than 1% of City contracts and contract dollars were awarded to firms in Delaware. Similarly, Pennsylvania firms located outside the five-county Philadelphia area received less than 3% of City contracts.
3. Expanding the relevant geographic area beyond the Philadelphia SMSA distorts the court's inquiry because it would unnecessarily expand the number of potentially available contractors of all races without any corresponding evidence that those additional contractors were qualified, willing, and able to perform City contracts, or that black contractors located outside the Philadelphia SMSA were discriminated against in the award of City contracts.⁷⁰

In addition, a review of other circuit courts may provide further guidance. In *Concrete Works IV*, like in *Philadelphia IV*, the Tenth Circuit Court of Appeals specifically approved the Denver Metropolitan Statistical Area as the appropriate market area, since 80% of the construction contracts were located there.⁷¹ By contrast, in *Coral Construction*, the Ninth Circuit Court of Appeals held that "an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction."⁷²



⁷⁰ *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 893 F. Supp. 419, 447 n 4-5 (E.D. Pa. 1995) ("*Philadelphia III*"), *aff'd*, 91 F.3d 586 (3d Cir. 1996), *cert. den.*, 519 U.S. 1113 (1997).

⁷¹ *Concrete Works of Colorado v. City and County of Denver* 321 F. 3d 950 (10th Cir. 2003). ("*Concrete Works IV*")

⁷² *Coral Construction*, 941 F.2d at 925.

Taken together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. *Croson* and its progeny did not provide a bright-line rule for local market area, for which determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.⁷³ Extra-jurisdictional evidence may be permitted when it is reasonably related to where the jurisdiction contracts.⁷⁴

2. Current Versus Historical Evidence

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

Croson requires that an MBE program be "narrowly tailored" to remedy current evidence of discrimination.⁷⁵ Thus, goals must be set according to the evidence of disparity found. For example, if there is a current disparity between the percentage of an entity's utilization of Hispanic construction contractors and the availability of Hispanic construction contractors in that entity's marketplace, then that entity can set a goal to bridge that disparity.

It is not mandatory to examine a long history of a government's utilization to assess current evidence of discrimination. In fact, *Croson* indicates that it may be legally fatal to justify an MBE program based on outdated evidence.⁷⁶ Therefore, the most recent two or three years of an entity's utilization data would suffice to determine whether or not a statistical disparity exists between current M/WBE utilization and availability.⁷⁷

Thus, a government should look both at pre-program and post-program data, to the extent it exists, to assess whether or not current discrimination exists and to analyze whether or not it would exist in the absence of an M/WBE program.

3. Statistical Evidence

To determine whether or not statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the "disparity index," which consists of the percentage of minority or women contractor participation in local contracts divided by the percentage of minority

⁷³ *Cone Corp. v. Hillsborough Cty.*, 908 F.2d 908, 913 (11th Cir. 1990); *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1402 (9th Cir. 1991).

⁷⁴ There is a related question of which firms can participate in a remedial program. In *Coral Construction*, the Court held that the definition of "minority business" used in King County's MBE program was over-inclusive. The Court reasoned that the definition was overbroad because it included businesses other than those who were discriminated against in the King County business community. The program would have allowed, for instance, participation by MBEs who had no prior contact with the County. Hence, location within the geographic area is not enough. An MBE had to have shown that it previously sought business, or is currently doing business, in the market area.

⁷⁵ See *Croson*, 488 U.S. at 509-10.

⁷⁶ *Id.* at 499 (stating that "[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination").

⁷⁷ See *Associated General Contractors of California v. Coalition for Economic Equity and City and Cty. of San Francisco*, 950 F.2d 1401, 1402 (9th Cir. 1991). (Consultant study looked at City's MBE utilization over a one-year period).



or women contractor availability or composition in the population of available firms in the local market area.⁷⁸ Disparity indexes have been found highly probative evidence of discrimination as long as they ensure that the “relevant statistical pool” of minority or women contractors is being considered.

- **Availability**

In *Philadelphia IV*, the Third Circuit Court of Appeals ruled that the “relevant statistical pool,” or availability, includes those businesses that not only exist in the marketplace but are also qualified and interested in performing the public agency’s work. In that case, the Third Circuit rejected a statistical disparity finding in which the pool of minority businesses used in comparing utilization to availability were those that were merely licensed to operate in the City of Philadelphia. Merely being licensed to do business with the City does not indicate either a willingness or capability to do work for the City. As such, the Court concluded this particular statistical disparity did not satisfy *Croson*.⁷⁹

Following the dictates of *Croson*, courts may carefully examine whether or not there are data that show that MBEs are ready, willing, and able to perform.⁸⁰ *Concrete Works II* made the same point, stating that capacity (i.e., whether the firm is “able to perform”) is a ripe issue when a disparity study is examined on the merits:

[Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the marketplace overstates “the ability of MBEs or WBEs to conduct business relative to the industry as a whole because MWBEs tend to be smaller and less experienced than non-minority owned firms.” In other words, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs.⁸¹

Notwithstanding that appellate concern, the disparity studies before the district court on remand did not examine the issue of M/WBE capacity to perform Denver’s public sector contracts. As

⁷⁸ Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been considered. In addition to looking at Dade County’s contracting and subcontracting statistics, the district court also considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County’s Wainwright study (which compared construction business ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County’s Brimmer Study (which focused only on Black-owned construction firms and looked at whether disparities existed when the sales and receipts of Black-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms). The court affirmed the judgment that declared appellant’s affirmative action plan for awarding county construction contracts unconstitutional and enjoined the plan’s operation because there was no statistical evidence of past discrimination and the appellant failed to consider race and ethnic-neutral alternatives to the plan.

⁷⁹ *Philadelphia IV*, 91 F.3d at 586. The courts have not spoken to the non-M/WBE component of the disparity index. However, if only as a matter of logic, the “availability” of non-M/WBEs requires that their willingness to be government contractors be established. The same measures used to establish the interest of M/WBEs should be applied to non-M/WBEs.

⁸⁰ The *Philadelphia* study was vulnerable on this issue.

⁸¹ *Concrete Works II*, 36 F.3d at 1528.



mentioned above, they were focused on the private sector, using census-based data and Dun & Bradstreet statistical extrapolations.

The Sixth Circuit Court of Appeals in *Drabik* concluded that for statistical evidence to meet the legal standard of *Croson*, it must consider the issue of capacity.⁸² The State's factual predicate study based its statistical evidence on the percentage of M/WBE businesses in the population. The statistical evidence did not consider the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.⁸³ The court reasoned as follows:

Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. If MBEs comprise 10% of the total number of contracting firms in the State, but only get 3% of the dollar value of certain contracts that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.⁸⁴

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

The appellate opinions in *Philadelphia IV*⁸⁵ and *Dade County*⁸⁶ regarding disparity studies involving public sector contracting are particularly instructive in defining availability. In *Philadelphia*, the earlier of the two decisions, contractors' associations challenged a city ordinance that created set-asides for minority subcontractors on city public works contracts. Summary judgment was granted for the contractors.⁸⁷ The Third Circuit, ultimately in 1996, upheld the lower court in finding that there was no firm basis in evidence for finding that race-conscious discrimination existed to justify a race-conscious program and the program was not narrowly tailored to address past discrimination by the City.⁸⁸

The Third Circuit reviewed the evidence of discrimination in prime contracting and stated that whether or not it is strong enough to infer discrimination is a "close call," which the Third Circuit

⁸² See *Assoc. General Contractors of Ohio v. Drabik*, 214 F.3d 730 (6th Cir. 2000). The court reviewed Ohio's 1980 pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

⁸³ *Id.* at 730.

⁸⁴ *Id.* at 736.

⁸⁵ *Philadelphia IV*, 91 F.3d 586 (3d Cir. 1996).

⁸⁶ *Dade County*, 943 F. Supp. 1546 (11th Cir. 1997).

⁸⁷ *Philadelphia IV*, 91 F.3d 586.

⁸⁸ *Id.* at 586.



“chose not to make.”⁸⁹ It was unnecessary to make this determination because the court found that even if there was a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach should also be weighed. The Court of Appeals found that “[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE” and that it was a “reasonable choice” under the circumstances to use a list of certified contractors as a source for available firms.⁹⁰ Although, theoretically, it may have been possible to adopt a more refined approach, the court found that using the list of certified contractors was a rational approach to identifying qualified firms.

In addition, the court found that a program certifying MBEs for federal construction projects was a satisfactory measure of capability of MBE firms.⁹¹ In order to qualify for certification, the federal certification program required firms to detail their bonding capacity, size of prior contracts, number of employees, financial integrity, and equipment owned. According to the court, “the process by which the firms were certified [suggests that] those firms were both qualified and willing to participate in public work projects.”⁹² The court found certification to be an adequate process of identifying capable firms, recognizing that the process may even understate the availability of MBE firms.⁹³ Therefore, the court was somewhat flexible in evaluating the appropriate method of determining the availability of MBE firms in the statistical analysis of a disparity.

In *Dade County*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program, because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs was taken into account.⁹⁴ The *Dade County* district court accepted the disparity study’s limiting of “available” prime construction contractors to those that had bid at least once in the study period. However, it must be noted that relying solely on bidders to identify available firms may have limitations. If the solicitation of bidders is biased, then the results of the bidding process will be biased.⁹⁵ In addition, a comprehensive count of bidders is dependent on the adequacy of the agency’s record keeping.⁹⁶

⁸⁹ *Id.* at 605.

⁹⁰ *Id.* at 603.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996).

⁹⁵ Cf. *League of United Latin American Citizens v. Santa Ana*, 410 F. Supp. 873, 897 (C.D. Cal. 1976); *Reynolds v. Sheet Metal Workers*, Local 102, 498 F. Supp 952, 964 n. 12 (D.D.C. 1980), *aff’d*, 702 F.2d 221 (D.C. Cir. 1981) (involving the analysis of available applicants in the employment context).

⁹⁶ Cf. *EEOC v. American Nat’l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1981) (in the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).



- **Utilization**

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

Second, M/WBE utilization can be compared to M/WBE availability as measured by the value of contracts awarded. This comparison would examine if there is a disparity between the value of award of contracts by an entity in the relevant market area to available majority contractors and subcontractors and the value of the awarded contracts (and subcontracts) to M/WBEs. Thus, in *AGCC II*, an independent consultant’s study compared the number of available MBE prime contractors in the construction industry in San Francisco with the amount of contract dollars awarded to San Francisco-based MBEs over a one-year period. The study found that available MBEs received fewer construction contract dollars in proportion to their numbers than their available non-minority counterparts.⁹⁷

Whether or not a disparity index supports an inference of discrimination in the market depends not only on what is being compared, but also on whether any disparity found is statistically significant. In *Croson*, Justice O’Connor opined, “[w]here the gross statistical disparities can be shown, they alone, in a proper case, may constitute a *prima facie* proof of a pattern or practice of discrimination.”⁹⁸

However, the Court has not assessed nor attempted to cast bright lines for determining if a disparity index is sufficient to support an inference of discrimination. Rather, the analysis of the disparity index and the finding of its significance are judged on a case-by-case basis.⁹⁹

When the court looked at subcontracting, it found that a firm basis in evidence did not exist. The only subcontracting evidence presented was a review of a random 25% to 30% of project engineer logs on projects more than \$30,000. The consultant determined that no MBEs were used during the study period based on recollections regarding whether or not the owners of the utilized firms were MBEs. The court found this evidence insufficient as a basis for finding that prime contractors in the market were discriminating against subcontractors.¹⁰⁰

⁹⁷ *AGCC II*, 950 F.2d 1401 at 1414. Specifically, the study found that MBE availability was 49.5% for prime construction, but MBE dollar participation was only 11.1%; that MBE availability was 36% for prime equipment and supplies, but MBE dollar participation was 17%; and that MBE availability for prime general services was 49%, but dollar participation was 6.2%.

⁹⁸ *Croson*, 488 U.S. at 501 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

⁹⁹ *Concrete Works II*, 36 F.3d at 1522.

¹⁰⁰ Another problem with the program was that the 15% goal was not based on data indicating that minority businesses in the market area were available to perform 15% of the City’s contracts. The court noted, however, that “we do not suggest that the percentage of the preferred group in the number of qualified contractors is necessarily the ceiling for all set-asides.” The court also found the program flawed because it did not provide sufficient waivers and exemptions, as well as consideration of race-neutral alternatives.



Furthermore, the court discussed whether or not bidding was required in prime construction contracts as the measure of “willingness.” The court stated, “[p]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work.”¹⁰¹

C. *Anecdotal Evidence*

In *Croson*, Justice O’Connor opined that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”¹⁰² Anecdotal evidence should be gathered to determine if minority contractors are systematically being excluded from contracting opportunities in the relevant market area. Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies, such as outreach to the M/WBE community, which are accessible to all segments of the business community, regardless of race. They are not intrusive and require no evidence of discrimination before implementation. Conversely, race-conscious measures, such as contracting goals, fall at the other end of the spectrum and require a larger amount of evidence.¹⁰³

As will be discussed below, anecdotal evidence alone will not suffice to establish the requisite predicate for a race-conscious program, but there is a suggestion that its absence, even in the face of statistical evidence of disparity, will undermine the basis for a remedial program. Ultimately, it appears from the cases that anecdotal evidence’s great value lies in pointing to remedies that are “narrowly tailored”—the second prong of a *Croson* study. The following types of anecdotal evidence have been presented and relied on by the Ninth Circuit, in both *Coral Construction* and *AGCC II*, to justify the existence of an M/WBE program:

- M/WBEs denied contracts despite being the low bidders (*Philadelphia*).¹⁰⁴
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs (*Cone Corporation v. Hillsborough County*).¹⁰⁵
- M/WBEs’ inability to obtain contracts for private sector work (*Coral Construction*).¹⁰⁶
- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties (*AGCC*).¹⁰⁷

¹⁰¹ *Id.*

¹⁰² *Croson*, 488 U.S. at 509. The Court specifically cited to *Teamsters*, 431 U.S. at 338.

¹⁰³ Cf. *AGCC II*, 950 F.2d at 1417-18 (in finding that an ordinance providing for bid preferences was narrowly tailored, the Ninth Circuit stated that the program encompassed the required flexibility and stated that “the burdens of the bid preferences on those not entitled to them appear relatively light and well distributed. In addition, in contrast to remedial measures struck down in other cases, those bidding have no settled expectation of receiving a contract. [Citations omitted.]”).

¹⁰⁴ *Philadelphia II*, 6 F.3d at 1002.

¹⁰⁵ *Cone Corporation v. Hillsborough County*, 908 F.2d at 916 (11th Cir.1990).

¹⁰⁶ For instance, where a small % of an MBE or WBE’s business comes from private contracts and most of its business comes from race or gender-based contract goals, this would demonstrate exclusion in the private industry. *Coral Construction*, 941 F.2d 910 at 933 (WBE’s affidavit indicated that less than seven % of the firm’s business came from private contracts and that most of its business resulted from gender-based set-asides).

¹⁰⁷ *AGCC II*, 950 F.2d at 1415.



- Attempts to circumvent M/WBE project goals (*Concrete Works I*).¹⁰⁸
- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on an entity's contracts (*AGCC*).¹⁰⁹

Courts must assess the extent to which relief measures disrupt settled “rights and expectations” when determining the appropriate corrective measures.¹¹⁰ Presumably, courts would look more favorably on anecdotal evidence, which supports a less intrusive program than a more intrusive one. For example, if anecdotal accounts related experiences of discrimination in obtaining bonds, they may be sufficient evidence to support a bonding program that assists M/WBEs. However, these accounts would not be evidence of a statistical availability that would justify a racially limited program such as a contract goal or participation goal.

As noted above, the Supreme Court found in *Croson* that the City of Richmond’s MBE program was unconstitutional because the City lacked proof that race-conscious remedies were justified. However, the Court opined that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”¹¹¹

In part, it was the absence of such evidence that proved lethal to the program. The Supreme Court stated that “[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”¹¹²

This was not the situation confronting the Ninth Circuit in *Coral Construction*. In that case, the 700-plus page appellate records contained the affidavits of “at least 57 minorities or women contractors, each of whom complain in varying degrees of specificity about discrimination within the local construction industry. These affidavits certainly suggest that ongoing discrimination may be occurring in much of the King County business community.”¹¹³

Nonetheless, this anecdotal evidence alone was insufficient to justify King County’s MBE program since “[n]otably absent from the record, however, is *any* statistical data in support of the County’s MBE program.”¹¹⁴ After noting the Supreme Court’s reliance on statistical data in Title VII employment discrimination cases and cautioning that statistical data must be carefully used, the Court elaborated on its mistrust of pure anecdotal evidence:

¹⁰⁸ *Concrete Works*, 36 F.3d at 1530.

¹⁰⁹ *AGCC II*, 950 F.2d at 1415.

¹¹⁰ *Wygant*, 476 U.S. at 283.

¹¹¹ *Croson*, 488 U.S. at 509 (citing *Teamsters*, 431 U.S. at 338).

¹¹² *Id.* (citing *Teamsters*, 431 U.S. at 480).

¹¹³ *Coral Construction*, 941 F.2d at 917-18.

¹¹⁴ *Id.* at 918 (emphasis added) (additional statistical evidence gathered after the program had been implemented was also considered by the court, and the case was remanded to the lower court for an examination of the factual predicate).



Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices.¹¹⁵

The Court concluded its discourse on the potency of anecdotal evidence in the absence of a statistical showing of disparity by observing that “rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”¹¹⁶

Two other circuit courts also suggested that anecdotal evidence might be dispositive, while rejecting it in the specific case before them. For example, in *Philadelphia II Contractors Ass’n*, the Third Circuit noted that the Philadelphia City Council had “received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination,” which the district court had “discounted” because it deemed this evidence to be “impermissible” for consideration under *Croson*.¹¹⁷ The Third Circuit disapproved of the district court’s actions discounting of this anecdotal evidence because, in its view, the court’s rejection of this evidence was contrary to *Croson*.¹¹⁸ The Third Circuit in emphasizing that the anecdotal evidence required the trial court’s consideration stated:

Yet, [g]iven *Croson*’s emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, we do not believe this amount of anecdotal evidence is sufficient to satisfy strict scrutiny [quoting *Coral*, *supra*]. Although anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.¹¹⁹

The District of Columbia Circuit Court echoed the Ninth Circuit’s acknowledgment of the rare case in which anecdotal evidence is particularly potent in *O’Donnell Construction v. District of Columbia*.¹²⁰ The court found that, in the face of conflicting statistical evidence, the anecdotal evidence was not sufficient:

It is true that in addition to statistical information, the committee received testimony from several witnesses attesting to problems they faced as minority contractors. Much of the testimony related to bonding requirements and other structural impediments any firm would have to overcome, no matter what the race of its owners. The more specific testimony about discrimination by white firms could not in itself support an industry-wide remedy [quoting *Coral*]. Anecdotal evidence is

¹¹⁵ *Coral Construction*, 941 F.2d at 919.

¹¹⁶ *Id.*

¹¹⁷ *Philadelphia II*, 6 F.3d at 1002.

¹¹⁸ *Id.* at 1003.

¹¹⁹ *Id.*

¹²⁰ *O’Donnell Construction v. District of Columbia*, 963 F.2d at 427 (D.C. Cir. 1992).



most useful as a supplement to strong statistical evidence—which the council did not produce in this case.¹²¹

The Eleventh Circuit Court agreed. In applying the “clearly erroneous” standard to its review of the district court’s decision in *Dade County*, it commented, “[t]he picture painted by the anecdotal evidence is not a good one.”¹²² However, it held that this was not the “exceptional case” where, unreinforced by statistics, the anecdotal evidence was enough.¹²³

In *Concrete Works II*, the Tenth Circuit Court of Appeals described the type of anecdotal evidence that is most compelling: evidence within a statistical context. In approving the anecdotal evidence marshaled by the City of Denver in the proceedings below, the court recognized that:

[w]hile a fact finder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality’s institutional practices carries more weight due to the systemic impact that such institutional practices have on market conditions.¹²⁴

The court noted that the City had provided such systemic evidence. The Ninth Circuit has articulated what it deems to be persuasive anecdotal evidence in *AGCC II*.¹²⁵ In that case, the court gave weight to a “vast number of individual accounts of discrimination,” which included numerous reports of MBEs being denied contracts despite being the low bidder, MBEs told they were not qualified although they were found qualified when evaluated by outside parties, and MBEs being harassed by City personnel to discourage them from bidding on City contracts. On appeal, the City pointed to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the City’s procurement processes; an “old boy’s network” still exists; and racial discrimination is still prevalent within the San Francisco construction industry.¹²⁶ Based on *AGCC II*, it would appear that the Ninth Circuit’s standard for persuasive anecdotal evidence is more lenient than other Circuits that have considered the issue, or there was a larger volume of anecdotal evidence that more directly pointed to pervasive discrimination in the industry.

Taken together, these statements constitute a taxonomy of appropriate anecdotal evidence. The cases suggest that to be optimally persuasive, anecdotal evidence must satisfy six particular requirements.¹²⁷ These requirements are that the accounts:

¹²¹ *Id.*

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

¹²³ *Id.* at 926.

¹²⁴ *Concrete Works II*, 36 F.3d at 1530.

¹²⁵ *AGCC II*, 950 F.2d 1401.

¹²⁶ *Id.* at 1415.

¹²⁷ *Philadelphia II*, 6 F.3d at 1003. The anecdotal evidence must be “dominant or pervasive.”



- Are gathered from minority contractors, preferably those that are “qualified.”¹²⁸
- Concern specific, allegations of discrimination.¹²⁹
- Involve the actions of governmental officials.¹³⁰
- Involve events within the relevant jurisdiction’s market area.¹³¹
- Discuss the harm that the improper conduct has inflicted on the businesses in question.¹³²
- Collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.¹³³

Moreover, when viewed collectively, anecdotal evidence that is most persuasive will reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.¹³⁴

Given that neither *Croson* nor its progeny identifies the circumstances under which anecdotal evidence alone will carry the day, it is not surprising that none of these cases explicate bright-line rules specifying the quantity of anecdotal evidence needed to support a race-conscious remedy. However, the foregoing cases and others provide some guidance by implication.

In *Philadelphia*, 14 anecdotal accounts did not suffice.¹³⁵ While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to have the qualities referenced above, were insufficient to justify the program in *Coral Construction*. The number of anecdotal accounts relied on by the district court in approving Denver’s M/WBE program in *Concrete Works I* is unclear, but by one count the number might have exceeded 139.¹³⁶

In addition, as noted above, the amount of anecdotal evidence a court would likely find acceptable may depend on the remedy in question. The remedies that are least burdensome to non-targeted

¹²⁸ *Philadelphia IV*, 91 F.3d at 603.

¹²⁹ *Coral Construction*, 941 F.2d at 917-18. But see *Concrete Works II*, 321 F.3d at 989. “There is no merit to [plaintiff’s] argument that the witnesses’ accounts must be verified to provide support for Denver’s burden.”

¹³⁰ *Croson*, 488 U.S. at 509.

¹³¹ *Coral Construction*, 941 F.2d at 925.

¹³² *O’Donnell*, 963 F.2d at 427.

¹³³ *Coral Construction*, 941 F.2d at 919.

¹³⁴ *Coral Construction*, 941 F.2d at 919.

¹³⁵ *Philadelphia II*, 6 F.3d at 1002-03.

¹³⁶ The Denver City Council enacted its MWBE ordinance in 1990. The program was based on the results of public hearings held in 1983 and 1988 (at which numerous people testified (approximately 21 people and at least 49 people, respectively) and on a disparity study performed in 1990. See *Concrete Works of Colorado v. Denver*, 823 F. Supp. 821, 833-34. The disparity study consultant examined all preexisting data, presumably including the anecdotal accounts from the 1983 and 1988 public hearings, as well as the results of its own 69 interviews, in preparing its recommendations. *Id.* at 833-34. Thus, short of analyzing the record in the case, it is not possible to determine a minimum number of accounts because it is not possible to ascertain the number of consultant interviews and anecdotal accounts that are recycled statements or statements from the same people. Assuming no overlap in accounts, however, and also assuming that the disparity study relied on prior interviews in addition to its own, the number of M/WBEs interviewed in this case could be as high as 139, and, depending on the number of new people heard by the Denver Department of Public Works in March 1988 (see *id.* at 833), the number might have been even greater.



groups would likely require a lesser degree of evidence. Those remedies that are more burdensome on the non-targeted groups would require a stronger factual basis likely extending to verification.

D. Remedial Statutory Scheme

In the 2010 case, *H.B. Rowe Company v. Tippet (Rowe)*, plaintiffs challenged the constitutionality of a North Carolina statute creating a program of specific goals for award of contracts.¹³⁷ The Statute set forth a general policy to promote the use of small, minority, physically disabled, and women contractors in non-federally funded State construction projects. The Fourth Circuit Court of Appeals considered whether or not the statutory scheme as it relates to women survives the intermediate scrutiny standard. The evidence demonstrated that the State's prime contractors "substantially over-utilized" women-owned businesses on public road construction projects. The 2004 Study calculated the overutilization of women subcontractors as statistically significant at a 95% confidence level. The circuit court further noted that the private sector evidence was insufficient to overcome the strong evidence of overutilization. Consequently, the circuit court determined that the evidence in the 2004 Study did not provide "exceedingly persuasive justification" to include women-owned businesses in gender-conscious remedies.

Similarly, in *Association for Business Fairness v. New Jersey*, the New Jersey District Court decided that the minority "set-aside" provisions of New Jersey's Casino Control Act and the implementing regulations promulgated by the Casino Control Commission were unconstitutional. In addition to lacking an appropriate finding of discrimination that would support a finding that New Jersey had a compelling interest in applying its set-asides, the implemented program was not narrowly tailored. Many of the goals for M/WBE participation were higher than the agency's own determination for what was necessary to address discrimination. For some defined minority-owned companies, including Native American, Native Alaskan, Hawaiian, or those of Portuguese descent, there was simply no statistical evidence study at all to provide evidence of discrimination against such companies.¹³⁸

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

IV. Consideration of Race-Neutral Options

A government's remedial program must address the source of the disadvantage faced by minority businesses in its geographic area. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing



¹³⁷ *H.B. Rowe Company v. Tippet*, 615 F.3d 233 (4th Cir. 2010).

¹³⁸ *Ass'n for Business Fairness v. New Jersey*, 82 F. Supp. 2d 353 (D.N.J. 2000).

MBEs with a counterbalancing advantage.¹³⁹ On the other hand, an MBE program cannot stand if the sole barrier to minority or woman-owned business participation is a barrier faced by all new businesses, regardless of ownership.¹⁴⁰ In *Croson*, the majority made an observation that before creating its race-conscious program, Richmond did not “appear to have consider[ed] any use of race-neutral means to increase minority business participation in city contracting.”¹⁴¹ In other words, if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

The *Croson* court’s observation about the absence of race-neutral measures is otherwise understood as a requirement that is part of the narrow tailoring of a remedy under the strict scrutiny standard.¹⁴² But it does not mean race-neutral options must be exhausted before race-conscious remedies can be employed. In 2003, the Supreme Court explained that although “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” it “does require serious, good faith consideration of workable race-neutral alternatives that will achieve... diversity[.]”¹⁴³ In *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, the district court referenced this language in finding that Miami-Dade County had failed to show the necessity for the relief it had chosen and the efficacy of alternative remedies had not been sufficiently explored.¹⁴⁴

If the barriers appear race-related but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found. If the evidence demonstrates the sole barrier to M/WBE participation is that M/WBEs disproportionately lack capital or cannot meet bonding requirements, then a race-neutral program of financing for all small firms would be justified.¹⁴⁵ If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, MBEs also face racial discrimination in the awarding of contracts, then a race-conscious program will stand, as long as it also includes race-neutral measures to address the capital and bonding barriers.¹⁴⁶

The Ninth Circuit Court of Appeals in *Coral Construction Co. v. King County* ruled there is no requirement that an entity exhaust every possible race-neutral alternative.¹⁴⁷ Instead, an entity must make a serious, good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing MBE utilization, it is imperative to examine barriers to MBE participation that

¹³⁹ *AGCC II*, 950 F.2d at 1404.

¹⁴⁰ *Croson*, 488 U.S. at 508.

¹⁴¹ *Id.* at 509.

¹⁴² *Id.*

¹⁴³ *Grutter v. Bollinger* 539 U.S. 306 (2003).

¹⁴⁴ *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp. 2d 1305, 1330 (S.D. Fla. 2004).

¹⁴⁵ *Croson*, 488 U.S. at 507. This statement was illustrative of a race neutral circumstance not presented by the facts and thus is dicta.

¹⁴⁶ *Id.* at 509. (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

¹⁴⁷ 941 F.2d 910 (9th Cir. 1991).



go beyond “small business problems.” The impact on the distribution of contracts programs that have been implemented to improve MBE utilization should also be measured.¹⁴⁸

V. United States Department of Transportation Disadvantaged Business Enterprise Program

In *Adarand*, which concerned USDOT’s race-based program to encourage award of subcontracts to minority-owned firms, the Supreme Court held that the strict scrutiny standard in *Croson* should be applied to federal race-based programs, as it is applied to race-based programs adopted by a State or local government.

In response to the Supreme Court’s decision in *Adarand*, USDOT revised provisions of the DBE rules in effect at the time of the decision, which were codified at 49 CFR Part 26, to be consistent with the “narrow tailoring” requirement of *Adarand*. The revised provisions applied to USDOT airport, transit, and highway financial assistance programs and required that recipients incorporate a Small Business Enterprise component in their DBE program by February 28, 2012.¹⁴⁹

Since *Adarand*, decisions in several Circuit Courts have applied *Croson* to various governments’ implementation of the USDOT’s post-*Adarand* DBE regulations. Two of these cases are instructive for the purposes of this study and are therefore discussed herein: *Western States Paving Co. v. Washington State Department of Transportation (Western States)*,¹⁵⁰ which was decided in 2005, and *GEOD Corp. v. New Jersey Transit Corp. (GEOD)*, which was decided in 2009.¹⁵¹

A. Western States

In *Western States*, the plaintiff sought a declaratory judgment on the grounds that the 1998 Transportation Equity Act for the 21st Century’s (TEA-21’s) preference program was in violation of the Equal Protection provisions under the Fifth and Fourteenth Amendments of the U.S. Constitution. According to the plaintiff, the statute and revised regulations governing the TEA-21 DBE Program on their face, and as applied by Washington in its implementation of the program, were all unconstitutional. The Ninth Circuit began with the key principle in the *Croson* plurality, that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.¹⁵² The Court found that at the time the TEA-21 was enacted, Congress considered a substantial body of statistical and anecdotal evidence that showed that, at

¹⁴⁸ *Dade County*, 122 F.3d at 927. At the same time, the Eleventh Circuit’s caveat in *Dade County* should be kept in mind: “Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications that a government may use to treat race-based problems. Instead, it is the strongest of medicines, with many potentially harmful side-effects, and must be reserved to those severe cases that are highly resistant to conventional treatment.” For additional guidance, see *supra* the discussion of narrow tailoring in *Concrete Works*, *Adarand*, *County of Cook*, and *City of Chicago*.

¹⁴⁹ As described in the Federal Register, Volume 76, No. 19.

¹⁵⁰ 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1332 (2006).

¹⁵¹ 678 F. Supp. 2d 276 (D.N.J. 2009).

¹⁵² 407 F.3d at 991 (citing *Croson*, 488 U.S. at 492).



least in some parts of the country, there was discrimination within the transportation contracting industry that hindered minorities' ability to compete for federally funded contracts.¹⁵³

Next, the Court considered whether the USDOT's DBE regulations were narrowly tailored. Again, citing *Croson*, the Ninth Circuit decided that a minority preference program must establish utilization goals that bear a close relationship to minority firms' availability in a particular market in order to be narrowly tailored.¹⁵⁴ The Court found that, because the regulations require each state to set minority utilization goals that reflect the contractor availability in its own labor market, the DBE regulations were narrowly tailored to remedy the effects of race and sex-based discrimination within the transportation contracting industry.¹⁵⁵

In implementing the DBE regulations, Washington reasoned that because the proportion of DBEs in the state was 11.17% and the percentage of contracting funds awarded to them on race-neutral contracts was only 9%, discrimination was demonstrated.¹⁵⁶ The Court, however, found that this oversimplified statistical evidence of narrow tailoring was to be accorded only little weight, because it did not account for factors that may affect the relative capacity of DBEs to undertake contracting work.¹⁵⁷ The Court noted that other states that implemented the DBE regulations had hired outside consulting firms to conduct statistical analyses of the availability and capacity of DBEs in their local market.¹⁵⁸

B. GEOD Corporation

GEOD Corporation facially challenged the USDOT's DBE program regulations as well as the State of New Jersey Transit's implementation of the regulations.¹⁵⁹ GEOD argued that NJ Transit was required to independently establish a compelling interest to justify its DBE program and to demonstrate it was narrowly tailored. The United States District Court dismissed the plaintiff's facial challenge ruling that the congressional findings were sufficient for the implementation of NJ Transit's DBE program. Consequently, the remaining issue considered by the district court was whether the methodology used to set the DBE goals by NJ Transit was narrowly tailored.

• Facial Constitutional Challenge

The plaintiff proffered that NJ Transit engaged in discriminatory practices by implementing an affirmative action construction program using race and gender goals without first establishing a

¹⁵³ *Id.* at 983.

¹⁵⁴ *Id.* at 994 (citing *Croson*, 488 U.S. at 507).

¹⁵⁵ *Id.* at 994-95.

¹⁵⁶ *Id.* at 999-1000.

¹⁵⁷ *Id.* at 1000-01.

¹⁵⁸ *Id.* at 997.

¹⁵⁹ *GEOD Corp. v. New Jersey Transit Corp.*, 678 F. Supp. 2d 276 (D.N.J. 2009).



factual predicate. In *GEOD*, the district court held that a recipient “does not need to justify establishing its DBE program, as it has already been justified by the legislators.”¹⁶⁰

The district court concurred with the holding in *Northern Contracting, Inc. v. Illinois Department of Transportation (NCI)*¹⁶¹ that a challenge to a state’s application of a federally mandated program must be limited to the question of whether “NJT exceeded its federal authority”.¹⁶² The district court agreed with the Seventh Circuit ruling in *NCI*, and held that when a recipient is “acting as an instrument of federal policy,” a plaintiff “cannot collaterally attack the federal regulations through a challenge to the recipient’s program.”¹⁶³

- **Application of the Narrowly Tailored Standard in Overall Goal Setting**

A nine-day bench trial was held to determine whether NJ Transit’s 2010 DBE goals were narrowly tailored. Following the trial, defendants’ motion for a directed verdict was granted after plaintiffs’ case in chief and all claims were dismissed.¹⁶⁴ In its opinion, the district court noted 49 CFR Section 26.45 was the controlling law for determining the goals for DBE participation. According to the regulations, recipients are required to determine a base figure for the relative availability of DBEs by utilizing one or a combination of methods, including DBE directories, United States Census Bureau data, bidders’ lists, data from a disparity study, goals of another DOT recipient, or methods based on demonstrable evidence of local market conditions designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in the recipient’s market.¹⁶⁵

The plaintiff contended that NJ Transit’s “DBE program is constitutionally defective because it is not narrowly tailored” because it includes in the category of DBEs to which a percentage of subcontracts must be awarded racial or ethnic groups as to which it has not evidence of discrimination.¹⁶⁶ In NJ Transit’s utilization data, Asian Americans were the only group that was not underutilized. They further argued that it is well-settled law that when determining if an affirmative action program is narrowly tailored, district courts should examine the following factors: “(1) whether such action is necessary to remedy past discrimination [and] the efficacy of alternative remedies, (2) flexibility and duration of the relief, including the availability of waiver provisions, (3) the relationship of the numerical goals to the relevant labor market, and (4) the impact of the relief on the rights of third parties.”¹⁶⁷

¹⁶⁰ *Id.* at 283.

¹⁶¹ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007).

¹⁶² *Id.* at 721.

¹⁶³ *Id.* at 283.

¹⁶⁴ *Id.*

¹⁶⁵ 49 CFR Section 26.45(c).

¹⁶⁶ Pls.’ Proposed Findings of Fact at 41.

¹⁶⁷ *Newark Brach, NAACP v. Harrison*, 940 F.2d 792, 807 (3d Cir. 1991) (quoting *United States v. Paradise*, 480 U.S. 149, 171 (1986)).



The district court held that the plaintiff's argument that NJ Transit's utilization data demonstrated that Asian Americans were not discriminated against in NJ Transit's contracting was not the end of the inquiry. Dismissing the plaintiff's argument, the district court ruled that anecdotal evidence was sufficient to establish discrimination against Asian Americans. The anecdotal evidence revealed that NJ Transit had received complaints regarding the lack of opportunities for Asian American firms. Additionally, NJ Transit employees testified that Asian American firms informally and formally complained of a lack of opportunity to grow, and indicated that the DBE Program was instrumental in addressing this issue.

Ultimately the district court concluded that NJ Transit demonstrated that each ethnic group included in the race-conscious remedy was discriminated against, as required by *Western States*, using statistical findings for some groups and anecdotal evidence as to Asian Americans. The district court also ruled that NJ Transit's DBE goals were constitutional and calculated in accordance with the federal regulations.¹⁶⁸

VI. Conclusion

The decisions of the Supreme Court in *Croson* and *Adarand* have defined the legal landscape for business affirmative action programs. These decisions require that all race-conscious programs satisfy strict scrutiny by requiring statistical evidence of underutilization of each ethnic group and narrow tailoring of the remedies, while still underscoring the importance of anecdotal evidence from M/WBE groups.

The Supreme Court in *SFFA* did not overrule the precedent established by *Croson* or *Adarand*, and it is far too early to determine the legal impact of the *SFFA* case on public contracting. There is no doubt that the *SFFA* decision, however, will trigger additional challenges to public contracting affirmative action programs. Future federal cases and decisions applying the *SFFA* decision to race-conscious affirmative action in public contracting will determine the road map by which to judge race and ethnicity-based classifications. The Court's disposition of these cases as they develop will provide guidance on the evidence required to establish the existence of an "extraordinary case"¹⁶⁹ that warrants the use of race-conscious measures. Relying on language in *SFFA*, litigation has already been filed in the Eastern District of Kentucky challenging the Disadvantaged Business Enterprise Program, and other challenges have also been asserted against private sector diversity, equity, and inclusion programs.¹⁷⁰

This chapter has examined what *Croson* and its progeny require for a local or state government agency to institute a constitutional race or gender-conscious public contracting program. Given the case law discussed in this chapter, any recommended race or gender-conscious affirmative action contracting programs must be based on a constitutionally sound factual predicate.



¹⁶⁸ *GEOD Corp. v. New Jersey Transit Corp.*, 746 F. Supp. 2d 642 (D.N.J. 2010).

¹⁶⁹ 143 S. Ct. at 2162.

¹⁷⁰ *Mid-America Milling Company, LLC et al. v. U.S. Department of Transportation, et al.*, Case No. 23-CV. 00072, filed October 26, 2023.

VII. List of Authorities

A. Cases

Cases	Pages
<i>Adarand Constructors, Inc. v. Slater</i> , 228 F.3d 1147 (10th Cir. 2000)	<i>passim</i>
<i>Associated Gen. Contractors v. Coal. for Econ. Equity (“AGCC II”)</i> , 950 F.2d 1401 (9th Cir. 1991)	14
<i>Associated Gen. Contractors of Ohio, Inc. v. Drabik</i> , 214 F.3d 730 (6th Cir. 2000)	10, 16
<i>Associated Gen. Contractors v. New Haven</i> , 791 F. Supp. 941 (D. Conn. 1992)	5, 6
<i>Association for Business Fairness v. New Jersey</i> , 82 F. Supp. 2d 353 (D. N. J. 2000)	25
<i>Builders Ass’n of Greater Chi. v. City of Chi.</i> , 298 F. Supp. 2d 725 (N.D. Ill. 2003)	10
<i>Builders Ass’n of Greater Chicago v. Cnty. of Cook</i> , 256 F.3d 642 (7th Cir. 2001)	10
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	<i>passim</i>
<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works I”)</i> , 823 F. Supp. 821 (D. Colo. 1993)	23
<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works II”)</i> , 36 F.3d 1513 (10th Cir. 1994)	<i>passim</i>
<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works I”)</i> , 86 F. Supp. 2d 1042 (D. Colo. 1993)	9
<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works IV”)</i> , 321 F.3d 950 (10th Cir. 2003)	7, 9, 13, 23
<i>Cone Corp. v. Hillsborough Cnty.</i> , 908 F.2d 908 (11th Cir. 1990)	14, 20



<i>Contractors Ass’n of E. Pa. v. City of Philadelphia (“Philadelphia II”),</i> 6 F.3d 990 (3d Cir. 1993)	1, 5
<i>Contractors Ass’n of E. Pa. v. City of Philadelphia (“Philadelphia III”),</i> 893 F. Supp. 419 (E.D. Pa.1995)	13
<i>Contractors Ass’n of E. Pa v. City of Philadelphia (“Philadelphia IV”),</i> 91 F.3d 586 (3rd Cir. 1996)	<i>passim</i>
<i>Coral Constr. Co. v. King County,</i> 941 F.2d 910 (9th Cir. 1991)	<i>passim</i>
<i>EEOC v. Am. Nat’l Bank,</i> 652 F.2d 1176 (4th Cir. 1981)	18
<i>Eng’g Contractors Ass’n v. Metro. Dade Cnty. (“Dade County I”),</i> 943 F. Supp. 1546 (S.D. Fla. 1996)	16, 17, 22
<i>Eng’g Contractors Ass’n v. Metro. Dade Cnty. (“Dade County II”),</i> 122 F.3d 895 (11th Cir. 1997)	22, 26
<i>GEOD Corp. v. New Jersey Transit Corp.,</i> 678 F. Supp. 2d 276 (D. N. J. 2009)	27, 28
<i>GEOD Corp. v. New Jersey Transit Corp.,</i> 746 F. Supp. 2d 642 (D. N. J. 2010)	30
<i>Gratz v. Bollinger,</i> 539 U.S.244 (2003)	10
<i>Grutter v. Bollinger,</i> 539 U.S. 306 (2003)	26
<i>Hazelwood Sch. Dist. v. United States,</i> 433 U.S. 299 (1977)	12, 18
<i>H.B. Rowe Co. v. N.C. Dep’t of Transp.,</i> 615 F.3d 233 (4th Cir. 2010)	25
<i>Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade Cnty.,</i> 333 F. Supp. 2d 1305 (S.D. Fla. 2004)	26
<i>Int’l Bhd. of Teamsters v. United States,</i> 431 U.S. 324 (1977)	12, 19, 20



<i>League of United Latin Am. Citizens v. Santa Ana</i> , 410 F. Supp. 873 (C.D. Cal. 1976)	18
<i>Monterey Mech. Co. v. Pete Wilson et al.</i> , 125 F.3d 702 (9th Cir. 1997)	11
<i>Newark Brach, NAACP v. Harrison</i> , 940 F.2d 792, 807 (3d Cir. 1991)	29
<i>Northern Contracting v. Illinois Dept. of Transportation</i> , 473 F.3d 715 (2007)	28
<i>O'Donnell Constr. Co. v. D.C.</i> , 963 F.2d 420 (D.C. Cir. 1992)	22, 23
<i>Ohio Contractors Ass'n v. Keip</i> , 713 F.2d 167 (6th Cir. 1983)	16
<i>Reynolds v. Sheet Metal Workers, Local 102</i> , 498 F. Supp. 952 (D.C. Cir. 1980)	18
<i>Students for Fair Admissions, Inc. ("SFFA") v. President and Fellows of Harvard College and University of North Carolina et. al (Harvard)</i> , 143 S.Ct. 2141 (2023)	2, 4, 30
<i>Shaw v. Hunt</i> , 517 U.S. 899 (1996)	9
<i>W.H. Scott Constr. Co. v. City of Jackson</i> , 199 F.3d 206 (1999)	11
<i>Western States Paving Co. v. State of Washington Dept. of Transportation</i> , 407 F.3d 983 (9th Cir. 2005)	27
<i>Wygant v. Jackson Bd. of Educ.</i> , 476 U.S. 267 (1986)	5, 6, 20

B. Statutes

42 U.S.C. Section 14000e et seq.

49 CFR, Part 26



CHAPTER 2: Procurement Analysis

I. Introduction

This chapter is an overview of the statutes, administrative code, and circulars (policy directives and/or procedures) governing the State contracting agencies' procurement of construction, professional services, and goods and services under the auspices of the Department of the Treasury.

