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# CHAPTER 1: Legal Analysis

## I. Introduction

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

In 2002, the Board of County Commissioners passed Ordinance No. 2002-064, adopting a race and gender-neutral Small Business Enterprise (SBE) program, which is codified in Chapter 2, Part C of the Palm Beach County Code. If there is evidence of statistically significant underutilization of available minority and woman-owned businesses, the County's SBE program may be amended to employ race and gender-conscious remedies to address the disparities. Those race and gender-conscious measures would be subject to the strict scrutiny standard set forth in *Croson*.

## II. Standard of Review

In this context, the standard of review refers to the level of scrutiny a court applies during its analysis of whether or not a particular law is constitutional. This chapter discusses the standards of review applied to remedial programs based on various classifications, including the heightened standard of review that the United States Supreme Court set forth in *Croson* for race-conscious programs.

### A. Minority Business Enterprise Programs

In *Croson*, the United States Supreme Court affirmed that, pursuant to the Fourteenth Amendment, the proper standard of review for state and local race-based MBE programs is strict scrutiny.<sup>2</sup> Specifically, the government must show that the race-conscious remedies are narrowly tailored to achieve a compelling state interest.<sup>3</sup> 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

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

<sup>2</sup> *Croson*, 488 U.S. at 493-95.

<sup>3</sup> *Id.* at 493.



discrimination within its jurisdiction.<sup>4</sup> Justice O'Connor, speaking for the majority, articulated various methods of demonstrating discrimination and set forth guidelines for crafting MBE programs that are "narrowly tailored" to address systemic racial discrimination.<sup>5</sup>

### **B. Women Business Enterprise Programs**

Since *Croson*, which dealt exclusively with the review of a race-conscious plan, the United States Supreme Court has remained silent with respect to the appropriate standard of review for geographically based Women Business Enterprise (WBE) programs and Local Business Enterprise (LBE) programs. In other contexts, however, the United States Supreme Court has ruled that gender classifications are not subject to the rigorous strict scrutiny standard applied to racial classifications. Instead, gender classifications have been subject only to an "intermediate" standard of review, regardless of which gender is favored.

Notwithstanding that the United States Supreme Court has not ruled on the standard of review that applies to a WBE program, the consensus among the federal circuit courts of appeals is that WBE programs are subject to intermediate scrutiny, rather than the more exacting strict scrutiny standard to which race-conscious programs are subject.<sup>6</sup> Intermediate review requires the governmental entity to demonstrate that the action taken furthers an "important governmental objective," employing a method that bears a fair and substantial relation to the goal.<sup>7</sup> The courts have also described the test as requiring an "exceedingly persuasive justification" for classifications based on gender.<sup>8</sup> The United States Supreme Court acknowledged that in "limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists the members of that sex who are disproportionately burdened."<sup>9</sup>

Consistent with the United States Supreme Court's finding with regard to gender classification, the Third Circuit in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia* ("*Philadelphia IV*") ruled in 1993 that the standard of review governing WBE programs is different from the standard imposed upon MBE programs.<sup>10</sup> The Third Circuit held that, whereas MBE programs must be "narrowly tailored" to a "compelling state interest," WBE programs must be

<sup>4</sup> *Croson*, 488 U.S. at 509.

<sup>5</sup> *Croson*, 488 U.S. at 501-2. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting: compelling interest and narrowly tailored remedies. The Supreme Court in *Croson* and subsequent cases provide fairly detailed guidance on how those concepts are to be treated in contracting. In education and employment, the concepts are not explicated to nearly the same extent. Therefore, references in those cases to "compelling governmental interest" and "narrow tailoring" for purposes of contracting are essentially generic and of little value in determining the appropriate methodology for disparity studies.

<sup>6</sup> See *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 930 (9th Cir. 1991); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("*Philadelphia IV*"), 91 F.3d 586, 596-98 (3d Cir. 1996); *Eng'g Constr. Ass'n v. Metro. Dade Cnty.* ("*Dade County II*"), 122 F.3d 895, 907-08 (11th Cir. 1997); see also *Concrete Works of Colo. v. City & Cnty. of Denver*, 321 F.3d 950, 960 (10th Cir. 2003) ("*Concrete Works IV*"); and *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 236 (4th Cir. 2010) ("*Rowe*").

<sup>7</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982); see also *United States v. Virginia*, 518 U.S. 515, 524 (1996) ("*Virginia*").