This section only reviews the procurement policy directives and/or procedures that govern the Department of the Treasury, specifically the Division of Purchase and Property and Division of Property Management and Construction. State contracting agencies that are not required to follow the Department of the Treasury's policies, directives, and procedures may have their own procurement standards.

The Department of the Treasury, Division of Purchase and Property (DPP) provides the centralized procurement of goods and related services to State contracting agencies within the State's executive branch. The primary mission of DPP is to procure the goods and services necessary for the daily operation of State government in a timely and effective manner.¹⁷¹

The Department of the Treasury, Division of Property Management and Construction (DPMC) provides centralized design and construction services and procurement and administration services for State contracting agencies and the State's executive branch.¹⁷²

A. Governing Laws and Regulations

The Treasury statutes, regulations, and policies governing the purchase of construction, professional services, and goods and services are outlined in Table 2.1 below.



¹⁷¹ N.J. Admin. Code § 17:12-1.1(a).

¹⁷² N.J. Admin. Code § 17:13-1.2.

Table 2.1: New Jersey’s Governing Laws and Policies

New Jersey Statutes	
• N.J. Stat. § 52:32-2 et seq. • N.J. Stat. § 52:34-6 et seq.	
New Jersey Administrative Code	
• N.J. Admin. Code § 17:12-1 et seq. • N.J. Admin. Code § 17:13-1 et seq. • N.J. Admin. Code § 17:14-1 et seq. • N.J. Admin. Code § 17:19-1 et seq.	
New Jersey Executive Order and Circulars	
• Executive Order No. 71 (2003) • DPP/OMB/OIT, Circular No. 14-07- DPP/OMB/OIT, Professional Services: Review, Control, Monitoring, and Extensions • Division of Purchase and Property, Circular No.: 17-07-DPP, State of New Jersey Purchasing Card Program • Division of Purchase and Property, Circular No.: 18-14-DPP, Requests for Waiver of Advertising • Division of Purchase and Property, Circular No.: 21-09-DPP, Delegated Purchasing Authority (DPA) For Goods and Services • Division of Property Management & Construction, Circular No.: 10-16-DPMC, Delegation of Authority – Small Construction Projects • Division of Purchase and Property, Circular No.: 16-02-DPP, Delegated Purchasing Authority (DPA)	

B. Industry Definitions

Construction: Erection, reconstruction, demolition, alteration, custom fabrication, repair work, or maintenance work, including painting and decorating, subject to the New Jersey Prevailing Wage Act, done under contract and funded in whole or in part with public funds or on the property or premises owned by the government entity.¹⁷³

Architecture and Engineering: Professional architectural, engineering, land surveying, planning, environmental, and construction inspection services required for the development and construction of a project.¹⁷⁴

Professional Services: Services performed by a person authorized and regulated by law to practice a recognized profession that requires advanced knowledge in a field of learning acquired by a prolonged formal course of specialized instruction and study. Professional services are rendered in: (1) the provision of goods, (2) original and creative in a recognized field of artistic endeavor, and (3) extraordinary, non-specifiable services if, after evaluation and assessment, it is determined cannot reasonably be described by written specifications.¹⁷⁵



¹⁷³ N.J. Stat. § 52:34A-3. And see N.J. Admin. Code § 17:19-6.2.

¹⁷⁴ N.J. Stat. § 52:34-9.2.

¹⁷⁵ N.J. Admin. Code § 17:12-1.3.

Goods and Services: Services not otherwise defined as professional, architectural or engineering, and commodities.

C. Procurement Process Overview

Tables 2.2 through 2.5 illustrate the State’s procurement process for State-managed contracts during the study period of July 1, 2015 to June 30, 2020. The procurement process varies between contracts awarded at different levels, as well as contracts awarded at the same level but in different industries. These are all outlined below.

**Table 2.2: State Procurement Process, Construction
July 1, 2015 to June 30, 2020**

Dollar Threshold	Public Notice	Solicitation Method
\$65,000 and under	Solicit contractors classified in the applicable construction trade	Three sealed bid proposals
Over \$65,000	Advertise on the contracting agency’s website, and in newspapers, direct mailings to classified firms, and written notices to professional societies and associations	Request for bids

**Table 2.3: State Procurement Process, Architecture and Engineering
July 1, 2015 to June 30, 2020**

Dollar Threshold	Public Notice	Solicitation Method
\$400,000 and under	Solicit from a short list of prequalified firms randomly selected from DPMC’s database	Request for proposals
Over \$400,000	Publication of the solicitation in design and construction publications, newspapers, written notice to State professional societies, direct mailing to prequalified firms, or other electronic means	Request for proposals



**Table 2.4: State Procurement Process, Professional Services
July 1, 2015 to June 30, 2020**

Dollar Threshold	Public Notice	Solicitation Method
\$1,000 and under	Not required	Not required
Over \$1,000 to \$17,500	Not required	Three verbal quotes
Over \$17,500 to \$40,000	Advertising on the awarding entity's website is encouraged	Three written proposals
Over \$40,000	Public notice on DPP website and other media, including newspapers, a minimum of seven business days before proposals are due	Request for proposals

**Table 2.5: State Procurement Process, Goods and Services
July 1, 2015 to June 30, 2020**

Dollar Threshold	Public Notice	Solicitation Method
\$1,000 and under	Not required	Not required
Over \$1,000 to \$17,500	Not required	Three verbal quotes
Over \$17,500 to \$40,000	Advertising on the awarding agency's website is encouraged	Three written quotes
Over \$40,000	Public notice on DPP website and other media, including newspapers, a minimum of seven business days before bid proposals are due	Request for bid proposals



II. Construction Procurement

As noted above, DPMC is the State agency within the Department of the Treasury which provides centralized construction procurement for the State contracting agencies.¹⁷⁶ The Department of the Treasury procures construction contracts through a competitive, sealed bidding process, unless otherwise authorized by law.

A. Contractor Classification

All contractors or vendors¹⁷⁷ seeking a public works construction prime contract or subcontract must be classified by DPMC prior to the bid opening date.¹⁷⁸ The classification must be valid on the bid opening date.¹⁷⁹ The firm must have a valid classification and rating appropriate to the project to submit a bid or be listed as a subcontractor in a principal trade.¹⁸⁰

Classification is the process that prequalifies a contractor or vendor to bid as a prime contractor or to be listed as a subcontractor. The process assigns the applicant specific construction categories or trades and an aggregate rating that determines the size and type of public work the firm is eligible to bid.¹⁸¹ To remain eligible to bid on public work, firms must be reclassified every 24 months.¹⁸²

Required information for classification includes the following:

- Financial statement
- Organizational statement
- Prior experience statement
- Past performance statement

Classification is based on the information contained in the application, and the rating is based on past performance. To be classified for a specific trade, a firm must have successfully completed at least two significant projects in the trade within the previous five years. The application must include a contract document that identifies the following information: dated signature page, dollar amount of the contract, scope of work, schedule of values, and contact names of the owner, design

¹⁷⁶ N.J. Admin. Code § 17:13-1.2.

¹⁷⁷ Department of Transportation, New Jersey Transit, New Jersey Turnpike Authority, and New Jersey Schools Development Authority have their own classification policies.

¹⁷⁸ N.J. Admin. Code § 17:19-6.4.

¹⁷⁹ N.J. Admin. Code § 17:19-2.1.

¹⁸⁰ See N.J. Stat. § 52:32-2.

¹⁸¹ N.J. Admin. Code § 17:19-1.1.

¹⁸² N.J. Admin. Code § 17:19-2.6.



professional, and/or construction manager, who must be licensed and permitted to perform work in the given trade.¹⁸³

Upon review of the complete classification application, DPMC determines if the firm is entitled to a classification in any trade and calculates an aggregate rating.

B. Construction Projects under \$65,000

When the aggregate project cost or cost estimate for the erection, construction, alteration, or repair of any State building or facility, including labor and construction materials, does not exceed the delegated amount of \$65,000, the State contracting agency may make, negotiate, or award the small construction contract without public advertising.¹⁸⁴ However, the State contracting agency must establish procedures to ensure the procurement is performed according to a free and fair competition whenever competition is practicable.¹⁸⁵

Whenever possible, the State contracting agencies must seek sealed informal bids from at least three contractors. All solicited contractors must be classified by DPMC in the applicable construction trade.¹⁸⁶

State contracting agencies may not segment projects to circumvent the small project delegation threshold and are required to develop plans and procedures for meeting current Small Business Enterprise (SBE) set-aside goals and the Service-Disabled, Veteran-Owned Business (SDVOB) Program.¹⁸⁷

The State contracting agency opens the sealed bid at a specified time and place. If the bids are over the \$65,000 threshold, the State contracting agency must initiate a formal DPMC procurement or revise the scope of services to reduce the cost of the project.¹⁸⁸

The State contracting agency ensures that the low bidder has complied with applicable requirements and notifies the successful low bidder of the award. If the lowest bidder is not in compliance, the State contracting agency notifies the bidder and proceeds with an award to the next lowest bidder.

¹⁸³ N.J. Admin. Code § 17:19-2.7.

¹⁸⁴ DPP, Adjustment to Public Bidding Threshold, <https://www.state.nj.us/treasury/purchase/adjpubbid05.shtml>.

¹⁸⁵ State of New Jersey Circular, Division of Property Management & Construction, No 10-16-DPMC effective 4-16-10, Delegation of Authority – Small Construction Projects.

¹⁸⁶ N.J.S.A. 52:35-1.

¹⁸⁷ State of New Jersey Circular, Division of Property Management & Construction, No 10-16-DPMC effective 4-16-10, Delegation of Authority – Small Construction Projects, p. 3.

¹⁸⁸ State of New Jersey Circular, Division of Property Management & Construction, No 10-16-DPMC effective 4-16-10, Delegation of Authority – Small Construction Projects, p. 4.



C. Construction Projects over \$65,000

When the aggregate project cost or cost estimate of the construction project is over \$65,000, separate plans and specifications may be prepared for the following construction trade work:

- Plumbing, gas fitting, and related work
- Steam and hot-water heating and ventilating apparatus, steam-powered plants, and related work
- Electrical work
- Structural steel and ornamental iron work
- General construction, which includes all other work and materials required for the completion of the project¹⁸⁹

1. Advertisement

Whenever public works construction projects require advertisement, DPMC and the State contracting agencies must advertise for bids. Bids may be solicited in one or more of the following methods:

- Advertisements in newspapers
- Direct mailings to classified firms
- Design and construction publications and trade journals covering the construction industry in New Jersey
- Written notices to New Jersey professional societies and associations¹⁹⁰

2. Single Contracting Bid Evaluation

DPMC, which is authorized by law to award contracts for such work, must advertise and receive bids in one or both of the following manners: (1) separate bids for each trade or (2) bids for all the work and materials required to complete the project, to be included in a single over-all contract, in which case there shall be set forth in the bid the name(s) of all subcontractors to whom the bidder will subcontract for the furnishing of any of the work and materials specified in branches of work.

3. Contract Award

In the case of bids separated by type of work, the contract is awarded to the lowest bidder for each branch. Where the trades are bid together, the contract is awarded to the lowest bidder overall.



¹⁸⁹ N.J. Stat. § 52:34.7.

¹⁹⁰ N.J. Admin. Code § 17:19-6.3.

III. Architecture and Engineering Services Procurement

Contracts for professional architectural, engineering, and land surveying services are awarded to firms on the prequalification list. However, notice of the project must be publicly announced prior to the award. The contract is negotiated with a prequalified consultant with consideration to the firm's demonstrated competence and qualifications for the type of professional services required, and at fair and reasonable compensation.¹⁹¹

The consultant selection procedures include the following steps:

- Verify the qualifications of firms interested in providing consultant services to the State contracting agencies.
- Advertise the project, which may include other solicitation requirements.
- Screen all interested and qualified firms.
- Apply evaluation procedures using a selection committee.
- Obtain final approval of the recommended award from the DPMC Director.¹⁹²

A. Prequalification Determination

The consultant selection process for prequalified firms is based on a combination of technical qualifications and cost proposals.¹⁹³ Any firm seeking prequalification must have at least one principal on its staff who has been engaged in active private practice with full financial responsibility for a period of two years immediately preceding the request for prequalification.¹⁹⁴ To be considered for a professional services contract award, a consultant must submit a prequalification form providing comprehensive information on the management of the firm, its financial history, type and value of past projects, licensed and technical staff, and other factors deemed relevant by DPMC.

The application information is used by DPMC to establish the professional disciplines for which the firm is qualified and the maximum estimated costs the firm can be awarded. The firm's prequalification is effective for a 24-month period.¹⁹⁵

DPMC assigns a level, or project rating limit, that is justified by applicable overall experience, length of time in business, prior experience, the number of licensed New Jersey principals, professional and technical staffing, and management depth. At minimum, the consultant must have three public or private projects (two completed and one in progress) that equal or exceed the specified prequalification dollar level in the discipline requested, before being approved for that

¹⁹¹ N.J. Stat. § 52:34-9.1.

¹⁹² N.J. Admin. Code § 17:19-3.2.

¹⁹³ N.J. Admin. Code § 17:19-3.1.

¹⁹⁴ N.J. Admin. Code § 17:19-3.3(g).

¹⁹⁵ N.J. Admin. Code § 17:19-3.3(a).



prequalification level.¹⁹⁶ The prequalification level assigned does not necessarily reflect the level on which a consultant has performed for other clients.

Firms may increase their technical qualification for a specific project by entering joint ventures with other firms. Each individual firm of the joint venture must be separately prequalified. One of the firms must have been prequalified at the level stipulated for the project.¹⁹⁷

If a firm does not agree with its assigned prequalification or the denial of its prequalification, it may request reconsideration. Firms may also challenge the project rating limit. Written results of this review will be provided to the firm. If the firm still does not agree with DPMC's prequalification determination, it may appeal to the Director of the DPMC, whose decision is final.¹⁹⁸

B. Advertisement

The State contracting agencies must publicly advertise solicitations for proposals and expressions of interest for professional, architectural, engineering, and land surveying services when the contract estimated value is above the informal threshold.¹⁹⁹ The advertisement must include a statement of the criteria that will be used to evaluate the technical qualifications of professional firms and determine the order of preference to designate the firms most highly qualified to perform the services. This statement must either explicitly describe those criteria or identify them by reference to the pertinent regulations. The advertisement must also include notice that proposers must be pre-qualified.

DPMC may publicly solicit the interest of prequalified firms to provide professional services by advertising in one or more of the following ways:

- Design and construction publications and trade journals covering the construction industry in New Jersey
- Newspapers
- Written notice to New Jersey professional societies
- Direct mailings to prequalified firms
- Electronic means

Public notification must include instructions specifying any special information or experience that a firm must submit. Failure to respond within the time limits noted in the advertisement is cause for rejection of a firm's application.²⁰⁰

¹⁹⁶ N.J. Admin. Code § 17:19-3.3(h).

¹⁹⁷ N.J. Admin. Code § 17:19-3.3(i).

¹⁹⁸ N.J. Admin. Code § 17:19-3.3(e).

¹⁹⁹ N.J. Stat. § 52:34-9.4.

²⁰⁰ N.J. Admin. Code § 17:19-3.4.



For any firm proposing to submit bids on public work requiring the DPMC classification, a final project performance evaluation (FPPE) will be determined.²⁰¹ The FPPE is the mathematical average of all interim performance reviews for a contractor or a consultant on a completed project.²⁰²

For firms with no prior public work experience with the State contracting agencies, the FPPE is based on an evaluation of the firm's references and experience. DPMC may choose to require that the owner certify that the projects referenced by the firm have been completed in a satisfactory manner. For firms with prior public work experience with the State contracting agencies, the FPPE is based on the project evaluations submitted to DPMC if performance reviews were appropriately prepared by the State.²⁰³

C. Project Selection Procedures for Services under \$400,000

Projects that have an anticipated cost for services under \$400,000 may be referred to as routine.²⁰⁴ Routine projects are only open to those prequalified firms who have been invited to participate upon being randomly selected from DPMC's database. Criteria such as the consultant's geographical location, discipline, and "building type" experience may be used to determine the final pool of eligible consultants.²⁰⁵

The selection process is initiated when DPMC receives a request from a State contracting agency for consultant services that meet the criteria for a routine project. Upon the receipt or development of a project scope of work, DPMC then creates a selection committee to select a professional services consultant for the project. DPMC and/or the selection committee will develop specific selection evaluation and ranking criteria to be used for the selection.²⁰⁶

DPMC advertises each routine contract electronically and/or in newspapers before the random selection of firms for that contract. The advertisement/notice states the date on which DPMC will be randomly selecting the prequalified firms from which proposals will be solicited. The advertisement/notice must specify the prequalification disciplines and project rating limit required for the project and the criteria DPMC will use in the evaluation and ranking of the proposals submitted from interested firms.²⁰⁷

DPMC performs a computer-generated, random selection of firms from the pool of prequalified consultants specified in the advertisement and solicits technical proposals and sealed cost proposals from the list of randomly generated firms. Pre-proposal conferences, site visits, and

²⁰¹ N.J. Admin. Code § 17:19-2.5.

²⁰² N.J. Admin. Code § 17:19-1.1.

²⁰³ N.J. Admin. Code § 17:19-3.5.

²⁰⁴ N.J. Admin. Code § 17:19-1.1.

²⁰⁵ See DPMC, https://www.state.nj.us/treasury/dpmc/project_routine_advertisements.shtml.

²⁰⁶ N.J. Admin. Code § 17:19-3.7(b).

²⁰⁷ N.J. Admin. Code § 17:19-3.7(c).



interviews may be scheduled. Technical proposals are evaluated and ranked in accordance with the specific evaluation criteria for the project.²⁰⁸

The selection process regarding the sealed cost proposals will be in accordance with the major project selection procedures discussed below in *Section D*. The selection committee recommends the Director select the highest ranked firm whose cost proposal is determined to be fair and reasonable.²⁰⁹

D. Project Selection Procedures for Services over \$400,000

Major projects have an anticipated cost for services greater than \$400,000 or are complex or of a specialized nature, which includes technical work requiring special licenses or certifications, new building technologies or processes, historical renovations, the potential for unforeseeable conditions that may significantly increase the project cost, the need for increased competition, and/or the need to combine several smaller components or projects to ensure effective coordination and completion of the project, as determined by the Director.²¹⁰ As with routine projects, major projects require that firms be appropriately prequalified to submit a proposal.²¹¹ Solicitations for major projects may be publicly advertised.

Site visits, pre-interview conferences, and pre-proposal conferences may be scheduled. A selection committee will be established to select a consultant for a specific project. The selection committee develops the selection evaluation criteria for the project, and these criteria are included in the public notice of the project. The evaluation criteria for each project will generally include the following:

- Firm's experience on projects of a similar size and nature
- Project team experience and past project performance
- Project approach
- Understanding of project needs
- Project schedule, budget, and cost estimating
- Other appropriate criteria²¹²

The evaluation process may include specific project questionnaire forms, technical proposals, past performance evaluations, and interviews. Each individual member of the selection committee evaluates all submissions based on specific criteria and prepares a selection evaluation. The selection coordinator compiles all evaluation scores and prepares a ranking. The chairperson then calls for a meeting of the selection committee to review the ranking and prepare a shortlist of the

²⁰⁸ N.J. Admin. Code § 17:19-3.7.

²⁰⁹ N.J. Admin. Code § 17:19-3.7.

²¹⁰ N.J. Admin. Code § 17:19-1.1. Major projects have a size threshold above Routine Projects. See https://www.state.nj.us/treasury/dpmc/contract_project_adv.shtml for the current major projects threshold.

²¹¹ DPMC, https://www.state.nj.us/treasury/dpmc/project_major_advertisements.shtml.

²¹² N.J. Admin. Code § 17:19-3.6.



appropriate number of firms for further consideration. Additional technical and/or organizational information may be requested from the firms before a final ranking is prepared. When the selection committee completes the ranking, cost proposals are solicited from the highest ranked firms.²¹³

Sealed cost proposals are accepted on a pre-determined date and time by the selection coordinator. The selection committee will meet to open and review the cost proposals. Upon completion of the review, the selection committee may begin negotiations with the highest ranked firm(s) for a cost proposal that is fair and reasonable. The selection committee may request additional meetings, as well as additional technical, organizational, or cost data from any of the firms. If a satisfactory conclusion cannot be reached with the highest ranked firm(s), the selection committee may negotiate with the next highest ranked firm(s). The selection committee recommends to the Director the selection of the firm that is the highest ranked and whose cost proposal is fair and reasonable to the State.²¹⁴

E. Term Contracts Selection Procedures

A term contract is awarded to a consultant for a specific period based on the qualifications of the consultant firm and/or hourly rates for specific service categories.²¹⁵ Businesses desiring to perform certain consultant services for DPMC may submit proposals for term contracts. Term contracts may be used by DPMC to serve a variety of consultant needs.

The initiation of the selection process may be in accordance with the major or the routine project selection procedures, discussed above in *Section C* and *Section D*. Pre-proposal conferences and interviews may be scheduled. Technical proposals are evaluated and ranked in accordance with the specific technical criteria for the project. The selection process regarding the sealed cost proposals is the same as the major project selection procedures, based on hourly daily rates or other methods for determining costs over a specific period. The selection committee has the same responsibility to recommend to the Director the selection of the highest ranked firm whose costs are fair and reasonable to the State, as it does when the major project selection process is used.²¹⁶

The Director will award term contracts to consultants who have complied with the terms and conditions of the term contract request for proposal and have been determined by the selection committee to be the best qualified. Term contracts may also be used to provide consultant services to State agencies in specific service categories for a specific period.²¹⁷

The agency consultant program provides a selection process for architectural, engineering, or other consultant services to assist State contracting agencies and DPMC in the planning of construction projects, developing scopes of work, investigating construction-related problems, designing small

²¹³ N.J. Admin. Code § 17:19-3.6.

²¹⁴ N.J. Admin. Code § 17:19-3.6.

²¹⁵ N.J. Admin. Code § 17:19-1.1.

²¹⁶ N.J. Admin. Code § 17:19-3.9.

²¹⁷ N.J. Admin. Code § 17:19-3.8.



projects, and administering small construction projects. DPMC may delegate to the State contracting agencies the authority to award projects for consultants to perform professional services for smaller construction projects. The State contracting agency must evaluate and rank the technical submissions according to selection procedures established by DPMC policy. A fee limit for each work order will be established by DPMC, including a fee limit threshold per year. The State contracting agency monitors and manages all activities of the consultant. Financial data and project files must be made available to DPMC's auditors.²¹⁸

IV. Professional Services Procurement

The Department of the Treasury, Division of Purchase and Property, sets policy and advises, facilitates, approves, and monitors the State's procurement of professional services for the Executive Branch.²¹⁹ Professional Services contracts are awarded at two dollar thresholds, and the procedures for procurement at these two thresholds differ.

A. Professional Services Contracts under \$40,000

Small professional services contracts below a certain dollar threshold may be delegated to the State. A limited dollar order (LDO) can be issued without price competition for a purchase of less than or equal to \$1,000. No competitive quotes or vendor forms are required.²²⁰ Three verbal quotations are required for all transactions over \$1,000 and up to \$17,500. The State contracting agencies are responsible for ensuring that the competition is fair. To submit quotes, all vendors must be provided with the same New Jersey Standard Terms and Conditions, including the same information on the proposed service or supply needed.²²¹

A minimum of three written proposals are to be solicited for purchases over \$17,500 and up to \$40,000.²²² Telephone quotes are not accepted. Each State contracting agency is encouraged to place the solicitation on its website to increase competition for needed supplies and services. The Request for Proposal must be simultaneously distributed to a minimum of three vendors in sufficient time for the vendors to review, complete, and submit proposals. No quotes can be accepted if received after the return date and time noted on the Request for Proposal.²²³

²¹⁸ N.J. Admin. Code § 17:19-3.10.

²¹⁹ The professional services circular does not apply to procurement by State colleges and universities, New Jersey Transit, and the Attorney General's procurement of expert witnesses and legal services, or various other State contracting agencies with procurement authority.

²²⁰ Agencies are encouraged to use the State's Purchasing Card ("P-Card") to process transactions for \$1,000 or less. When a P-Card is not accepted by a vendor, the agency should use the LDO document type in MACS-E for such purchases.

²²¹ Division Of Purchase and Property, Circular No.: 16-02-DPP, Delegated Purchasing Authority (DPA).

²²² Division Of Purchase and Property, Circular No.: 16-02-DPP, Delegated Purchasing Authority (DPA).

²²³ Division Of Purchase and Property, Circular No.: 16-02-DPP, Delegated Purchasing Authority (DPA).



B. Professional Services Contracts over \$40,000

1. Advertising

Advertisement is required when the contract amount is expected to exceed the public bidding threshold or is not subject to the relevant statutory exceptions.²²⁴ To provide best notice to bidders, public notice of the bidding opportunity must be placed on DPP's website and in other media, including newspapers, as required by law, and determined by the State Treasurer. Advertisements must be made a minimum of seven business days in advance of the announced deadline for receipt of proposals to encourage free and open competition. In addition to statutorily mandated public advertising, DPP must also publish notices of bidding opportunities on the DPP website.²²⁵

DPP offers online self-registration as a service to vendors interested in competing for State contracts to be awarded by DPP. Vendors and other interested parties can register to receive direct email notices pertaining to DPP's procurements for goods or services based on specific commodity classes or codes.²²⁶

2. Proposal Evaluation

Proposals are typically evaluated either of two ways, with a recommendation for proposed award made to the Director of DPP upon conclusion of the evaluation. The first method is performed by an evaluation committee appointed by the Director prior to the date of the scheduled proposal opening event. No member of the evaluation committee may have any personal, financial, or familial interest that would affect his or her ability to evaluate the proposals objectively and impartially. Each member of the evaluation committee must certify in writing that no such real or apparent conflict of interest exists. Members of evaluation committees must conduct evaluations of proposals objectively, impartially, and with propriety. The Director retains the discretion to reject proposed members, remove sitting members, and add additional members to an evaluation committee.

The second method of evaluation is performed by a DPP staff member assigned to conduct the procurement.²²⁷ Regardless of whether the proposals received are evaluated by an evaluation committee or a DPP staff member, the proposals are initially reviewed for compliance with the mandatory requirements for submission of a proposal. The proposals that comply with the mandatory submission requirements are then evaluated by the evaluation committee or the DPP staff member against the requirements of the RFP. Upon conclusion of the proposal evaluation, the committee or the assigned DPP staff member prepares a written report with a recommendation for award based on its evaluation of the proposals for the Director's consideration.²²⁸

²²⁴ N.J. Stat. § 52:34-6, 9, or 10.

²²⁵ N.J. Admin. Code § 17:12-2.1.

²²⁶ N.J. Admin. Code § 17:12-2.1.

²²⁷ N.J. Admin. Code § 17:12-2.7.

²²⁸ N.J. Admin. Code § 17:12-2.7.



All recommendations, whether prepared by an evaluation committee or by a DPP staff member assigned to conduct the procurement, are advisory in nature and not binding upon the Director.²²⁹

3. Contract Award

The Director reviews the award recommendation and documentation presented by the evaluation committee or the assigned DPP staff member and may accept, modify, or reject the recommendation or return a modified award recommendation and documentation for additional consideration. The Director retains the discretion to issue a notice of intent to award to a responsible bidder whose conforming proposal is most advantageous to the State, according to price, and other factors, or to reject all proposals when the Director determines it is in the public interest or the State's interest to do so.²³⁰

Prior to submitting a procurement request to DPP, the requesting State contracting agency should obtain the Office of Management and Budget's (OMB's) and the Office of Information Technology's (OIT's) approval, either in written or electronic form. Professional services are subject to OMB approval if they are proposed to be with private sector vendors or with a state college or university and are likely to exceed \$250,000 or have no dollar amount specified. Professional services related to information technology are subject to OIT approval regardless of dollar amount.²³¹

V. Goods and Services Procurement

The DPP Director may delegate goods and services purchases to the State.²³² Effective July 1, 2020, the delegated purchasing authority (DPA) threshold increased from \$40,000, the threshold at the time of the July 1, 2015 to June 30, 2020 study period, to \$44,000 for goods and services.²³³ However, in the event the Governor declares an emergency through an executive order, the DPA threshold will increase to \$100,000 for necessary supplies and services purchased during the declared emergency period that are related to the declared emergency.²³⁴ The DPA threshold may also be raised in the event exceptional circumstances.²³⁵

²²⁹ N.J. Admin. Code § 17:12-2.7.

²³⁰ N.J. Admin. Code § 17:12-2.7.

²³¹ DPP/OMB/OIT, Circular 14-07, Professional Services: Review, Control, Monitoring, and Extensions.

²³² N.J. Stat. § 52:25-23.

²³³ The delegated purchasing authority (DPA) for goods and services during the July 1, 2015 to June 30, 2020 study period was \$40,000.

²³⁴ Division Of Purchase and Property, Circular No.: 21-09-DPP, Delegated Purchasing Authority (DPA) For Goods and Services.

²³⁵ Division of Purchase and Property, Circular No.: 16-02-DPP, Delegated Purchasing Authority (DPA).



A. Small Goods and Services Procurement under \$40,000

1. Delegated Purchasing Authority Thresholds

Purchases below a certain dollar threshold may be delegated to the State contracting agencies. A limited dollar order (LDO) can be issued without price competition for a purchase of \$1,000 or less. No competitive quotes or vendor forms are required.²³⁶ Three verbal quotations are required for all transactions over \$1,000 and up to \$17,500. The awarding entity is responsible for ensuring that the competition is fair. To submit quotes, all vendors must be provided with the same New Jersey Standard Terms and Conditions, including the same information on the proposed service or goods needed.²³⁷

At minimum, three written quotes must be solicited for purchases over \$17,500 and up to \$40,000.²³⁸ Telephone quotes are not accepted. It is recommended that the solicitations are posted on the website to increase competition. The Request for Proposal must be forwarded simultaneously to a minimum of three vendors and allowed sufficient time to review, complete, and submit proposals. No quotes can be accepted if received after the return date and time noted on the Request for Proposal.²³⁹

2. Delegated Purchasing Authority Evaluation and Award Procedures

It is the State's responsibility to establish internal control procedures for the acceptance, security, review, and evaluation of quotes solicited under the delegated purchasing authority. These procedures must include time-stamping quotes, maintaining quotes in a secure location, no reviewing of quotes until the time specified for submittal has passed, and no acceptance of quotes after the time specified for submittal has passed.²⁴⁰

The vendor with the lowest price is entitled to the award if its quote fully conforms to the specifications and the terms and conditions. If the lowest quote fails to fully conform, it will be deemed "non-responsive" and ineligible for award. The lowest bidder can be bypassed in favor of a higher priced responsive vendor if the awarding entity determines that the higher priced responsive vendor's quote better serves the State's interest. If an award is made to a vendor other than the lowest responsive vendor, the selection of the vendor must include a substantive justification. If a vendor's quote is found to be non-responsive or is bypassed, the non-responsive vendor and/or any bypassed vendor must be notified in writing of the reason for the non-responsive or bypass determination.²⁴¹

²³⁶ Agencies are encouraged to use the State's Purchasing Card ("P-Card") to process transactions for \$1,000 or less. When a P-Card is not accepted by a vendor, the agency should use the LDO document type in MACS-E for such purchases.

²³⁷ Division Of Purchase and Property, Circular No.: 21-09-DPP, Delegated Purchasing Authority (DPA) For Goods and Services.

²³⁸ Division Of Purchase and Property, Circular No.: 21-09-DPP, Delegated Purchasing Authority (DPA) For Goods and Services.

²³⁹ Division Of Purchase and Property, Circular No.: 21-09-DPP, Delegated Purchasing Authority (DPA) For Goods and Services.

²⁴⁰ Division Of Purchase and Property, Circular No.: 21-09-DPP, Delegated Purchasing Authority (DPA) For Goods and Services.

²⁴¹ Division Of Purchase and Property, Circular No.: 21-09-DPP, Delegated Purchasing Authority (DPA) For Goods and Services.



If identical pricing is offered by more than one responsive vendor and the quality of the supply or service offered is identical, the following factors listed in order of priority must be applied in determining the vendor to which the award will be made:

- Tie-breaking provisions set forth in the quote
- Usable cash or volume-based discount that renders one quote more favorably priced
- Delivery advantage, specifically shorter proposed timeframes for delivery and/or closer proximity to the point of delivery
- Active registration as a small business at the time of quote opening or a veteran-owned business
- In-state location²⁴²

B. Small Goods and Services Procurement Procurements over \$40,000

1. Advertising Procedures

Advertising is required when the contract amount is expected to exceed the public bidding threshold or is not subject to the relevant statutory exceptions.²⁴³ To provide best notice to bidders, public notice of the bidding opportunity must be placed on DPP's website and in other media, including newspapers, as required by law and determined by the State Treasurer. Opportunities must be advertised a minimum of seven business days before the announced deadline for receipt of bids. In addition to statutorily mandated public advertising, DPP must also publish notices of bidding opportunities on its website.²⁴⁴

As a service to vendors interested in competing for State contracts to be awarded by DPP, online self-registration is provided by DPP. Vendors and other interested parties can register to receive direct email notices pertaining to DPP procurements for goods and services based on specific commodity classes or codes.²⁴⁵

2. Evaluation of Responses and Award of Contracts

Once responses are evaluated, the DPP evaluator or evaluation committee prepares a written report with an award recommendation for the Director's consideration. The Director reviews the award recommendation and documentation and may accept, modify, or reject it, or return a modified award recommendation and documentation for additional consideration.²⁴⁶

²⁴² Division Of Purchase and Property, Circular No.: 21-09-DPP, Delegated Purchasing Authority (DPA) For Goods and Services.

²⁴³ NJ Stat. § 52:34-6, 9, or 10.

²⁴⁴ N.J. Admin. Code § 17:12-2.1.

²⁴⁵ N.J. Admin. Code § 17:12-2.1.

²⁴⁶ N.J. Admin. Code § 17:12-2.9.



The Director may award a contract to the bidder submitting the lowest price proposal when it is determined that the best value is expected to result. When using the lowest price process, the following apply:

- The factors and significant subfactors that establish the requirements of responsiveness must be set forth in the RFP. The RFP will specify that award will be made based on the lowest calculated price of proposals meeting the factors and significant subfactors in the RFP.²⁴⁷
- Proposals are evaluated for responsiveness and ranked using only cost/price factors. When pricing is calculated or ranked using formulas, utility models, or market baskets, the assigned DPP staff member must determine, document, and date-stamp such formulas, utility models, or market basket methodologies before proposals are opened.
- Bypass of the low bidder is not permitted, except for poor performance.²⁴⁸

VI. Other Procurement Methods

A. Cooperative Purchasing

A contract awarded by DPP may be made available for use by intrastate cooperative purchasing participants such as local government authorities, State colleges, or quasi-State agencies. Eligible agencies and the awarded vendor and awarding State contracting agency must adhere to the terms and pricing of the State contract.

The DPP Director may also utilize contracts procured by a nationally recognized cooperative procurement entity. The Director may also award a participating agreement, and agencies may utilize the contract without bidding for the goods or services.

B. Exceptions to Competitive Procurement Process

Goods and services are to be procured, to the extent feasible, through publicly advertised bidding. Examples of situations in which a waiver of advertising may be granted are described below.

1. Sole Source Purchases

If only one source can provide the supply or service, a memorandum of sole source justification must be prepared. The determination is based on a demonstrable need that can be satisfied by only one vendor. A “best qualified” vendor is not the only vendor who can provide the supply or service. An accompanying letter from the vendor must also be received indicating why the vendor is the only one who can provide the supplies or services.²⁴⁹



²⁴⁷ “Request for Proposal” (RFP) means all documents, whether attached or incorporated by reference, used for a publicly advertised procurement process that solicits proposals or offers to provide the goods and/or services specified therein. N.J. Admin. Code § 17:12-1.3.

²⁴⁸ N.J. Admin. Code § 17:12-2.9.

²⁴⁹ Division of Purchase and Property, Circular No.: 18-14-DPP, Requests for Waiver of Advertising.

A thorough explanation must be included regarding the attempts that were made to obtain competition. Sole source justification is a legal determination subject to the review and approval of the Attorney General's office.²⁵⁰

2. Emergency Purchases

When public exigency requires the immediate delivery of the goods or performance of the service, waivers may be granted. Public exigency includes the following conditions: (1) existence of a potential health or safety hazard, (2) homeland security or other purchases of goods and services that cannot be publicly advertised because of an overriding State safety or security concern, or (3) critical agency mandate or statutory or operational requirement that must be fulfilled immediately.²⁵¹

3. Waiver Procedure

Advertisement waivers may be granted in situations including: (1) services to be performed are of a technical and professional nature,²⁵² (2) procurements managed by DPP, for which after advertised bidding, prices for supplies, or services are not reasonable or have not been independently determined in open competition, and (3) the equipment is of a technical nature, and its procurement without advertising is necessary to assure standardization and interchangeability of parts.²⁵³

Pre-approval to use the waiver process must be requested from DPP before proceeding with any waived contract. For each waiver submitted to DPP, the State contracting agency must designate a State contract manager for the procurement who is responsible for the management and administration of the contract. Upon approval of the waiver by the treasurer, the State contract manager is responsible for coordinating all aspects of the State contracting agency's use of the contract.²⁵⁴

Agencies are required to seek as much competition as is reasonable and practical under the circumstances for each waiver requested. When competition is required, the State contracting agency must attempt to obtain at least three written quotations for the services and/or products contemplated under the waiver.²⁵⁵

The competitive process must be fair and provide all vendors solicited with the same opportunity to bid. The process must also provide bidders with the same information concerning the work to be performed and the terms and conditions of the proposed contract to ensure all vendors are

²⁵⁰ Division of Purchase and Property, Circular No.: 18-14-DPP, Requests for Waiver of Advertising.

²⁵¹ Division of Purchase and Property, Circular No.: 18-14-DPP, Requests for Waiver of Advertising.

²⁵² Division of Purchase and Property, Circular No.: 18-14-DPP, Requests for Waiver of Advertising.

²⁵³ Division of Purchase and Property, Circular No.: 18-14-DPP, Requests for Waiver of Advertising.

²⁵⁴ Division of Purchase and Property, Circular No.: 18-14-DPP, Requests for Waiver of Advertising.

²⁵⁵ Division of Purchase and Property, Circular No.: 18-14-DPP, Requests for Waiver of Advertising.



treated fairly and have the same opportunity to respond to the same work requirements under the same terms and conditions.

For all waivers, the State contracting agency must provide a thorough evaluation and analysis of the pricing and technical proposals submitted by all bidders to support the award of the contract to the selected vendor. DPP strongly recommends that communication with vendors throughout the procurement process, including the initial solicitation, be conducted in writing. The preferred method for soliciting is also in writing.²⁵⁶

VII. Set-Aside Programs

A. Small Business Program

State law establishes a set-aside program requiring that State agencies make a good faith effort to award State contracts and subcontracts to eligible small businesses.²⁵⁷ At least 25% of the total dollar value of State contracts is to be set aside for small businesses.²⁵⁸ This percentage goal is an overall program goal for each State contracting agency, and each State contracting agency is expected to apply its business judgment when establishing set-aside goals for individual contracts.

The 25% small business goal for goods and services contracts is satisfied as follows:

- At least 10% must be awarded to small businesses whose gross revenues do not exceed \$500,000.
- At least an additional 15% must be awarded to small businesses whose gross revenues do not exceed \$12 million or the applicable federal revenue standards established at 13 CFR 121.201, whichever is higher.²⁵⁹

For design and construction contracts, the goal is to award 25% of the total contract value to either prime contractors or subcontractors that qualify as small businesses with revenues that do not exceed the annual revenue standards established by the federal standard at 13 CFR 121.201.²⁶⁰

Percentages are measured by the total dollar value of all set-aside contracts in comparison to the total dollar value of all publicly advertised contracts awarded by the agency in a fiscal year.²⁶¹

²⁵⁶ Division of Purchase and Property, Circular No.: 18-14-DPP, Requests for Waiver of Advertising.

²⁵⁷ N.J. Stat. § 52:32-17 et seq., P.L. 2008, c. 27, and Executive Order No. 71, dated October 2, 2003.

²⁵⁸ Executive Order No. 71 (2003).

²⁵⁹ N.J. Admin. Code § 17:13-4.1.

²⁶⁰ N.J. Admin. Code § 17:13-4.1.

²⁶¹ N.J. Admin. Code § 17:13-4.1.



1. Small Business Set Asides

The State is to review its schedule of contracting opportunities and determine which upcoming contracts will be offered as part of a set-aside program. A contract may be considered suitable as a set-aside when there is a reasonable expectation that responses may be obtained from at least three qualified eligible businesses. The designation as a set-aside contract must be made before the solicitation is publicly advertised.²⁶²

Public advertisement of the set-aside contracting opportunity must be consistent with the State contracting agencies.²⁶³

2. Subcontracting Target Program

The State may establish a subcontracting target program in lieu of or as a supplement to the small business set-aside program.²⁶⁴ Each State contracting agency is to establish written procedures and maintain records to define, document, and report subcontracts awarded. The State must review its schedule of contracting opportunities and establish a method of determining which upcoming contracts are suitable for the subcontracting target program. Factors for consideration include the total dollar amount of the project, project subcontracting opportunities, and the number of eligible businesses in geographical proximity to the project site. The designation of a particular solicitation as a small business set-aside subcontracting opportunity may be made prior to the public advertisement for bids or established pursuant to addenda.²⁶⁵

3. Construction Project Goals

The State reviews projects to determine if small business set-aside goals are appropriate or can reasonably be attained given the elements of the job. The State contracting agency may review the list of classified contractors to determine the number of eligible small businesses that may reasonably be expected to participate in the project, considering the geographic location, required trades, and estimated dollar value of the project.

The SBE goal for construction projects can be met either at the prime contract or subcontract level. Public advertisement includes notice to prospective bidders disclosing the SBE goal for the contract. Bidders must provide sufficient documentation of good faith efforts to meet the SBE set-aside goal, either with their response or within 10 days of a request by the State contracting agency. Failure to comply may preclude the award of a contract.²⁶⁶

²⁶² N.J. Admin. Code § 17:13-4.1.

²⁶³ Or the applicable Federal revenue standards established at 13 CFR 121.201, whichever is higher.

²⁶⁴ N.J. Admin. Code § 17:13-4.2.

²⁶⁵ N.J. Admin. Code § 17:13-4.2.

²⁶⁶ N.J. Admin. Code § 17:13-4.2.



4. Goods and Services Target Goals

Public advertisement for goods and services must include a notice to prospective bidders identifying small business categories applicable to the RFP. If a goods and services RFP is designated as a small business set-aside subcontracting opportunity, the RFP contains a detailed notice to bidders advising that the bidding package includes a subcontractor utilization document that must be completed and included as part of the bidder's proposal. Included are the good faith steps the bidder would need to take if the targets were not met.²⁶⁷

When requested, bidders must provide sufficient documentation of a good faith effort either with the response or within seven days. Failure to comply precludes award of a contract to a bidder. Each bidder awarded a contract for a procurement that contains the set-aside subcontracting goal requirement must fully cooperate in any studies or surveys that may be conducted to determine the extent of the bidder's compliance.²⁶⁸

5. Good Faith Efforts

The following actions must be taken by a bidder to establish a good faith effort to solicit and award subcontracts to eligible small businesses, as established in the RFP:

- The bidder must attempt to locate qualified potential small business subcontractors.
- The bidder must request a listing of small businesses from the State if none are known to the bidder.
- The bidder must keep a record of his or her efforts, including the names of businesses contacted and the means and results of such contacts.
- The bidder must provide all potential subcontractors with detailed information regarding the specifications.
- The bidder must attempt to negotiate prices with potential subcontractors submitting higher than acceptable price quotes.

Bidders must maintain adequate records to document their good faith efforts to solicit and award subcontracts to eligible small businesses.²⁶⁹

B. Service-Disabled Veteran-Owned Business Program

The State established a race-neutral set-aside program for service-disabled, veteran-owned businesses (SDVOBs) in 2019. SDVOBs must be independently owned and operated to be eligible for the program. Its management must own and control at least a 51% interest in the business and be responsible for its daily and long-term operation. The business must also be incorporated or registered to do business in the State and have its principal place of business there; and the business



²⁶⁷ N.J. Admin. Code § 17:13-4.2.

²⁶⁸ N.J. Admin. Code § 17:13-4.2.

²⁶⁹ N.J. Admin. Code § 17:13-4.3.

owner must have federal certification from the Department of Veteran's Affairs as having a service-connected disability.²⁷⁰

1. SDVOB Set-Aside

The goal of the State's set-aside program is to award at least three percent of the contracts awarded to eligible service-disabled, veteran-owned businesses. Percentages are measured by the total number of all set-aside contracts, including any subcontracts, compared to the total number of all publicly advertised contracts awarded in a fiscal year.²⁷¹

The State must designate specific set-aside contracts, establish written procedures, and maintain records to define, document, and report their good faith efforts to attain the established set-aside contracting goals.²⁷²

The schedule of contracting opportunities must be reviewed regularly, and a method of determining which upcoming contracts will be offered as part of the set-aside program must be established. As noted above, a contract may be suitable for a set-aside whenever it can be established that there is a reasonable expectation that bids can be obtained from at least three qualified eligible businesses capable of furnishing the specified products or services.²⁷³

The designation as a set-aside contract is made before bids are advertised. When the State determines that a contract is suitable for set-aside, the opportunity is publicly advertised, and the standard bidding procedures may be supplemented by special notification efforts to maximize participation. When portions of invitations for bids have been set aside for service-disabled, veteran-owned businesses, other bidders may be rejected.²⁷⁴

2. Subcontracting Program and Goals

The State may establish a subcontracting goal program in lieu of, or supplement to, the SDVOB set-aside program. Records must be maintained regarding subcontracts awarded pursuant to the program. The State must review its schedule of contracting opportunities and establish a method of determining which upcoming contracts are suitable for the subcontracting goal program. Factors to be considered include, but are not limited to, the minimum number of contractors assigned to a commodity code, the total dollar amount of the project and subcontracting opportunities on the project, and the number of available eligible businesses in geographical proximity to the project

²⁷⁰ N.J. Admin. Code § 17:14-4.1.

²⁷¹ N.J. Admin. Code § 17:14-4.1.

²⁷² N.J. Admin. Code § 17:14-4.1.

²⁷³ N.J. Admin. Code § 17:14-4.1.

²⁷⁴ N.J. Admin. Code § 17:14-4.1.



site. Designation of a particular opportunity as a service-disabled, veteran-owned business set-aside subcontracting opportunity must be made before the public advertisement.²⁷⁵

Bidders are to provide sufficient documentation of their good faith efforts to meet the set-aside subcontracting goal, either with their bid or when requested to do so. Failure to comply may preclude award of a contract to a bidder.²⁷⁶

To demonstrate a good faith effort to solicit and award subcontracts to eligible SDVOBs, bidders must take the following actions:

- Attempt to locate qualified potential service-disabled, veteran-owned business subcontractors.
- Consult the service-disabled, veteran-owned business database if none are known to the bidder.
- Keep a record of its efforts, including the names of businesses contacted and the means and results of such contacts, as well as documentation on any good faith efforts to solicit and award any subcontract to an eligible service-disabled, veteran-owned business.
- Provide all potential subcontractors with detailed information regarding the specifications.²⁷⁷

Each bidder awarded a contract for a procurement that contains the set-aside subcontracting goal requirement must fully cooperate in any studies or surveys that may be conducted to determine the extent of the bidder's compliance with SDVOB program requirements.²⁷⁸

VIII. Summary

Procurement is governed by State statutes, administrative code, and circulars. The procurement of goods and related services is centralized in the Department of the Treasury, Division of Purchase and Property (DPP). Building design and construction procurement is centralized in the Department of the Treasury, Division of Property Management and Construction (DPMC). Some of the Department of Treasury's procurement authority may be delegated to State contracting agencies.

Two race-neutral, set-aside programs promulgated in 2017 and 2019 require State contracting agencies to make a good faith effort to award prime contracts and subcontracts to eligible small businesses and service-disabled veteran-owned businesses. State statute requires all State contracting agencies to establish and administer a set-aside program to award at least 25% percent of the total dollars to small businesses and 3% to service-disabled, veteran-owned businesses. The effectiveness of the race-neutral programs in awarding contracts to the available M/WBEs and



²⁷⁵ N.J. Admin. Code § 17:14-4.2.

²⁷⁶ N.J. Admin. Code § 17:14-4.2.

²⁷⁷ N.J. Admin. Code § 17:14-4.3.

²⁷⁸ N.J. Admin. Code § 17:14-4.2.

minority and woman-owned SDVOBs is considered in *Chapter 3: Prime Contractor Utilization Analysis*.



CHAPTER 3: Prime Contractor Utilization Analysis

I. Introduction

This chapter documents the State contracting agencies' utilization of Minority and Woman-owned Business Enterprise (M/WBE) and non-minority male-owned business enterprise (non-M/WBE) prime contractors by ethnicity, gender, and industry during the July 1, 2015 to June 30, 2020 study period. For purposes of the analysis, the contracts the State contracting agencies awarded were classified into three industries—construction, professional services, and goods and services.²⁷⁹

- **Construction:** Construction, reconstruction, demolition, alteration, custom fabrication, repair, or maintenance done on any property or premises owned by the State or paid for from State funds.
- **Professional Services:** Architectural, engineering, land surveying, planning, environmental, and construction inspection services required for the development and construction of a project; and other services performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law or requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study.
- **Goods and Services:** Services not otherwise defined as professional services, and commodities and items procured by the State.



²⁷⁹ The architectural and engineering and professional services contracts were combined because the design consulting contracts, which included professional architectural, engineering, land surveying, planning, environmental, and construction inspection services required for the development and construction of a project were not readily differentiated in the contract records the 61 State contracting agencies provided.

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

Table 3.1: Business Ethnic and Gender Groups

Ethnicity and Gender Category	Definition
Asian American	Businesses owned by male and female Asian Americans
Black American	Businesses owned by male and female persons having origins with the black racial groups in Africa
Hispanic American	Businesses owned by male and female persons of Hispanic descent
American Indian and Alaskan Native	Businesses owned by male and female American Indians or Alaskan Natives
Caucasian Female	Businesses owned by Caucasian females
Non-minority Male	Businesses owned by Caucasian males, and businesses that could not be identified as minority or female-owned ²⁸⁰
Woman-owned Businesses	Businesses owned by females
Minority-owned Businesses	Businesses owned by male and female Black Americans, Asian Americans, Hispanic Americans, American Indians, and Alaskan Natives

II. Prime Contract Data Sources

Prime contract data for the 61 State contracting agencies listed in Table 3.2 were included in the analysis. The effort to compile data for the 61 State contracting agencies was challenging. The State did not have a single database housing prime contracts awarded during the study period, nor did the datasets identify the awarded contracts that required formal advertising.

To reconstruct a comprehensive dataset of prime contract records, the Department of the Treasury Division of Purchase and Property provided prime contractor data extracted from NJSTART, and the New Jersey Office of Information Technology (OIT) provided prime contract data extracted from the MACS-E, the Management Acquisition and Control System - Enhanced. NJSTART is an eProcurement system interfacing with NJCFS, the New Jersey Comprehensive Financial System, where the State contracting agencies' procurement transactions were to have been recorded during the study period. The provided dataset listed prime contract records for only 28 of the 61 State contracting agencies and the 15 divisions of the Department of Corrections, nine divisions of the

²⁸⁰ See *Section II: Prime Contract Data Sources* for the methodology employed to identify the ethnicity and gender of State contracting agencies' utilized prime contractors.



Department of Environmental Protection, nine divisions of the Department of Human Services, three divisions of the Department of Law and Public Safety, 14 divisions of the New Jersey Courts, and two divisions of the Department of the Treasury. It was anticipated that all prime contract records for the 61 State contracting agencies would be housed in either NJSTART or MACS-E.

When it was determined the data extracted from the NJSTART and MACS-E systems did not contain all prime contract data for the study period, an alternative data collection plan was constructed. The decision was to collect missing data directly from the State contracting agencies. Direct contact with 43 State contracting agencies was coordinated by the Department of the Treasury.

Data was received from 34²⁸¹ of the 43 State contracting agencies following a series of virtual meetings Mason Tillman facilitated to define the data requirements and assist the State contracting agencies' staff to identify the needed data contained within their procurement systems. Data was extracted from sources such as Oracle, Banner System/Excel, and Great Plains. Even though the data provided was in the format requested by Mason Tillman, there were issues with the sufficiency of the data identified during the data verification process.

Mason Tillman prepared a data verification report for each of the 34 agencies to decipher the data fields provided in each of the datasets. The data required to define each unique contract was described in the data verification report and used by the State contracting agencies to resubmit the required data.

The datasets, however, did not specify whether any prime contracts had been formally advertised. In the absence of this relevant information in the contract records, the determination of the contracts that had been subject to advertising was made based on the amount of the contract. The amount of the contract was used to classify each record as formal, which required advertising, or informal, which only required quotations.

There were 81,530 contracts which were within the threshold that only required quotations. Additionally, there were 23,115 unique prime contractors. Among those, 1,319 were M/WBEs.

The State contracting agencies that Mason Tillman requested data from for the analysis are listed in Table 3.2.²⁸²



²⁸¹ Data extracted from 33 of the State contracting agencies' files was used in the analysis.

²⁸² Note that many of the entities identified in Table 3.2 have their own statutes, regulations and policies which govern their procurement processes. Many of those statutes, regulations and policies are similar to the statutes, regulations and policies which govern Treasury procurement, and therefore, data was collected from these entities.

Table 3.2: State Departments, Agencies, Authorities, Commissions, Colleges, and Universities in the Study

Study Participants Providing Data
Casino Reinvestment Development Authority
Department of Agriculture
Department of Banking & Insurance
Department of Children & Families
Department of Community Affairs
Department of Corrections
Department of Education
Department of Environmental Protection
Department of Health
Department of Human Services
Department of Labor & Workforce Development
Department of Military & Veteran's Affairs
Department of State
Department of Transportation
Department of the Treasury
Fort Monmouth Economic Revitalization Authority
Kean University
Montclair State University
New Jersey Office of the Attorney General, Department of Law & Public Safety
New Jersey Board of Public Utility Commissioners
New Jersey Motor Vehicle Commission
New Jersey Casino Control Commission
New Jersey City University
New Jersey Administrative Office of the Courts
New Jersey Office of the Attorney General, Division of Consumer Affairs
New Jersey Economic Development Authority
New Jersey Educational Facilities Authority
New Jersey Health Care Facilities Financing Authority
New Jersey Higher Education Student Assistance Authority
New Jersey Highlands Council
New Jersey Housing & Mortgage Finance Agency
New Jersey Infrastructure Bank
New Jersey Institute of Technology
New Jersey Office of Legislative Services
New Jersey Pinelands Commission
New Jersey Redevelopment Authority



Study Participants Providing Data
New Jersey Schools Development Authority
New Jersey Sports & Exposition Authority
New Jersey State Commission of Investigation
New Jersey State Parole Board
New Jersey Office of the Attorney General, New Jersey State Police
New Jersey Transit
New Jersey Turnpike Authority
New Jersey Water Supply Authority
North Jersey District Water Supply
North Jersey Transportation Planning Authority
New Jersey Office of Information Technology
New Jersey Office of Homeland Security and Preparedness
Passaic Valley Sewerage Authority
Rowan University
Rowan University/Rutgers-Camden Board of Governors
Rutgers, The State University of New Jersey
South Jersey Port Corporation
South Jersey Transportation Authority
South Jersey Transportation Planning Organization
Stockton University
The College of New Jersey
Thomas Edison State University
Treasury - Division of Property Management and Construction
Treasury - Division of Purchase and Property
William Paterson University

III. Thresholds for Analysis

The State contracting agencies' prime contracts awarded in each industry are analyzed at three size thresholds: (1) all prime contracts including outliers, (2) formal prime contracts with the upper limits determined by a statistical calculation and the outliers removed, and (3) informal prime contracts. Outliers are the atypical contract values notably different from the rest of the contract values in the dataset. They can either be contract amounts that are too high or too low.



While formal prime contracts are defined by New Jersey Statute and the New Jersey Department of the Treasury's periodic adjustments, an upper limit was set for each industry by excluding outliers, which would otherwise skew the statistical findings. In this chapter, the analysis of M/WBE and non-M/WBE prime contractor utilization is presented with and without the outliers.

A. Formal Thresholds

In this analysis, contracts awarded over the DPA threshold, as defined by New Jersey Statute, are referred to as formal. Formal contracts typically require public notice and a specified advertisement period to solicit bids and proposals. The formal thresholds for each industry, as defined by New Jersey Statute are listed in Table 3.3.

Table 3.3: Formal Thresholds by Industry, July 1, 2015 to June 30, 2020

Industry	Formal Contract Threshold
Construction	\$65,000 and over
Professional Services	\$40,000 and over
Goods and Services	\$40,000 and over

B. Formal Thresholds Excluding Outliers

To perform the statistical analysis of formal procurement, the contract thresholds were reviewed to exclude outliers from the dataset. Since outliers also skew the statistical findings, the outliers were identified during the utilization analysis and removed from the statistical analysis presented in *Chapter 7: Prime Contractor Disparity Analysis*.

To determine the outliers, a distribution cluster analysis was undertaken to define the characteristics of the data given the wide range of contract amounts in the State contracting agencies' dataset. The 1.5x interquartile range (IQR) rule was applied²⁸³ to reveal any outliers present in the dataset.

Calculating the interquartile range required identifying the value of the contracts at both the first and third quartiles. The distance, or the difference in value, between the first and third quartile was designated as the interquartile range. The interquartile range multiplied by 1.5 was subtracted from the first quartile to identify the lower limit of the accepted contract amount. The value of 1.5 multiplied by the interquartile range was then added to the third quartile to identify the upper limit of the accepted contract amount. Contracts that had an amount outside the upper range were considered outliers and excluded from the disparity analysis of the formal contracts presented in *Chapter 7: Prime Contractor Disparity Analysis*.

The utilization analysis presented in this chapter includes the contract dataset with the outliers included to illustrate State contracting agencies' total spending during the study period. The high roller analysis in this chapter also includes the outliers. In addition, the contract dataset with the outliers removed is included in this chapter.



²⁸³ The interquartile range (IQR) is a measure of variability, based on dividing a data set into quartiles.

There are two formal thresholds: \$40,000 and over formal for professional services and goods and services, and \$65,000 and over for construction. Table 3.4 lists each industry's formal contract threshold with the outliers removed.

Table 3.4: Formal Contract Threshold by Industry, July 1, 2015 to June 30, 2020

Industry	Formal Contract Threshold
Construction	Over \$65,000 to \$5,710,000
Professional Services	Over \$40,000 to \$800,000
Goods and Services	Over \$40,000 to \$360,000

C. Informal Thresholds

New Jersey Statute and the New Jersey Department of the Treasury's periodic adjustments, Notice of Adjustment to Public Bidding Threshold define a threshold, for contracts procured under an agency's delegated purchasing authority, for each of the three industries. In this analysis, contracts awarded within the thresholds are referred to as informal. For informal contracts, only written quotations are required.²⁸⁴ The informal thresholds for each industry are listed in Table 3.5.

Table 3.5: Informal Contract Thresholds by Industry, July 1, 2015 to June 30, 2020

Industry	Informal Contract Threshold
Construction	\$65,000 and under
Professional Services	\$40,000 and under
Goods and Services	\$40,000 and under



²⁸⁴ DPP, Adjustment to Public Bidding Threshold, <https://www.state.nj.us/treasury/purchase/adjpubbid05.shtml>.

IV. Formal Prime Contractor Utilization

A. All Formal Prime Contractors

As shown in Table 3.6, the State contracting agencies issued 20,341 prime contracts above the formal threshold levels. The 20,341 formal prime contracts include the outliers.

The 20,341 total number of prime contracts included 3,041 for construction, 5,643 for professional services, and 11,657 for goods and services. The payments made by State contracting agencies during the study period totaled \$18,562,789,813 for all 20,341 prime contracts. Payments included \$11,297,693,432 for construction, \$4,032,598,413 for professional services, and \$3,232,497,969 for goods and services.

**Table 3.6: Total Formal Prime Contracts and Dollars Expended:
All Industries, July 1, 2015 to June 30, 2020**

Industry	Total Number of Contracts	Total Dollars Expended
Construction	3,041	\$11,297,693,432
Professional Services	5,643	\$4,032,598,413
Goods and Services	11,657	\$3,232,497,969
Total Expenditures	20,341	\$18,562,789,813

B. Distribution of Formal Prime Contract Dollars

All formal prime contracts, including the outliers, are included in the analysis of highly used contractors. State contracting agencies awarded a significant number of its prime contract dollars to a few vendors referred to as highly used. The “highly used” analysis shows the businesses that received approximately 70% of the total contract dollars. The “most highly used” analysis shows a subset of the “highly used” businesses that received approximately 50% of the total contract dollars in each industry. For the purposes of these tables, the dollar amounts and percentages have been rounded to the nearest whole number.

C. Highly Used Construction Prime Contractors

The presentation below of highly used prime contractors describes the utilization of prime contractors on all formally awarded construction contracts, including the outliers. State contracting agencies awarded 3,041 construction contracts during the study period. As listed in Table 3.7, State contracting agencies’ 3,041 construction prime contracts were awarded to 669 unique businesses.



Table 3.7: Construction Prime Contracts, July 1, 2015 to June 30, 2020

Total Prime Contracts	3,041
Total Utilized Businesses	669
Total Expenditures	\$11,297,693,432

Table 3.8 shows the distribution of State contracting agencies' construction prime contracts by the number of businesses. Thirty-five of the businesses received \$7,937,290,230 or 70% of the total construction prime contract dollars. These findings show that a small group of prime contractors received most of the construction prime contract dollars awarded by State contracting agencies.

**Table 3.8: Construction Prime Contracts Distributed by Number of Businesses
July 1, 2015 to June 30, 2020**

Businesses	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
35 Highly Used Businesses	\$7,937,290,230	70%	612	20%
634 Businesses	\$3,360,403,202	30%	2,429	80%
669 Total Businesses	\$11,297,693,432	100%	3,041	100%

Table 3.9 shows the ethnicity and gender of the most highly used construction prime contractors who received most construction prime contract dollars. The most highly used prime contractors were 16 non-minority male-owned businesses. These 16 contractors received 50% of the total construction prime contract dollars. The contracts received ranged in value from \$66,252 to \$247,985,000.

**Table 3.9: Top 16 Highly Used Construction Prime Contractors
July 1, 2015 to June 30, 2020**

Ethnicity/ Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Non-Minority Males	\$5,647,931,346	100%	412	100%

D. Highly Used Professional Services Prime Contractors

State contracting agencies awarded 5,643 formal professional services contracts during the study period. As listed in Table 3.10, these 5,643 professional services prime contracts were received by 1,311 unique businesses.



Table 3.10: Professional Services Prime Contracts, July 1, 2015 to June 30, 2020

Total Prime Contracts	5,643
Total Utilized Businesses	1,311
Total Expenditures	\$4,032,598,413

Table 3.11 shows the distribution of State contracting agencies' professional services prime contracts by the number of businesses. Forty-nine of the 1,311 businesses received \$2,815,748,715 or 70% of the total professional services prime contract dollars. These findings show that a small group of prime contractors received most of the professional services prime contract dollars awarded by State contracting agencies.

**Table 3.11: Professional Services Prime Contracts Distributed by Number of Businesses
July 1, 2015 to June 30, 2020**

Businesses	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
49 Highly Used Businesses	\$2,815,748,715	70%	1,416	25%
1,262 Businesses	\$1,216,849,698	30%	4,227	75%
1,311 Total Businesses	\$4,032,598,413	100%	5,643	100%

Table 3.12 shows the ethnicity and gender of the most highly used professional services prime contractors, who received the most professional services prime contract dollars. The most highly used prime contractors were 15 non-minority male-owned and two Asian American-owned businesses. These 17 contractors received 50% of the total professional services prime contract dollars. Of the 50% of total dollars, the distribution of dollars between these two groups were 95% and 5%, respectively. The contracts ranged in valued from \$41,032 to \$524,483,364.

**Table 3.12: Top 17 Highly Used Professional Services Prime Contractors
July 1, 2015 to June 30, 2020**

Ethnicity/ Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Non-Minority Males	\$1,921,200,283	95%	597	95%
Asian Americans	\$100,280,942	5%	33	5%

E. Highly Used Goods and Services Prime Contractors

State contracting agencies awarded 11,657 goods and services contracts during the study period. As listed in Table 3.13, State contracting agencies' 11,657 goods and services prime contracts were received by 2,764 unique businesses.



Table 3.13: Goods and Services Prime Contracts, July 1, 2015 to June 30, 2020

Total Prime Contracts	11,657
Total Utilized Businesses	2,764
Total Expenditures	\$3,232,497,969

Table 3.14 shows the distribution of State contracting agencies' goods and services prime contracts by the number of businesses. One hundred eighty-nine of the 2,764 businesses received \$2,262,349,982 or 70% of the total goods and services prime contract dollars. These findings show that a small group of prime contractors received most of the goods and services prime contract dollars awarded by State contracting agencies.

**Table 3.14: Goods and Services Prime Contracts Distributed by Number of Businesses
July 1, 2015 to June 30, 2020**

Businesses	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
189 Highly Used Businesses	\$2,262,349,982	70%	4,193	36%
2,575 Businesses	\$970,147,986	30%	7,464	64%
2,764 Total Businesses	\$3,232,497,969	100%	11,657	100%

Table 3.15 shows the ethnicity and gender of the most highly used goods and services prime contractors, who received the most goods and services prime contract dollars. The most highly used prime contractors were 42 non-minority male-owned, one Caucasian female-owned, and two Asian American-owned businesses. The highly used Caucasian female-owned businesses received less than 1% of these contracts. These 45 contractors received 50% of the total goods and services prime contract dollars. The percentage of these dollars received by each of the three groups ranged from 1% to 94%. The contracts received ranged from \$40,100 to \$110,000,000.

**Table 3.15: Top 45 Highly Used Goods and Services Prime Contractors
July 1, 2015 to June 30, 2020**

Ethnicity/ Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Non-Minority Males	\$1,515,890,556	94%	2,336	94%
Asian American	\$73,359,167	5%	151	6%
Caucasian Females	\$24,190,622	1%	9	0%



F. All Formal Prime Contracts by Industry

1. Construction Prime Contract Utilization: All Formal Contracts

Table 3.16 lists all contract dollars expended by State contracting agencies on all construction prime contracts valued \$65,000 and over. Minority business enterprises (MBEs) received 1.54% of the prime contract dollars, women business enterprises (WBEs) received 2.65%, and non-minority male-owned businesses (non-M/WBEs) received 96.00%.

Black Americans received 13, or 0.43% of all formal construction prime contracts awarded during the study period, representing \$3,302,674, or 0.03%, of the construction prime contract dollars.

Asian Americans received 43, or 1.41% of all formal construction prime contracts awarded during the study period, representing \$92,839,016, or 0.82% of the construction prime contract dollars.

Hispanic Americans received 55, or 1.81% of all formal construction prime contracts awarded during the study period, representing \$65,398,896, or 0.58% of the construction prime contract dollars.

American Indians and Alaskan Natives received 4, or 0.13% of all formal construction prime contracts awarded during the study period, representing \$11,994,230 or 0.11% of the construction prime contract dollars.

Caucasian Females received 264, or 8.68% of all formal construction prime contracts awarded during the study period, representing \$277,916,316 or 2.46% of the construction prime contract dollars.

Non-minority Males received 2,662, or 87.54% of all formal construction prime contracts awarded during the study period, representing \$10,846,242,299 or 96.00% of the construction prime contract dollars.

Minority Business Enterprises received 115, or 3.78% of all formal construction prime contracts awarded during the study period, representing \$173,534,816, or 1.54% of the construction prime contract dollars.

Woman Business Enterprises received 276, or 9.08% of all formal construction prime contracts awarded during the study period, representing \$299,698,277 or 2.65% of the construction prime contract dollars.



**Table 3.16: Formal Construction Prime Contract Utilization:
All Contracts, July 1, 2015 to June 30, 2020**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black Americans	13	0.43%	\$3,302,674	0.03%
Asian Americans	43	1.41%	\$92,839,016	0.82%
Hispanic Americans	55	1.81%	\$65,398,896	0.58%
American Indians and Alaskan Natives	4	0.13%	\$11,994,230	0.11%
Caucasian Females	264	8.68%	\$277,916,316	2.46%
Non-minority Males	2,662	87.54%	\$10,846,242,299	96.00%
TOTAL	3,041	100.00%	\$11,297,693,432	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black American Females	2	0.07%	\$251,872	0.00%
Black American Males	11	0.36%	\$3,050,802	0.03%
Asian American Females	6	0.20%	\$20,792,056	0.18%
Asian American Males	37	1.22%	\$72,046,960	0.64%
Hispanic American Females	3	0.10%	\$659,926	0.01%
Hispanic American Males	52	1.71%	\$64,738,970	0.57%
American Indian and Alaskan Native Females	1	0.03%	\$78,107	0.00%
American Indian and Alaskan Native Males	3	0.10%	\$11,916,123	0.11%
Caucasian Females	264	8.68%	\$277,916,316	2.46%
Non-minority Males	2,662	87.54%	\$10,846,242,299	96.00%
TOTAL	3,041	100.00%	\$11,297,693,432	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	115	3.78%	\$173,534,816	1.54%
Woman Business Enterprises	276	9.08%	\$299,698,277	2.65%



2. Professional Services Prime Contract Utilization: All Formal Contracts

Table 3.17 summarizes all contract dollars expended by State contracting agencies on formal professional services prime contracts valued \$40,000 and over. MBEs received 9.58% of the professional services prime contract dollars, WBEs received 6.95%, and non-M/WBEs received 85.11%.

Black Americans received 65, or 1.15% of all formal professional services prime contracts awarded during the study period, representing \$13,736,729 or 0.34% of the professional services prime contract dollars.

Asian Americans received 445, or 7.89% of all formal professional services prime contracts awarded during the study period, representing \$363,959,960 or 9.03% of the professional services prime contract dollars.

Hispanic Americans received 63, or 1.12% of all formal professional services prime contracts awarded during the study period, representing \$8,607,950 or 0.21% of the professional services prime contract dollars.

American Indians and Alaskan Natives received none of the formal professional services prime contracts awarded during the study period, representing none of the professional services prime contracts.

Caucasian Females received 535, or 9.48% of all formal professional services prime contracts awarded during the study period, representing \$214,190,753 or 5.31% of the professional services prime contract dollars.

Non-minority Males received 4,535, or 80.37% of all formal professional services prime contracts awarded during the study period, representing \$3,432,103,021 or 85.11% of the professional services prime contract dollars.

Minority Business Enterprises received 573, or 10.15% of all formal professional services prime contracts awarded during the study period, representing \$386,304,639 or 9.58% of the professional services prime contract dollars.

Woman Business Enterprises received 589, or 10.44% of all formal professional services prime contracts awarded during the study period, representing \$280,285,223 or 6.95% of the professional services prime contract dollars.



**Table 3.17: Formal Professional Services Prime Contract Utilization:
All Contracts, July 1, 2015 to June 30, 2020**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black Americans	65	1.15%	\$13,736,729	0.34%
Asian Americans	445	7.89%	\$363,959,960	9.03%
Hispanic Americans	63	1.12%	\$8,607,950	0.21%
American Indians and Alaskan Natives	0	0.00%	\$0	0.00%
Caucasian Females	535	9.48%	\$214,190,753	5.31%
Non-minority Males	4,535	80.37%	\$3,432,103,021	85.11%
TOTAL	5,643	100.00%	\$4,032,598,413	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black American Females	8	0.14%	\$1,939,478	0.05%
Black American Males	57	1.01%	\$11,797,251	0.29%
Asian American Females	17	0.30%	\$60,975,946	1.51%
Asian American Males	428	7.58%	\$302,984,013	7.51%
Hispanic American Females	29	0.51%	\$3,179,046	0.08%
Hispanic American Males	34	0.60%	\$5,428,904	0.13%
American Indian and Alaskan Native Females	0	0.00%	\$0	0.00%
American Indian and Alaskan Native Males	0	0.00%	\$0	0.00%
Caucasian Females	535	9.48%	\$214,190,753	5.31%
Non-minority Males	4,535	80.37%	\$3,432,103,021	85.11%
TOTAL	5,643	100.00%	\$4,032,598,413	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	573	10.15%	\$386,304,639	9.58%
Woman Business Enterprises	589	10.44%	\$280,285,223	6.95%



3. Goods and Services Prime Contract Utilization: All Formal Contracts

Table 3.18 summarizes all contract dollars expended by State contracting agencies on formal goods and services prime contracts valued \$40,000 and over. MBEs received 3.83% of the goods and services prime contract dollars, WBEs received 7.87%, and non-M/WBEs received 89.97%.

Black Americans received 62, or 0.53% of all formal goods and services prime contracts awarded during the study period, representing \$12,227,367 or 0.38% of the goods and services prime contract dollars.

Asian Americans received 282, or 2.42% of all formal goods and services prime contracts awarded during the study period, representing \$89,290,391 or 2.76% of the goods and services prime contract dollars.

Hispanic Americans received 150, or 1.29% of all formal goods and services prime contracts awarded during the study period, representing \$21,534,225 or 0.67% of the goods and services prime contract dollars.

American Indians and Alaskan Natives received 12, or 0.10% of all formal goods and services prime contracts awarded during the study period, representing \$806,759 or 0.02% of the goods and services prime contract dollars.

Caucasian Females received 983, or 8.43% of all formal goods and services prime contracts awarded during the study period, representing \$200,507,625 or 6.20% of the goods and services prime contract dollars.

Non-minority Males received 10,168, or 87.23% of all formal goods and services prime contracts awarded during the study period, representing \$2,908,131,602 or 89.97% of the goods and services prime contract dollars.

Minority Business Enterprises received 506, or 4.34% of all formal goods and services prime contracts awarded during the study period, representing \$123,858,742 or 3.83% of the goods and services prime contract dollars.

Woman Business Enterprises received 1,232, or 10.57% of all formal goods and services prime contracts awarded during the study period, representing \$254,496,132 or 7.87% of the goods and services prime contract dollars.



**Table 3.18: Formal Goods and Services Prime Contract Utilization:
All Contracts, July 1, 2015 to June 30, 2020**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black Americans	62	0.53%	\$12,227,367	0.38%
Asian Americans	282	2.42%	\$89,290,391	2.76%
Hispanic Americans	150	1.29%	\$21,534,225	0.67%
American Indians and Alaskan Natives	12	0.10%	\$806,759	0.02%
Caucasian Females	983	8.43%	\$200,507,625	6.20%
Non-minority Males	10,168	87.23%	\$2,908,131,602	89.97%
TOTAL	11,657	100.00%	\$3,232,497,969	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black American Females	25	0.21%	\$3,540,648	0.11%
Black American Males	37	0.32%	\$8,686,719	0.27%
Asian American Females	164	1.41%	\$41,899,249	1.30%
Asian American Males	118	1.01%	\$47,391,142	1.47%
Hispanic American Females	60	0.51%	\$8,548,611	0.26%
Hispanic American Males	90	0.77%	\$12,985,614	0.40%
American Indian and Alaskan Native Females	0	0.00%	\$0	0.00%
American Indian and Alaskan Native Males	12	0.10%	\$806,759	0.02%
Caucasian Females	983	8.43%	\$200,507,625	6.20%
Non-minority Males	10,168	87.23%	\$2,908,131,602	89.97%
TOTAL	11,657	100.00%	\$3,232,497,969	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	506	4.34%	\$123,858,742	3.83%
Woman Business Enterprises	1,232	10.57%	\$254,496,132	7.87%



G. Formal Prime Contracts by Industry Outliers Excluded

1. Construction Prime Contract Utilization: Contracts Valued over \$65,000 to \$5,710,000

Table 3.19 lists all contract dollars expended by State contracting agencies on all construction prime contracts valued over \$65,000 to \$5,710,000 awarded during the study period. MBEs received 3.69% of the construction prime contract dollars, WBEs received 8.73%, and non-M/WBEs received 88.16%.

Black Americans received 13, or 0.50% of all construction prime contracts for contracts valued over \$65,000 to \$5,710,000 awarded during the study period, representing \$3,302,674 or 0.14% of the construction prime contract dollars.

Asian Americans received 39, or 1.49% of all construction prime contracts for contracts valued over \$65,000 to \$5,710,000 awarded during the study period, representing \$46,909,539 or 2.03% of the construction prime contract dollars.

Hispanic Americans received 52, or 1.98% of all construction prime contracts for contracts valued over \$65,000 to \$5,710,000 awarded during the study period, representing \$34,939,907 or 1.51% of the construction prime contract dollars.

American Indians and Alaskan Natives received 3, or 0.11% of all construction prime contracts for contracts valued over \$65,000 to \$5,710,000 awarded during the study period, representing \$247,871 or 0.01% of the construction prime contract dollars.

Caucasian Females received 257, or 9.81% of all construction prime contracts for contracts valued over \$65,000 to \$5,710,000 awarded during the study period, representing \$188,159,871 or 8.14% of the construction prime contract dollars.

Non-minority Males received 2,257, or 86.11% of all construction prime contracts for contracts valued over \$65,000 to \$5,710,000 awarded during the study period, representing \$2,037,753,561 or 88.16% of the construction prime contract dollars.

Minority Business Enterprises received 107, or 4.08% of all construction prime contracts for contracts valued over \$65,000 to \$5,710,000 awarded during the study period, representing \$85,399,991 or 3.69% of the construction prime contract dollars.

Woman Business Enterprises received 268, or 10.23% of all construction prime contracts for contracts valued over \$65,000 to \$5,710,000 awarded during the study period, representing \$201,865,901 or 8.73% of the construction prime contract dollars.



**Table 3.19: Construction Prime Contract Utilization:
Contracts Valued over \$65,000 to \$5,710,000, July 1, 2015 to June 30, 2020**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black Americans	13	0.50%	\$3,302,674	0.14%
Asian Americans	39	1.49%	\$46,909,539	2.03%
Hispanic Americans	52	1.98%	\$34,939,907	1.51%
American Indians and Alaskan Natives	3	0.11%	\$247,871	0.01%
Caucasian Females	257	9.81%	\$188,159,871	8.14%
Non-minority Males	2,257	86.11%	\$2,037,753,561	88.16%
TOTAL	2,621	100.00%	\$2,311,313,423	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black American Females	2	0.08%	\$251,872	0.01%
Black American Males	11	0.42%	\$3,050,802	0.13%
Asian American Females	5	0.19%	\$12,716,126	0.55%
Asian American Males	34	1.30%	\$34,193,414	1.48%
Hispanic American Females	3	0.11%	\$659,926	0.03%
Hispanic American Males	49	1.87%	\$34,279,981	1.48%
American Indian and Alaskan Native Females	1	0.04%	\$78,107	0.00%
American Indian and Alaskan Native Males	2	0.08%	\$169,764	0.01%
Caucasian Females	257	9.81%	\$188,159,871	8.14%
Non-minority Males	2,257	86.11%	\$2,037,753,561	88.16%
TOTAL	2,621	100.00%	\$2,311,313,423	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	107	4.08%	\$85,399,991	3.69%
Woman Business Enterprises	268	10.23%	\$201,865,901	8.73%



2. Professional Services Prime Contract Utilization: Contracts Valued over \$40,000 to \$800,000

Table 3.20 lists all contract dollars expended by State contracting agencies on professional services prime contracts valued over \$40,000 to \$800,000 awarded during the study period. MBEs received 14.34% of the professional services prime contract dollars, WBEs received 9.91%, and non-M/WBEs received 76.65%.

African Americans received 63, or 1.32% of all professional services prime contracts for contracts valued over \$40,000 to \$800,000 awarded during the study period, representing \$11,063,011 or 1.44% of the professional services prime contract dollars.

Asian Americans received 349, or 7.32% of all professional services prime contracts for contracts valued over \$40,000 to \$800,000 awarded during the study period, representing \$91,776,555 or 11.92% of the professional services prime contract dollars.

Hispanic Americans received 62, or 1.30% of all professional services prime contracts for contracts valued over \$40,000 to \$800,000 awarded during the study period, representing \$7,592,468 or 0.99% of the professional services prime contract dollars.

American Indians and Alaskan Natives received none of all professional services prime contracts for contracts valued over \$40,000 to \$800,000 awarded during the study period, representing none of the professional services prime contract dollars.

Caucasian Females received 492, or 10.33% of all professional services prime contracts for contracts valued over \$40,000 to \$800,000 awarded during the study period, representing \$69,434,317 or 9.01% of the professional services prime contract dollars.

Non-minority Males received 3,799, or 79.73% of all professional services prime contracts for contracts valued over \$40,000 to \$800,000 awarded during the study period, representing \$590,387,669 or 76.65% of the professional services prime contract dollars.

Minority Business Enterprises received 474, or 9.95% of all professional services prime contracts for contracts valued over \$40,000 to \$800,000 awarded during the study period, representing \$110,432,034 or 14.34% of the professional services prime contract dollars.

Woman Business Enterprises received 543, or 11.40% of all professional services prime contracts for contracts valued over \$40,000 to \$800,000 awarded during the study period, representing \$76,314,709 or 9.91% of the professional services prime contract dollars.



**Table 3.20: Professional Services Prime Contract Utilization:
Contracts Valued over \$40,000 to \$800,000, July 1, 2015, to June 30, 2020**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black Americans	63	1.32%	\$11,063,011	1.44%
Asian Americans	349	7.32%	\$91,776,555	11.92%
Hispanic Americans	62	1.30%	\$7,592,468	0.99%
American Indians and Alaskan Natives	0	0.00%	\$0	0.00%
Caucasian Females	492	10.33%	\$69,434,317	9.01%
Non-minority Males	3,799	79.73%	\$590,387,669	76.65%
TOTAL	4,765	100.00%	\$770,254,020	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black American Females	8	0.17%	\$1,939,478	0.25%
Black American Males	55	1.15%	\$9,123,533	1.18%
Asian American Females	14	0.29%	\$1,761,869	0.23%
Asian American Males	335	7.03%	\$90,014,687	11.69%
Hispanic American Females	29	0.61%	\$3,179,046	0.41%
Hispanic American Males	33	0.69%	\$4,413,422	0.57%
American Indian and Alaskan Native Females	0	0.00%	\$0	0.00%
American Indian and Alaskan Native Males	0	0.00%	\$0	0.00%
Caucasian Females	492	10.33%	\$69,434,317	9.01%
Non-minority Males	3,799	79.73%	\$590,387,669	76.65%
TOTAL	4,765	100.00%	\$770,254,020	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	474	9.95%	\$110,432,034	14.34%
Woman Business Enterprises	543	11.40%	\$76,314,709	9.91%



3. Goods and Services Prime Contract Utilization: Contracts Valued over \$40,000 to \$360,000

Table 3.21 lists all contract dollars expended by State contracting agencies on goods and services prime contracts valued over \$40,000 to \$360,000 awarded during the study period. MBEs received 4.24% of the goods and services prime contract dollars, WBEs received 11.09%, and non-M/WBEs received 86.88%.

Black Americans received 55, or 0.54% of all goods and services prime contracts for contracts valued over \$40,000 to \$360,000 awarded during the study period, representing \$4,930,542 or 0.46% of the goods and services prime contract dollars.

Asian Americans received 255, or 2.48% of all goods and services prime contracts for contracts valued over \$40,000 to \$360,000 awarded during the study period, representing \$25,694,596 or 2.42% of the goods and services prime contract dollars.

Hispanic Americans received 136, or 1.32% of all goods and services prime contracts for contracts valued over \$40,000 to \$360,000 awarded during the study period, representing \$13,672,759 or 1.29% of the goods and services prime contract dollars.

American Indians and Alaskan Natives received 12, or 0.12% of all goods and services prime contracts for contracts valued over \$40,000 to \$360,000 awarded during the study period, representing \$806,759 or 0.08% of the goods and services prime contract dollars.

Caucasian Females received 889, or 8.65% of all goods and services prime contracts for contracts valued over \$40,000 to \$360,000 awarded during the study period, representing \$94,273,812 or 8.87% of the goods and services prime contract dollars.

Non-minority Males received 8,927, or 86.89% of all goods and services prime contracts for contracts valued over \$40,000 to \$360,000 awarded during the study period, representing \$923,173,288 or 86.88% of the goods and services prime contract dollars.

Minority Business Enterprises received 458, or 4.46% of all goods and services prime contracts for contracts valued over \$40,000 to \$360,000 awarded during the study period, representing \$45,104,657 or 4.24% of the goods and services prime contract dollars.

Woman Business Enterprises received 1,114, or 10.84% of all goods and services prime contracts for contracts valued over \$40,000 to \$360,000 awarded during the study period, representing \$117,817,458 or 11.09% of the goods and services prime contract dollars.