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

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

<sup>10</sup> *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("*Philadelphia IV*"), 6 F.3d 990, 1001 (3d Cir. 1993).



“substantially related” to “important governmental objectives.”<sup>11</sup> In contrast, an MBE program would survive constitutional scrutiny only by demonstrating a pattern and practice of systemic racial exclusion or discrimination in which a state or local government was an active or passive participant.<sup>12</sup>

The Ninth Circuit in *Associated General Contractors of California v. City and County of San Francisco* (“AGCC I”) held that classifications based on gender require an “exceedingly persuasive justification.”<sup>13</sup> The justification is valid only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification, and the classification does not reflect or reinforce archaic and stereotyped notions of the roles and abilities of women.<sup>14</sup>

The United States Court of Appeals for the Eleventh Circuit also applied intermediate scrutiny.<sup>15</sup> In its review and affirmation of the district court’s holding, in *Engineering Contractors Association of South Florida v. Metropolitan Dade County* (“Dade County II”), the Eleventh Circuit cited the Third Circuit’s 1993 formulation in *Philadelphia*: “[T]his standard requires the [County] to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.”<sup>16</sup> Although the *Dade County II* appellate court ultimately applied the intermediate scrutiny standard, it queried whether the United States Supreme Court decision in *United States v. Virginia*,<sup>17</sup> finding the all-male program at Virginia Military Institute unconstitutional, signaled a heightened level of scrutiny.<sup>18</sup> In the case of *United States v. Virginia*, the U.S. Supreme Court held that parties who seek to defend gender-based government action must demonstrate an “exceedingly persuasive justification” for that action.<sup>19</sup> While the Eleventh Circuit United States Court of Appeals echoed that speculation, it concluded that “[u]nless and until the U.S. Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective.”<sup>20</sup>

In *Dade County II*, the Eleventh Circuit court noted that the Third Circuit in *Philadelphia* was the only federal appellate court that explicitly attempted to clarify the evidentiary requirement applicable to WBE programs.<sup>21</sup> *Dade County II* interpreted that standard to mean that “evidence

<sup>11</sup> *Philadelphia IV*, 6 F.3d at 1009-10.

<sup>12</sup> *Philadelphia IV*, 6 F.3d at 1002.

<sup>13</sup> *AGCC I*, 813 F.2d at 940.

<sup>14</sup> *Ballard*, 419 U.S. at 508.

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

<sup>16</sup> *Dade County II*, 122 F.3d at 909 (citing *Philadelphia IV*, 6 F.3d at 1010; see also *Saunders v. White*, 191 F. Supp. 2d 95, 134 (D.D.C. 2002) (stating “[g]iven the gender classifications explained above, the initial evaluation procedure must satisfy intermediate scrutiny to be constitutional.”).

<sup>17</sup> *Virginia*, 518 U.S. at 534.

<sup>18</sup> *Dade County II*, 122 F.3d at 907-08.

<sup>19</sup> *Virginia*, 518 U.S. at 534.

<sup>20</sup> *Dade County II*, 122 F.3d at 908.



offered in support of a gender preference must not only be 'probative' [but] must also be 'sufficient.'"<sup>22</sup>

It also reiterated two principal guidelines of intermediate scrutiny evidentiary analysis: (1) under this test, a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself<sup>23</sup> and (2) the intermediate scrutiny evidentiary review is not to be directed toward mandating that gender-conscious affirmative action is used only as a "last resort,"<sup>24</sup> but instead ensuring that the affirmative action is "a product of analysis rather than a stereotyped reaction based on habit."<sup>25</sup>

This determination requires "evidence of past discrimination in the economic sphere at which the affirmative action program is directed."<sup>26</sup> The court also stated that "a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."<sup>27</sup>

### C. Local Business Enterprise Programs

In *AGCC I*, a pre-*Croson* case, the Ninth Circuit Court of Appeals applied the rational basis standard when evaluating the City and County of San Francisco's Local Business Enterprise (LBE) program, holding that a local government may give a preference to local businesses to address the economic disadvantages those businesses face in doing business within the City and County of San Francisco.<sup>28</sup>

To survive a constitutional challenge under a "rational basis" review, the government entity need only demonstrate that the governmental action or program is "rationally related" to a "legitimate" government interest.<sup>29</sup> The Supreme Court cautioned government agencies seeking to meet the rational basis standard by advising that, if a race and gender-neutral program is subjected to a constitutional attack, the facts upon which the program is predicated will be subject to judicial review.<sup>30</sup> The rational basis standard of review does not have to be the government's actual interest.