**Table 3.21: Goods and Services Prime Contract Utilization:
Contracts Valued over \$40,000 to \$360,000, July 1, 2015 to June 30, 2020**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black Americans	55	0.54%	\$4,930,542	0.46%
Asian Americans	255	2.48%	\$25,694,596	2.42%
Hispanic Americans	136	1.32%	\$13,672,759	1.29%
American Indians and Alaskan Natives	12	0.12%	\$806,759	0.08%
Caucasian Females	889	8.65%	\$94,273,812	8.87%
Non-minority Males	8,927	86.89%	\$923,173,288	86.88%
TOTAL	10,274	100.00%	\$1,062,551,756	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black American Females	23	0.22%	\$2,364,224	0.22%
Black American Males	32	0.31%	\$2,566,318	0.24%
Asian American Females	148	1.44%	\$16,196,256	1.52%
Asian American Males	107	1.04%	\$9,498,340	0.89%
Hispanic American Females	54	0.53%	\$4,983,166	0.47%
Hispanic American Males	82	0.80%	\$8,689,593	0.82%
American Indian and Alaskan Native Females	0	0.00%	\$0	0.00%
American Indian and Alaskan Native Males	12	0.12%	\$806,759	0.08%
Caucasian Females	889	8.65%	\$94,273,812	8.87%
Non-minority Males	8,927	86.89%	\$923,173,288	86.88%
TOTAL	10,274	100.00%	\$1,062,551,756	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	458	4.46%	\$45,104,657	4.24%
Woman Business Enterprises	1,114	10.84%	\$117,817,458	11.09%



H. Informal Prime Contracts, All Industries

1. All Industries Prime Contract Utilization: Contracts Valued \$40,000 and under for Professional Services and Goods and Services, and \$65,000 and under for Construction

Table 3.22 lists all contract dollars expended by State contracting agencies on all industries' informal prime contracts valued \$40,000 and under for professional services and goods and services, and \$65,000 and under for construction. MBEs received 2.58% of the prime contract dollars, WBEs received 7.77%, and non-M/WBEs received 90.40%.

Black Americans received 565, or 0.69%, of the informal prime contracts awarded during the study period, representing \$4,720,149, or 0.75%, of the informal prime contract dollars for all industries.

Asian Americans received 514, or 0.63%, of the informal prime contracts awarded during the study period, representing \$5,462,312, or 0.87%, of the informal prime contract dollars for all industries.

Hispanic Americans received 514, or 0.63%, of the informal prime contracts awarded during the study period, representing \$4,816,437, or 0.77%, of the informal prime contract dollars for all industries.

American Indian and Alaskan Natives received 103, or 0.13%, of the informal prime contracts awarded during the study period, representing \$1,173,963, or 0.19%, of the informal prime contract dollars for all industries.

Caucasian Females received 4,482, or 5.50%, of the informal prime contracts awarded during the study period, representing \$43,984,341, or 7.02%, of the informal prime contract dollars for all industries.

Non-minority Males received 75,352, or 92.42%, of the informal prime contracts awarded during the study period, representing \$566,234,221, or 90.40%, of the informal prime contract dollars for all industries.

Minority Business Enterprises received 1,696, or 2.08%, of the informal prime contracts awarded during the study period, representing \$16,172,861, or 2.58%, of the informal prime contract dollars for all industries.

Woman Business Enterprises received 5,006, or 6.14%, of the informal prime contracts awarded during the study period, representing \$48,689,507, or 7.77%, of the informal prime contract dollars for all industries.



**Table 3.22: All Industries Prime Contract Utilization: Contracts Valued \$40,000 and under for Professional Services and Goods and Services, and \$65,000 and under for Construction
July 1, 2015 to June 30, 2020**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black Americans	565	0.69%	\$4,720,149	0.75%
Asian Americans	514	0.63%	\$5,462,312	0.87%
Hispanic Americans	514	0.63%	\$4,816,437	0.77%
American Indians and Alaskan Natives	103	0.13%	\$1,173,963	0.19%
Caucasian Females	4,482	5.50%	\$43,984,341	7.02%
Non-minority Males	75,352	92.42%	\$566,234,221	90.40%
TOTAL	81,530	100.00%	\$626,391,423	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black American Females	198	0.24%	\$1,743,902	0.28%
Black American Males	367	0.45%	\$2,976,247	0.48%
Asian American Females	141	0.17%	\$1,522,219	0.24%
Asian American Males	373	0.46%	\$3,940,093	0.63%
Hispanic American Females	161	0.20%	\$1,248,380	0.20%
Hispanic American Males	353	0.43%	\$3,568,057	0.57%
American Indian and Alaskan Native Females	24	0.03%	\$190,665	0.03%
American Indian and Alaskan Native Males	79	0.10%	\$983,298	0.16%
Caucasian Females	4,482	5.50%	\$43,984,341	7.02%
Non-minority Males	75,352	92.42%	\$566,234,221	90.40%
TOTAL	81,530	100.00%	\$626,391,423	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	1,696	2.08%	\$16,172,861	2.58%
Woman Business Enterprises	5,006	6.14%	\$48,689,507	7.77%



V. Summary

The formal prime contract utilization analysis examined \$18,562,789,813 prime contract dollars awarded by the State contracting agencies during the July 1, 2015 to June 30, 2020 study period. The \$18,562,789,813 expended included for \$11,297,693,432 construction, \$4,032,598,413 for professional services, and \$3,232,497,969 for goods and services. A total of 20,341 formal prime contracts were analyzed, which included 3,041 for construction, 5,643 for professional services, and 11,657 for goods and services.

The utilization analysis was performed for prime contracts in the three industries at two-dollar thresholds: (1) the analysis of all prime contracts regardless of award amount, and (2) the analysis of formal prime contracts with thresholds set for each industry to eliminate outliers. Given the application of these thresholds, the formal prime contracts analyzed were valued over \$65,000 to \$5,710,000 for construction, over \$40,000 to \$800,000 for professional services, and over \$40,000 to \$360,000 for goods and services.

A separate analysis of all informal prime contracts was also undertaken. It combined all industries contracts, valued \$40,000 and under for professional services and goods and services, and \$65,000 and under for construction. *Chapter 7: Prime Contractor Disparity Analysis* presents the statistical analysis for disparity in each of the three industries for formal prime contracts and disparity in all industries combined for informal prime contracts.



CHAPTER 4: Subcontractor Utilization Analysis

I. Introduction

A disparity study, as *Croson* decided, must document the local government's utilization of Minority and Woman-owned Business Enterprises (M/WBEs) and non-minority male-owned businesses (non-M/WBEs) as prime contractors and subcontractors. This chapter presents the utilization of M/WBE and non-M/WBE subcontractors utilized on all prime contracts by ethnicity, gender, and industry during the study period of July 1, 2015 to June 30, 2020.

II. Subcontractor Data Collection

The State and State contracting agencies provided payment records for the subcontracts awarded by their construction and professional services prime contractors. The subcontract data for the construction and professional services covered the July 1, 2015 to June 30, 2020 study period.

The State and State contracting agencies did not have a standard for tracking or reporting subcontract awards or payment data, so extensive research was undertaken to reconstruct the data. The reconstruction effort required the State contracting agencies to participate in the data retrieval process, and data was collected from 28 State contracting agencies over a 13-month period.

Three main steps were taken to collect and reconstruct the data. First, kick-off meetings were held with the State contracting agencies to explain the study process and request prime contract and subcontract data. Eleven of the 28 State contracting agencies with contract data submitted subcontract records, resulting in a total of 4,833 records to use in the analysis. Second, a prime contractor survey was sent to 352 prime contractors. These contractors were selected through a random sample of 800 contracts valued over \$500,000, and 224 subcontract records were received. Third, requests for data were sent to the 28 State contracting agencies for their assistance, and 131 subcontract records were collected through both electronic and in-person methods.

These data collection methods furthered the research extensively, and a summary of the data collected is presented below.



III. Subcontractor Utilization

A. All Subcontracts

As indicated in Table 4.1, there were 3,666 construction contracts with subcontractor information and 1,104 professional services contracts with subconsultant information recorded in the State contracting agencies' systems. In total, there were 4,770 subcontracts awarded, totaling \$2,485,630,665.

**Table 4.1: Subcontracts Awarded and Dollars Expended by Industry
July 1, 2015 to June 30, 2020**

Industry	Total Number of Subcontracts	Total Amount Expended
Construction	3,666	\$2,184,228,346
Professional Services	1,104	\$301,402,318
Total	4,770	\$2,485,630,665



B. Subcontracts by Industry

1. Construction Subcontracts

Table 4.2 lists the identified construction subcontracts awarded by the State contracting agencies' prime contractors. Minority Business Enterprises (MBEs) received 8.15%, Woman Business Enterprises (WBEs) received 25.26%, and non-minority male-owned businesses (non-M/WBEs) received 68.87% of the construction subcontract dollars.

Black Americans received 30, or 0.82%, of the State contracting agencies' construction subcontracts during the study period, representing \$9,823,574, or 0.45%, of the construction subcontract dollars.

Asian Americans received 69, or 1.88%, of the State contracting agencies' construction subcontracts during the study period, representing \$26,436,006, or 1.21%, of the construction subcontract dollars.

Hispanic Americans received 248, or 6.76%, of the State contracting agencies' construction subcontracts during the study period, representing \$136,381,874, or 6.24%, of the construction subcontract dollars.

American Indians and Alaskan Natives received 30, or 0.82%, of the State contracting agencies' construction subcontracts during the study period, representing \$5,390,797, or 0.25%, of the construction subcontract dollars.

Caucasian Females received 985, or 26.87%, of the State contracting agencies' construction subcontracts during the study period, representing \$501,995,031, or 22.98%, of the construction subcontract dollars.

Non-minority Males received 2,304, or 62.85%, of the State contracting agencies' construction subcontracts during the study period, representing \$1,504,201,065, or 68.87%, of the construction subcontract dollars.

Minority Business Enterprises received 377, or 10.28%, of the State contracting agencies' construction subcontracts during the study period, representing \$178,032,251, or 8.15%, of the construction subcontract dollars.

Woman Business Enterprises received 1,093, or 29.81%, of the State contracting agencies' construction subcontracts during the study period, representing \$551,784,579, or 25.26%, of the construction subcontract dollars.



Table 4.2: Construction Subcontractor Utilization, July 1, 2015 to June 30, 2020

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black Americans	30	0.82%	\$9,823,574	0.45%
Asian Americans	69	1.88%	\$26,436,006	1.21%
Hispanic Americans	248	6.76%	\$136,381,874	6.24%
American Indians and Alaskan Natives	30	0.82%	\$5,390,797	0.25%
Caucasian Females	985	26.87%	\$501,995,031	22.98%
Non-minority Males	2,304	62.85%	\$1,504,201,065	68.87%
TOTAL	3,666	100.00%	\$2,184,228,346	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black American Females	1	0.03%	\$873,335	0.04%
Black American Males	29	0.79%	\$8,950,239	0.41%
Asian American Females	26	0.71%	\$7,509,401	0.34%
Asian American Males	43	1.17%	\$18,926,604	0.87%
Hispanic American Females	77	2.10%	\$39,276,812	1.80%
Hispanic American Males	171	4.66%	\$97,105,062	4.45%
American Indian and Alaskan Native Females	4	0.11%	\$2,130,000	0.10%
American Indian and Alaskan Native Males	26	0.71%	\$3,260,797	0.15%
Caucasian Females	985	26.87%	\$501,995,031	22.98%
Non-minority Males	2,304	62.85%	\$1,504,201,065	68.87%
TOTAL	3,666	100.00%	\$2,184,228,346	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	377	10.28%	\$178,032,251	8.15%
Woman Business Enterprises	1,093	29.81%	\$551,784,579	25.26%



2. Professional Services Subcontracts

Table 4.3 lists the identified professional services subcontracts awarded by the State contracting agencies' prime contractors. MBEs received 29.09%, WBEs received 14.13%, and non-M/WBEs received 59.01% of the professional services subcontract dollars.

Black Americans received 15, or 1.36%, of the State contracting agencies' professional services subcontracts during the study period, representing \$9,683,177, or 3.21%, of the professional services subcontract dollars.

Asian Americans received 327, or 29.62%, of the State contracting agencies' professional services subcontracts during the study period, representing \$77,067,407, or 25.57%, of the professional services subcontract dollars.

Hispanic Americans received 17, or 1.54%, of the State contracting agencies' professional services subcontracts during the study period, representing \$934,576, or 0.31%, of the professional services subcontract dollars.

American Indians and Alaskan Natives received none of the State contracting agencies' professional services subcontracts during the study period, representing none of the professional services subcontract dollars.

Caucasian Females received 255, or 23.10%, of the State contracting agencies' professional services subcontracts during the study period, representing \$35,872,793, or 11.90%, of the professional services subcontract dollars.

Non-minority Males received 490, or 44.38%, of the State contracting agencies' professional services subcontracts during the study period, representing \$177,844,365, or 59.01%, of the professional services subcontract dollars.

Minority Business Enterprises received 359, or 32.52%, of the State contracting agencies' professional services subcontracts during the study period, representing \$87,685,161, or 29.09%, of the professional services subcontract dollars.

Woman Business Enterprises received 274, or 24.82%, of the State contracting agencies' professional services subcontracts during the study period, representing \$42,596,026, or 14.13%, of the professional services subcontract dollars.



Table 4.3: Professional Services Subcontractor Utilization, July 1, 2015 to June 30, 2020

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black Americans	15	1.36%	\$9,683,177	3.21%
Asian Americans	327	29.62%	\$77,067,407	25.57%
Hispanic Americans	17	1.54%	\$934,576	0.31%
American Indians and Alaskan Natives	0	0.00%	\$0	0.00%
Caucasian Females	255	23.10%	\$35,872,793	11.90%
Non-minority Males	490	44.38%	\$177,844,365	59.01%
TOTAL	1,104	100.00%	\$301,402,318	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Black American Females	10	0.91%	\$5,268,545	1.75%
Black American Males	5	0.45%	\$4,414,632	1.46%
Asian American Females	9	0.82%	\$1,454,688	0.48%
Asian American Males	318	28.80%	\$75,612,719	25.09%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	17	1.54%	\$934,576	0.31%
American Indian and Alaskan Native Females	0	0.00%	\$0	0.00%
American Indian and Alaskan Native Males	0	0.00%	\$0	0.00%
Caucasian Females	255	23.10%	\$35,872,793	11.90%
Non-minority Males	490	44.38%	\$177,844,365	59.01%
TOTAL	1,104	100.00%	\$301,402,318	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	359	32.52%	\$87,685,161	29.09%
Woman Business Enterprises	274	24.82%	\$42,596,026	14.13%



IV. Summary

There were 4,770 construction and professional services subcontracts awarded by prime contractors during the July 1, 2015 to June 30, 2020 study period. The data included 3,666 construction subcontracts and 1,104 professional services subcontracts. Construction subcontract payments totaled \$2,184,228,346, and professional services subcontract payments totaled \$301,402,318.



CHAPTER 5: Market Area Analysis

I. Market Area Definition

A. Legal Criteria for Geographic Market Area

The Supreme Court’s decision in *City of Richmond v. J.A. Croson Co.*²⁸⁵ (*Croson*) held that programs established by local governments to set goals for the participation of Minority Business Enterprises (MBEs) must be supported by evidence of past discrimination in the award of their contracts. Prior to the *Croson* decision, local governments could implement race-conscious programs without developing a detailed public record to document the underutilization of MBEs in their award of contracts. Instead, they relied on widely recognized societal patterns of discrimination.²⁸⁶

Croson established that a local government could not rely on society-wide discrimination as the basis for a race-based contracting program. Instead, a local government was required to identify discrimination within its own contracting jurisdiction.²⁸⁷ In *Croson*, the United States Supreme Court found the City of Richmond, Virginia’s MBE construction program to be unconstitutional because there was insufficient evidence of discrimination in the local construction market.

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

B. Application of the Croson Standard

While *Croson* emphasized the importance of the local market area, it provided little assistance in defining its parameters. However, it is informative to review the Court’s definition of the City of Richmond, Virginia’s market area. In discussing the geographic parameters of the constitutional violation that must be investigated, the Court interchangeably used the terms “relevant market,” “Richmond construction industry,”²⁸⁸ and “city’s construction industry.”²⁸⁹ These terms were used to define the proper scope for examining the existence of discrimination within the City. This interchangeable use of terms lends support to a definition of market area that is contiguous with the boundaries of the contracting jurisdiction.

An analysis of the cases following *Croson* provides additional guidance for defining the market area. The body of cases examining the *reasonable* market area definition is *fact-based*—rather

²⁸⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁸⁶ *United Steelworkers v. Weber*, 433 U.S. 193, 198, n. 1 (1979).

²⁸⁷ *Croson*, 488 U.S. at 497.

²⁸⁸ *Croson*, 488 U.S. at 500.

²⁸⁹ *Id.* at 470.

than dictated by a specific formula.²⁹⁰ In *Cone Corporation v. Hillsborough County*,²⁹¹ the United States Eleventh Circuit Court of Appeals considered a disparity study in support of Hillsborough County, Florida’s MBE Program. The MBE program used minority contractors located in Hillsborough County as the measure of available firms. The program was found to be constitutional under the compelling governmental interest element of the strict scrutiny standard.

Hillsborough County’s program was based on statistics indicating that specific discrimination existed in the construction contracts awarded by Hillsborough County, not in the construction industry in general. Hillsborough County extracted data from within its own jurisdictional boundaries and assessed the percentage of minority businesses available in Hillsborough County. The Court stated that the disparity study was properly conducted within the “local construction industry.”²⁹²

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII)*,²⁹³ the United States Ninth Circuit Court of Appeals found the City and County of San Francisco, California’s MBE Program to have the factual predicate necessary to survive strict scrutiny. The San Francisco MBE Program was supported by a disparity study that assessed the number of available MBE contractors within the City and County of San Francisco, California. The Court found it appropriate to use the City and County as the relevant market area within which to conduct a disparity study.²⁹⁴

In *Coral Construction v. King County*, the United States Ninth Circuit Court of Appeals held that “a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program.”²⁹⁵ In support of its MBE program, King County, Washington offered studies compiled by other jurisdictions, including entities completely within the County, others coterminous with the boundaries of the County, as well as a jurisdiction significantly distant from King County. The plaintiffs contended that *Croson* required King County, Washington to compile its own data, and cited *Croson* as prohibiting data sharing.

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

The Court concluded that data gathered by a neighboring county could not be used to support King County’s MBE program. The Court noted, “It is vital that a race-conscious program align itself as

²⁹⁰ See e.g., *Concrete Works of Colorado v. City of Denver, Colorado*, 36 F.3d 1513, 1528 (10th Cir. 1994) (“*Concrete Works*”).

²⁹¹ *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

²⁹² *Id.* at 915.

²⁹³ *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991).

²⁹⁴ *AGCCII*, 950 F.2d at 1415.

²⁹⁵ *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).



closely to the scope of the problem sought to be rectified by the governmental entity. To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries.”²⁹⁶ However, the Court did note that the “world of contracting does not conform itself neatly to jurisdictional boundaries.”²⁹⁷

There are other situations in which courts have approved a market area definition that extended beyond a jurisdiction’s geographic boundaries. In *Concrete Works v. City and County of Denver* (*Concrete Works*),²⁹⁸ the United States Tenth Circuit Court of Appeals directly addressed the issue of whether extra-jurisdictional evidence of discrimination can be used to determine the “local market area” for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver, Colorado Metropolitan Statistical Area (Denver MSA) to support its MBE program. Plaintiffs argued that the federal constitution prohibited consideration of evidence beyond jurisdictional boundaries. The Court of Appeals disagreed.

Critical to the Court’s acceptance of the Denver MSA as the relevant local market was the finding that more than 80% of construction and design contracts awarded by the City and County of Denver were awarded to contractors within the Denver MSA. Another consideration was that the City and County of Denver’s analysis was based on United States Census data, which were available for the Denver MSA but not for the City of Denver itself. There was no undue burden placed on nonculpable parties, as the City and County of Denver had expended most of its construction contract dollars within the area defined as the local market. Citing *AGCC II*,²⁹⁹ the Court noted “that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions the city has taken in the past have visited racial discrimination on such individuals.”³⁰⁰

Similarly, New York State conducted a disparity study in which the geographic market consisted of New York State and eight counties in northern New Jersey. The geographic market was defined as the area encompassing the location of businesses that received more than 90% of the dollar value of all contracts awarded by the agency.³⁰¹

State and local governments must pay special attention to the geographical scope of their disparity studies. *Croson* determined that the statistical analysis should focus on the number of qualified minority business owners in the government’s marketplace.³⁰² The text of *Croson* itself suggests that the geographical boundaries of the government entity comprise an appropriate market area. Other courts have agreed with this finding.

²⁹⁶ *Coral Construction Co. v. King County*, 941 F.2d at 917.

²⁹⁷ *Id.*

²⁹⁸ *Concrete Works*, 36 F.3d at 1528.

²⁹⁹ *AGCC II*, 950 F.2d at 1401.

³⁰⁰ *Concrete Works*, 36 F.3d at 1528.

³⁰¹ *Opportunity Denied! New York State’s Study*, 26 Urban Lawyer No. 3, Summer 1994.

³⁰² *Croson*, 488 U.S. at 501.



Therefore, it follows that an entity may limit consideration of evidence of discrimination to discrimination occurring within its own jurisdiction.

II. Market Area Analysis

Although *Croson* and its progeny do not provide a bright line rule for the delineation of the local market area, taken collectively, the case law supports a definition of the market area as the geographical boundaries of the government entity. Given the State's jurisdiction, the Study's market area is determined to be its geographical boundaries.



A. Summary of the Distribution of All Prime Contracts Awarded

The State contracting agencies awarded 20,341 prime contracts valued at \$18,562,789,813 from July 1, 2015 to June 30, 2020. Businesses located in the market area received 67.31% of the prime contracts and 85.73% of the dollars. The distribution of all prime contracts awarded and dollars received by all businesses domiciled within, and outside the State is listed below in Table 5.1. The market area is presented by the counties within the State.

**Table 5.1: Distribution of All Contracts Awarded
July 1, 2015 to June 30, 2020**

Counties in Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Middlesex	1,950	9.59%	\$3,206,644,690	17.27%
Bergen	1,137	5.59%	\$1,846,326,178	9.95%
Mercer	1,339	6.58%	\$1,524,117,642	8.21%
Essex	1,181	5.81%	\$1,132,332,068	6.10%
Somerset	830	4.08%	\$1,108,517,379	5.97%
Monmouth	916	4.50%	\$1,030,126,121	5.55%
Morris	1,167	5.74%	\$986,222,521	5.31%
Cumberland	291	1.43%	\$782,388,243	4.21%
Union	704	3.46%	\$749,252,583	4.04%
Passaic	572	2.81%	\$733,148,339	3.95%
Burlington	885	4.35%	\$643,906,762	3.47%
Atlantic	379	1.86%	\$594,502,528	3.20%
Camden	671	3.30%	\$578,589,578	3.12%
Hudson	472	2.32%	\$324,609,284	1.75%
Gloucester	524	2.58%	\$222,620,352	1.20%
Salem	41	0.20%	\$158,487,363	0.85%
Ocean	217	1.07%	\$102,003,944	0.55%
Warren	135	0.66%	\$75,565,551	0.41%
Sussex	95	0.47%	\$42,668,975	0.23%
Hunterdon	158	0.78%	\$37,563,068	0.20%
Cape May	27	0.13%	\$33,861,965	0.18%
Subtotal	13,691	67.31%	\$15,913,455,134	85.73%

Outside Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Out of State	6,593	32.41%	\$2,638,606,253	14.21%
Out of Country	57	0.28%	\$10,728,426	0.06%
Subtotal	6,650	32.69%	\$2,649,334,679	14.27%

Grand Total	20,341	100.00%	\$18,562,789,813	100.00%
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B. Distribution of Construction Prime Contracts

The State contracting agencies awarded 3,041 construction prime contracts valued at \$11,297,693,432 during the study period. Businesses located in the market area received 93.85% of the construction prime contracts and 93.51% of the dollars. The distribution of the construction prime contracts awarded and dollars received by all businesses domiciled within, and outside the market area is listed below in Table 5.2.

**Table 5.2: Distribution of Construction Prime Contracts
July 1, 2015 to June 30, 2020**

Counties in Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Middlesex	435	14.30%	\$1,924,991,714	17.04%
Bergen	219	7.20%	\$1,550,819,420	13.73%
Monmouth	268	8.81%	\$870,453,966	7.70%
Cumberland	132	4.34%	\$761,847,359	6.74%
Somerset	119	3.91%	\$678,204,039	6.00%
Essex	247	8.12%	\$638,190,747	5.65%
Union	201	6.61%	\$634,192,841	5.61%
Passaic	141	4.64%	\$606,079,546	5.36%
Mercer	119	3.91%	\$602,467,138	5.33%
Morris	211	6.94%	\$458,481,444	4.06%
Atlantic	144	4.74%	\$453,129,638	4.01%
Camden	135	4.44%	\$372,597,858	3.30%
Burlington	131	4.31%	\$339,227,215	3.00%
Hudson	32	1.05%	\$190,702,386	1.69%
Salem	14	0.46%	\$153,598,273	1.36%
Gloucester	169	5.56%	\$142,359,857	1.26%
Ocean	54	1.78%	\$63,817,760	0.56%
Warren	29	0.95%	\$51,884,654	0.46%
Sussex	23	0.76%	\$31,902,330	0.28%
Cape May	5	0.16%	\$31,152,048	0.28%
Hunterdon	26	0.85%	\$8,497,390	0.08%
Subtotal	2,854	93.85%	\$10,564,597,624	93.51%

Outside Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Out of State	187	6.15%	\$733,095,807	6.49%
Subtotal	187	6.15%	\$733,095,807	6.49%

Grand Total	3,041	100.00%	\$11,297,693,432	100.00%
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C. *Distribution of Professional Services Prime Contracts*

The State contracting agencies awarded 5,643 professional services prime contracts valued at \$4,032,598,413 during the study period. Businesses located in the market area received 68.19% of the professional services prime contracts and 83.21% of the dollars. The distribution of the professional services prime contracts awarded and dollars received by all businesses domiciled within, and outside the market area is listed below in Table 5.3.

**Table 5.3: Distribution of Professional Services Prime Contracts
July 1, 2015 to June 30, 2020**

Counties in Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Middlesex	494	8.75%	\$955,393,099	23.69%
Mercer	793	14.05%	\$822,852,686	20.41%
Essex	476	8.44%	\$357,993,891	8.88%
Morris	387	6.86%	\$311,975,452	7.74%
Somerset	185	3.28%	\$187,716,794	4.65%
Burlington	201	3.56%	\$145,828,321	3.62%
Bergen	269	4.77%	\$124,260,716	3.08%
Atlantic	123	2.18%	\$113,693,522	2.82%
Camden	231	4.09%	\$101,406,116	2.51%
Monmouth	218	3.86%	\$85,421,444	2.12%
Hudson	126	2.23%	\$48,808,496	1.21%
Ocean	84	1.49%	\$23,991,582	0.59%
Union	86	1.52%	\$23,144,279	0.57%
Warren	30	0.53%	\$13,165,452	0.33%
Hunterdon	34	0.60%	\$12,570,461	0.31%
Gloucester	42	0.74%	\$12,234,759	0.30%
Passaic	28	0.50%	\$7,832,408	0.19%
Cumberland	17	0.30%	\$4,399,420	0.11%
Cape May	12	0.21%	\$1,689,406	0.04%
Sussex	12	0.21%	\$1,078,340	0.03%
Subtotal	3,848	68.19%	\$3,355,456,642	83.21%

Outside Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Out of State	1,780	31.54%	\$671,531,871	16.65%
Out of Country	15	0.27%	\$5,609,900	0.14%
Subtotal	1,795	31.81%	\$677,141,771	16.79%

Grand Total	5,643	100.00%	\$4,032,598,413	100.00%
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D. Distribution of Goods and Services Prime Contracts

The State contracting agencies awarded 11,657 goods and services prime contracts valued at \$3,232,497,969 during the study period. Businesses located in the market area received 59.96% of the goods and services prime contracts and 61.67% of the dollars. The distribution of the goods and services prime contracts awarded and dollars received by all businesses domiciled within, and outside the market area is listed below in Table 5.4.

**Table 5.4: Distribution of Goods and Services Prime Contracts
July 1, 2015 to June 30, 2020**

Counties in Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Middlesex	1,021	8.76%	\$326,259,878	10.09%
Somerset	526	4.51%	\$242,596,546	7.50%
Morris	569	4.88%	\$215,765,625	6.67%
Bergen	649	5.57%	\$171,246,043	5.30%
Burlington	553	4.74%	\$158,851,227	4.91%
Essex	458	3.93%	\$136,147,430	4.21%
Passaic	403	3.46%	\$119,236,385	3.69%
Camden	305	2.62%	\$104,585,604	3.24%
Mercer	427	3.66%	\$98,797,818	3.06%
Union	417	3.58%	\$91,915,462	2.84%
Hudson	314	2.69%	\$85,098,403	2.63%
Monmouth	430	3.69%	\$74,250,711	2.30%
Gloucester	313	2.69%	\$68,025,736	2.10%
Atlantic	112	0.96%	\$27,679,369	0.86%
Hunterdon	98	0.84%	\$16,495,217	0.51%
Cumberland	142	1.22%	\$16,141,464	0.50%
Ocean	79	0.68%	\$14,194,602	0.44%
Warren	76	0.65%	\$10,515,445	0.33%
Sussex	60	0.51%	\$9,688,305	0.30%
Salem	27	0.23%	\$4,889,090	0.15%
Cape May	10	0.09%	\$1,020,511	0.03%
Subtotal	6,989	59.96%	\$1,993,400,868	61.67%

Outside Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Out of State	4,626	39.68%	\$1,233,978,575	38.17%
Out of Country	42	0.36%	\$5,118,526	0.16%
Subtotal	4,668	40.04%	\$1,239,097,101	38.33%

Grand Total	11,657	100.00%	\$3,232,497,969	100.00%
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III. Summary

During the study period, the State contracting agencies awarded 20,341 construction, professional services, and goods and services prime contracts valued at \$18,562,789,813. The State contracting agencies awarded 67.31% of prime contracts and 85.73% of dollars to businesses domiciled within its market area.

Table 5.5 through 5.7 below lists an overview of the number of construction, professional services, and goods and services prime contracts the State contracting agencies awarded and the dollars spent in the market area. Table 5.8 shows the total contract distribution for all the industries combined.

Construction Prime Contracts: 2,854, or 93.85%, of construction prime contracts were awarded to market area businesses. Construction prime contracts in the market area accounted for \$10,564,597,624, or 93.51%, of the total construction prime contract dollars.

Professional Services Prime Contracts: 3,848, or 68.19%, of professional services prime contracts were awarded to market area businesses. Professional services prime contracts in the market area accounted for \$3,355,456,642, or 83.21%, of the total professional services prime contract dollars.

Goods and Services Prime Contracts: 6,989, or 59.96%, of goods and services prime contracts were awarded to market area businesses. Goods and services prime contracts in the market area accounted for \$1,993,400,868, or 61.67%, of the total goods and services prime contract dollars.

**Table 5.5: New Jersey Construction Contract Distribution
July 1, 2015 to June 30, 2020**

Counties in Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Market Area	2,854	93.85%	\$10,564,597,624	93.51%
Outside Market Area	187	6.15%	\$733,095,807	6.49%
TOTAL	3,041	100.00%	\$11,297,693,432	100.00%

**Table 5.6: New Jersey Professional Services Contract Distribution
July 1, 2015 to June 30, 2020**

Counties in Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Market Area	3,848	68.19%	\$3,355,456,642	83.21%
Outside Market Area	1,795	31.81%	\$677,141,771	16.79%
TOTAL	5,643	100.00%	\$4,032,598,413	100.00%



**Table 5.7: New Jersey Goods and Services Contract Distribution
July 1, 2015 to June 30, 2020**

Counties in Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Market Area	6,989	59.96%	\$1,993,400,868	61.67%
Outside Market Area	4,668	40.04%	\$1,239,097,101	38.33%
TOTAL	11,657	100.00%	\$3,232,497,969	100.00%

**Table 5.8: New Jersey Contract Distribution for All Industries
July 1, 2015 to June 30, 2020**

Counties in Market Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Market Area	13,691	67.31%	\$15,913,455,134	85.73%
Outside Market Area	6,650	32.69%	\$2,649,334,679	14.27%
TOTAL	20,341	100.00%	\$18,562,789,813	100.00%



CHAPTER 6: Prime Contractor and Subcontractor Availability Analysis

I. Introduction

According to *City of Richmond v. J.A. Croson Co.* (Croson), availability is defined as the number of businesses in the jurisdiction's market area that are ready, willing, and able to provide the goods or services procured by the jurisdiction.³⁰³ To determine the availability of Minority and Woman-owned Business Enterprises³⁰⁴ (M/WBEs) and non-minority male-owned businesses (non-M/WBEs) within the jurisdiction's market area, businesses domiciled within the market area need to be enumerated. As defined in *Chapter 5: Market Area Analysis*, the market area is the jurisdictional boundaries of the State.

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

II. Prime Contractor Availability Data Sources

The sources used to identify the willing and able businesses are discussed below. Only businesses determined to be willing and able were added to the availability list. If a business was willing and able to provide goods or services in more than one industry, it was listed separately in each industry.

A. Identification of Willing Businesses within the Market Area

To identify willing businesses in the State that provide construction, professional services and goods and services the State contracting agencies procure, four main sources of information were used: (1) the State contracting agencies' records, including utilized vendors' lists, (2) government certification directories, (3) business owners who registered for the State's Disparity Study business community meetings, and (4) business and trade association membership lists.

The four sources were ranked according to their reliability in determining a business' willingness to contract with the State contracting agencies, with the highest rank assigned to utilized businesses and vendors. Government certification lists ranked second; community meeting registrations ranked third; and business and trade association membership lists ranked fourth. The first source

³⁰³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

³⁰⁴ Hereinafter referred to in the statistical tables as "Minority and Caucasian female-owned businesses."



used to build the availability database was the State contracting agencies' utilized businesses. Vendor lists were then appended to the availability database. Businesses identified from federal and local government certification agencies were thereafter appended. The registration lists from the six business community meetings were appended because the registration of a business for one of the six business community meetings was the affirmation of the business's willingness to contract with the State's contracting agencies. Businesses identified from association membership lists that affirmed their willingness through a survey were also appended. The business associations included trade organizations, professional organizations, and chambers of commerce.

B. Prime Contractor Sources

Table 6.1 below lists all the sources compiled, from which at least one willing business in the market area was identified. Extensive targeted outreach to business associations in the market area was performed to identify businesses and secure business membership directories.

The sources are divided into the following categories: State of New Jersey sources, government certification directories, and association membership lists.

Table 6.1: Prime Contractor Availability Data Sources

Source	Type of Information
State of New Jersey Sources	
2015-2018 Contract Index Listing	M/WBE and Non-minority Male
2019-2020 Contract Index Listing_	M/WBE and Non-minority Male
2021 Disparity Study- PVSC Response 3-17-22 2018-2020 DATA_2018	M/WBE and Non-minority Male
2021 Disparity Study- PVSC Response 3-17-22 2018-2020 DATA_2019	M/WBE and Non-minority Male
2021 Disparity Study- PVSC Response 3-17-22 2018-2020 DATA_2020	M/WBE and Non-minority Male
Answers for Questions regarding the Disparity Study CRDA_SupportingTables_081821-Final_Additional Contracts	M/WBE and Non-minority Male
Bureau of EMS Disparity Study Data Structure 3-9-21 - 1_PrimeUtil	M/WBE and Non-minority Male
Bureau of EMS Disparity Study Data Structure 3-9-21 - 2_PrimeUtil	M/WBE and Non-minority Male
Casino Reinvestment Development Authority_Disparity Study Data Structure File 5.17.2021_PrimeUtil	M/WBE and Non-minority Male
Construction Services - Disparity Report - Clarifications - Master Copy	M/WBE and Non-minority Male
ContractCSVExport_as of 2021_10_27	M/WBE and Non-minority Male
Copy of 2016-2020 NJTPA PO Data	M/WBE and Non-minority Male
Copy of Disparity Study Data UpdatePrimeUtil	M/WBE and Non-minority Male
Copy of Disparity Study Data Structure 3-9-21-Thomas Edison and NJ State LibraryPrimeUtil	M/WBE and Non-minority Male
Copy of Disparity Study Data Structure 3-9-21 - original template_NJINFRASTRUCTUREBANK_PrimeUtil	M/WBE and Non-minority Male
Copy of Disparity Study Data Structure 5-17-21(PassaicValley)- 1_PrimeUtil_15	M/WBE and Non-minority Male
Copy of Disparity Study Data Structure 5-17-21(PassaicValley)- 1_PrimeUtil_16	M/WBE and Non-minority Male





State of New Jersey Sources	
Copy of Disparity Study Data Structure 5-17-21(PassaicValley)-1_PrimeUtil_17	M/WBE and Non-minority Male
Copy of Disparity Study EMS 10-15-2021	M/WBE and Non-minority Male
Copy of Disparity Study Prime and Vendor Data Structure 4-19_NJSEA_PrimeUtil	M/WBE and Non-minority Male
Copy of Montclair State University prime contractor(1)_PrimeUtil	M/WBE and Non-minority Male
Copy of New Jersey City University_PrimeUtil	M/WBE and Non-minority Male
Copy of NJTA_primecontractorfile_part1_PrimeUtil	M/WBE and Non-minority Male
Copy of NJTA_primecontractorfile_part2_PrimeUtil	M/WBE and Non-minority Male
Copy of NJTA_primecontractorfile_part3_PrimeUtil	M/WBE and Non-minority Male
Disparity Study Data Structure - IBank - Submitted Version_PrimeUtil	M/WBE and Non-minority Male
Disparity Study Data Structure _04.05.2021_PrimeUtil	M/WBE and Non-minority Male
Disparity Study Data Structure 3-9-21_PrimeUtil	M/WBE and Non-minority Male
Disparity Study Data DPMC 4-16-21	M/WBE and Non-minority Male
Disparity Study Data DPMC 4-29-21_Prime	M/WBE and Non-minority Male
Disparity Study Data DPMC 8-31-21	M/WBE and Non-minority Male
Disparity Study Data Structure - NJEFA Response_PrimeUtil	M/WBE and Non-minority Male
Disparity Study Data Structure rev. 9-20-21	M/WBE and Non-minority Male
Disparity Study Data with Ramapo Data 5-17-21 Submittal_PrimeUtil	M/WBE and Non-minority Male
Disparity Study Prime and Vendor Data (2)_CHS Prime Contractor Util	M/WBE and Non-minority Male
Disparity Study Prime and Vendor Data (2)_COS Prime Contractor Util	M/WBE and Non-minority Male
Disparity Study Prime and Vendor Data Structure 4-19	M/WBE and Non-minority Male
Disparity Study Prime and Vendor Data Structure 4-19_Prime Contractor Utilization	M/WBE and Non-minority Male
Disparity Study Prime and Vendor Data_FMERA Prime Contractor Util	M/WBE and Non-minority Male
Disparity Study Prime Contracts updated Nov 2021_No-PO Prime Contractor Utiliz	M/WBE and Non-minority Male
Disparity Study Prime Contracts updated Nov 2021_Prime Contractor Utilization	M/WBE and Non-minority Male
Disparity Study_SJTPO Data Prime.Subcontractor Data_PrimeUtil	M/WBE and Non-minority Male
DPP Disparity Report	M/WBE and Non-minority Male
DPP Prime_Contracts_and_Vendors March 2022	M/WBE and Non-minority Male
EDW_State Disparity_Construction Services_051221 (003)_PrimeUtil	M/WBE and Non-minority Male
EDW_State Disparity_Professional Services_042021 (002)_PrimeUtil	M/WBE and Non-minority Male
HMFAs Master Disparity Study Data Structure 5-17-21_PrimeUtil	M/WBE and Non-minority Male
Kean University Disparity Study Data Structure 5-6-21 FINAL_PrimeUtil	M/WBE and Non-minority Male
Kean_SupportingTables_010722 KEAN COMPLETED 3-29-2022	M/WBE and Non-minority Male
Mason-Tillman OIT	M/WBE and Non-minority Male
Master Disparity Study Data Structure 3-9-21_PrimeUtil	M/WBE and Non-minority Male
Master Disparity Study Data Structure 5-9-2022_PrimeContractorUtilization	M/WBE and Non-minority Male
Master Disparity Study Data Structure 9-28-21_PrimeUtil	M/WBE and Non-minority Male
NJ water supply_Disparity Study Data Structure 3-9-21_PrimeUtil	M/WBE and Non-minority Male

State of New Jersey Sources	
NJDWSC Mason Tillman 2021 Disparity Study_PrimeUtil	M/WBE and Non-minority Male
NJEDA 2021 Stwd Disp Study Data Rept (to Mason Tillman)-Final_PrimeUtil	M/WBE and Non-minority Male
NJIT Prime Contractors_PrimeUtil	M/WBE and Non-minority Male
NJIT Prime Contractors_updated_3_28_2022 includes payments	M/WBE and Non-minority Male
NJIT Prime Contractors_updated_7_6_2022_PrimeUtil	M/WBE and Non-minority Male
NJRA Disparity Study Data Structure 3-9-21_PrimeUtil	M/WBE and Non-minority Male
NJSDA - Disparity Study Data Emailed June 1_PrimeUtil	M/WBE and Non-minority Male
NJT State Disparity Cont.Treas.RealEst Data Final 6.25.21v3_PrimeUtil_Contracts	M/WBE and Non-minority Male
NJT State Disparity Cont.Treas.RealEst Data Final 6.25.21v3_PrimeUtil_POs	M/WBE and Non-minority Male
NJT State Disparity Cont.Treas.RealEst Data Final 6.25.21v3_PrimeUtil_RealEstate	M/WBE and Non-minority Male
NJTPA_Copy of Disparity Study Data Structure 3-9-21_PrimeUtil	M/WBE and Non-minority Male
Prime Contractor William Paterson_PrimeUtil	M/WBE and Non-minority Male
RURCBOG Disparity Study 5-17-21_PrimeUtil	M/WBE and Non-minority Male
Rutgers - Payment Data for NJ Disparity - May 2021_PrimeUtil	M/WBE and Non-minority Male
SJTA_Copy of Disparity Study Prime Contracts_PrimeUtil	M/WBE and Non-minority Male
Stockton University Contract List for Statewide Disparity Study (2015-2020)	M/WBE and Non-minority Male
Stockton University Statewide Disparity Study Submission 05172021_PrimeUtil	M/WBE and Non-minority Male
TCNJ Disparity Study Payment and Vendor Report_PrimeUtil_Payments	M/WBE and Non-minority Male
TCNJ Disparity Study PO Report_PrimeUtil	M/WBE and Non-minority Male
Answers for Questions rearding the Disparity Study CRDA_SupportingTables_081821-Final	M/WBE and Non-minority Male
Bureau of EMS Disparity Study Data Structure 3-9-21 - 1_Vendor	M/WBE and Non-minority Male
casino reinvestment development authority_Disparity Study Data Structure File 5.17.2021_Vendors	M/WBE and Non-minority Male
Construction Services - Disparity Report - Clarifications - Master Copy	M/WBE and Non-minority Male
Copy of Copy of Disparity Study Data Update_Vendors	M/WBE and Non-minority Male
Copy of Disparity Study Data Structure 3-9-21-Thomas Edison and NJ State Library_Vendors	M/WBE and Non-minority Male
Copy of Disparity Study Data Structure 3-9-21 - original template_NJINFRASTRUCTUREBANK_Vendors	M/WBE and Non-minority Male
Copy of Disparity Study Data Structure 5-17-21(PassaicValley)-1_Vendors	M/WBE and Non-minority Male
Copy of Disparity Study Data_Vendors	M/WBE and Non-minority Male
Copy of Disparity Study EMS 10-15-2021	M/WBE and Non-minority Male
Copy of Disparity Study Prime and Vendor Data Structure 4-19_NJSEA_Vendors	M/WBE and Non-minority Male
Copy of Montclair University Vendor List 05-13-21WN	M/WBE and Non-minority Male
Copy of new jersey city university_Vendors	M/WBE and Non-minority Male
Copy of new jersey city university_VendorsList	M/WBE and Non-minority Male
Disparity Study Data Structure 3-9-21_Vendors	M/WBE and Non-minority Male





State of New Jersey Sources	
Disparity Study Data Structure 5-18-21_dos_Vendors	M/WBE and Non-minority Male
Disparity Study Data DPMC 4-16-21_Vendors	M/WBE and Non-minority Male
Disparity Study Data DPMC 4-29-21_Vendors	M/WBE and Non-minority Male
Disparity Study Data Structure - NJEFA Response_Vendors	M/WBE and Non-minority Male
Disparity Study Data with Ramapo Data 5-17-21 Submittal_Vendors	M/WBE and Non-minority Male
Disparity Study Prime and Vendor Data Structure 4-19_Vendors List	M/WBE and Non-minority Male
Disparity Study Prime and Vendor Data_CHS Vendor List	M/WBE and Non-minority Male
Disparity Study Prime and Vendor Data_COS Vendor List	M/WBE and Non-minority Male
Disparity Study Prime and Vendor Data_FMERA Vendor List	M/WBE and Non-minority Male
Disparity Study Vendor List_Vendors	M/WBE and Non-minority Male
EDW_State Disparity_Construction Services_051221 (003)_Vendors	M/WBE and Non-minority Male
HMFA's Master Disparity Study Data Structure 5-17-21	M/WBE and Non-minority Male
Kean University Disparity Study Data Structure 5-6-21 FINAL_Vendors	M/WBE and Non-minority Male
Master Disparity Study Data Structure 3-9-21_Vendors	M/WBE and Non-minority Male
nj water supply_Disparity Study Data Structure 3-9-21_Vendors	M/WBE and Non-minority Male
nj_disparity_study_vendors_20210407_Vendors	M/WBE and Non-minority Male
NJDWSC Mason Tillman 2021 Disparity Study_Vendors	M/WBE and Non-minority Male
NJIB_SupportingTables_100821 - Followups - Oct 2021, Tab 3	M/WBE and Non-minority Male
NJRA Disparity Study Data Structure 3-9-21_Vendors	M/WBE and Non-minority Male
NJSDA - Disparity Study Data Emailed June 1_Vendors	M/WBE and Non-minority Male
NJT Oracle Non Oracle Vendor Info MM FNL 7.19.21_Use This	M/WBE and Non-minority Male
NJT Oracle Non Oracle Vendor Info MM FNL 7.19.21_Vendors	M/WBE and Non-minority Male
NJTA Vendor List with Enterprise and Ethnicity rev2021-11-23	M/WBE and Non-minority Male
NJTPA_Copy of Disparity Study Data Structure 3-9-21_Vendors	M/WBE and Non-minority Male
Revised_State Study CFD Vendor List with GLs_Vendors	M/WBE and Non-minority Male
Revised_State Study Vendor List with OPS GL_Vendors	M/WBE and Non-minority Male
RURCBOG Disparity Study 5-17-21_Vendors	M/WBE and Non-minority Male
Stockton University Statewide Disparity Study Submission 05172021_VendorsList	M/WBE and Non-minority Male
Stockton Vendor List 5-24-22	M/WBE and Non-minority Male
TCNJ Disparity Study Payment and Vendor Report_Vendors	M/WBE and Non-minority Male
Vendor List with Enterprise and Ethnicity May 13, 2021_Vendors	M/WBE and Non-minority Male
Vendors File William Paterson	M/WBE and Non-minority Male
Government Certification Directories	
NJ TRANSIT List of Certified Businesses 9.2.2022	M/WBE and Non-minority Male
State of New Jersey Unified Certification Program	M/WBE and Non-minority Male
The Port Authority of New York and New Jersey Minority, Women-Owned, Small and Disadvantaged Business Enterprises	M/WBE
The State of New Jersey Department of the Treasury / NJ Selective Assistance Vendor Information	M/WBE and Non-minority Male
U.S. Small Business Administration - 8(a) Certified or 8(a) Joint Venture	M/WBE



Government Certification Directories	
U.S. Small Business Administration - Disadvantaged Businesses	M/WBE
U.S. Small Business Administration - HUBZone	M/WBE and Non-minority Male
U.S. Small Business Administration - Veteran-Owned Businesses	M/WBE and Non-minority Male
U.S. Small Business Administration - Women-Owned Businesses	M/WBE
Association Membership Lists	
African American Chamber of Commerce of New Jersey	M/WBE
Alliance of New York Asian Architects and Engineers	M/WBE
American Council of Engineering Companies of New Jersey	M/WBE and Non-minority Male
American Institute of Architects, Central New Jersey Chapter	M/WBE and Non-minority Male
American Institute of Architects, West Jersey Chapter	M/WBE and Non-minority Male
American Society of Heating, Refrigerating and Air-Conditioning Engineers, New Jersey Chapter	M/WBE and Non-minority Male
American Welding Society, New Jersey Section	M/WBE and Non-minority Male
Architects League of Northern New Jersey	M/WBE and Non-minority Male
Asbury Park Chamber of Commerce	M/WBE and Non-minority Male
Associated Construction Contractors of New Jersey	M/WBE and Non-minority Male
Associated General Contractors of America	M/WBE and Non-minority Male
Avalon Chamber of Commerce	M/WBE and Non-minority Male
Black Owned, Inc.	M/WBE
Bridgeton Area Chamber of Commerce	M/WBE and Non-minority Male
Brigantine Beach Chamber of Commerce	M/WBE and Non-minority Male
Builders League of South Jersey	M/WBE and Non-minority Male
Burlington Mercer Chamber of Commerce	M/WBE and Non-minority Male
Cape May County Chamber of Commerce	M/WBE and Non-minority Male
Chamber of Commerce of Greater Cape May	M/WBE and Non-minority Male
Chamber of Commerce of Southern New Jersey	M/WBE and Non-minority Male
Cliffside Park Chamber of Commerce	M/WBE and Non-minority Male
Commerce and Industry Association of New Jersey	M/WBE and Non-minority Male
Delaware River Port Authority	M/WBE and Non-minority Male
Drywall and Interior Systems Contractors Association of New Jersey, Inc.	M/WBE and Non-minority Male
East Brunswick Regional Chamber of Commerce	M/WBE and Non-minority Male
Eastern Heating & Cooling Council	M/WBE and Non-minority Male
Eastern Monmouth Area Chamber of Commerce	M/WBE and Non-minority Male
Edison Chamber of Commerce	M/WBE and Non-minority Male
Essex County Latino-American Chamber of Commerce	M/WBE
Fair Lawn Chamber of Commerce	M/WBE and Non-minority Male
Glen Rock Chamber of Commerce	M/WBE and Non-minority Male
Greater Atlantic City Chamber of Commerce	M/WBE and Non-minority Male
Greater Hackensack Chamber of Commerce	M/WBE and Non-minority Male
Greater Long Branch Chamber of Commerce	M/WBE and Non-minority Male
Greater Millville Chamber of Commerce	M/WBE and Non-minority Male



Association Membership Lists	
Greater Ocean Township Chamber of Commerce	M/WBE and Non-minority Male
Greater Paterson Chamber of Commerce	M/WBE and Non-minority Male
Greater Paulsboro Chamber of Commerce	M/WBE and Non-minority Male
Greater Pitman Chamber of Commerce	M/WBE and Non-minority Male
Greater Sea Isle City Chamber of Commerce	M/WBE and Non-minority Male
Greater Spring Lake Chamber of Commerce	M/WBE and Non-minority Male
Greater Toms River Chamber of Commerce	M/WBE and Non-minority Male
Greater Tuckahoe Area Merchants Association	M/WBE and Non-minority Male
Greater Vineland Chamber of Commerce	M/WBE and Non-minority Male
Greater Westfield Area Chamber of Commerce	M/WBE and Non-minority Male
Greater Wildwood Chamber of Commerce	M/WBE and Non-minority Male
Greater Woodbury Chamber of Commerce	M/WBE and Non-minority Male
Hawthorne Chamber of Commerce	M/WBE and Non-minority Male
Hudson County Chamber of Commerce	M/WBE and Non-minority Male
Irrigation Association of New Jersey	M/WBE and Non-minority Male
Irvington Chamber of Commerce	M/WBE and Non-minority Male
Jersey City Supplier Diversity Directory	M/WBE and Non-minority Male
Jersey Shore Chamber of Commerce	M/WBE and Non-minority Male
Madison Chamber of Commerce	M/WBE and Non-minority Male
Manasquan Chamber of Commerce	M/WBE and Non-minority Male
Marine Trades Association of New Jersey	M/WBE and Non-minority Male
Masonry Contractors of New Jersey	M/WBE and Non-minority Male
Matawan-Aberdeen Chamber of Commerce	M/WBE and Non-minority Male
Meadowlands Regional Chamber of Commerce	M/WBE and Non-minority Male
Mechanical Contractors Association of New Jersey	M/WBE and Non-minority Male
Metropolitan Builders & Contractors Association of New Jersey	M/WBE and Non-minority Male
Metuchen Area Chamber of Commerce	M/WBE and Non-minority Male
Middlesex County Regional Chamber of Commerce	M/WBE and Non-minority Male
Montvale Chamber of Commerce	M/WBE and Non-minority Male
Morris County Chamber of Commerce	M/WBE and Non-minority Male
Morris County Hispanic American Chamber of Commerce	M/WBE
Mount Olive Area Chamber of Commerce	M/WBE and Non-minority Male
National Air Duct Cleaners Association	M/WBE and Non-minority Male
National Electrical Contractors Association Northern New Jersey	M/WBE and Non-minority Male
National Electrical Contractors Association, Southern New Jersey Chapter	M/WBE and Non-minority Male
New Jersey Asphalt Pavement Association	M/WBE and Non-minority Male
New Jersey Association of Women Business Owners	M/WBE
New Jersey Business and Industry Association	M/WBE and Non-minority Male
New Jersey Chamber of Commerce	M/WBE and Non-minority Male
New Jersey Electronic Security Association	M/WBE and Non-minority Male

Association Membership Lists	
New Jersey Korean American Chamber of Commerce	M/WBE
New Jersey Land Improvement Contractors	M/WBE and Non-minority Male
New Jersey Landscape Contractors Association	M/WBE and Non-minority Male
New Jersey Nursery and Landscape Association	M/WBE and Non-minority Male
New Jersey Professional Engineers in Construction	M/WBE and Non-minority Male
New Jersey Society of Professional Land Surveyors	M/WBE and Non-minority Male
New Jersey State Veterans Chamber of Commerce	M/WBE and Non-minority Male
New Jersey Subcontractors Association	M/WBE and Non-minority Male
New Jersey Technology and Manufacturing Association	M/WBE and Non-minority Male
Newark Regional Business Partnership	M/WBE and Non-minority Male
NJ Association of Woman Business Owners	M/WBE
Orthodox Jewish Chamber Of Commerce	M/WBE and Non-minority Male
Petroleum Equipment Contractor's Association of New Jersey	M/WBE and Non-minority Male
Pile Driving Contractors Association, Northeast Chapter	M/WBE and Non-minority Male
Shore Builders Association of Central NJ, Inc.	M/WBE and Non-minority Male
Somerset County Business Partnership	M/WBE and Non-minority Male
South New Jersey Mechanical Contractors Association	M/WBE and Non-minority Male
Statewide Hispanic Chamber of Commerce of New Jersey	M/WBE
The Builders Association of Northern New Jersey	M/WBE and Non-minority Male
Union County Latino-American Chamber of Commerce	M/WBE
West Orange Chamber of Commerce	M/WBE and Non-minority Male
Woodbridge Metropolitan Chamber of Commerce	M/WBE and Non-minority Male



C. Determination of Willingness

From the sources listed in the previous section, 9,630 unique market area businesses that provide goods or services in one or more of the three industries were identified. An accounting of the willing businesses derived from these sources is listed below.

1. Prime Contractor Utilization

A total of 2,701 unique market area businesses were added to the availability database from the State contracting agencies' contract and vendor records.

2. Certification Lists

A total of 6,470 unique market area businesses were added to the availability database from government certification lists.

3. Vendor Lists

A total of 21 unique market area businesses identified from utilized vendor lists that confirmed their willingness were added to the availability database.

4. Business Community Meeting Registrations

A total of 43 unique market area businesses were added to the availability database from the six community meetings.

5. Business Association Membership Lists

A total of 335 unique market area businesses identified from business association membership lists that confirmed their willingness were added to the availability database.

6. Business Survey

A total of 29 unique market area businesses were added to the availability database from the surveys businesses completed online.

7. Anecdotal Interviews

A total of 31 unique market area businesses were added to the availability database from the anecdotal interview surveys businesses completed online.



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

Tables 6.2 through 6.4 present the distribution of willing prime contractors by source. As noted in Table 6.2, 95.99% of the available construction businesses identified were determined from the State contracting agencies' records, government certification lists, and vendor lists. Companies identified through community meetings, business associations, business surveys, and anecdotal interviews represent 4.01% of the willing businesses.

**Table 6.2: Distribution of Prime Contractor Availability Data Sources
Formal Construction, July 1, 2015 to June 30, 2020**

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	10.92%	38.56%	25.36%
Certification Lists	86.00%	56.09%	70.38%
Vendors Lists	0.23%	0.28%	0.26%
Subtotal	97.15%	94.93%	95.99%
Community Meeting Attendees	0.54%	0.49%	0.51%
Business Associations	1.31%	4.01%	2.72%
Business Survey	0.46%	0.28%	0.37%
Anecdotal Interview	0.54%	0.28%	0.40%
Subtotal	2.85%	5.07%	4.01%
Grand Total*	100.00%	100.00%	100.00%

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

Table 6.3 lists the data sources for the available professional services prime contractors. As noted, 94.65% of the identified professional services businesses were determined from the State contracting agencies' records, government certification lists, and vendor lists. Companies identified through the community meetings, business associations, business surveys, and anecdotal interviews represent 5.35% of the willing businesses.



**Table 6.3: Distribution of Prime Contractor Availability Data Sources
Formal Professional Services, July 1, 2015 to June 30, 2020**

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	8.20%	41.06%	20.84%
Certification Lists	88.19%	50.12%	73.54%
Vendors Lists	0.44%	0.00%	0.27%
Subtotal	96.83%	91.18%	94.65%
Community Meeting Attendees	0.78%	0.23%	0.57%
Business Associations	1.90%	8.04%	4.26%
Business Survey	0.24%	0.31%	0.27%
Anecdotal Interview	0.24%	0.23%	0.24%
Subtotal	3.17%	8.82%	5.35%
Grand Total*	100.00%	100.00%	100.00%

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

Table 6.4 lists the data sources for the available goods and services prime contractors. As noted, 95.74% of the identified goods and services businesses were determined from the State contracting agencies' records, government certification lists, and vendor lists. Companies identified through the community meetings, business associations, business surveys, and anecdotal interviews represent 4.26% of the willing businesses.

**Table 6.4: Distribution of Prime Contractor Availability Data Sources
Formal Goods and Services, July 1, 2015 to June 30, 2020**

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	13.91%	52.71%	34.90%
Certification Lists	82.72%	41.96%	60.67%
Vendors Lists	0.31%	0.04%	0.17%
Subtotal	96.94%	94.72%	95.74%
Community Meeting Attendees	0.78%	0.13%	0.43%
Business Associations	1.92%	4.45%	3.29%
Business Survey	0.26%	0.26%	0.26%
Anecdotal Interview	0.10%	0.44%	0.29%
Subtotal	3.06%	5.28%	4.26%
Grand Total*	100.00%	100.00%	100.00%

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



E. Distribution of Available Contractors by Source, Ethnicity, and Gender for Informal Prime Contracts

Table 6.5 presents the distribution of willing prime contractors for informal prime contracts. As noted in Table 6.5, 97.44% of the available businesses for all industries identified were determined from the State contracting agencies' records, government certification lists, and vendor lists. Companies identified through community meetings, business associations, business surveys, and anecdotal interviews represent 2.56% of the willing businesses. Prime contractors utilized on formal contracts, as well as those utilized only on informal prime contracts, are included.

**Table 6.5: Distribution of Prime Contractor Availability Data Sources for Informal Contracts
All Industries, July 1, 2015 to June 30, 2020**

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	14.03%	78.83%	59.53%
Certification Lists	82.70%	18.74%	37.79%
Vendors Lists	0.31%	0.04%	0.12%
Subtotal	97.04%	97.61%	97.44%
Community Meeting Attendees	0.61%	0.10%	0.25%
Business Associations	1.77%	2.04%	1.96%
Business Survey	0.31%	0.11%	0.17%
Anecdotal Interview	0.27%	0.14%	0.18%
Subtotal	2.96%	2.39%	2.56%
Grand Total*	100.00%	100.00%	100.00%

*The percentages may not total 100 percent due to rounding

III. Capacity

The second component of the availability requirement set forth in *Croson* is the capacity or ability of a business to perform the contracts awarded by the jurisdiction.³⁰⁵ Capacity requirements are not delineated in *Croson*, but capacity has been considered in subsequent cases. Specifically, the Third Circuit held certification to be a valid method of defining availability.³⁰⁶ In *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)*, the court held that utilizing a list of certified contractors was a rational approach to identify qualified, willing firms.³⁰⁷ The Court stated “[a]n analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach [of qualification].”³⁰⁸

³⁰⁵ *Croson*, 488 U.S. 469.

³⁰⁶ *Contractors Ass’n of E. Pa.*, 91 F.3d at 603.

³⁰⁷ *Contractors Ass’n of E. Pa.*, 91 F.3d at 603.

³⁰⁸ *Id.* at 603; see also, *Concrete Works IV*, 321 F.3d at 966 (noting a less sophisticated method to calculate availability does not render a disparity study flawed).



As noted in *Philadelphia*, “[t]he issue of qualifications can be approached at different levels of specificity[.]”³⁰⁹ Researchers have attempted to define capacity using census data by profiling the age of the business, education of the business owner, business revenue, number of employees, and bonding limits. However, these conventional indices are themselves impacted by race and gender-based discrimination.³¹⁰ Furthermore, they are difficult to measure.

Capacity is also a subject of review in *North Shore Concrete and Assoc., Inc. v. City of New York*³¹¹ (*North Shore*), in which North Shore Concrete and Associates challenged the constitutionality of the New York City M/WBE program. The plaintiff argued that in calculating availability, the disparity study failed to take into consideration relevant criteria, such as willingness or the ability to perform the services required by City contracts. The plaintiff asserted that the disparity study considered all M/WBE construction firms with one employee other than the owner as qualified to perform any type of construction work, thereby overstating the number of qualified M/WBEs.

The Court rejected the plaintiff’s argument that the study overstated the number of available M/WBE firms because it did not take into consideration certain criteria such as the size of the firm. The *North Shore* court concluded that firm size was not a proper indicator of capacity in determining the pool of available firms. The district court accepted the defendant’s argument that in construction it is easy to obtain “qualifications” by hiring additional employees. The Court noted that the plaintiff North Shore was a small construction firm with an owner and only one employee, a secretary, but had bid on construction projects worth more than one million dollars.³¹²

Given the requirement to assess capacity and the challenges of measuring it, Mason Tillman uses five methods to compare the capacity of M/WBEs to similarly situated non-M/WBE businesses. These measures, as applied in this study, also control for the impact of race and gender-discrimination on the capacity findings. The capacity measures include: (1) a review of the distribution of contracts to determine the size of the contracts that the State contracting agencies awarded, (2) the identification of the largest prime contracts the State contracting agencies awarded to M/WBEs, (3) an analysis of the frequency distribution of the State contracting agencies’ contracts awarded to M/WBEs and non-M/WBE firms, (4) a threshold applied to formal prime contracts in the disparity analysis in order to remove outliers that would skew the disparity findings, and (5) an assessment of capacity-related economic factors affecting M/WBE and non-M/WBE businesses using the results of the capacity e-survey.

³⁰⁹ *Contractors Ass’n of E. Pa.*, 91 F.3d at 610.

³¹⁰ Blanchflower, D.G., Levine, P.B., and Zimmerman, D.J. (2003). “Discrimination in the Small-Business Credit Market.” In: *The Review of Economics and Statistics*, 85(4). Cambridge, MA: MIT Press.

³¹¹ *North Shore Concrete and Assoc., Inc. v. City of New York*, No. 94-CV-4017, 1998 WL 273027 (E.D.N.Y. April 12, 1998).

³¹² *North Shore Concrete and Assoc., Inc. v. City of New York*, No. 94-CV-4017, 1998 WL 273027 at *25 (E.D.N.Y. April 12, 1998).



A. *Formal Prime Contract Size Distribution*

The State contracting agencies' formal prime contracts were organized according to the size of the award to determine the distribution of the awarded contracts. The distribution gauged the capacity required to perform the State contracting agencies' contracts. In Table 6.6 and Chart 6.1, the distribution of the contract awards in the three industries were grouped into seven ranges³¹³ and are presented under the groupings of non-minority females, non-minority males, minority females, and minority males.

The distribution revealed that 47.45% of all the formal prime contracts the State contracting agencies awarded were less than \$100,000. Additionally, 72.50% were less than \$250,000; 82.67% were less than \$500,000; 88.85% were less than \$1,000,000; and 95.01% were less than \$3,000,000. Only 4.99% of the awarded prime contracts were valued at \$3,000,000 and greater.

Table 6.6: Formal Contracts by Size: All Industries
July 1, 2015 to June 30, 2020

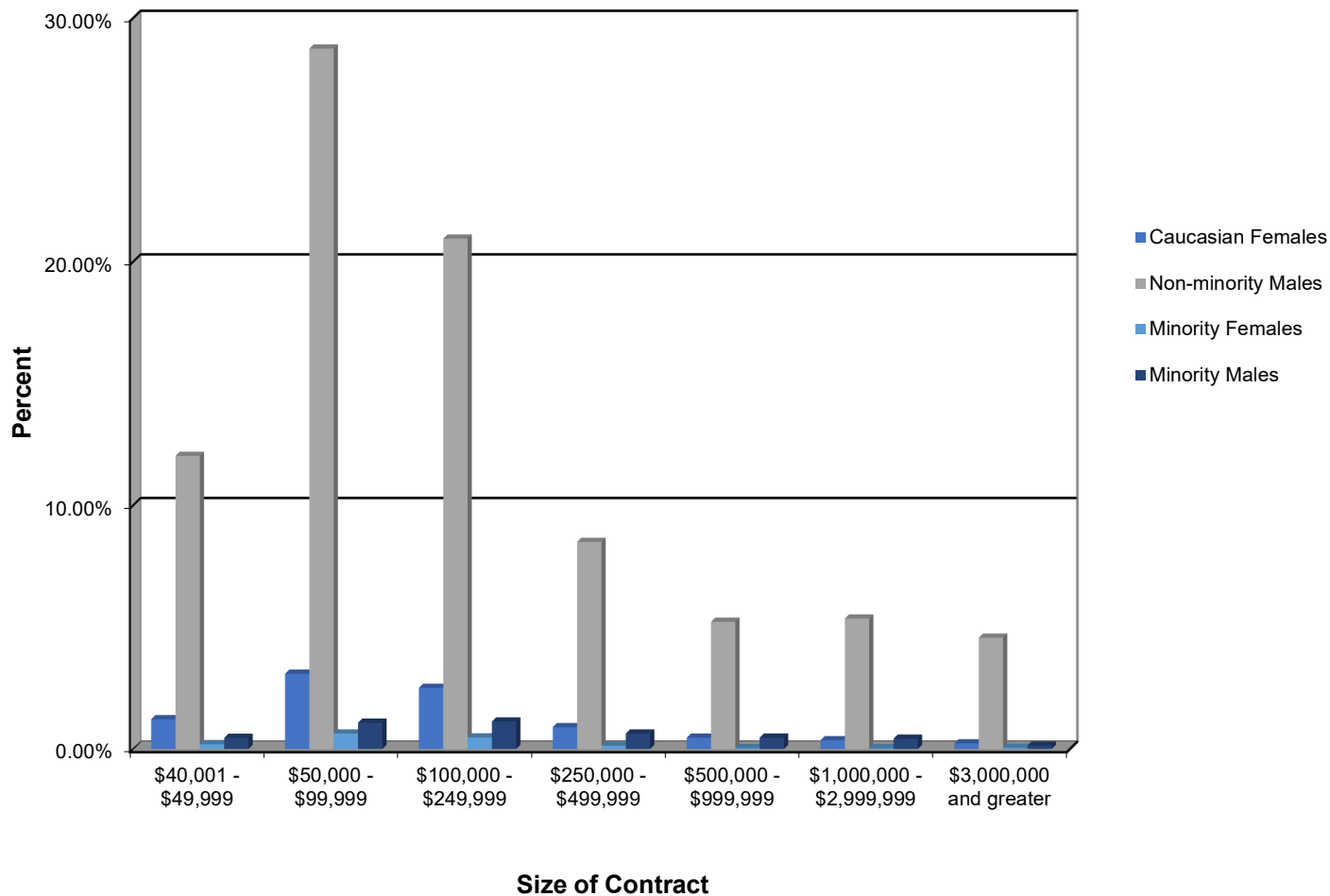
Size	Non-minority				Minority				Total	
	Females		Males		Females		Males			
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
\$40,001 - \$49,999	248	1.22%	2,447	12.03%	40	0.20%	93	0.46%	2,828	13.90%
\$50,000 - \$99,999	628	3.09%	5,848	28.75%	129	0.63%	219	1.08%	6,824	33.55%
\$100,000 - \$249,999	510	2.51%	4,261	20.95%	96	0.47%	229	1.13%	5,096	25.05%
\$250,000 - \$499,999	182	0.89%	1,729	8.50%	27	0.13%	129	0.63%	2,067	10.16%
\$500,000 - \$999,999	94	0.46%	1062	5.22%	7	0.03%	95	0.47%	1258	6.18%
\$1,000,000 - \$2,999,999	73	0.36%	1089	5.35%	6	0.03%	86	0.42%	1254	6.16%
\$3,000,000 and greater	47	0.23%	929	4.57%	10	0.05%	28	0.14%	1014	4.99%
Total	1,782	8.76%	17,365	85.37%	315	1.55%	879	4.32%	20,341	100.00%

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



³¹³ The seven-dollar ranges are \$40,001 - \$49,999; \$50,000 - \$99,999; \$100,000 - \$249,999; \$250,000 - \$499,999; \$500,000 - \$999,999; \$1,000,000 - \$2,999,999; \$3,000,000 and greater.

Chart 6.1: Formal Contracts by Size: All Industries
July 1, 2015 to June 30, 2020



The size of the State contracting agencies' prime contracts is a determinant of the capacity that a willing business needs to be competitive at the prime contract level. The fact that 47.45% of the State contracting agencies' contracts are less than \$100,000 illustrates that the capacity needed to perform a significant number of the State contracting agencies' contracts is not considerable.



B. Largest M/WBE Prime Contracts Awarded by Industry

Table 6.7 shows that M/WBEs demonstrated capacity to perform contracts as large as \$28,357,360 in construction, \$47,082,068 in professional services, and \$32,693,032 in goods and services. The size of the largest prime contract the State contracting agencies awarded to M/WBEs illustrates there are M/WBEs with the capacity to perform substantial contracts.

Table 6.7: Largest Prime Contracts Awarded to M/WBEs, July 1, 2015 to June 30, 2020

Ethnic/Gender Group	Construction	Professional Services	Goods and Services
Black American Female	\$128,000	\$506,231	\$693,692
Black American Male	\$796,000	\$1,716,742	\$1,638,904
Asian American Female	\$8,075,930	\$47,082,068	\$4,028,566
Asian American Male	\$25,994,000	\$16,478,362	\$32,693,033
Hispanic American Female	\$441,434	\$452,492	\$983,472
Hispanic American Male	\$11,940,149	\$1,015,482	\$745,302
American Indian and Alaskan Native Female	\$78,107	----	----
American Indian and Alaskan Native Male	\$11,746,359	----	\$79,992
Caucasian Female	\$28,357,361	\$25,302,090	\$6,509,046
Largest Dollar Amounts MBEs	\$25,994,000	\$47,082,068	\$32,693,032
Largest Dollar Amounts WBEs	\$28,357,360	\$47,082,068	\$6,509,046

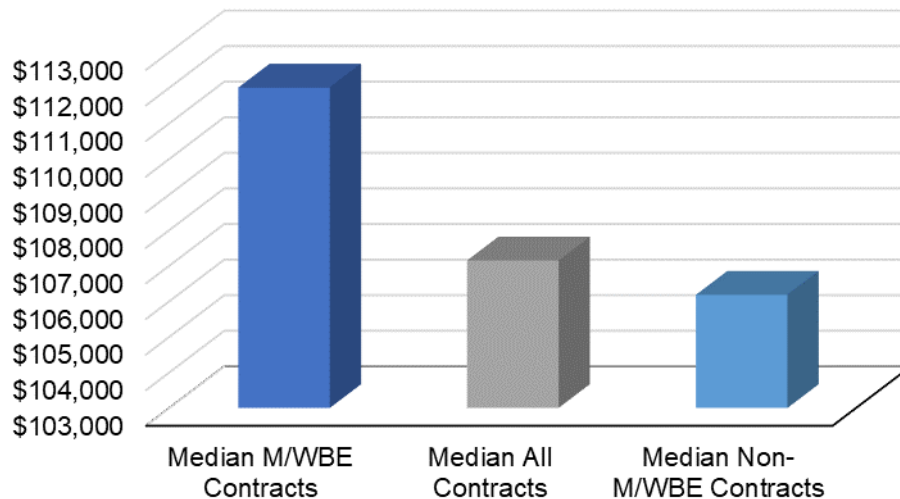
(-----) Denotes a group that was not awarded any contracts within the respective industry.

C. Frequency Distribution

The State contracting agencies' formal contracts range from \$40,003 to \$524,483,364. A frequency distribution was calculated for the State contracting agencies' prime contracts to illustrate the median, where the size of a contract marks the midpoint between the smallest and largest contracts. The same distribution was calculated separately for M/WBEs and non-M/WBEs. Within each frequency distribution, the median, or center point, of the dataset was determined. As shown in Chart 6.2, the midpoint of the State contracting agencies' prime contracts for all industries was \$107,143. This midpoint marks the value at which 50% of contracts were above and 50% were below \$101,143. The median prime contract awarded to M/WBEs was \$112,002, while the median awarded to non-M/WBEs was \$106,179.



Chart 6.2: Median Contract Value, July 1, 2015 to June 30, 2020



These statistics show the difference in medians between M/WBE and non-M/WBE contracts. The difference between the medians of the two groups is statistically significant, illustrating that the median of M/WBE contracts is significantly higher than the median on non-M/WBE contracts. These data illustrate that M/WBEs have comparable capacity to perform a significant number of the prime contracts awarded by the State contracting agencies.

D. Formal Contract Upper Threshold Defined to Eliminate Outliers

The prime contracts subject to the statistical analysis of disparity were defined by removing the outliers. This additional capacity measure ensures that available businesses can perform the contracts analyzed in the disparity analysis. As discussed in *Chapter 3: Prime Contractor Utilization Analysis*, the formal contract assessment included all prime contracts except outliers. The decision to eliminate outliers was made to reduce the business capacity requirements and to increase the reliability of the statistical findings.

E. Socioeconomic Survey

A capacity survey was administered to compile relevant measures to profile the available businesses and to determine the percentage of M/WBEs that are similarly situated to non-minority male-owned businesses. The survey included questions on the business owner's ethnicity, gender, education, and years in business. A profile of the company was solicited with questions on gross revenue, bonding limits, number of employees, and maximum number of contracts performed at one time.

The survey was sent to the 9,630 market area prime contractors and subcontractors in Mason Tillman's availability database. The database was built using the seven sources described earlier in this chapter in *Section C: Determination of Willingness*. Only 150 businesses responded, and 20 responses were from businesses in industries not included in the study. When the 20 businesses



were removed, there were only 130 useful surveys. The 130 survey responses were one percent of the surveyed population. The response rate was significantly less than the percentage needed for a meaningful sample; therefore, no conclusions were drawn.

F. Summary

The capacity of M/WBEs to perform the prime contracts analyzed in the disparity chapter is clearly documented in this chapter. The four measures are significant indicators that the pool of available businesses has the capacity to perform the prime contract and subcontracts analyzed. Furthermore, common industry practice enumerated in *North Shore*, subcontracting, joint ventures, and staff augmentation are all methods available to increase the contractor's capacity on a contract-by-contract basis.



IV. Prime Contractor Availability Analysis for Formal Contracts

The prime contractor availability analysis for formal contracts is based on the 9,630 willing market area businesses enumerated from the availability sources described in *Section C: Determination of Willingness*. The availability of willing market area businesses is presented by ethnicity, gender, and industry in the sections below.

A. Construction Prime Contractor Availability for Formal Contracts

The distribution of available construction prime contractors for formal contracts is summarized in Table 6.8 below.

Black Americans account for 9.19% of the construction prime contractors in the State contracting agencies' market area.

Asian Americans account for 6.43% of the construction prime contractors in the State contracting agencies' market area.

Hispanic Americans account for 11.65% of the construction prime contractors in the State contracting agencies' market area.

American Indians and Alaskan Natives account for 0.70% of the construction prime contractors in the State contracting agencies' market area.

Caucasian Females account for 19.70% of the construction prime contractors in the State contracting agencies' market area.

Non-minority Males account for 52.33% of the construction prime contractors in the State contracting agencies' market area.

Minority Business Enterprises account for 27.97% of the construction prime contractors in the State contracting agencies' market area.

Woman Business Enterprises account for 24.48% of the construction prime contractors in the State contracting agencies' market area.



**Table 6.8: Available Construction Prime Contractors for Formal Contracts
July 1, 2015 to June 30, 2020**

Ethnicity	Percent of Businesses
Black Americans	9.19%
Asian Americans	6.43%
Hispanic Americans	11.65%
American Indians and Alaskan Natives	0.70%
Caucasian Females	19.70%
Non-minority Males	52.33%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
Black American Females	1.98%
Black American Males	7.20%
Asian American Females	1.07%
Asian American Males	5.37%
Hispanic American Females	1.51%
Hispanic American Males	10.14%
American Indian and Alaskan Native Females	0.22%
American Indian and Alaskan Native Males	0.48%
Caucasian Females	19.70%
Non-minority Males	52.33%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	27.97%
Woman Business Enterprises	24.48%



B. Professional Services Prime Contractor Availability for Formal Contracts

The distribution of available professional services prime contractors for formal contracts is summarized in Table 6.9 below.

Black Americans account for 12.01% of the professional services prime contractors in the State contracting agencies' market area.

Asian Americans account for 15.71% of the professional services prime contractors in the State contracting agencies' market area.

Hispanic Americans account for 5.77% of the professional services prime contractors in the State contracting agencies' market area.

American Indians and Alaskan Natives account for 0.39% of the professional services prime contractors in the State contracting agencies' market area.

Caucasian Females account for 27.66% of the professional services prime contractors in the State contracting agencies' market area.

Non-minority Males account for 38.47% of the professional services prime contractors in the State contracting agencies' market area.

Minority Business Enterprises account for 33.87% of the professional services prime contractors in the State contracting agencies' market area.

Woman Business Enterprises account for 37.75% of the professional services prime contractors in the State contracting agencies' market area.



**Table 6.9: Available Professional Services Prime Contractors for Formal Contracts
July 1, 2015 to June 30, 2020**

Ethnicity	Percent of Businesses
Black Americans	12.01%
Asian Americans	15.71%
Hispanic Americans	5.77%
American Indians and Alaskan Natives	0.39%
Caucasian Females	27.66%
Non-minority Males	38.47%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
Black American Females	4.26%
Black American Males	7.75%
Asian American Females	3.96%
Asian American Males	11.74%
Hispanic American Females	1.71%
Hispanic American Males	4.05%
American Indian and Alaskan Native Females	0.15%
American Indian and Alaskan Native Males	0.24%
Caucasian Females	27.66%
Non-minority Males	38.47%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	33.87%
Woman Business Enterprises	37.75%



C. Goods and Services Prime Contractor Availability for Formal Contracts

The distribution of available goods and services prime contractors for formal contracts is summarized in Table 6.10 below.

Black Americans account for 10.08% of the goods and services prime contractors in the State contracting agencies' market area.

Asian Americans account for 5.24% of the goods and services prime contractors in the State contracting agencies' market area.

Hispanic Americans account for 7.98% of the goods and services prime contractors in the State contracting agencies' market area.

American Indians and Alaskan Natives account for 0.26% of the goods and services prime contractors in the State contracting agencies' market area.

Caucasian Females account for 22.34% of the goods and services prime contractors in the State contracting agencies' market area.

Non-minority Males account for 54.10% of the goods and services prime contractors in the State contracting agencies' market area.

Minority Business Enterprises account for 23.56% of the goods and services prime contractors in the State contracting agencies' market area.

Woman Business Enterprises account for 28.97% of the goods and services prime contractors in the State contracting agencies' market area.



**Table 6.10: Available Goods and Services Prime Contractors for Formal Contracts
July 1, 2015 to June 30, 2020**

Ethnicity	Percent of Businesses
Black Americans	10.08%
Asian Americans	5.24%
Hispanic Americans	7.98%
American Indians and Alaskan Natives	0.26%
Caucasian Females	22.34%
Non-minority Males	54.10%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
Black American Females	3.31%
Black American Males	6.77%
Asian American Females	1.29%
Asian American Males	3.95%
Hispanic American Females	1.98%
Hispanic American Males	6.00%
American Indian and Alaskan Native Females	0.05%
American Indian and Alaskan Native Males	0.21%
Caucasian Females	22.34%
Non-minority Males	54.10%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	23.56%
Woman Business Enterprises	28.97%



V. Prime Contractor Availability Analysis for Informal Contracts

The availability of contractors to perform informal contracts is based on the 9,630 willing market area businesses enumerated from the availability sources described above. The availability of willing market area businesses for all industries is presented by ethnicity and gender in the section below.

A. Prime Contractor Availability for Informal Contracts, All Industries

The distribution of available prime contractors for informal contracts for all industries is summarized in Table 6.11 below.

Black Americans account for 5.97% of the prime contractors for informal contracts for all industries in the State contracting agencies' market area.

Asian Americans account for 5.16% of the prime contractors for informal contracts for all industries in the State contracting agencies' market area.

Hispanic Americans account for 4.64% of the prime contractors for informal contracts for all industries in the State contracting agencies' market area.

American Indians and Alaskan Natives account for 0.25% of the prime contractors for informal contracts for all industries in the State contracting agencies' market area.

Caucasian Females account for 13.73% of the prime contractors for informal contracts for all industries in the State contracting agencies' market area.

Non-minority Males account for 70.25% of the prime contractors for informal contracts for all industries in the State contracting agencies' market area.

Minority Business Enterprises account for 16.02% of the prime contractors for informal contracts for all industries in the State contracting agencies' market area.

Woman Business Enterprises account for 17.90% of the prime contractors for informal contracts for all industries in the State contracting agencies' market area.



**Table 6.11: Available Prime Contractors for Informal Contracts, All Industries
July 1, 2015 to June 30, 2020**

Ethnicity	Percent of Businesses
Black Americans	5.97%
Asian Americans	5.16%
Hispanic Americans	4.64%
American Indians and Alaskan Natives	0.25%
Caucasian Females	13.73%
Non-minority Males	70.25%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
Black American Females	1.86%
Black American Males	4.12%
Asian American Females	1.23%
Asian American Males	3.93%
Hispanic American Females	1.01%
Hispanic American Males	3.63%
American Indian and Alaskan Native Females	0.08%
American Indian and Alaskan Native Males	0.18%
Caucasian Females	13.73%
Non-minority Males	70.25%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	16.02%
Woman Business Enterprises	17.90%



VI. Subcontractor Availability Analysis

A. Source of Willing and Able Subcontractors

The calculation of subcontractor availability included all available prime contractors and the unique subcontractors identified in the subcontractor utilization analysis. The sources are presented in Table 6.12.

Analysis was performed for construction and professional services contracts. Subcontractor analysis was not performed for goods and services contracts. Thus, there was no availability calculated for the industry.

Table 6.12: Unique Subcontractor Availability Data Sources

Type Record	Type Information
Prime contracts awarded during the study period	M/WBEs and non-M/WBEs
Subcontractors awarded during the study period	M/WBEs and non-M/WBEs

B. Determination of Willingness and Capacity

Subcontractor availability was limited to the utilized prime contractors and the unique businesses utilized as subcontractors. Thus, there was no need for further assessment of willingness or capacity. It is noteworthy that *Croson* does not require a measure of capacity in the analysis of subcontractor availability. The selection of the subcontractors is the prerogative of the prime contractors.



C. Construction Subcontractor Availability

The distribution of available construction subcontractors is summarized in Table 6.13 below.

Black Americans account for 10.72% of the construction subcontractors in the State contracting agencies' market area.

Asian Americans account for 9.32% of the construction subcontractors in the State contracting agencies' market area.

Hispanic Americans account for 8.99% of the construction subcontractors in the State contracting agencies' market area.

American Indians and Alaskan Natives account for 0.46% of the construction subcontractors in the State contracting agencies' market area.

Caucasian Females account for 21.65% of the construction subcontractors in the State contracting agencies' market area.

Non-minority Males account for 48.85% of the construction subcontractors in the State contracting agencies' market area.

Minority Business Enterprises account for 29.49% of the construction subcontractors in the State contracting agencies' market area.

Woman Business Enterprises account for 29.42% of the construction subcontractors in the State contracting agencies' market area.



**Table 6.13: Available Construction Subcontractors
July 1, 2015 to June 30, 2020**

Ethnicity	Percent of Businesses
Black Americans	10.72%
Asian Americans	9.32%
Hispanic Americans	8.99%
American Indians and Alaskan Natives	0.46%
Caucasian Females	21.65%
Non-minority Males	48.85%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
Black American Females	3.28%
Black American Males	7.44%
Asian American Females	2.45%
Asian American Males	6.87%
Hispanic American Females	1.87%
Hispanic American Males	7.12%
American Indian and Alaskan Native Females	0.17%
American Indian and Alaskan Native Males	0.30%
Caucasian Females	21.65%
Non-minority Males	48.85%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	29.49%
Woman Business Enterprises	29.42%



D. Professional Services Subcontractor Availability

The distribution of available professional services subcontractors is summarized in Table 6.14 below.

Black Americans account for 11.38% of the professional services subcontractors in the State contracting agencies' market area.

Asian Americans account for 10.60% of the professional services subcontractors in the State contracting agencies' market area.

Hispanic Americans account for 9.38% of the professional services subcontractors in the State contracting agencies' market area.

American Indians and Alaskan Natives account for 0.40% of the professional services subcontractors in the State contracting agencies' market area.

Caucasian Females account for 22.70% of the professional services subcontractors in the State contracting agencies' market area.

Non-minority Males account for 45.54% of the professional services subcontractors in the State contracting agencies' market area.

Minority Business Enterprises account for 31.77% of the professional services subcontractors in the State contracting agencies' market area.

Woman Business Enterprises account for 31.13% of the professional services subcontractors in the State contracting agencies' market area.



**Table 6.14: Available Professional Services Subcontractors
July 1, 2015 to June 30, 2020**

Ethnicity	Percent of Businesses
Black Americans	11.38%
Asian Americans	10.60%
Hispanic Americans	9.38%
American Indians and Alaskan Natives	0.40%
Caucasian Females	22.70%
Non-minority Males	45.54%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
Black American Females	3.57%
Black American Males	7.81%
Asian American Females	2.64%
Asian American Males	7.96%
Hispanic American Females	2.06%
Hispanic American Males	7.31%
American Indian and Alaskan Native Females	0.16%
American Indian and Alaskan Native Males	0.25%
Caucasian Females	22.70%
Non-minority Males	45.54%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	31.77%
Woman Business Enterprises	31.13%



VII. Summary

This chapter presented the enumeration of willing and able market area businesses by ethnicity, gender, and industry. In compliance with the *Croson* standard, the capacity of the enumerated businesses was assessed. Four methods were successfully employed: (1) review of the State contracting agencies' contract size distribution to identify the capacity needed to perform most the State contracting agency contracts, (2) determination of the largest contracts the State contracting agencies awarded to M/WBEs, (3) frequency distribution to define the median size of contracts awarded to both M/WBEs and non-M/WBEs, and (4) threshold analysis to define and remove the contract outliers to increase the reliability of the statistical findings.

The findings from these analyses illustrate that M/WBEs have the capacity to perform large State contracting agency contracts. Minority-owned businesses account for 27.78% of construction, professional services, and goods and services prime contractors. Caucasian female-owned businesses account for 23.28%, and non-minority male-owned businesses account for 48.94% of prime contractors.



CHAPTER 7: Prime Contractor Disparity Analysis

I. Introduction

The objective of this chapter is to determine if available, willing, and able Minority and Woman-owned Business Enterprise (M/WBE) contractors were underutilized on prime contracts issued by the State contracting agencies during the study period of July 1, 2015 to June 30, 2020. Under a fair and equitable system of awarding prime contracts, the proportion of prime contract dollars awarded to M/WBEs should be close to the corresponding proportion of available M/WBEs³¹⁴ in the relevant market area. If the ratio of utilized M/WBE prime contractors compared to available M/WBE prime contractors is less than 1, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio. This analysis assumes a fair and equitable system.³¹⁵ *City of Richmond v. J.A. Croson Co. (Croson)*³¹⁶ states that an inference of discrimination can be made if the disparity is statistically significant. Under the *Croson* standard, non-minority male-owned businesses (non-M/WBEs) are not subjected to a statistical test of underutilization. SBEs, SDVOBs, and WBEs are subject to a lesser legal standard and are not subject to the strict scrutiny test of statistical significance.

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

For parametric and non-parametric analyses, the p-value considers the number of contracts, amount of contract dollars, and variation in contract dollars. If the difference between the actual and expected number of contracts and total contract dollars has a p-value equal to or less than 0.05, the difference is statistically significant.³¹⁷

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

³¹⁴ Availability is defined as the number of ready, willing, and able firms. The methodology for determining willing and able firms is detailed in Chapter 6: Prime Contractor and Subcontractor Availability Analysis.

³¹⁵ When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100-percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95-percent confidence level is the statistical standard used in physical and social sciences, and is thus used in the present report to determine if an inference of discrimination can be made.

³¹⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

³¹⁷ This study does not statistically test the overutilization of minority or gender groups or the underutilization of non-minority males.



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

II. Disparity Analysis

A prime contract disparity analysis was performed on formal construction, professional services, and goods and services contracts awarded from July 1, 2015 to June 30, 2020. A separate prime contract disparity analysis was also performed on informal contracts for all industries combined. Both disparity analyses are discussed in this section.

The State's procurement policy has no upper limits on the formal contract levels. However, for the formal contract disparity analysis, upper limits were derived from a statistical calculation that determined the contract values that were outliers and would skew the disparity analysis. The statistical analysis performed to define the outliers is discussed in *Chapter 3: Prime Contractor Utilization Analysis*. The lower limits for the formal disparity analyses are derived from the State's formal contract threshold, which was \$40,000 for professional services and goods and services, and \$65,000 for construction.

The formal contract thresholds derived for each industry are listed in Table 7.1. Contracts below these thresholds are presented in the informal contract analysis.

Table 7.1: Formal Contract Thresholds for Analysis by Industry
July 1, 2015 to June 30, 2020

Industry	Formal Contract Threshold
Construction	Over \$65,000 to \$5,710,000
Professional Services	Over \$40,000 to \$800,000
Goods and Services	Over \$40,000 to \$360,000



The findings from the calculation of statistical significance for each industry are presented in the subsequent sections. The outcomes from the statistical analyses are presented in the “P-Value” column of each table. A description of these statistical outcomes, as shown in the disparity tables, is presented in Table 7.2.

Table 7.2: Statistical Outcome Descriptions

P-Value Outcome	Definition of P-Value Outcome
< 0.05 *	This underutilization is statistically significant.
not significant	M/WBEs: This underutilization is not statistically significant. Non-minority males: This overutilization is not statistically significant.
< 0.05 †	This overutilization is statistically significant.
----	While this group was underutilized, there were no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.
**	This study does not statistically test the overutilization of minority or gender groups or the underutilization of non-minority males.



A. *Disparity Analysis: Formal Prime Contracts by Industry*

1. Construction Prime Contracts Valued over \$65,000 to \$5,710,000

The disparity analysis of construction prime contracts valued over \$65,000 to \$5,710,000 is described below and shown in Table 7.3 and Chart 7.1.

Black Americans represent 9.19% of the available construction businesses and received 0.14% of the dollars on construction contracts valued over \$65,000 to \$5,710,000. This underutilization is statistically significant.

Asian Americans represent 6.43% of the available construction businesses and received 2.03% of the dollars on construction contracts valued over \$65,000 to \$5,710,000. This underutilization is statistically significant.

Hispanic Americans represent 11.65% of the available construction businesses and received 1.51% of the dollars on construction contracts valued over \$65,000 to \$5,710,000. This underutilization is statistically significant.

American Indians and Alaskan Natives represent 0.70% of the available construction businesses and received 0.01% of the dollars on construction contracts valued over \$65,000 to \$5,710,000. This underutilization could not be tested because there were too few available businesses and too few contracts awarded.

Caucasian Females represent 19.70% of the available construction businesses and received 8.14% of the dollars on construction contracts valued over \$65,000 to \$5,710,000. This underutilization is statistically significant.

Non-minority Males represent 52.33% of the available construction businesses and received 88.16% of the dollars on construction contracts valued over \$65,000 to \$5,710,000. This overutilization is statistically significant.

Minority Business Enterprises represent 27.97% of the available construction businesses and received 3.69% of the dollars on construction contracts valued over \$65,000 to \$5,710,000. This underutilization is statistically significant.

Woman Business Enterprises represent 24.48% of the available construction businesses and received 8.73% of the dollars on construction contracts valued over \$65,000 to \$5,710,000. This underutilization is statistically significant.



**Table 7.3: Disparity Analysis: Construction Prime Contracts Valued over \$65,000 to \$5,710,000
July 1, 2015 to June 30, 2020**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black Americans	\$3,302,674	0.14%	9.19%	\$212,358,822	-\$209,056,148	0.02	< .05 *
Asian Americans	\$46,909,539	2.03%	6.43%	\$148,651,176	-\$101,741,636	0.32	< .05 *
Hispanic Americans	\$34,939,907	1.51%	11.65%	\$269,270,987	-\$234,331,080	0.13	< .05 *
American Indians and Alaskan Natives	\$247,871	0.01%	0.70%	\$16,139,271	-\$15,891,400	0.02	---
Caucasian Females	\$188,159,871	8.14%	19.70%	\$455,297,315	-\$267,137,445	0.41	< .05 *
Non-minority Males	\$2,037,753,561	88.16%	52.33%	\$1,209,595,852	\$828,157,709	1.68	< .05 †
TOTAL	\$2,311,313,423	100.00%	100.00%	\$2,311,313,423			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black American Females	\$251,872	0.01%	1.98%	\$45,869,506	-\$45,617,634	0.01	< .05 *
Black American Males	\$3,050,802	0.13%	7.20%	\$166,489,317	-\$163,438,514	0.02	< .05 *
Asian American Females	\$12,716,126	0.55%	1.07%	\$24,633,623	-\$11,917,498	0.52	< .05 *
Asian American Males	\$34,193,414	1.48%	5.37%	\$124,017,552	-\$89,824,139	0.28	< .05 *
Hispanic American Females	\$659,926	0.03%	1.51%	\$34,826,847	-\$34,166,921	0.02	< .05 *
Hispanic American Males	\$34,279,981	1.48%	10.14%	\$234,444,140	-\$200,164,159	0.15	< .05 *
American Indian and Alaskan Native Females	\$78,107	0.00%	0.22%	\$5,096,612	-\$5,018,505	0.02	---
American Indian and Alaskan Native Males	\$169,764	0.01%	0.48%	\$11,042,659	-\$10,872,895	0.02	---
Caucasian Females	\$188,159,871	8.14%	19.70%	\$455,297,315	-\$267,137,445	0.41	< .05 *
Non-minority Males	\$2,037,753,561	88.16%	52.33%	\$1,209,595,852	\$828,157,709	1.68	< .05 †
TOTAL	\$2,311,313,423	100.00%	100.00%	\$2,311,313,423			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$85,399,991	3.69%	27.97%	\$646,420,255	-\$561,020,264	0.13	< .05 *
Woman Business Enterprises	\$201,865,901	8.73%	24.48%	\$565,723,903	-\$363,858,001	0.36	< .05 *

(*) denotes a statistically significant underutilization.

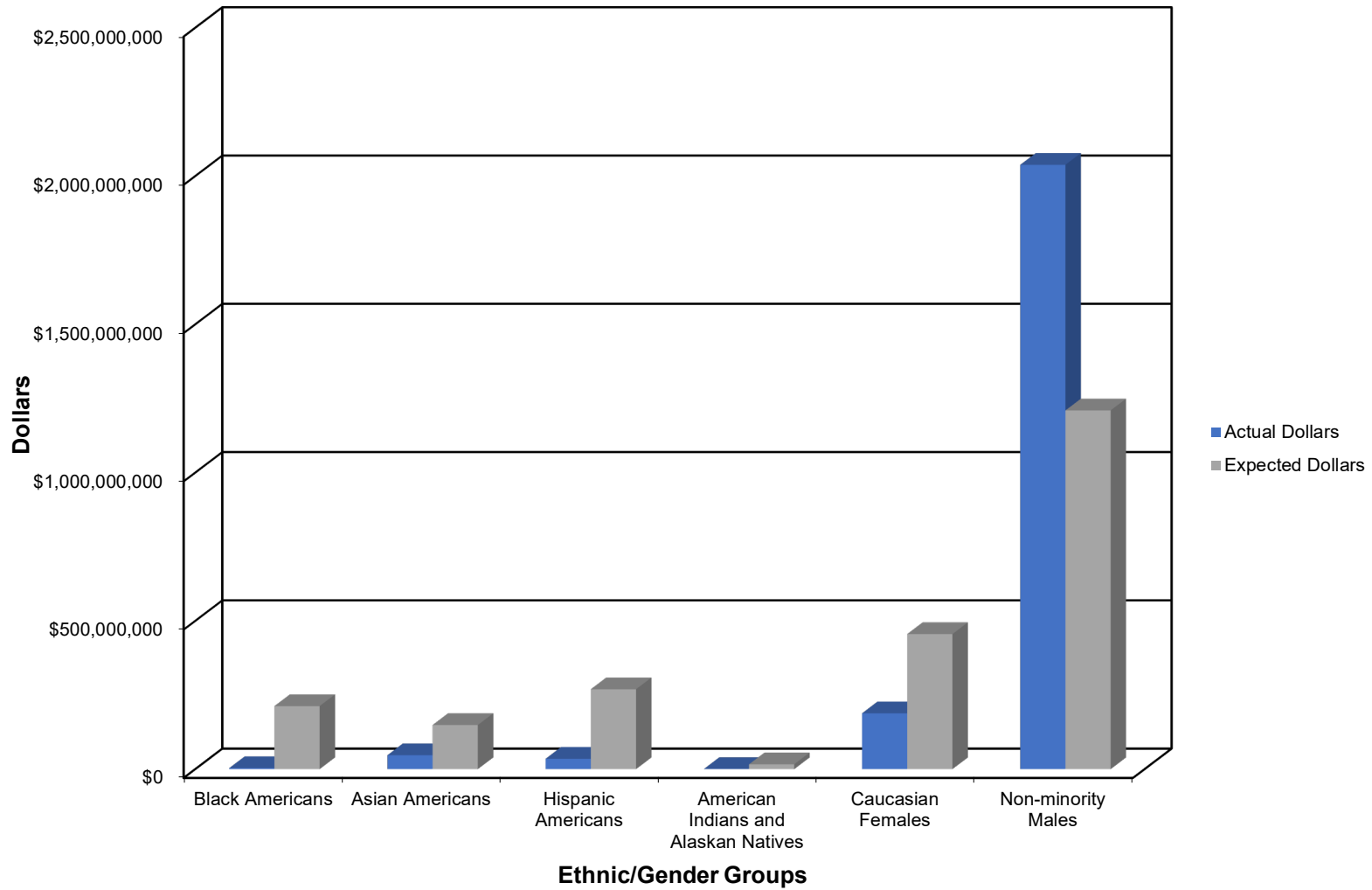
(†) denotes a statistically significant overutilization.

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

(---) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



**Chart 7.1: Disparity Analysis: Construction Prime Contracts Valued over \$65,000 to \$5,710,000
July 1, 2015 to June 30, 2020**



2. Professional Services Prime Contracts Valued over \$40,000 to \$800,000

The disparity analysis of professional services prime contracts valued over \$40,000 to \$800,000 is described below and shown in Table 7.4 and Chart 7.2.

Black Americans represent 12.01% of the available professional services businesses and received 1.44% of the dollars on professional services contracts valued over \$40,000 to \$800,000. This underutilization is statistically significant.

Asian Americans represent 15.71% of the available professional services businesses and received 11.92% of the dollars on professional services contracts valued over \$40,000 to \$800,000. This underutilization is statistically significant.

Hispanic Americans represent 5.77% of the available professional services businesses and received 0.99% of the dollars on professional services contracts valued over \$40,000 to \$800,000. This underutilization is statistically significant.

American Indians and Alaskan Natives represent 0.39% of the available professional services businesses and received none of the dollars on professional services contracts valued over \$40,000 to \$800,000. This underutilization could not be tested because there were too few available businesses and no contracts awarded.

Caucasian Females represent 27.66% of the available professional services businesses and received 9.01% of the dollars on professional services contracts valued over \$40,000 to \$800,000. This underutilization is statistically significant.

Non-minority Males represent 38.47% of the available professional services businesses and received 76.65% of the dollars on professional services contracts valued over \$40,000 to \$800,000. This overutilization is statistically significant.

Minority Business Enterprises represent 33.87% of the available professional services businesses and received 14.34% of the dollars on professional services contracts valued over \$40,000 to \$800,000. This underutilization is statistically significant.

Woman Business Enterprises represent 37.75% of the available professional services businesses and received 9.91% of the dollars on professional services contracts valued over \$40,000 to \$800,000. This underutilization is statistically significant.



**Table 7.4: Disparity Analysis: Professional Services Prime Contracts Valued over \$40,000 to \$800,000
July 1, 2015 to June 30, 2020**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black Americans	\$11,063,011	1.44%	12.01%	\$92,523,005	-\$81,459,994	0.12	< .05 *
Asian Americans	\$91,776,555	11.92%	15.71%	\$120,973,830	-\$29,197,274	0.76	< .05 *
Hispanic Americans	\$7,592,468	0.99%	5.77%	\$44,411,043	-\$36,818,575	0.17	< .05 *
American Indians and Alaskan Natives	\$0	0.00%	0.39%	\$3,006,998	-\$3,006,998	0.00	----
Caucasian Females	\$69,434,317	9.01%	27.66%	\$213,034,220	-\$143,599,903	0.33	< .05 *
Non-minority Males	\$590,387,669	76.65%	38.47%	\$296,304,925	\$294,082,744	1.99	< .05 †
TOTAL	\$770,254,020	100.00%	100.00%	\$770,254,020			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black American Females	\$1,939,478	0.25%	4.26%	\$32,845,667	-\$30,906,189	0.06	< .05 *
Black American Males	\$9,123,533	1.18%	7.75%	\$59,677,338	-\$50,553,806	0.15	< .05 *
Asian American Females	\$1,761,869	0.23%	3.96%	\$30,532,592	-\$28,770,723	0.06	< .05 *
Asian American Males	\$90,014,687	11.69%	11.74%	\$90,441,238	-\$426,551	1.00	not significant
Hispanic American Females	\$3,179,046	0.41%	1.71%	\$13,184,528	-\$10,005,483	0.24	< .05 *
Hispanic American Males	\$4,413,422	0.57%	4.05%	\$31,226,514	-\$26,813,092	0.14	< .05 *
American Indian and Alaskan Native Females	\$0	0.00%	0.15%	\$1,156,538	-\$1,156,538	0.00	----
American Indian and Alaskan Native Males	\$0	0.00%	0.24%	\$1,850,460	-\$1,850,460	0.00	----
Caucasian Females	\$69,434,317	9.01%	27.66%	\$213,034,220	-\$143,599,903	0.33	< .05 *
Non-minority Males	\$590,387,669	76.65%	38.47%	\$296,304,925	\$294,082,744	1.99	< .05 †
TOTAL	\$770,254,020	100.00%	100.00%	\$770,254,020			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$110,432,034	14.34%	33.87%	\$260,914,875	-\$150,482,841	0.42	< .05 *
Woman Business Enterprises	\$76,314,709	9.91%	37.75%	\$290,753,544	-\$214,438,835	0.26	< .05 *

(*) denotes a statistically significant underutilization.

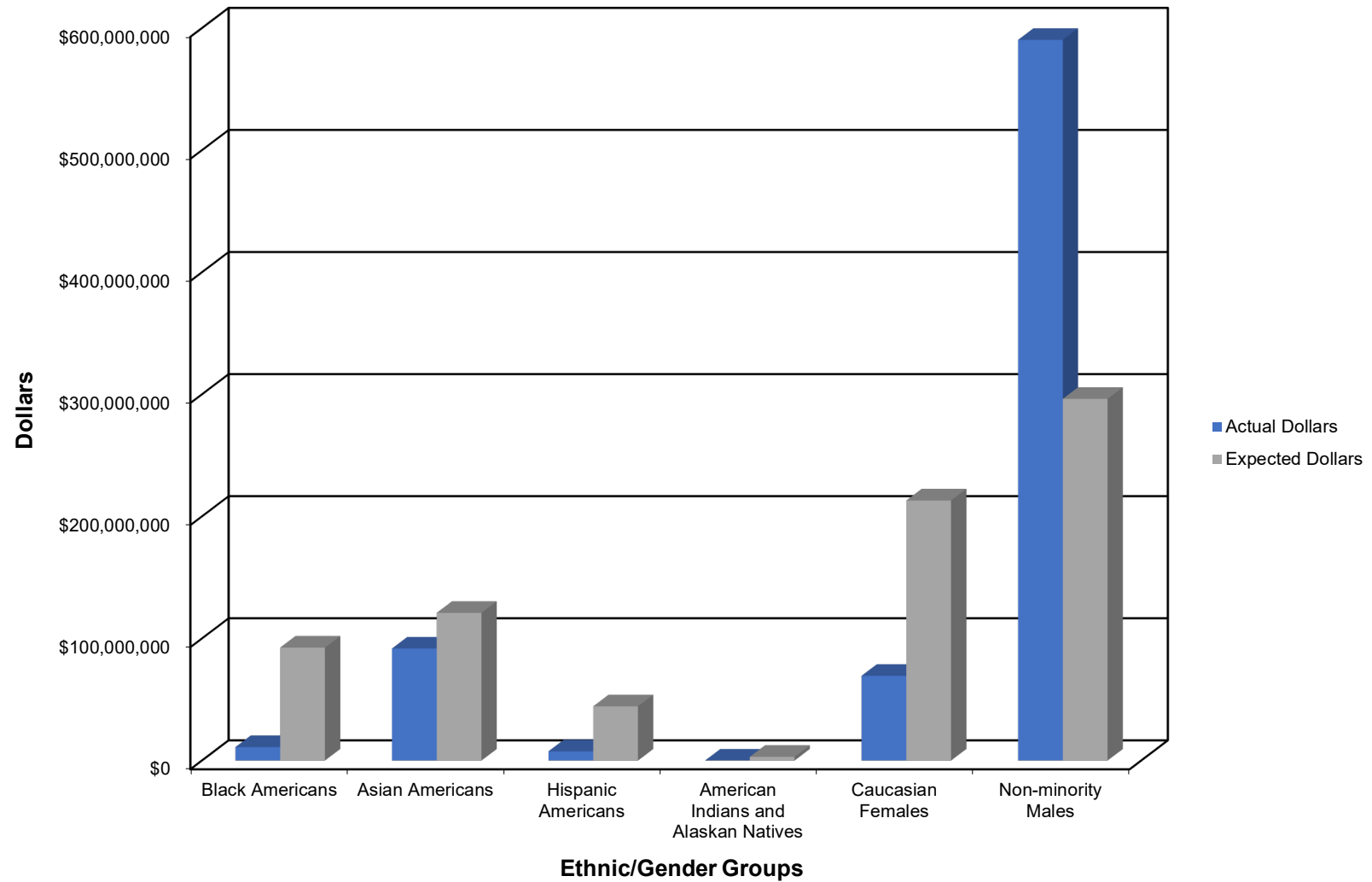
(†) denotes a statistically significant overutilization.

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

(----) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



**Chart 7.2: Disparity Analysis: Professional Services Prime Contracts Valued over \$40,000 to \$800,000
July 1, 2015 to June 30, 2020**



3. Goods and Services Prime Contracts Valued over \$40,000 to \$360,000

The disparity analysis of goods and services prime contracts valued over \$40,000 to \$360,000 is described below and shown in Table 7.5 and Chart 7.3.

Black Americans represent 10.08% of the available goods and services businesses and received 0.46% of the dollars on goods and services contracts valued over \$40,000 to \$360,000. This underutilization is statistically significant.

Asian Americans represent 5.24% of the available goods and services businesses and received 2.42% of the dollars on goods and services contracts valued over \$40,000 to \$360,000. This underutilization is statistically significant.

Hispanic Americans represent 7.98% of the available goods and services businesses and received 1.29% of the dollars on goods and services contracts valued over \$40,000 to \$360,000. This underutilization is statistically significant.

American Indians and Alaskan Natives represent 0.26% of the available goods and services businesses and received 0.08% of the dollars on goods and services contracts valued over \$40,000 to \$360,000. This underutilization could not be tested because there were too few available businesses and too few contracts awarded.

Caucasian Females represent 22.34% of the available goods and services businesses and received 8.87% of the dollars on goods and services contracts valued over \$40,000 to \$360,000. This underutilization is statistically significant.

Non-minority Males represent 54.10% of the available goods and services businesses and received 86.88% of the dollars on goods and services contracts valued over \$40,000 to \$360,000. This overutilization is statistically significant.

Minority Business Enterprises represent 23.56% of the available goods and services businesses and received 4.24% of the dollars on goods and services contracts valued over \$40,000 to \$360,000. This underutilization is statistically significant.

Woman Business Enterprises represent 28.97% of the available goods and services businesses and received 11.09% of the dollars on goods and services contracts valued over \$40,000 to \$360,000. This underutilization is statistically significant.



**Table 7.5: Disparity Analysis: Goods and Services Prime Contracts Valued over \$40,000 to \$360,000
July 1, 2015 to June 30, 2020**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black Americans	\$4,930,542	0.46%	10.08%	\$107,065,125	-\$102,134,582	0.05	< .05 *
Asian Americans	\$25,694,596	2.42%	5.24%	\$55,683,989	-\$29,989,393	0.46	< .05 *
Hispanic Americans	\$13,672,759	1.29%	7.98%	\$84,791,529	-\$71,118,770	0.16	< .05 *
American Indians and Alaskan Natives	\$806,759	0.08%	0.26%	\$2,784,199	-\$1,977,440	0.29	----
Caucasian Females	\$94,273,812	8.87%	22.34%	\$237,416,281	-\$143,142,469	0.40	< .05 *
Non-minority Males	\$923,173,288	86.88%	54.10%	\$574,810,633	\$348,362,654	1.61	< .05 †
TOTAL	\$1,062,551,756	100.00%	100.00%	\$1,062,551,756			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black American Females	\$2,364,224	0.22%	3.31%	\$35,182,157	-\$32,817,933	0.07	< .05 *
Black American Males	\$2,566,318	0.24%	6.77%	\$71,882,968	-\$69,316,649	0.04	< .05 *
Asian American Females	\$16,196,256	1.52%	1.29%	\$13,667,888	\$2,528,368	1.18	**
Asian American Males	\$9,498,340	0.89%	3.95%	\$42,016,101	-\$32,517,761	0.23	< .05 *
Hispanic American Females	\$4,983,166	0.47%	1.98%	\$21,008,050	-\$16,024,885	0.24	< .05 *
Hispanic American Males	\$8,689,593	0.82%	6.00%	\$63,783,478	-\$55,093,885	0.14	< .05 *
American Indian and Alaskan Native Females	\$0	0.00%	0.05%	\$506,218	-\$506,218	0.00	----
American Indian and Alaskan Native Males	\$806,759	0.08%	0.21%	\$2,277,981	-\$1,471,222	0.35	----
Caucasian Females	\$94,273,812	8.87%	22.34%	\$237,416,281	-\$143,142,469	0.40	< .05 *
Non-minority Males	\$923,173,288	86.88%	54.10%	\$574,810,633	\$348,362,654	1.61	< .05 †
TOTAL	\$1,062,551,756	100.00%	100.00%	\$1,062,551,756			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$45,104,657	4.24%	23.56%	\$250,324,842	-\$205,220,185	0.18	< .05 *
Woman Business Enterprises	\$117,817,458	11.09%	28.97%	\$307,780,595	-\$189,963,137	0.38	< .05 *

(*) denotes a statistically significant underutilization.

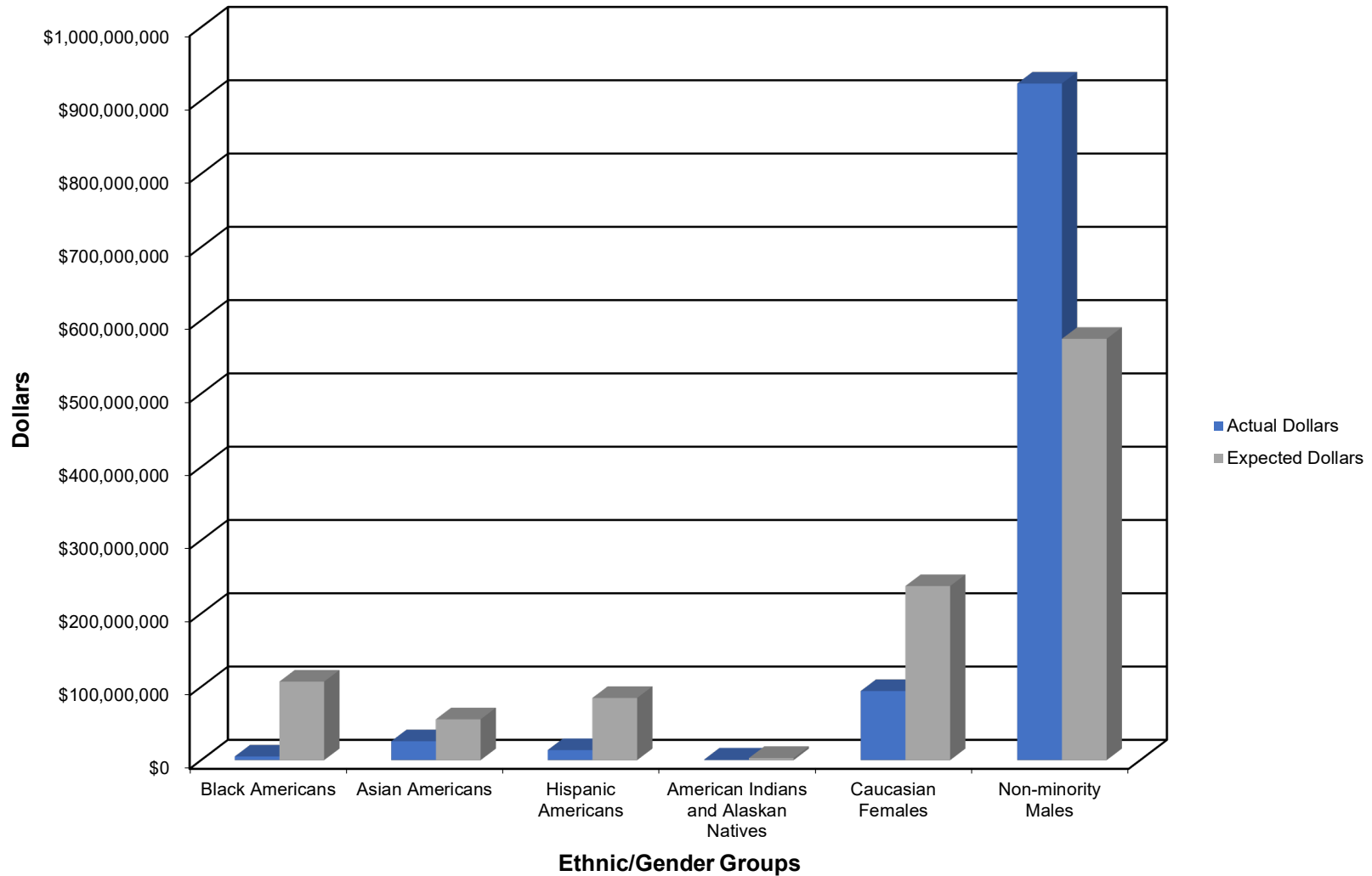
(†) denotes a statistically significant overutilization.

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

(----) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



**Chart 7.3: Disparity Analysis: Goods and Services Prime Contracts Valued over \$40,000 to \$360,000
July 1, 2015 to June 30, 2020**



B. Disparity Analysis: Informal Prime Contracts, All Industries

The disparity analysis for informal prime contracts for all industries is described below and shown in Table 7.6 and Chart 7.4.

Black Americans represent 5.97% of the available prime contractors for informal contracts and received 0.75% of the dollars on informal prime contracts for all industries. This underutilization is statistically significant.

Asian Americans represent 5.16% of the available prime contractors for informal contracts and received 0.87% of the dollars on informal prime contracts for all industries. This underutilization is statistically significant.

Hispanic Americans represent 4.64% of the available prime contractors for informal contracts and received 0.77% of the dollars on informal prime contracts for all industries. This underutilization is statistically significant.

American Indians and Alaskan Natives represent 0.25% of the available prime contractors for informal contracts and received 0.19% of the dollars on informal prime contracts for all industries. This underutilization could not be tested because there were too few available businesses and too few contracts awarded.

Caucasian Females represent 13.73% of the available prime contractors for informal contracts and received 7.02% of the dollars on informal prime contracts for all industries. This underutilization is statistically significant.

Non-minority Males represent 70.25% of the available prime contractors for informal contracts and received 90.40% of the dollars on informal prime contracts for all industries. This overutilization is statistically significant.

Minority Business Enterprises represent 16.02% of the available prime contractors for informal contracts and received 2.58% of the dollars on informal prime contracts for all industries. This underutilization is statistically significant.

Woman Business Enterprises represent 17.90% of the available prime contractors for informal contracts and received 7.77% of the dollars on informal prime contracts for all industries. This underutilization is statistically significant.



Table 7.6: Disparity Analysis: Informal Prime Contracts, All Industries
July 1, 2015 to June 30, 2020

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black Americans	\$4,720,149	0.75%	5.97%	\$37,423,257	-\$32,703,108	0.13	< .05 *
Asian Americans	\$5,462,312	0.87%	5.16%	\$32,301,794	-\$26,839,482	0.17	< .05 *
Hispanic Americans	\$4,816,437	0.77%	4.64%	\$29,046,008	-\$24,229,571	0.17	< .05 *
American Indians and Alaskan Natives	\$1,173,963	0.19%	0.25%	\$1,573,021	-\$399,057	0.75	----
Caucasian Females	\$43,984,341	7.02%	13.73%	\$86,003,985	-\$42,019,644	0.51	< .05 *
Non-minority Males	\$566,234,221	90.40%	70.25%	\$440,043,358	\$126,190,863	1.29	< .05 †
TOTAL	\$626,391,423	100.00%	100.00%	\$626,391,423			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black American Females	\$1,743,902	0.28%	1.86%	\$11,633,036	-\$9,889,134	0.15	< .05 *
Black American Males	\$2,976,247	0.48%	4.12%	\$25,790,221	-\$22,813,974	0.12	< .05 *
Asian American Females	\$1,522,219	0.24%	1.23%	\$7,682,193	-\$6,159,974	0.20	< .05 *
Asian American Males	\$3,940,093	0.63%	3.93%	\$24,619,601	-\$20,679,508	0.16	< .05 *
Hispanic American Females	\$1,248,380	0.20%	1.01%	\$6,328,664	-\$5,080,284	0.20	< .05 *
Hispanic American Males	\$3,568,057	0.57%	3.63%	\$22,717,344	-\$19,149,287	0.16	< .05 *
American Indian and Alaskan Native Females	\$190,665	0.03%	0.08%	\$475,564	-\$284,899	0.40	----
American Indian and Alaskan Native Males	\$983,298	0.16%	0.18%	\$1,097,456	-\$114,158	0.90	----
Caucasian Females	\$43,984,341	7.02%	13.73%	\$86,003,985	-\$42,019,644	0.51	< .05 *
Non-minority Males	\$566,234,221	90.40%	70.25%	\$440,043,358	\$126,190,863	1.29	< .05 †
TOTAL	\$626,391,423	100.00%	100.00%	\$626,391,423			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$16,172,861	2.58%	16.02%	\$100,344,079	-\$84,171,218	0.16	< .05 *
Woman Business Enterprises	\$48,689,507	7.77%	17.90%	\$112,123,443	-\$63,433,936	0.43	< .05 *

(*) denotes a statistically significant underutilization.

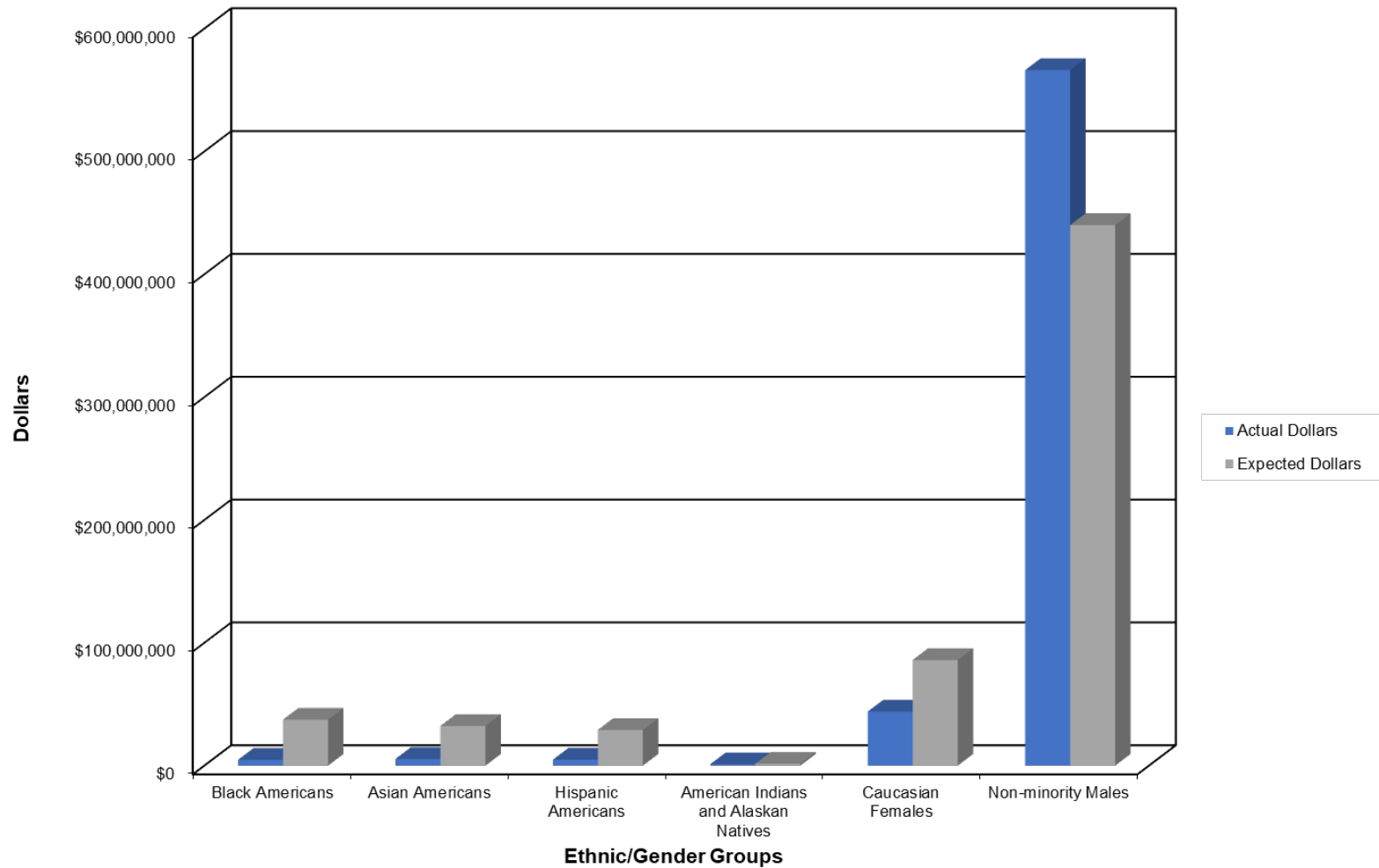
(†) denotes a statistically significant overutilization.

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

(----) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



**Chart 7.4: Disparity Analysis: Informal Prime Contracts, All Industries
July 1, 2015 to June 30, 2020**



III. Disparity Analysis Summary

A. Formal Construction Prime Contracts

As indicated in Table 7.7 below, disparity was found for Black American, Asian American, Hispanic American, Caucasian Female, MBE, and WBE prime contractors on formal construction contracts valued over \$65,000 to \$5,710,000. There were insufficient data to statistically test the utilization of American Indian and Alaskan Native prime contractors on formal construction contracts.

**Table 7.7: Disparity Summary: Formal Construction Prime Contract Dollars
July 1, 2015 to June 30, 2020**

Ethnicity/Gender	Construction Contracts Valued over \$65,000 to \$5,710,000
Black Americans	<i>Disparity</i>
Asian Americans	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>
American Indians and Alaskan Natives	Insufficient Data
Caucasian Females	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>
Women Business Enterprises	<i>Disparity</i>



B. Formal Professional Services Prime Contracts

As indicated in Table 7.8 below, disparity was found for Black American, Asian American, Hispanic American, Caucasian Female, MBE, and WBE prime contractors on formal professional services contracts valued over \$40,000 to \$800,000. There were insufficient data to statistically test the utilization of American Indian and Alaskan Native prime contractors on formal professional services prime contracts.

**Table 7.8: Disparity Summary: Formal Professional Services Prime Contract Dollars
July 1, 2015 to June 30, 2020**

Ethnicity/Gender	Professional Services Contracts Valued over \$40,000 to \$800,000
Black Americans	<i>Disparity</i>
Asian Americans	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>
American Indians and Alaskan Natives	Insufficient Data
Caucasian Females	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>
Women Business Enterprises	<i>Disparity</i>



C. Formal Goods and Services Prime Contracts

As indicated in Table 7.9 below, disparity was found for Black American, Asian American, Hispanic American, Caucasian Female, MBE, and WBE prime contractors on formal goods and services contracts valued over \$40,000 to \$360,000. There were insufficient data to statistically test the utilization of American Indian and Alaskan Native prime contractors on formal goods and services prime contracts.

**Table 7.9: Disparity Summary: Formal Goods and Services Prime Contract Dollars
July 1, 2015 to June 30, 2020**

Ethnicity/Gender	Goods and Services Contracts Valued over \$40,000 to \$360,000
Black Americans	<i>Disparity</i>
Asian Americans	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>
American Indians and Alaskan Natives	Insufficient Data
Caucasian Females	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>
Women Business Enterprises	<i>Disparity</i>



D. Informal Prime Contracts, All Industries

As indicated in Table 7.10 below, disparity was found for Black American, Asian American, Hispanic American, Caucasian Female, MBE, and WBE prime contractors on all industries informal prime contracts valued at \$40,000 and under for professional services and goods and services, and \$65,000 and under for construction. There were insufficient data to statistically test the utilization of American Indian and Alaskan Native prime contractors on informal prime contracts.

**Table 7.10: Disparity Summary: Informal Prime Contracts, All Industries
July 1, 2015 to June 30, 2020**

Ethnicity/Gender	All Industries Informal Contracts Valued \$40,000 and under for Professional Services and Goods and Services, and \$65,000 and under for Construction
Black Americans	<i>Disparity</i>
Asian Americans	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>
American Indians and Alaskan Natives	Insufficient Data
Caucasian Females	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>
Women Business Enterprises	<i>Disparity</i>



CHAPTER 8: Subcontractor Disparity Analysis

I. Introduction

The objective of this chapter is to determine if available Minority and Woman-owned Business Enterprises (M/WBEs) were underutilized in the award of State contracting agencies' subcontracts during the July 1, 2015 to June 30, 2020 study period. A detailed discussion of the statistical procedures for conducting a disparity analysis is found in *Chapter 7: Prime Contractor Disparity Analysis*. The same statistical procedures are used to perform the subcontractor disparity analysis.

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

If the ratio of utilized M/WBE subcontractors to available M/WBE subcontractors is less than one, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio or any event which is less probable.³¹⁸ *Croson* states that an inference of discrimination can be made *prima facie* if the observed disparity in the award of contracts to MBEs is statistically significant. However, woman-owned business programs were not considered in *Croson*. Therefore, a finding of disparity in the utilization of WBEs is only subject to a rational basis test, which requires substantial underutilization but not a test of statistical significance.

II. Disparity Analysis

As detailed in *Chapter 4: Subcontractor Utilization Analysis*, subcontract records for the State contracting agencies' construction and professional services prime contracts were on file with the State. The disparity analysis was performed on the construction and professional services subcontracts the prime contractors issued during the July 1, 2015 to June 30, 2020 study period.

Ethnic groups that are underutilized are subject to a test of statistical significance to determine if the underutilization is due to chance. A p-value of 0.05 is a measure of statistical significance and is reported in the disparity tables as disparity. Female groups are subject to a lesser standard, which only requires a finding of disparity, for which the utilization is less than the availability. In this study, all female groups with a disparity are also subject to the statistical significance test. When there is a finding of disparity for a female group that is not statistically significant, the outcome is reported as underutilization. When the group is not underutilized, the finding is reported as no disparity.

³¹⁸ When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100-percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95-percent confidence level is the statistical standard used in physical and social sciences and is thus used in the present report to determine if an inference of discrimination can be made.



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

Table 8.1: Statistical Outcome Descriptions

P-Value Outcome	Definition of P-Value Outcome
< 0.05 *	This underutilization is statistically significant.
not significant	M/WBEs: This underutilization is not statistically significant. Non-minority males: This overutilization is not statistically significant.
< 0.05 †	This overutilization is statistically significant.
----	The disparity could not be subject to the statistical test because there were no contracts awarded, too few contracts awarded, or no available firms.
**	This study does not test the statistical significance of the overutilization of minority or gender groups or the underutilization of non-minority males.



III. Disparity Analysis: All Subcontracts by Industry

A. Construction Subcontracts

The disparity analysis of construction subcontracts is described below and listed in Table 8.2 and Chart 8.1.

Black Americans represent 10.72% of the available construction businesses and received 0.45% of the dollars on construction subcontracts. This underutilization is statistically significant.

Asian Americans represent 9.32% of the available construction businesses and received 1.21% of the dollars on construction subcontracts. This underutilization is statistically significant.

Hispanic Americans represent 8.99% of the available construction businesses and received 6.24% of the dollars on construction subcontracts. This underutilization is not statistically significant.

American Indians and Alaskan Natives represent 0.46% of the available construction businesses and received 0.25% of the dollars on construction subcontracts. This underutilization could not be tested because there were too few available businesses and too few contracts awarded.

Caucasian Females represent 21.65% of the available construction businesses and received 22.98% of the dollars on construction subcontracts. This study does not statistically test the overutilization of M/WBEs.

Non-minority Males represent 48.85% of the available construction businesses and received 68.87% of the dollars on construction subcontracts. This overutilization is statistically significant.

Minority Business Enterprises represent 29.49% of the available construction businesses and received 8.15% of the dollars on construction subcontracts. This underutilization is statistically significant.

Woman Business Enterprises represent 29.42% of the available construction businesses and received 25.26% of the dollars on construction subcontracts. This underutilization is not statistically significant.



**Table 8.2: Disparity Analysis: Construction Subcontracts
July 1, 2015 to June 30, 2020**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black Americans	\$9,823,574	0.45%	10.72%	\$234,225,311	-\$224,401,736	0.04	< .05 *
Asian Americans	\$26,436,006	1.21%	9.32%	\$203,576,380	-\$177,140,375	0.13	< .05 *
Hispanic Americans	\$136,381,874	6.24%	8.99%	\$196,265,626	-\$59,883,753	0.69	not significant
American Indians and Alaskan Natives	\$5,390,797	0.25%	0.46%	\$10,122,582	-\$4,731,785	0.53	----
Caucasian Females	\$501,995,031	22.98%	21.65%	\$472,949,547	\$29,045,484	1.06	**
Non-minority Males	\$1,504,201,065	68.87%	48.85%	\$1,067,088,900	\$437,112,165	1.41	< .05 †
TOTAL	\$2,184,228,346	100.00%	100.00%	\$2,184,228,346			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black American Females	\$873,335	0.04%	3.28%	\$71,701,626	-\$70,828,291	0.01	< .05 *
Black American Males	\$8,950,239	0.41%	7.44%	\$162,523,685	-\$153,573,446	0.06	< .05 *
Asian American Females	\$7,509,401	0.34%	2.45%	\$53,424,741	-\$45,915,339	0.14	< .05 *
Asian American Males	\$18,926,604	0.87%	6.87%	\$150,151,640	-\$131,225,036	0.13	< .05 *
Hispanic American Females	\$39,276,812	1.80%	1.87%	\$40,771,513	-\$1,494,701	0.96	not significant
Hispanic American Males	\$97,105,062	4.45%	7.12%	\$155,494,114	-\$58,389,052	0.62	< .05 *
American Indian and Alaskan Native Females	\$2,130,000	0.10%	0.17%	\$3,655,377	-\$1,525,377	0.58	----
American Indian and Alaskan Native Males	\$3,260,797	0.15%	0.30%	\$6,467,205	-\$3,206,408	0.50	----
Caucasian Females	\$501,995,031	22.98%	21.65%	\$472,949,547	\$29,045,484	1.06	**
Non-minority Males	\$1,504,201,065	68.87%	48.85%	\$1,067,088,900	\$437,112,165	1.41	< .05 †
TOTAL	\$2,184,228,346	100.00%	100.00%	\$2,184,228,346			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$178,032,251	8.15%	29.49%	\$644,189,900	-\$466,157,649	0.28	< .05 *
Woman Business Enterprises	\$551,784,579	25.26%	29.42%	\$642,502,803	-\$90,718,224	0.86	not significant

(*) denotes a statistically significant underutilization.

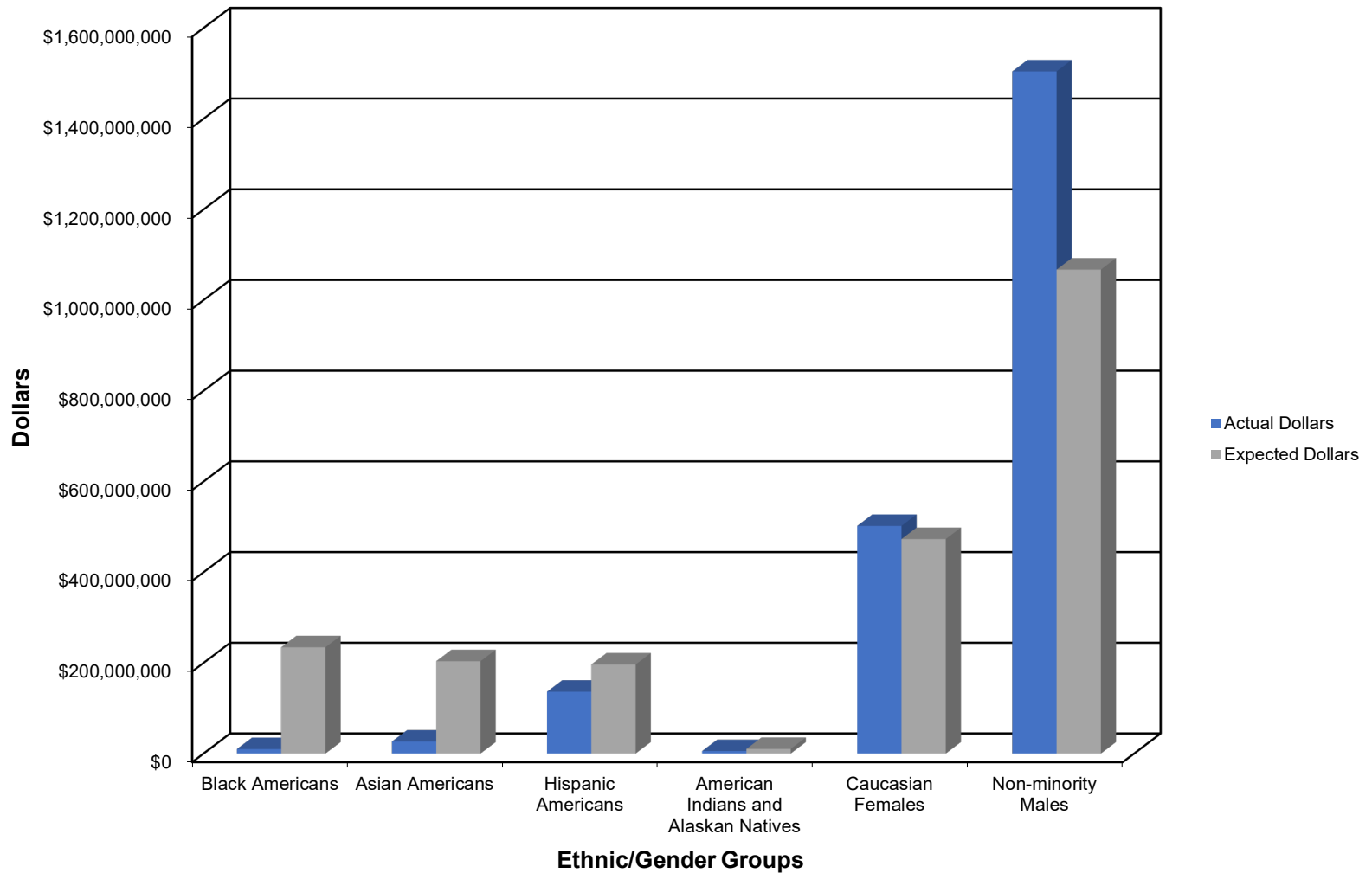
(†) denotes a statistically significant overutilization.

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

(----) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



Chart 8.1: Disparity Analysis: Construction Subcontracts
July 1, 2015 to June 30, 2020



B. Professional Services Subcontracts

The disparity analysis of professional services subcontracts is described below and listed in Table 8.3 and Chart 8.2.

Black Americans represent 11.38% of the available professional services businesses and received 3.21% of the dollars on professional services subcontracts. This underutilization is statistically significant.

Asian Americans represent 10.60% of the available professional services businesses and received 25.57% of the dollars on professional services subcontracts. This study does not statistically test the overutilization of M/WBEs.

Hispanic Americans represent 9.38% of the available professional services businesses and received 0.31% of the dollars on professional services subcontracts. This underutilization is statistically significant.

American Indians and Alaskan Natives represent 0.40% of the available professional services businesses and received none of the dollars on professional services subcontracts. This underutilization could not be tested because there were too few available businesses and no contracts awarded.

Caucasian Females represent 22.70% of the available professional services businesses and received 11.90% of the dollars on professional services subcontracts. This underutilization is statistically significant.

Non-minority Males represent 45.54% of the available professional services businesses and received 59.01% of the dollars on professional services subcontracts. This overutilization is statistically significant.

Minority Business Enterprises represent 31.77% of the available professional services businesses and received 29.09% of the dollars on professional services subcontracts. This underutilization is not statistically significant.

Woman Business Enterprises represent 31.13% of the available professional services businesses and received 14.13% of the dollars on professional services subcontracts. This underutilization is statistically significant.



**Table 8.3: Disparity Analysis: Professional Services Subcontracts
July 1, 2015 to June 30, 2020**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black Americans	\$9,683,177	3.21%	11.38%	\$34,300,248	-\$24,617,071	0.28	< .05 *
Asian Americans	\$77,067,407	25.57%	10.60%	\$31,960,532	\$45,106,876	2.41	**
Hispanic Americans	\$934,576	0.31%	9.38%	\$28,263,779	-\$27,329,203	0.03	< .05 *
American Indians and Alaskan Natives	\$0	0.00%	0.40%	\$1,216,653	-\$1,216,653	0.00	----
Caucasian Females	\$35,872,793	11.90%	22.70%	\$68,413,319	-\$32,540,527	0.52	< .05 *
Non-minority Males	\$177,844,365	59.01%	45.54%	\$137,247,788	\$40,596,578	1.30	< .05 †
TOTAL	\$301,402,318	100.00%	100.00%	\$301,402,318			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Black American Females	\$5,268,545	1.75%	3.57%	\$10,762,697	-\$5,494,152	0.49	< .05 *
Black American Males	\$4,414,632	1.46%	7.81%	\$23,537,551	-\$19,122,919	0.19	< .05 *
Asian American Females	\$1,454,688	0.48%	2.64%	\$7,955,037	-\$6,500,349	0.18	< .05 *
Asian American Males	\$75,612,719	25.09%	7.96%	\$24,005,494	\$51,607,225	3.15	**
Hispanic American Females	\$0	0.00%	2.06%	\$6,223,647	-\$6,223,647	0.00	< .05 *
Hispanic American Males	\$934,576	0.31%	7.31%	\$22,040,132	-\$21,105,556	0.04	< .05 *
American Indian and Alaskan Native Females	\$0	0.00%	0.16%	\$467,943	-\$467,943	0.00	----
American Indian and Alaskan Native Males	\$0	0.00%	0.25%	\$748,709	-\$748,709	0.00	----
Caucasian Females	\$35,872,793	11.90%	22.70%	\$68,413,319	-\$32,540,527	0.52	< .05 *
Non-minority Males	\$177,844,365	59.01%	45.54%	\$137,247,788	\$40,596,578	1.30	< .05 †
TOTAL	\$301,402,318	100.00%	100.00%	\$301,402,318			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$87,685,161	29.09%	31.77%	\$95,741,212	-\$8,056,051	0.92	not significant
Woman Business Enterprises	\$42,596,026	14.13%	31.13%	\$93,822,644	-\$51,226,618	0.45	< .05 *

(*) denotes a statistically significant underutilization.

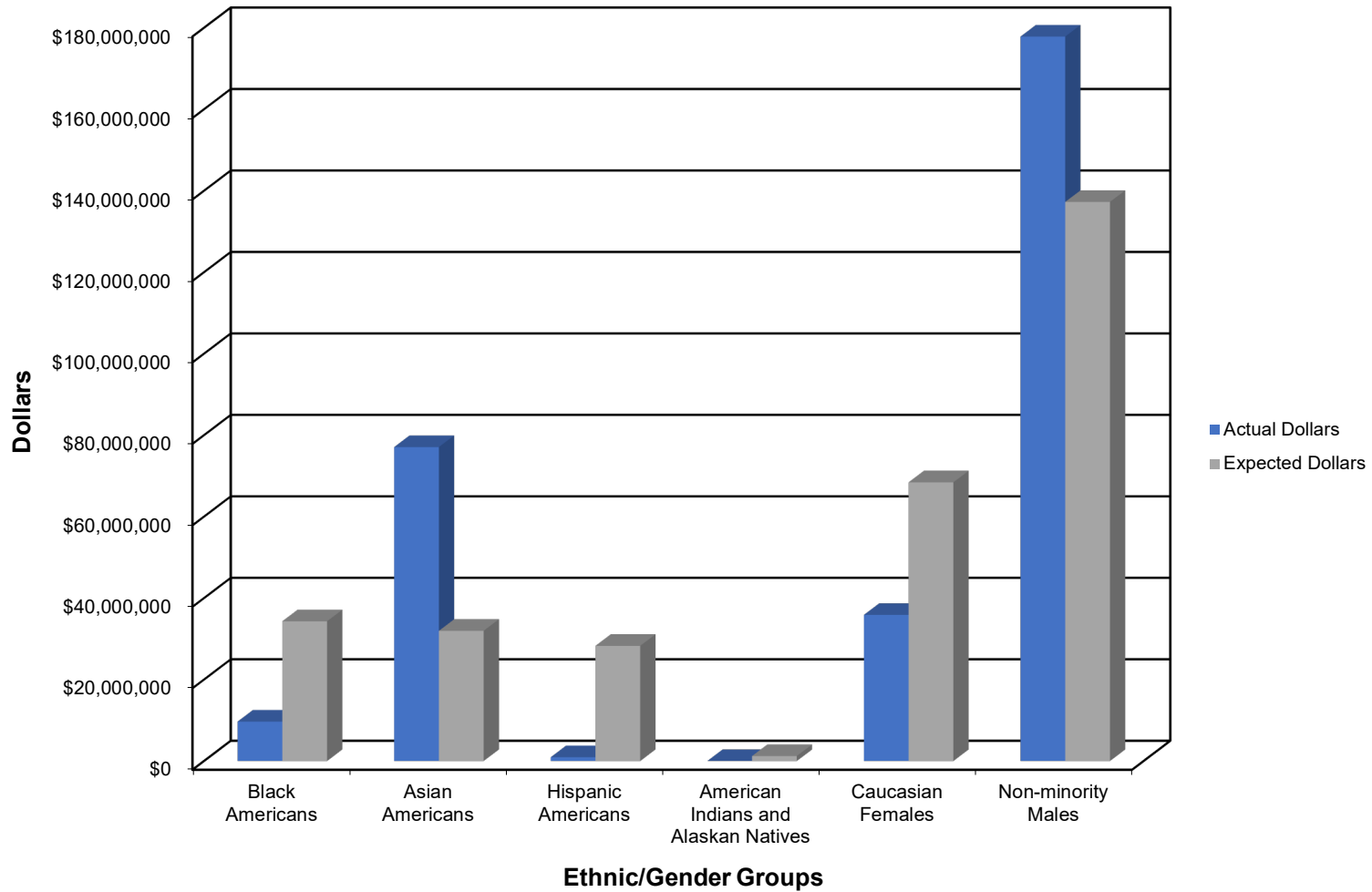
(†) denotes a statistically significant overutilization.

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

(----) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



Chart 8.2: Disparity Analysis: Professional Services Subcontracts
July 1, 2015 to June 30, 2020



IV. Subcontractor Disparity Summary

As listed in Table 8.4, statistically significant disparity was found for Black American, Asian American, and MBE subcontractors in the award of construction subcontracts. WBE subcontractors were underutilized on construction subcontracts, although the finding was not statistically significant. Disparity was also found in professional services subcontracts for Black American, Hispanic American, Caucasian Female, and WBE subcontractors. The significance of the disparity in the utilization of American Indian and Alaskan Native subcontractors on both construction and professional services subcontracts could not be measured because there was an insufficient number of available businesses and contracts awarded to these ethnic groups.

**Table 8.4: Subcontractor Disparity Summary
July 1, 2015 to June 30, 2020**

Ethnicity / Gender	Construction	Professional Services
Black Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	No Disparity
Hispanic Americans	No Disparity	<i>Disparity</i>
American Indians and Alaskan Natives	Insufficient Data	Insufficient Data
Caucasian Females	No Disparity	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>	No Disparity
Woman Business Enterprises	Underutilization	<i>Disparity</i>



CHAPTER 9: Regression Analysis

I. Introduction

Private sector business practices that are not subject to government Minority and Woman-owned Business Enterprise (M/WBE) requirements are indicators of marketplace conditions that could adversely affect the formation and growth of M/WBEs. The adverse marketplace conditions thereby could depress the current availability of M/WBEs. *Concrete Works of Colorado v. City and County of Denver (Concrete Works III)*³¹⁹ sets forth a framework for considering a passive participant model for an analysis of discrimination in private sector business practices. In accordance with *Concrete Works III*, regression analyses were conducted to examine two outcome variables—business ownership rates and business earnings—to determine whether the State and State contracting agencies are passively participating in ethnic and gender discrimination. These two regression analyses examined possible impediments to minority and woman business ownership, as well as factors affecting M/WBE business earnings. Further details are provided in the current chapter under *Section IV: Datasets Analyzed*.

Each regression analysis compared minority group members³²⁰ and Caucasian females to non-minority male-owned business enterprises by controlling for race and gender-neutral explanatory variables, such as age, education, marital status, and access to capital. The impact of the explanatory variables on the outcome variables is described in this chapter. These findings elucidate the socioeconomic conditions in the State contracting agencies' market area that could adversely affect the measuring of relative availability of M/WBEs and non-minority male-owned business enterprises. Statistically significant findings for lower M/WBE business earnings and lower likelihoods of minority and Caucasian female business ownership could indicate patterns of discrimination that might result in disproportionately smaller numbers of willing and capable M/WBEs.

The United States Census Public Use Microdata Sample (PUMS) was used to compare the probabilities of a minority male, minority female, and Caucasian female owning a business to the probability of a non-minority male owning a business. Logistic regression was used to determine if race and gender have a statistically significant effect on the probability of business ownership. The PUMS data were also used to compare the business earnings of M/WBEs to non-minority male-owned businesses. An Ordinary Least Squares (OLS) regression was used to determine disparities in owner-reported incomes, controlling for race and gender-neutral factors.

The applicable limits of the private sector discrimination findings are set forth in *Builders Association of Greater Chicago v. City of Chicago*³²¹ (*City of Chicago*), in which the court established that even when there is evidence of private sector discrimination, the findings cannot be used as the factual predicate for a government-sponsored, race-conscious M/WBE program

³¹⁹ *Concrete Works of Colo., Inc. v. Denver*, 86 F. Supp. 2d 1042, 1057-61 (D. Colo. 2000), *rev'd on other grounds*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003) ("*Concrete Works III*").

³²⁰ Minority group members include both males and females.

³²¹ *Builders Ass'n of Greater Chicago v. Chicago*, 298 F. Supp. 2d 725 (N.D. Ill. 2003).



unless there is a nexus between the private sector data and the public agency actions. The private sector findings, however, can be used to develop race-neutral programs to address barriers to the formation and development of M/WBEs. Given the case law, caution must be exercised in the interpretation and application of the regression findings. Case law regarding the application of private sector discrimination is discussed below in detail.

II. Legal Analysis

A. Passive Discrimination

The controlling legal precedent set forth in the 1989 *City of Richmond v. J.A. Croson Co.*³²² decision authorized state and local governments to remedy discrimination in the awarding of subcontracts by their prime contractors on the grounds that the government cannot be a “passive participant” in such discrimination. In January 2003, *Concrete Works IV*³²³ and *City of Chicago*³²⁴ extended the private sector analysis to the investigation of discriminatory barriers that M/WBEs encountered in the formation and development of businesses and their consequence for state and local remedial programs. *Concrete Works IV* set forth a framework for considering such private sector discrimination as a passive participant model for analysis. However, the obligation of presenting an appropriate nexus between the government remedy and the private sector discrimination was first addressed in *City of Chicago*.

The Tenth Circuit Court decided in *Concrete Works IV* that business activities conducted in the private sector, if within the government’s market area, are also appropriate areas to explore the issue of passive participation.³²⁵ However, the appropriateness of the City’s remedy, given the finding of private sector discrimination, was not at issue before the court. The question before the court was whether sufficient facts existed to determine if the private sector business practices under consideration constituted discrimination. For technical legal reasons,³²⁶ the court did not examine whether a consequent public sector remedy (i.e., one involving a goal requirement on the City of Denver’s contracts) was “narrowly tailored” or otherwise supported by the City’s private sector findings of discrimination. While *Concrete Works IV*³²⁷ and *City of Chicago*³²⁸ are not directly binding on the State, certain aspects of those decisions have been derived from binding Supreme Court cases. Therefore, although the cases are merely persuasive as a legal matter, following them could be considered best practice for a disparity study. That does not, however, preclude legal arguments that these decisions from other jurisdictions do not reflect the governing law that would apply to the State’s programs.

³²² 488 U.S. 469 (1989).

³²³ *Concrete Works of Colo., Inc. v. Denver*, 321 F.3d 950, 965-69 (10th Cir. 2003) (“*Concrete Works IV*”).

³²⁴ *City of Chicago*, 298 F. Supp. 2d at 738-39.

³²⁵ *Concrete Works IV*, 321 F.3d at 966-67.

³²⁶ Plaintiff had not preserved the issue on appeal. Therefore, it was no longer part of the case.

³²⁷ *Concrete Works of Colo., Inc. v. Denver*, 321 F.3d 950, 965-69 (10th Cir. 2003) (“*Concrete Works IV*”).

³²⁸ *City of Chicago*, 298 F. Supp. 2d at 738-39.



B. Narrow Tailoring

The question of whether a particular public sector remedy is narrowly tailored when it is based solely on business practices within the private sector was at issue in *City of Chicago*. The case, decided ten months after *Concrete Works IV*, found that certain private sector business practices constituted discrimination against minorities in the Chicago market area. However, the district court did not find the City of Chicago's M/WBE subcontracting goal to be a remedy "narrowly tailored" to address the documented private sector discriminatory business practices that had been discovered within the City's market area.³²⁹ The court explicitly stated that certain discriminatory business practices documented by regression analyses constituted private sector discrimination.³³⁰ It is also notable that the documented discriminatory business practices reviewed by the court in *City of Chicago* were similar to those reviewed in *Concrete Works IV*. Notwithstanding the fact that discrimination in the City of Chicago's market area was documented, the court determined the evidence was insufficient to support the city's race-based subcontracting goals.³³¹ The court ordered an injunction to invalidate the City of Chicago's race-based program.³³²

The following statements from that opinion are noteworthy:

Racial preferences are, by their nature, highly suspect, and they cannot be used to benefit one group that, by definition, is not either individually or collectively the present victim of discrimination...There may well also be (and the evidence suggests that there are) minorities and women who do not enter the industry because they perceive barriers to entry. If there is none, and their perception is in error, that false perception cannot be used to provide additional opportunities to M/WBEs already in the market to the detriment of other firms who, again by definition, neither individually nor collectively, are engaged in discriminatory practices.³³³

Given these distortions of the market and these barriers, is City's program narrowly tailored as a remedy? It is here that I believe the program fails. There is no "meaningful individualized review" of M/WBEs. *Gratz v. Bollinger*, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S.Ct. 2411, 2431 (2003) (Justice O'Connor concurring). Chicago's program is more expansive and more rigid than plans that have been sustained in the courts. It has no termination date, nor has it any means for determining a termination date. The "graduation" revenue amount is very high, \$27,500,000, and very few have graduated. There is no net worth threshold. A third generation Japanese American from a wealthy family, with a graduate degree from MIT, qualifies (and an Iraqi immigrant does not). Waivers are rarely or never granted on construction contracts, but "[r]egarding flexibility, 'the availability of waiver' is of particular importance...a 'rigid numerical quota' particularly disserves

³²⁹ *City of Chicago*, 298 F. Supp. 2d at 739.

³³⁰ *Id.* at 731-32.

³³¹ *Id.* at 742.

³³² *Id.*

³³³ *Id.* at 734-35.



the cause of narrow tailoring.” *Adarand Constructors v. Slater*, *supra*, at 1177. The City’s program is “rigid numerical quota,” a quota not related to the number of available, willing, and able firms but to concepts of how many of those firms there should be. Formalistic points did not survive strict scrutiny in *Gratz v. Bollinger*, *supra*, and formalistic percentages cannot survive scrutiny.³³⁴

C. Conclusion

As established in *City of Chicago*, private sector discrimination cannot be used as the factual basis for a government-sponsored, race-based M/WBE program without a nexus to the government’s actions. Therefore, the discrimination that might be revealed in the regression analysis is not a sufficient factual predicate for the State to establish a race-based M/WBE program unless a nexus is established between the State and the private sector data. These economic indicators, albeit not a measure of passive discrimination, are illustrative of private sector discrimination and can support the State-sponsored, race-neutral programs.

III. Regression Analysis Methodology

A regression analysis is the methodology employed to determine whether there are private sector economic indicators of discrimination in the State contracting agencies’ market area that could impact the formation and development of M/WBEs. The two regression analyses focus on the construction, professional services and goods and services industries. The data used for the regression analyses did not allow for an exact match of the industries used in the State’s Disparity Study. Therefore, the three industries were selected to most closely mirror the industries used in the Study.

As noted, two separate regression analyses were conducted. They are the Business Ownership Analysis and the Earnings Disparity Analysis. Both analyses take into consideration race and gender-neutral factors, such as age, education, and creditworthiness in assessing whether the explanatory factors examined are disproportionately affecting minorities and females when compared to similarly situated non-minority males.

IV. Datasets Analyzed

The 2015 through 2020 PUMS produced by the United States Census Bureau was used to analyze business ownership and earnings disparities within the State and State contracting agencies. The 2015 through 2020 PUMS dataset represented the most recent data that most closely matched the State data from the July 1, 2015 to June 30, 2020 study period. The data for the State were identified using Public Use Microdata Areas (PUMA), a variable within PUMS that reports data for counties and cities within states. The data include information on personal profile, industry, work characteristics, and family structure. The PUMS data enabled an analysis by an individual’s ethnicity and gender.

Unemployment rates by ethnicity and gender within the State were examined using the 2015 through 2020 PUMS dataset. These data represent the most recent information available on access to observations on unemployment status and willingness to work by an individual’s ethnicity and

³³⁴ *City of Chicago*, 298 F.Supp.2d at 739-40.



gender. PUMS uses a defining variable that can specify the geographical boundaries, and the area variable was used to determine the unemployment rates of individuals within the study area who have the willingness to work. There were many individuals who refused to respond to questions regarding their employment status or whether they are looking for work. Those individuals were taken out of the observation sample. Table 9.1 lists the percentage of unemployed individuals by ethnicity and gender and their response to whether they are looking for work.

Table 9.1: Non-minority Male and Minority Unemployment Rate

Ethnicity/Gender	Looking for Work but Unemployed	Looking for Work and Employed
Non-minority Male	2.91%	97.09%
Caucasian Female	4.24%	95.76%
Black American	6.64%	93.36%
Asian American	3.11%	96.89%
Hispanic American	2.82%	97.18%
American Indian and Alaskan Native	19.05%	80.95%
Other Minority	3.61%	96.39%

In the State, 2.91% of non-minority males were looking for work but unemployed while 4.24% of Caucasian females were looking for work but unemployed. Also, 6.64% of Black Americans, 3.11% of Asian Americans, 2.82% of Hispanic Americans, 19.05% of American Indians and Alaskan Natives, and 3.61% of other minority males and females were looking for work but unemployed.

V. Regression Models Defined

A. Business Ownership Analysis

The Business Ownership Analysis examines the relationship between the likelihood of being a business owner and independent socioeconomic variables. Business ownership, the dependent variable, includes business owners of incorporated and non-incorporated firms. The business ownership variable utilizes two values. A value of “1” indicates that a person is a business owner, whereas a value of “0” indicates that a person is not a business owner. When the dependent variable is defined this way, it is called a binary variable. In this case, a logistic regression model is utilized to predict the likelihood of business ownership using independent socioeconomic variables. Three logistic models were run to predict the probability of business ownership in each of the three industries examined in the Study. Categories of the independent variables analyzed include educational level, housing status, personal characteristics, and race/gender.

In the table below, a finding of disparity is denoted by an asterisk when the independent variable is significant at or above the 95% confidence level. A finding of disparity indicates that there is a non-random relationship between the probability of owning a business and the independent variable. Tables of regression results indicate the sign of each variable’s coefficient from the regression output. If the coefficient sign is positive, it indicates that there is a positive relationship between the dependent variable and that independent variable. For example, having an advanced degree is positively related to the likelihood of being a business owner, holding all other variables



constant. If the coefficient sign for the independent variable is negative, this implies an inverse relationship between the dependent variable and that independent variable. For instance, an individual with children under the age of six has a lower likelihood of owning a business, holding all other variables constant.

For each of the three industries, the logistic regression was used to identify the likelihood that an individual owns a business given his or her background, including race, gender, and race and gender-neutral factors. The dependent variables in all regressions are binary variables coded as “1” for individuals who are self-employed and “0” for individuals who are not self-employed.³³⁵ Table 9.2 presents the independent variables used for the Business Ownership Analysis.

Table 9.2: Independent Variables Used in the Business Ownership Analysis

Personal Characteristics	Educational Attainment	Ethnicity	Gender
Age Age squared Home ownership Home value Monthly mortgage payments Interest and dividends Speaks English at home Children under the age of six in the household Marital status	Bachelor's degree Advanced degree	Caucasian American Black American Asian American Hispanic American American Indian and Alaskan Native Other minority group ³³⁶	Female

B. The Earnings Disparity Analysis

The Earnings Disparity Analysis examines the relationship between annual self-employment income and independent socioeconomic variables. “Wages” are defined as the individual’s total dollar income earned in the previous 12 months. Categories of independent socioeconomic variables analyzed include educational level, housing status, personal characteristics, business characteristics, and race/gender.

All independent variables were regressed against wages in an Ordinary Least Squares (OLS) regression model. The OLS model estimates a linear relationship between the independent variables and the dependent variable. This multivariate regression model estimates a line similar to the standard $y = mx + b$ format, but with additional independent variables. The mathematical purpose of a regression analysis is to estimate a best-fit line for the model and assess which findings are statistically significant.

A finding of disparity indicates there is a non-random relationship between wages and the independent variable, and is denoted with an asterisk in tables below. If the coefficient sign is positive, there is a positive relationship between the dependent variable and that independent



³³⁵ Note: The terms “business owner” and “self-employed” are used interchangeably throughout the chapter.

³³⁶ Other minority includes individuals who belong to two or more racial groups.

variable. If the coefficient sign for the independent variable is negative, this implies an inverse relationship between the dependent variable and that independent variable.

An OLS regression analysis is used to assess the presence of business earning disparities. OLS regressions have been conducted separately for each industry. Table 9.3 presents the independent variables used for the Earnings Disparity Analysis.³³⁷

Table 9.3: Independent Variables Used for the Earnings Disparity Analysis

Personal Characteristics	Educational Attainment	Ethnicity	Gender
Age Age squared Incorporated business Home ownership Home value Monthly mortgage payments Interest and dividends Speaks English at home Children under the age of six in the household Marital status	Bachelor's degree Advanced degree	Caucasian American Black American Asian American Hispanic American American Indian and Alaskan Native Other minority group	Female

VI. Findings

A. Business Ownership Analysis

The business ownership variable is defined by the number of self-employed individuals in each of the three industries. The analysis considered incorporated and non-incorporated businesses. The data in this section come from the State, which was specified using PUMA, a variable within PUMS that can specify the different counties and cities within states.³³⁸ As noted in *Section IV*, because each PUMA is determined by the United States Census, the region analyzed in the regression analyses could be limited to the State.

Previous studies have shown that many non-discriminatory factors, such as education, age, and marital status, are associated with self-employment. In this analysis, race and gender-neutral factors are combined with race and gender-specific factors in a logistic regression model. The purpose of this model is to determine whether observed race or gender disparities are independent of the race and gender-neutral factors known to be associated with self-employment. It must be noted that many of these variables, such as having an advanced degree, while seeming to be race and gender-neutral, may be correlated with race and gender. For example, if Caucasian females are less likely to have advanced degrees and the regression results show that individuals with

³³⁷ If an independent variable is a binary variable, it will be coded as “1” if the individual has that variable present and “0” if otherwise (i.e., for the Hispanic American variable, it is coded as “1” if the individual is Hispanic American and “0” if otherwise). If an independent variable is a continuous variable, a value will be used (i.e., one’s age can be labeled as 35).

³³⁸ The PUMS data were collected by the United States Census Bureau from a five-percent sample of United States households. The observations were weighted to preserve the representative nature of the sample in relation to the population.



advanced degrees are significantly more likely to own a business, Caucasian females may be disadvantaged in multiple ways. First, Caucasian females may have statistically significantly lower business ownership rates, so they face a direct disadvantage as a group. Second, they are indirectly disadvantaged, as fewer of them tend to have advanced degrees, which significantly increase one's chances of owning a business.



1. Logistic Model Results for Construction Business Ownership

Table 9.4 presents the logistic regression results for the likelihood of owning a business in the construction industry based on the 22 variables analyzed in this model.

Table 9.4: Construction Industry Logistic Model, 2015 to 2020

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.106974	*	0.013215	8.09	0.000
Age-squared	-0.000656	*	0.000132	-4.99	0.000
Bachelor's Degree (a)	0.043053		0.075404	0.57	0.568
Advanced Degree	-0.395155	*	0.180585	-2.19	0.029
Homeowner	-0.036882		0.087379	-0.42	0.673
Home Value	0.000001	*	0.000000	5.38	0.000
Monthly Mortgage Payment	0.000019		0.000028	0.66	0.511
Interest and Dividends	0.000001		0.000001	0.93	0.353
Speaks English at Home	-0.279779	*	0.088077	-3.18	0.001
Has a Child under the Age of Six	0.535990		0.300277	1.78	0.074
Married	0.162080	*	0.069208	2.34	0.019
Caucasian Female (b)	-0.796847	*	0.123201	-6.47	0.000
Black American	-0.227617		0.154721	-1.47	0.141
Asian American	0.019113		0.223385	0.09	0.932
Hispanic American	-0.269093	*	0.104463	-2.58	0.010
American Indian and Alaskan Native	-1.725473	*	0.787492	-2.19	0.028
Other Minority	-0.094070		0.294258	-0.32	0.749
Year 2017 (c)	0.092890		0.081700	1.14	0.256
Year 2018	0.000014		0.082856	0.00	1.000
Year 2019	-0.083353		0.084540	-0.99	0.324
Year 2020	0.000235		0.103229	0.00	0.998
Constant	-4.760218	*	0.331637	-14.35	0.000

(a) For the variables bachelor's degree and advanced degree, the baseline variable is high school.

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

(c) For the year variables, the baseline variable is Year 2015.

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

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

(-) denotes an omitted variable due to insufficient observations.



The construction industry logistic regression results indicate the following:

- The likelihood of construction business ownership is positively associated with increased age. Older individuals are significantly³³⁹ more likely to be business owners in the construction industry. However, as individuals reach advanced age, the likelihood of being a business owner significantly decreases in the construction industry.
- Individuals with an advanced degree are significantly less likely to be business owners in the construction industry.
- Individuals who have a higher-valued home are significantly more likely to be business owners in the construction industry.
- Individuals who speak English at home are significantly less likely to be business owners in the construction industry.
- Married individuals are significantly more likely to be business owners in the construction industry.
- Caucasian females, Hispanic Americans, and American Indians and Alaskan Natives are significantly less likely than non-minority males to be business owners in the construction industry.



³³⁹ Throughout this chapter, significance refers to statistical significance.

2. Logistic Model Results for Professional Services Business Ownership

Table 9.5 presents the logistic regression results for the likelihood of owning a business in the professional services industry based on the 22 variables analyzed in this model.

Table 9.5: Professional Services Industry Logistic Model, 2015 to 2020

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.085544	*	0.011395	7.51	0.000
Age-squared	-0.000267	*	0.000108	-2.48	0.013
Bachelor's Degree (a)	0.463781	*	0.070465	6.58	0.000
Advanced Degree	0.779047	*	0.072580	10.73	0.000
Homeowner	-0.093536		0.073547	-1.27	0.203
Home Value	0.000000	*	0.000000	6.73	0.000
Monthly Mortgage Payment	0.000027		0.000018	1.52	0.129
Interest and Dividends	0.000002	*	0.000001	3.17	0.002
Speaks English at Home	-0.036067		0.071275	-0.51	0.613
Has a Child under the Age of Six	0.393652	*	0.122193	3.22	0.001
Married	0.053275		0.058879	0.90	0.366
Caucasian Female (b)	-0.185201	*	0.058147	-3.19	0.001
Black American	-0.199779		0.120230	-1.66	0.097
Asian American	-0.285837	*	0.114103	-2.51	0.012
Hispanic American	-0.042646		0.110064	-0.39	0.698
American Indian and Alaskan Native	1.469994		1.233342	1.19	0.233
Other Minority	-0.099872		0.193437	-0.52	0.606
Year 2017 (c)	0.030536		0.065961	0.46	0.643
Year 2018	-0.002832		0.065474	-0.04	0.966
Year 2019	-0.101017		0.066964	-1.51	0.131
Year 2020	-0.016741		0.085903	-0.19	0.845
Constant	-5.603940	*	0.303408	-18.47	0.000

(a) For the variables bachelor's degree and advanced degree, the baseline variable is high school.

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

(c) For the year variables, the baseline variable is Year 2015.

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

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

(-) denotes an omitted variable due to insufficient observations.



The professional services industry logistic regression results indicate the following:

- The likelihood of professional services business ownership is positively associated with increased age. Older individuals are significantly more likely to be business owners in the professional services industry. However, as individuals reach advanced age, the likelihood of being a business owner significantly decreases in the professional services industry.
- Individuals with a bachelor's degree or an advanced degree are significantly more likely to be business owners in the professional services industry.
- Individuals who have a higher-valued home are significantly more likely to be business owners in the professional services industry.
- Individuals who have higher interest and dividends income are significantly more likely to be business owners in the professional services industry.
- Individuals who have a child under the age of six are significantly more likely to be business owners in the professional services industry.
- Caucasian females and Asian Americans are significantly less likely to be business owners in the professional services industry.



3. Logistic Model Results for Goods and Services Business Ownership

Table 9.6 presents the logistic regression results for the likelihood of owning a business in the goods and services industry based on the 22 variables analyzed in this model.

Table 9.6: Goods and Services Industry Logistic Model, 2015 to 2020

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.114090	*	0.014188	8.04	0.000
Age-squared	-0.000928	*	0.000145	-6.40	0.000
Bachelor's Degree (a)	-0.098960		0.075627	-1.31	0.191
Advanced Degree	-0.453291	*	0.154626	-2.93	0.003
Homeowner	0.280172	*	0.086149	3.25	0.001
Home Value	0.000000	*	0.000000	5.07	0.000
Monthly Mortgage Payment	0.000050		0.000030	1.68	0.092
Interest and Dividends	0.000004	*	0.000001	2.91	0.004
Speaks English at Home	-0.591197	*	0.113541	-5.21	0.000
Has a Child under the Age of Six	-0.030442		0.212604	-0.14	0.886
Married	0.200326	*	0.072526	2.76	0.006
Caucasian Female (b)	-0.161986		0.086999	-1.86	0.063
Black American	-0.790704	*	0.132981	-5.95	0.000
Asian American	-0.584946	*	0.193414	-3.02	0.002
Hispanic American	-0.562536	*	0.129749	-4.34	0.000
American Indian and Alaskan Native	-0.535286		0.665868	-0.80	0.421
Other Minority	-0.243910		0.220984	-1.10	0.270
Year 2017 (c)	0.011974		0.086317	0.14	0.890
Year 2018	-0.111664		0.087143	-1.28	0.200
Year 2019	0.021548		0.089185	0.24	0.809
Year 2020	0.065475		0.104648	0.63	0.532
Constant	-4.851293	*	0.356134	-13.62	0.000

(a) For the variables bachelor's degree and advanced degree, the baseline variable is high school.

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

(c) For the year variables, the baseline variable is Year 2015.

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

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

(-) denotes an omitted variable due to insufficient observations.



The goods and services industry logistic regression results indicate the following:

- The likelihood of goods and services business ownership is positively associated with increased age. Older individuals are significantly more likely to be business owners in the goods and services industry. However, as individuals reach advanced age, the likelihood of being a business owner significantly decreases in the goods and services industry.
- Individuals with an advanced degree are significantly less likely to be business owners in the goods and services industry.
- Individuals who own a home are significantly more likely to be business owners in the goods and services industry.
- Individuals who have a higher-valued home are significantly more likely to be business owners in the goods and services industry.
- Individuals who have higher interest and dividends income are significantly more likely to be business owners in the goods and services industry.
- Individuals who speak English at home are significantly less likely to be business owners in the goods and services industry.
- Married individuals are significantly more likely to be business owners in the goods and services industry.
- Black Americans, Asian Americans, and Hispanic Americans are significantly less likely than non-minority males to be business owners in the goods and services industry.



B. Business Ownership Analysis Conclusion

The Business Ownership Analysis examined the different explanatory variables' impact on an individual's likelihood of owning a business in the construction, professional services, and goods and services industries. Controlling for race and gender-neutral factors, the Business Ownership Analysis results show that statistically significant disparities in the likelihood of owning a business exist for minorities and Caucasian females compared to similarly situated non-minority males.

Caucasian females, Asian Americans, and Hispanic Americans experience the greatest disparity, as they are significantly less likely to own a business in multiple industries than similarly situated non-minority males. Caucasian females are significantly less likely to own a business in the construction and professional services industry. Asian Americans are significantly less likely to own a business in the professional services and goods and services industry. Hispanic Americans are significantly less likely to own a business in the construction and goods and services industry. Also, Black Americans are significantly less likely to own a business in the goods and services industry, and American Indians and Alaskan Natives are significantly less likely to own a business in the construction industry. Table 9.7 shows the business ownership regression analysis results by race, gender, and industry.

Table 9.7: Statistically Significant Business Ownership Disparities

Race/Gender	Construction	Professional Services	Goods and Services
Black American	NOT SIGNIFICANT	NOT SIGNIFICANT	<i>SIGNIFICANT</i>
Asian American	NOT SIGNIFICANT	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>
Hispanic American	<i>SIGNIFICANT</i>	NOT SIGNIFICANT	<i>SIGNIFICANT</i>
American Indian and Alaskan Native	<i>SIGNIFICANT</i>	NOT SIGNIFICANT	NOT SIGNIFICANT
Caucasian Female	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>	NOT SIGNIFICANT
Other Minority	NOT SIGNIFICANT	NOT SIGNIFICANT	NOT SIGNIFICANT



C. Business Earnings Analysis

The business earnings variable is identified by self-employment income³⁴⁰ from 2015 to 2020 for the three industries: construction, professional services, and goods and services. The analysis considered incorporated and non-incorporated businesses.

Previous studies have shown that many non-discriminatory factors, such as education, age, and marital status, are associated with self-employment income. In this analysis, race and gender-neutral factors are combined with race and gender groups in an OLS regression model to determine whether observed race or gender disparities were independent of the race and gender-neutral factors known to be associated with self-employment income.



³⁴⁰ The terms “business earnings” and “self-employment income” are used interchangeably.

1. OLS Regression Results in the Construction Industry

Table 9.8 shows the results of the OLS regression for business earnings in the construction industry based on the 23 variables analyzed in this model.

Table 9.8: Construction Industry OLS Regression, 2015 to 2020

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	4572.856	*	275.062	16.62	0.000
Age-squared	-44.635	*	3.200	-13.95	0.000
Incorporated Business	-2449.392		2871.095	-0.85	0.394
Bachelor's Degree (a)	18963.230	*	1984.503	9.56	0.000
Advanced Degree	35406.400	*	4974.351	7.12	0.000
Homeowner	3874.217	*	1879.246	2.06	0.039
Home Value	0.020	*	0.004	4.86	0.000
Monthly Mortgage Payment	5.150	*	0.850	6.06	0.000
Interest and Dividends	0.383	*	0.117	3.29	0.001
Speaks English at Home	8768.255	*	1840.766	4.76	0.000
Has a Child under the Age of Six	-3138.021		6100.007	-0.51	0.607
Married	8580.013	*	1528.538	5.61	0.000
Caucasian Female (b)	-23362.460	*	2842.801	-8.22	0.000
Black American	-18233.820	*	4091.784	-4.46	0.000
Asian American	-12754.230	*	4717.076	-2.70	0.007
Hispanic American	-13041.420	*	1784.670	-7.31	0.000
American Indian and Alaskan Native	-6144.858		10977.260	-0.56	0.576
Other Minority	-9868.186	*	4856.060	-2.03	0.042
Year 2017 (c)	2991.918		1802.599	1.66	0.097
Year 2018	-345.930		1610.966	-0.21	0.830
Year 2019	1176.352		1680.017	0.70	0.484
Year 2020	-844.943		2090.187	-0.40	0.686
Constant	-67379.910	*	5775.224	-11.67	0.000

(a) For the variables bachelor's degree and advanced degree, the baseline variable is high school.

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

(c) For the year variables, the baseline variable is Year 2015.

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

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

(-) denotes an omitted variable due to insufficient observations.



The OLS regression results for business earnings in the construction industry indicate the following:

- Older business owners have significantly higher business earnings in the construction industry. However, as business owners reach advanced age, they have significantly lower business earnings in the construction industry.
- Business owners with a bachelor's degree or an advanced degree have significantly higher business earnings in the construction industry.
- Business owners who own a home have significantly higher business earnings in the construction industry.
- Business owners who have a higher-valued home have significantly higher business earnings in the construction industry.
- Business owners with a higher monthly mortgage payment have significantly higher business earnings in the construction industry.
- Business owners who have higher interest and dividends income have significantly higher business earnings in the construction industry.
- Business owners who speak English at home have significantly higher business earnings in the construction industry.
- Married business owners have significantly higher business earnings in the construction industry.
- Caucasian female, Black American, Asian American, Hispanic American, and other minority business owners have significantly lower business earnings than non-minority males in the construction industry.



2. OLS Regression Results in the Professional Services Industry

Table 9.9 shows the results of the OLS regression for business earnings in the professional services industry based on the 23 variables analyzed in this model.

Table 9.9: Professional Services Industry OLS Regression, 2015 to 2020

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	8396.519	*	375.847	22.34	0.000
Age-squared	-81.041	*	4.302	-18.84	0.000
Incorporated Business	-14095.530	*	4250.647	-3.32	0.001
Bachelor's Degree (a)	27802.030	*	1580.761	17.59	0.000
Advanced Degree	57752.880	*	2153.780	26.81	0.000
Homeowner	-12008.060	*	2370.211	-5.07	0.000
Home Value	0.048	*	0.004	10.74	0.000
Monthly Mortgage Payment	11.529	*	1.042	11.07	0.000
Interest and Dividends	0.483	*	0.073	6.64	0.000
Speaks English at Home	11345.280	*	2033.018	5.58	0.000
Has a Child under the Age of Six	-8957.347	*	2808.434	-3.19	0.001
Married	11456.910	*	1677.095	6.83	0.000
Caucasian Female (b)	-41341.470	*	2091.996	-19.76	0.000
Black American	-40344.270	*	3066.609	-13.16	0.000
Asian American	-28833.620	*	3171.503	-9.09	0.000
Hispanic American	-29082.870	*	2764.228	-10.52	0.000
American Indian and Alaskan Native	7113.207		9273.246	0.77	0.443
Other Minority	-19427.790	*	8289.831	-2.34	0.019
Year 2017 (c)	848.926		2078.211	0.41	0.683
Year 2018	2047.216		2004.077	1.02	0.307
Year 2019	7710.407	*	2154.242	3.58	0.000
Year 2020	7937.824	*	2890.175	2.75	0.006
Constant	-149726.60	*	7913.997	-18.92	0.000

(a) For the variables bachelor's degree and advanced degree, the baseline variable is high school.

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

(c) For the year variables, the baseline variable is Year 2015.

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

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

(-) denotes an omitted variable due to insufficient observations.



The OLS regression results for business earnings in the professional services industry indicate the following:

- Older business owners have significantly higher business earnings in the professional services industry. However, as business owners reach advanced age, they have significantly lower business earnings in the professional services industry.
- Incorporated business owners have significantly lower business earnings in the professional services industry.
- Business owners with a bachelor's degree or an advanced degree have significantly higher business earnings in the professional services industry.
- Business owners who own a home have significantly lower business earnings in the professional services industry.
- Business owners who have a higher-valued home have significantly higher business earnings in the professional services industry.
- Business owners with a higher monthly mortgage payment have significantly higher business earnings in the professional services industry.
- Business owners who have higher interest and dividends income have significantly higher business earnings in the professional services industry.
- Business owners who speak English at home have significantly higher business earnings in the professional services industry.
- Business owners who have a child under the age of six have significantly lower business earnings in the professional services industry.
- Married business owners have significantly higher business earnings in the professional services industry.
- Caucasian female, Black American, Asian American, Hispanic American, and other minority business owners have significantly lower business earnings than non-minority males in the professional services industry.



3. OLS Regression Results in the Goods and Services Industry

Table 9.10 shows the results of the OLS regression for business earnings in the goods and services industry based on the 23 variables analyzed in this model.

Table 9.10: Goods and Services Industry OLS Regression, 2015 to 2020

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	3615.542	*	209.696	17.24	0.000
Age-squared	-35.425	*	2.518	-14.07	0.000
Incorporated Business	8019.804	*	3492.045	2.30	0.022
Bachelor's Degree (a)	17067.690	*	1362.801	12.52	0.000
Advanced Degree	48375.230	*	5231.226	9.25	0.000
Homeowner	-4135.535	*	1711.636	-2.42	0.016
Home Value	0.029	*	0.005	5.85	0.000
Monthly Mortgage Payment	5.849	*	0.760	7.69	0.000
Interest and Dividends	0.411	*	0.120	3.42	0.001
Speaks English at Home	8379.705	*	1434.319	5.84	0.000
Has a Child under the Age of Six	-3498.113	*	1744.824	-2.00	0.045
Married	9398.474	*	996.616	9.43	0.000
Caucasian Female (b)	-19355.150	*	1603.961	-12.07	0.000
Black American	-13814.040	*	1460.751	-9.46	0.000
Asian American	-12475.500	*	3859.948	-3.23	0.001
Hispanic American	-13379.690	*	1553.635	-8.61	0.000
American Indian and Alaskan Native	-23776.230	*	6565.415	-3.62	0.000
Other Minority	-5924.597		3808.515	-1.56	0.120
Year 2017 (c)	-34.366		1374.692	-0.02	0.980
Year 2018	1329.678		1396.115	0.95	0.341
Year 2019	-646.148		1274.182	-0.51	0.612
Year 2020	-535.020		1557.714	-0.34	0.731
Constant	-52196.670	*	4292.489	-12.16	0.000

(a) For the variables bachelor's degree and advanced degree, the baseline variable is high school.

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

(c) For the year variables, the baseline variable is Year 2015.

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

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

(-) denotes an omitted variable due to insufficient observations.



The OLS regression results for business earnings in the goods and services industry indicate the following:

- Older business owners have significantly higher business earnings in the goods and services industry. However, as business owners reach advanced age, they have significantly lower business earnings in the goods and services industry.
- Incorporated business owners have significantly higher business earnings in the goods and services industry.
- Business owners with a bachelor's degree or an advanced degree have significantly higher business earnings in the goods and services industry.
- Business owners who own a home have significantly lower business earnings in the goods and services industry.
- Business owners who have a higher-valued home have significantly higher business earnings in the goods and services industry.
- Business owners with a higher monthly mortgage payment have significantly higher business earnings in the goods and services industry.
- Business owners who have higher interest and dividends income have significantly higher business earnings in the goods and services industry.
- Business owners who speak English at home have significantly higher business earnings in the goods and services industry.
- Business owners who have a child under the age of six have significantly lower business earnings in the goods and services industry.
- Married business owners have significantly higher business earnings in the goods and services industry.
- Caucasian female, Black American, Asian American, Hispanic American, and American Indian and Alaskan Native business owners have significantly lower business earnings than non-minority males in the goods and services industry.



D. Business Earnings Analysis Conclusion

Controlling for race and gender-neutral factors, the Business Earnings Analysis documented statistically significant disparities in business earnings for minorities and Caucasian females compared to similarly situated non-minority males. Caucasian female, Black American, Asian American, and Hispanic American business owners experience the greatest disparity, as they have significantly lower business earnings in the construction, professional services, and goods and services industries than similarly situated non-minority males. Other minority business owners have significantly lower business earnings in the construction and professional services industries. American Indian and Alaskan Native business owners have significantly lower business earnings in the goods and services industry. Table 9.11 shows the earnings disparity regression results by race, gender, and industry.

Table 9.11: Business Earnings Disparities

Race/Gender	Construction	Professional Services	Goods and Services
Black American	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>
Asian American	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>
Hispanic American	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>
American Indian and Alaskan Native	NOT SIGNIFICANT	NOT SIGNIFICANT	<i>SIGNIFICANT</i>
Caucasian Female	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>
Other Minority	<i>SIGNIFICANT</i>	<i>SIGNIFICANT</i>	NOT SIGNIFICANT



VII. Conclusion

Two regression analyses were conducted to determine whether there were factors in the private sector that might help explain the current levels of M/WBE availability and any statistical disparities between M/WBE availability and utilization identified in this Study. The analyses examined the following outcome variables: business ownership and business earnings.

These analyses were performed for the three industries—construction, professional services, and goods and services—included in this Study. The regression analyses examined the effect of race and gender on the two outcome variables. The Business Ownership Analysis and the Earnings Disparity Analysis used data from the 2015 through 2020 PUMS datasets for the State and compared business ownership rates and earnings for M/WBEs to those of similarly situated non-minority males.

The analyses of the two outcome variables document disparities that could adversely affect the formation and growth of M/WBEs within the construction, professional services, and goods and services industries. In the absence of a race and gender-neutral explanation for the disparities, the regression findings point to racial and gender discrimination that depressed business ownership and business earnings. Such discrimination is a manifestation of economic conditions in the private sector that impede minorities and Caucasian females' efforts to own, expand, and sustain businesses. It can reasonably be inferred that these private sector conditions are manifested in the current M/WBEs' experiences and likely contributed to lower levels of willing and able M/WBEs. It is important to note that there are limitations to using the regression findings to access disparity between the utilization and availability of businesses. No matter how discriminatory the private sector may be, the findings cannot be used as the factual basis for a government-sponsored, race-conscious M/WBE program. Therefore, caution must be used in the interpretation and application of the regression findings in a disparity study. Nevertheless, the findings can be used to enhance the race-neutral recommendations to eliminate identified statistically significant disparities in the State contracting agencies' use of available M/WBEs.



CHAPTER 10: Anecdotal Analysis

I. Introduction

This chapter presents anecdotal testimony gathered through public comments from business community meetings and in-depth, one-on-one interviews. The purpose of this chapter is to garner qualitative evidence of acts that may have impacted Minority and Woman-owned Business Enterprises' (M/WBE), Small Business Enterprises' (SBE), and service-disabled veteran-owned businesses' (SDVOB) access to contracting with State contracting agencies. The anecdotal testimony supplements the statistical findings reported in the *Chapter 7: Prime Contractor Disparity Analysis* and *Chapter 8: Subcontract Disparity Analysis* chapters and discloses barriers that might affect small, minority, women, and service-disabled veteran-owned business (SMWSDVOB) access to the State contracting agencies' contracts.

II. Legal Standard

The importance of anecdotal testimony in a disparity study was discussed in the landmark case, *City of Richmond v. J.A. Croson Co.*³⁴¹ (*Croson*). In this 1989 decision, the United States Supreme Court considered the use of anecdotal testimony to determine whether remedial race-conscious relief may be justified in a market area. The Court opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a [local entity's] determination that broader remedial relief [be] justified."³⁴² The Court found that anecdotal testimony of individual discriminatory acts, when paired with statistical data, can document the routine practices affecting M/WBE access to contacting opportunities.

Anecdotal testimony from business owners provides information on the types of barriers that are perceived to exist within the market area, and affect the development and sustainability of small, service-disabled veteran, minority, and woman-owned businesses. The statistical data quantify the results of discriminatory practices, while anecdotal testimony provides the human context to understand the numbers.

A. Evidence of Active and Passive Discrimination

Croson authorizes anecdotal inquiries along two lines of inquiry. The first line of inquiry investigates active government discrimination, as reflected in its procurement policies and practices in the awarding of prime contracts. Passive discrimination, the second line of inquiry, results when government officials knowingly use public funds to contract with companies that discriminate against M/WBEs or fail to take positive steps to prevent discrimination by contractors who receive public contracts.³⁴³

³⁴¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 509 (1989).

³⁴² *Id.*

³⁴³ *Croson*, 488 U.S. at 491-93, 509.



The Court has cautioned that anecdotal evidence of discrimination is entitled to less evidentiary weight than statistical findings because the evidence concerns more private than government-sponsored activities. Relative weight was also assigned to personal accounts. Personal accounts of discrimination that reflect isolated incidents were assigned less weight compared to anecdotal evidence of a municipality's institutional practices. Institutional practices were considered to have a different and relatively greater impact on market conditions than other practices.³⁴⁴

Despite the differences in the assigned weight of the different types of personal accounts, the Court found that anecdotal evidence, paired with appropriate statistical data, either active or passive forms of discrimination, can support the imposition of a race or gender-conscious remedial program.³⁴⁵

As *Croson* points out, jurisdictions have at their disposal “a whole array of race-neutral devices to increase the accessibility of City contracting opportunities to small entrepreneurs of all races.”³⁴⁶ The Court found that anecdotal evidence has value because it can paint a portrait of the practices and procedures that generally govern the award of public contracts in the relevant market area. These narratives, according to *Croson*, can identify specific generic practices that government can implement, improve, or eliminate to increase contracting opportunities for businesses owned by all citizens. In this Study, the utility of the anecdotal evidence is considered within the parameters of the law. Thus, the information obtained offers the State vital insights that could influence policy changes to its SBE and SDVOB programs and the creation of a M/WBE program.

Anecdotal testimony was solicited from an ethnically diverse group of minority, Caucasian female and non-minority male-owned prime contractors, subcontractors, and suppliers in the State to provide a comprehensive perspective of experiences.

III. Anecdotal Methodology

The methods used to collect the anecdotal information consisted of public comments from business community meetings and one-on-one interviews conducted after the meetings. All the business owners interviewed were domiciled in the geographical market area. The market area is the State of New Jersey, as described in *Chapter 5: Market Area Analysis*.

A. Business Community Meetings

The first phase of the anecdotal process was the collection of public comments during six virtual business community meetings held in September 2022. Invitations were emailed to 20,780 businesses. Pre-registration was completed by 798 businesses and 551 logged onto at least one meeting. Upon registering for a meeting, the business received a survey to complete, which elicited

³⁴⁴ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d at 1530 (10th Cir. 1994): “while a fact finder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality’s institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions.”

³⁴⁵ *Croson*, 488 U.S. at 509.

³⁴⁶ *Id.*



business profile information and included an invitation to participate in an anecdotal interview. Testimony from the six business community meetings has been incorporated into this chapter.

The email list was compiled from various sources, including utilized businesses, vendor' lists, certification directories, business, and trade associations' membership lists and chambers of commerce directories.

Formal meeting notices were published in various newspapers and community calendars and were distributed by trade associations. Social media promotion included placement in AllEvents, Eventbrite, TapInto, Patch, American Towns, Yelp, and Town Planner.

The meeting format afforded businesses an opportunity to make comments during the question-and-answer section of each meeting. Registered businesses were provided with a survey soliciting their interest in being interviewed.

The meetings, facilitated by Mason Tillman, served as a forum to inform the business community about the study's legal framework, methodology, and timeline. The State, as a partner in the meetings, described contracting opportunities and afforded business owners the opportunity to speak with State representatives regarding contracting opportunities. The table below lists the 187 responses to Mason Tillman's request for meeting registrants to agree to an anecdotal interview.

Table 10.1: Business Community Meetings

Response to Invitation to Interview	Number of Responses from Meeting Registrants
Yes	114
No	25
Maybe	48

B. One-on-One Interviews

Phase two involved one-on-one interviews to collect anecdotal information. In addition to the interviewees solicited from the community meetings, database of the utilized businesses, certification directories, chamber of commerce list and business organization lists were used to identify potential interviewees.

Businesses that indicated a willingness to interview were screened to determine if they had experience doing or attempting to do business with the State contracting agencies during the study period. The screener also collected basic demographic data and specific information to determine the relevant experiences of the business owners. The screener confirmed the businesses' willingness to recount experiences to a trained interviewer.

In the one-on-one interviews, anecdotal probes were used to solicit information from the interviewees. The questions sought to determine if the business owner encountered or had specific



knowledge of instances in which the State contracting agencies contracting practices had a positive or adverse impact on their business during the July 1, 2015 to June 30, 2020 study period.

IV. Anecdotal Findings

The anecdotal findings describe general market conditions and the range of experiences encountered by interviewees that adversely affected their effort to do business with the State contracting agencies. The anecdotal accounts from the one-on-one interviews are described below.

A. Racial Barriers

Business owners reported experiences with discrimination and structural barriers in contracting with the State contracting agencies. Several business owners believe that Caucasian-owned businesses are more likely to receive contracts over similarly situated minority businesses. Interviewees also described their experiences with gender discrimination limiting fair access to contracting opportunities.

A minority male owner of a construction company reported that he rarely observes minority contractors working on the State contracting agencies' construction projects:

I have been in this business since I was a teen. When I got into this business, there was a big issue about race, and there still is. You do not see any minorities working here. Maybe one. That is still severe.

A minority male owner of a professional services company believes that his ethnicity has served as a barrier to receiving contracting opportunities from the State contracting agencies:

My race has been a disadvantage. It put us in a hole. We are still recuperating from trying to seek work from the State.

A minority male owner of a professional services company explained that managers select preferred businesses rather than follow the State contracting agencies' procurement policies and guidelines.

I went to [agency name withheld] and there were two guys that had been there almost 30 years. I thought I was in Alabama. I think they may have since retired. But I was told, "Look, I don't really care what the Governor wants. This is how we do business; we pick firms that we like, and that is just what we do. I don't care."



A minority female owner of a professional services company reported that minority engineers do not receive the same contracting opportunities as their counterparts, despite holding the same qualifications:

There is a significant minority population in New Jersey. And, for too long, they have been marginalized and sidelined on professional services opportunities. We had to complete the same courses to get the same engineering degrees, but we do not receive the same opportunities to work on different State projects. So, the more New Jersey can help, the more equitable society will be.

A minority female owner of a professional services company believes that the State should enact new procurement regulations to level the playing field for minority consultants:

There is a need for regulations, policies, and procedures that ensure everyone gets a fair shake by leveling the playing field. We have been talking about this for generations. It is time to let in African Americans. I mean, it is horrific. The procurement regulations need to be changed. They need a committee to review the regulations.

A minority female owner of a professional services company believes minority-owned businesses are largely excluded from the State contracting agencies' professional services contracts:

They talk about social justice issues, diversity, and inclusion. But there is no movement or activity in that space because they do not have to. They look out for their own people by building a legacy in their business for their family. They are not looking to support or offer a helping hand to professional consultants who may be African American, Latina, or women. They do not because it is not mandated. This is not White money or Black money. It is everybody who pays taxes. Although Black people pay taxes, they do not have access to doing business with the government who collects the taxes.



This same business owner further elaborated on the Request for Proposal (RFP) process:

So, it is discriminatory and institutional racism. Everybody pays taxes but only White people can get business with the government. That is why they are the ones who have large, successful companies. The people who are in decision-making positions have the power and authority to award the RFPs to people who look like them, not who look like African Americans or Latinas. We know that they are getting the lion's share of the business, and unless there are State mandates to include minority business, nothing will change.

B. Preferred Contractors

Some interviewees expressed concern that the State contracting agencies' managers prefer to work with the same contractors, which makes it difficult to obtain contracting opportunities. It is notable that the statistical analysis from this Study shows the majority of the State contracting agencies' contracts were small. Forty-three percent of the contracts awarded during the study were valued \$99,000 or less. Therefore, to perform on most State contracting agencies' contracts, even competitively bid construction projects required only minimal capacity.

A Caucasian female owner of a professional services company believes the requirements listed in certain RFPs can only be met by a few preferred firms. The restrictive requirements lead to the exclusion of otherwise qualified companies:

The State already has an idea of who they want to work with before advertising the Request for Proposal. That is why they have very specific requirements in their RFPs. There are only one or two companies that can meet the requirements. Issuing an RFP just to allow businesses to respond with no intention of using them is not fair. We spend up to 40 hours to respond to an RFP, sometimes it is much more than that.

A minority male owner of a professional services company believes the decision to award certain RFPs are made before they are publicized:

Usually by the time the RFP hits the street, it's wired for someone who has been doing the work. The RFPs are pretty much loaded for someone in particular; our chance of winning is small. Especially if you have not had conversations with the agency putting out the RFP before it hits the street.



A minority female owner of a professional services company reported the State regularly utilizes the same companies for their professional services:

I would say that the State of New Jersey has its regulars that it goes to because it worked with them and knows them very well. It goes to the same consultants that it worked with, and other firms are blocked.

A minority male owner of a professional services company believes small businesses are hurt by the selection of preferred contractors:

Certain prime consultants are shown favoritism when it comes to the State. There is favoritism, but, at the end of the day, the State needs to know that it can count on smaller firms to deliver its needed services, and they are committed to delivering good work.

A minority female owner of a construction company explained why she believes certain contractors are preferred over others:

It seems like the same businesses in my industry are winning most of the work. They have been around for quite a while, and they are very equipped. They also have the finances to support the job. The State's RFP process is completely biased toward large firms. They have been doing business with these majority-owned companies for decades. So, most minority businesses are not known to them.

A minority male owner of a professional services company believes more transparency is needed regarding the State's legal services contracts:

When I go to State agencies to talk about opportunities to provide legal services, it is a very short conversation. There is not a lot of public discourse regarding the firms that receive legal services from the State.



A minority male owner of a goods and services company believes the State's preferred contractors are not minority-owned businesses:

I do not know if there is favoritism. All I can say is that I have not gotten anything. I know for a fact that minority businesses typically do not get any work. I do not think the State knows we exist.

A minority male owner of a professional services company also believes favored consultants dominate the State's engineering services:

Definitely, the same engineering businesses are winning most of the work. A lot of it is due to relationships and politics.

A minority male owner of a goods and services company believes certain bids are written to favor incumbent contractors:

We were competing with four or five other companies, and they went with the company who they dealt with for many years. It was clear that with all we went through to win the contract, they had already made up their minds who they were going to work with.

C. Minority Subcontractors Are Listed but Underutilized

A minority female owner of a goods and services firm believes prime contractors frequently do not offer subconsultants useful work:

They want to self-perform the big-ticket items and give the certified subcontractor the low-hanging fruit. Like, security for \$15 an hour.



A minority male owner of a construction company explained that oftentimes he is not afforded the opportunity to perform the subcontract work listed in the prime contractor's bid:

Yes, I have been listed as a subcontractor on a bid but was not used to perform the work after the prime won the contract. This happens a lot. We call the prime contractor by the midterm of the contract if we have not received an assignment, asking if there is anything we can do. But we are often told that they have received several assignments but there was nothing that we were capable of doing, therefore we did not call you.

A minority male owner of a professional services company believes prime contractors list minority subcontracts without utilizing their services because the State does not have minority business enterprise goals:

Unlike New York, on the New Jersey side, you do not have to demonstrate that you made any sincere effort to hire a minority company. Prime contractors do not have to demonstrate anything. They do not have to reach out regarding subcontract work.

A minority male owner of a construction company explained what he believes happens when prime contractors list certain subcontractors without providing them any work:

The only way to make a change is to rip up the entire system. It is set up where the architect is at the top of the food chain followed by the general contractor. Of course, the general contractor controls the money, but the architect approves whether the general contractor gets the money. And the general contractor distributes the money how he wants.

Another minority male owner of a professional services company reported that prime contractors often list his firm as a subconsultant without providing any work:

Our firm has been listed as a subcontractor without receiving work. It has happened many times in New Jersey. They do not have a process in place to prevent it. I have experienced this on NJDOT projects.



D. Onerous Bid and RFP Process

Interviewees expressed concerns that it is difficult to get bid information due to lack of a centralized solicitation process or ambiguous bid/proposal requirements.

A Caucasian female owner of a goods and services company reported that she learns about the State's bid opportunities from prime contractors when the State should have a centralized posting of solicitations:

The type of work we provide is not advertised. The only way I learn about it is through a contractor. There are so many cities and counties in New Jersey, but there is not one place to find bidding information. There is an issue with transparency and giving everyone bid information.

A minority female owner of a professional services company credits events that directly target minority-owned businesses with informing them about upcoming the State contracting opportunities:

I am 100% convinced that if it were not for minority procurement events, we would not learn about the State's contracting opportunities.

A minority female owner of a professional services company reported that the requirements set forth in the State's professional services RFPs are confusing:

The RFPs can be a little bit daunting. It takes at least two to three days before I finally figure out what it is that they want. By the time I get through reading all of the requirements, I am still at a loss because now I missed the deadline for the supplemental documents. And by the time I get to the point where it is time to submit questions, they are not quick to respond.



A Caucasian female owner of a professional services company explained that New Jersey Department of Transportation's (NJDOT's) cost basis approval requirement is a barrier for small businesses:

I do not seek contracts from NJDOT because they require a cost basis approval with their bids, and I am unable to provide them. But oddly, the New Jersey Transit Authority, which gets funding from NJDOT, does not require cost basis approvals. So, I seek work from them. But I cannot work for the NJDOT directly. I spoke to them about the cost basis approval years ago. They have not made any changes, although they acknowledged that some of the requirements may be out of reach for small businesses. Someone needs to tell them that their requirements are ridiculous because they do not understand how small businesses work.

E. Limited Access to Contract Information

A Caucasian female owner of a professional services company did not find the State contracting agencies' debriefing process beneficial or transparent:

I asked for a debriefing session after submitting an unsuccessful proposal. But it was not beneficial. The State of New Jersey would not provide information that was allowed under the open records request. In New Jersey, it is very difficult to get open records information. The State is not transparent; it takes so long to get the information. It is a very long process, and most times it is never fulfilled.

A minority female owner of a professional services company has struggled to find information on State's upcoming architecture and engineering services opportunities:

They have told us to register on this site or that portal to get contracting information. There is not a centralized location to learn about bid information. Each agency has its own website. So, we have to spend time going on different sites every day looking at stuff that has nothing to do with professional services.



A minority female owner of a professional services company expressed her frustration finding the State's contracting opportunities:

Trying to find contracting opportunities is like a wild-goose chase. I have to go to every agency, county, or city and sign up for emails to get contracting information. This stuff needs to be in one place instead of going on a wild-goose chase.

A minority female owner of a goods and services company also experienced difficulty obtaining information regarding the State's contracting opportunities:

I have attended the New Jersey League of Municipalities convention in the past. But I am still trying to figure out how to get contracting information for the services I provide without wasting time looking up stuff that is not relevant. There is no platform that provides all contracting opportunities.

A female owner of a professional services firm described the State's procurement process as challenging.

There is not a clearly defined approach in terms of how to get bid information from the State. It is like throwing everything against the wall to see what sticks. The shortest distance between two points is a straight line, and there is not a straight line to find out how to get bidding information.

A female owner of a professional services company described the State's procurement process as inaccessible:

I could not find the bid information. It should be easily accessible, but it is not. They need a process that is direct like in New York. In New Jersey, it is like a hunting expedition looking for construction opportunities. It seems like the opportunities are hidden or buried.



A minority male owner of a professional services company believes New Jersey does not have an open process to learn about contracting opportunities, when compared to nearby states:

I periodically get notices about legal service opportunities in Pennsylvania, but those opportunities are closed in New Jersey. It is unfortunate and I believe political. The people in the know are privy to what is going on behind closed doors. It is not an open process, and the big firms get the work. I have complained in the past that New York and Pennsylvania have a much better open system than New Jersey has. New Jersey does its own thing, and that is why it has huge disparities in terms of minority contractors getting work.

A minority male owner of a professional services company recommends more communication regarding contracting opportunities to MBEs:

The State should send notices to MBEs, just like New York State does. They send us notices advising us to look out for upcoming jobs.

F. Inadequate Time to Respond

Interviewees reported that additional time is needed to respond to the State's solicitations. A minority male owner of a professional services company considers at least five to six weeks is required to assemble a team to respond to an RFP:

A couple of extra weeks would be helpful. Generally, most agencies offer three or four weeks after they advertise the RFP. Extra time would be helpful to find the right teaming partner.

A Caucasian female owner of a professional services company reported that there is no uniformity in response times, which vary depending on the State contracting agencies, and that the response time should be longer:

The lead time is all over the place. Sometimes we will get two weeks, other agencies will provide a month and a half. There is no consistency. Sometimes they ask for questions too quickly. They also may be due within one week of issuing the RFP. The RFP process probably needs to be slightly longer.



A minority male owner of a professional services company also reported that the State contracting agencies are not uniform in the response time allotted for submitting proposals:

The NJDOT does not provide notifications to let you know that an RFP is being issued. Typically, there is not very much time to respond. And each agency has its own specific timeframe to respond and formatting requirements. Three weeks is not a lot of time.

A minority male owner of a professional services company reported that some businesses are made aware of RFPs before they are advertised, affording them more lead time than what is stated in the solicitation:

The lead time is pretty tight. Often, before it hits the street, there are already teams negotiating. This is another barrier for smaller firms because the big guys have intelligence that we do not have. So, they know about bridge projects before they are publicized.

A minority male owner of a professional services company suggests publishing forecasts to announce upcoming projects at least a quarter ahead of the solicitation publication date:

It would be great if they announced upcoming capital projects at least a quarter in advance. They could explain that these are the five, six, or ten projects that we anticipate within the next quarter. That would allow a firm like ours to assemble a team before the projects are advertised.

G. Late Payments

Several business owners reported late payments affecting their business operations. These late payments were attributed to both the State and its prime contractors.

A Caucasian female owner of a professional services company explained that it may take up to six months to receive payment from the State's prime contractors:

Our prime contractors do not pay us within 30 days. It usually takes three to six months. Depending on the agency, it could take up to six months.



A minority male owner of a professional services company reported typically receiving late invoice payments, depending on the prime contractor's billing practices:

Our issue is with the change order process. For instance, something changed, and our prime contractor asks us to agree to a change order. They wait to submit our change order until they are ready to send the change order for their work. So, that could cause a seven to eight-month delay.

A minority female owner of a professional services company reported that she spends an inordinate amount of time seeking payments from prime consultants when they should pay timely, in accord with the State's standard:

Contractors are very difficult to collect from. The turn-around time is more than 30 days. And sometimes, they do not pay, period. It is really a wasteful way to spend time. We do the work, and we should not have to run after it to get paid.

A minority male owner of a construction company discussed the impact of late payments on small businesses:

The whole system does not work. You ask a subcontractor who has nothing to finance and carry the costs of a public works job to then wait a long, long time to get paid. Additionally, late payments impact the bonding and financing of small businesses.

A Caucasian female owner of a professional services company waited 60 to 120 days for payment from the prime consultant:

Payments normally are late getting to the prime, which causes me to be about six months without a payment for a particular project. I generally wait anywhere from 60 to 120 days. I am fortunate to have a line of credit for the business in case I do not get paid. And I certainly had to use it. I do not like to because there is a high interest rate, but I have to make payroll, pay bills, and rent. Most small businesses run on shoestrings, so it is very difficult when you do not get paid on time.



A minority male owner of a professional services company reported that the prime contractor's late payments caused him to use personal finances to support his business:

Very often our prime contractors pay late. It is at least 180 days. Occasionally, I submit a bill for \$10,000, and they do not feel that is worth their trouble. So, they sit on it and submit it when they have more bills, maybe two months later. So, already the clock is ticking. My line of credit has been maxed. There have been times when I have had to use credit cards and personal resources to fund my business.

A Caucasian female owner of a construction company waited almost a year to receive payment on an NJDOT project:

It took almost a whole year until we were fully paid for our project. The resident engineer at NJDOT was very slow in approving the time and material billing for change orders.

A Caucasian female owner of a professional services company reported that, due to delays in the State's payments to the prime contractors, she has waited months for payment.

New Jersey Transit's payment process is atrocious. We have to give them multiple spreadsheets. It generally takes 45 minutes to an hour to get the bill together because of all of the extra crap they want. And inevitably, they find something wrong and send it back. So, it can take several months before the prime gets paid, and then another two months before I get paid.

A Caucasian female owner of a goods and services company also struggles to pay her bills due to late payments:

I seldom get paid on time. I usually wait over 60 days for probably 20% to 30% of the time. I have figured out how to pay bills through a very tight cashflow, but it can put you in an impossible situation.



A minority male owner of a professional services company reported that some delayed payments are due to inconsistent accounting and approval processes in some State contracting agencies:

The payment process with the various agencies causes confusion and delays. If something is wrong with the invoice, then it is delayed until things are approved. If you do not understand each agency's process, you can rub people the wrong way, and then they start sabotaging your invoice jobs.

A minority male owner of a goods and services company reported receiving late payments from prime contractors and the State:

My payments have been seven to eight months late from the State and prime contractors.

A minority male owner of a professional services company reported that he stopped seeking work from the State since they are late in paying their invoices:

I had a bitter experience working with the New Jersey Transit Authority. I almost had to file a lawsuit to get paid because it took so long. It is hard because in New Jersey most of the prime contractors are late because of lack of oversight regarding payment requirements. It has really affected our business. Unfortunately, because of late payments, I cannot stop paying my payroll. So, I have stopped going after certain agencies that take too much time to pay.



H. A Statewide M/WBE Program

The following interviewees expressed their opinions about the need for a State M/WBE program.

A minority male owner of a professional services company explained why he is considering relocating his business to another state:

We are able to succeed in New York City and other states that have quite a bit of infrastructure money. New York State's minority business enterprise goals have helped us. So, I sometimes wonder why I have an office in New Jersey, but my staff are mainly working in New York. And I have to pay for their travel. It is becoming next to impossible to make any profit from the work we have in New York. So, I am seriously considering moving out of New Jersey for that reason.

A minority male owner of a professional services company believes that the State should have specific MBE goals for architecture and engineering contracts:

There are no MBE goals. It is the same for every small business, whether you are Asian, Hispanic, or African American. Hopefully, it will be changed based on the study. There should be a separate, dedicated MBE percentage for design consultants.

A minority male owner of a construction company believes that there should be a State M/WBE program with participation goals for minority and women-owned businesses:

It is important that the State have goals for M/WBEs' participation on State contracts. The State should make sure the playing field is leveled so that M/WBEs can actually make money on the State's contracts.



A minority male owner of a professional services company also believes a State M/WBE program, with preferences for eligible businesses, should include compliance monitoring:

Having an MBE program with goals would be a good start. The M/WBE Program should be as inclusive as possible. They should follow State of New York's M/WBE Program. But setting goals will not do any good unless the goals are enforced. And that means they have to be monitored. And agencies have to be held accountable for meeting the goals.

A minority male owner of a professional services company also believes an M/WBE program without compliance standards would be ineffective in increasing the participation of M/WBEs on the State's contracts:

Talk is cheap; it is worthless. M/WBE programs without teeth are useless and worthless.

A minority female owner of a goods and services company recommends that the State survey its certified businesses to obtain suggestions to improve access for M/WBEs:

I recommend they take a look back at their records over the past two or three years to find out what is working and not working. Maybe through a survey, which would be my suggestion. Because they are not trying to give any work to any newcomers or M/WBEs.

A Caucasian female owner of a professional services company recommends that the State review other SBE programs for guidance on improving access for small businesses on its contracts:

I would recommend New Jersey look at what other states are doing for SBEs. I know Washington State actually provides specific guidance for small businesses. The State's program is just a waste of my time.



A minority male owner of a professional services company recommends more time to respond to the State's RFPs:

I think they should extend the time to respond to RFPs. That would be fantastic. A few extra weeks would give us an opportunity to find a partner to team with.

A Caucasian female owner of a professional services company recommends contracting preferences for M/WBEs:

I think the State's procurement process disadvantages M/WBEs. They talk about growing small businesses, but they leave them out to dry. If they had an MBE or WBE program with teeth, those firms would be able to grow their business.

A minority male owner of a professional services company suggests the State model its M/WBE Program after the City of Philadelphia:

The City of Philadelphia has the best M/WBE program by far. The Philadelphia airport puts out amazing RFPs that support M/WBEs. We were one of three contractors that won a contract with the City of Philadelphia at the airport. I suggest New Jersey look at their program.

A minority male owner of a professional services company has not received any contracting opportunities from the State:

In New Jersey, there is no real requirement for MBE goals. So, we have not been that successful as an MBE. We have not worked as a prime MBE.

A minority female owner of a construction company reported that the State's SBE programs have not benefited her company:

I have not received any benefits from being certified with regard to any certification in New Jersey. They do not have any preferences for WBEs, and their SBE program rarely helps either.



A minority male owner of a professional services company believes the State should require certified firms to be headquartered in New Jersey:

I think SBEs and M/WBEs should be headquartered in the State to be certified.

A minority male owner of a professional services company recommends a more streamlined certification process:

Simplicity, simplicity, simplicity. Make it simpler and easier to certify. If they make it easy for us to get certified, we may have a better chance of leveling the playing field.

I. Prequalification Challenges

A minority male owner of a professional services company believes the prequalification process is a barrier to bidding on contracts.

No one told me why I didn't meet the requirements for prequalification. I deduced the reason why the company wasn't approved and made the correction. Now, I'm resubmitting as a women-owned business, veteran-owned business, and minority-owned business. And we're not even in the bidding process yet. I can't even get through the door.

A minority female owner of professional services company believes that the prequalification process should be uniform and streamlined.

The New Jersey DOT prequalification process has a lot more paperwork than New York. New Jersey should have less paperwork, and everything should be online, on one website, and less confusing.

A minority male owner of a professional services company reported that the review of the prequalification application takes an inordinate amount of time.

New Jersey's DOT process of getting prequalified was tedious and we eventually got it, but it took quite a while to get prequalified.



A minority male owner of a professional services company reported inconsistencies in the prequalification application standards of DPMC and the authorities.

DPMC follows one particular method then, the Turnpike follows another method. And DOT follows a third type of method. And once again, DPMC automatically gets the Schools Development Authority.

A minority male owner of a professional services company described the prequalification process as onerous and applicable to large businesses.

The process for prequalification was extremely exhaustive. To bid with NJDOT, you must pre-qualify. And the prequalification exercise is a long and exhaustive one. And the questions are skewed to large multi-state engineering organizations with subsidiaries. And a lot of information is not applicable to small businesses.

A minority male owner of a professional services company reported that the prequalification requirements are a barrier to entry for small businesses interested in proposing on engineering contracts.

There are some prequalification requirements for the Department of Transportation that we investigated a couple of years ago and found very burdensome, so we gave up on that. We don't have documented overhead calculations the same way a larger firm would show rate and overhead expenses. It's not that we don't have good records. We have excellent records, financial and project records, but not the same level of details or accounting as larger firms. It's like a Catch-22, if you don't have qualifications, you cannot prequalify. If you don't have prequalification, you won't get the jobs.



J. Other Recommendations

A minority male owner of a construction company recommends a goal for all SBEs on contracts at a \$5,000 threshold:

I think they should create a process where they utilize every SBE or at least try them. Maybe award contracts based on a low threshold. I would suggest \$5,000; I am not talking about a \$100,000 contract.

A minority male owner of a professional services company suggests an online directory of prime contractors interested in architecture and engineering services to provide access to the potential proposers for subcontractors:

The State should have a directory listing the prime contractors that downloaded RFPs. We could contact them and let them know we are interested in the project that was downloaded and provide them with our credentials.

This same business owner suggested classes on how to navigate the State's procurement process:

They could do a Zoom class on how to seek work from the State. It should be readily available for everybody, not just a select few people who already know how to do it.

A Caucasian male owner of a goods and services company recommends an SBE Program Liaison:

I would suggest a liaison. Someone to help walk us through the procurement process as it relates to the State's Small Business Program.

A Caucasian female owner of a goods and services company recommends a centralized bid notification system:

I get emails regarding bids, but it seems like they come from a million different places. There is no consolidation. All the State agencies act independently in terms of advertising. I would suggest one place for all upcoming bids.



V. Summary

This chapter presents a qualitative analysis of the barriers business owners perceived while working on or seeking work from the State contracting agencies and their prime contractors. The interviewees referenced barriers to accessing contracts based on their race and gender. The interviewees also recommended the State implement a M/WBE program with specific race and gender goals for minority and women-owned businesses and provisions for ensuring compliance by both the prime contractors and State contracting agencies.



Epilogue

The State of New Jersey commissioned Mason Tillman Associates of Oakland, California, to perform a Disparity Study. The Study analyzed the State contracting agencies' utilization of minority and woman-owned business enterprises (M/WBEs) in compliance with the United States Supreme Court's 1989 ruling in *City of Richmond v. J.A. Croson*. In addition, the Study identified M/WBEs and service-disabled veteran-owned businesses (SDVOBs) in the market area that are ready, willing, and able to do business with the State contracting agencies, and assessed the procurement policies related to maximizing M/WBE and SDVOB participation.

The purpose of the Study was to determine if M/WBEs were underutilized on the State contracting agencies' prime contracts and subcontracts awarded during the July 1, 2015, to June 30, 2020 study period. The industries studied were construction, professional services, and goods and services. The contracts awarded in the three industries during the study period were analyzed. A qualitative analysis of the barriers and exemplary practices business owners perceived while working on or seeking work from the State contracting agencies and their prime contractors was also undertaken.

Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to M/WBEs should be relatively close to the proportion of available M/WBEs in the relevant market area. If either the available M/WBE prime contractors or the available M/WBE subcontractors are underutilized, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio or any less probable event. The required test determines if a finding of underutilization of MBEs is statistically significant. Underutilized woman-owned businesses are not subject to the statistical significance test because *Croson* only reviewed the City of Richmond's MBE program.

Statistical findings of disparity were identified in the analysis of the prime contracts the State contracting agencies awarded and the subcontracts awarded by their prime contractors. The disparity findings are presented in *Chapter 7: Prime Contractor Disparity Analysis* and *Chapter 8: Subcontractor Disparity Analysis*. The statistical evidence, together with the anecdotal accounts, will inform the remedies to address the disparity.





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