<sup>21</sup> *Dade County II*, 122 F.3d at 909.

<sup>22</sup> *Dade County II*, 122 F.3d at 910.

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

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

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

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

<sup>27</sup> *Id.* at 929; cf. *Builders Ass'n of Greater Chi. v. Cnty. of Cook*, 256 F.3d 642, 644 (7th Cir. 2001) (questioned why there should be a lesser standard where the discrimination was against women rather than minorities.).

<sup>28</sup> *AGCC I*, 813 F.2d at 943; *Lakeside Roofing Company v. State of Missouri*, et al., 2012 WL 709276 (E.D. Mo. Mar. 5, 2012) (Note that federal judges will generally rule the way that a previous court ruled on the same issue following the doctrine of *stare decisis* – the policy of courts to abide by or adhere to principles established by decisions in earlier cases; however, a decision reached by a different circuit is not legally binding on another circuit court, it is merely persuasive and instructional on the issue).

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

<sup>30</sup> *Id.*



Rather, if the court can merely hypothesize a "legitimate" interest served by the challenged action, it will withstand the rational basis review.<sup>31</sup> The term "rational" must convince an impartial lawmaker that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.<sup>32</sup>

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

San Francisco-based businesses incurred higher administrative costs in doing business within the City. Such costs included higher taxes, rents, wages, insurance rates, and benefits for labor. In upholding the LBE Ordinance, the Ninth Circuit held “. . . the city may rationally allocate its own funds to ameliorate disadvantages suffered by local businesses, particularly where the city itself creates some of the disadvantages.”<sup>33</sup>

#### **D. Small Business Enterprise Programs**

A government entity may implement a Small Business Enterprise (SBE) program predicated upon a rational basis to ensure adequate small business participation in government contracting. Rational basis is the lowest level of scrutiny and the standard the courts apply to race and gender-neutral public contracting programs.<sup>34</sup>

### **III. Burden of Proof**

The procedural protocol established by *Croson* imposes an initial burden of proof upon the government to demonstrate that the challenged MBE program is supported by a strong factual predicate, i.e., documented evidence of past discrimination. Notwithstanding this requirement, the plaintiff bears the ultimate burden of proof to persuade the court that the MBE program is unconstitutional. The plaintiff may challenge a government’s factual predicate on any of the following grounds:<sup>35</sup>

- Disparity exists due to race-neutral reasons
- Methodology is flawed
- Data are statistically insignificant
- Controverting data exist

<sup>31</sup> *Lakeside Roofing*, 2012 WL 709276; see *Kathleen M. Sullivan & Gerald Gunther, Constitutional Law Foundation Press* Chapter 9 (16th ed. 2007).

<sup>32</sup> *Croson*, 488 U.S. at 515.

<sup>33</sup> *AGCC I*, 813 F.2d at 943.

<sup>34</sup> *Doe I v. Lower Merion Sch. Dist.*, 689 F. Supp. 2d 742, 748 (E.D. Pa. 2010).

<sup>35</sup> *Contractors Ass'n v. City of Philadelphia*, 893 F. Supp. 419, 430, 431, 433, 437 (E.D. Pa.1995) (“*Philadelphia I*”) (These were the issues on which the district court in Philadelphia reviewed the disparity study before it).



**A. Initial Burden of Proof**

*Croson* requires defendant jurisdictions to produce a “strong basis in evidence” that the objective of the challenged MBE program is to rectify the effects of past identified discrimination.<sup>36</sup> Whether or not the government has produced a strong basis in evidence is a question of law.<sup>37</sup> The defendant in a constitutional claim against a disparity study has the initial burden of proof to show that there was past discrimination.<sup>38</sup> Once the defendant meets this initial burden, the burden shifts to the plaintiff to prove that the program is unconstitutional. Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.<sup>39</sup>

The adequacy of the government’s evidence is “evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction].”<sup>40</sup> The onus is upon the jurisdiction to provide a factual predicate that is sufficient in scope and precision to demonstrate that contemporaneous discrimination necessitated the adoption of the MBE program.<sup>41</sup>

**B. Ultimate Burden of Proof**

The party challenging an MBE program will bear the ultimate burden of proof throughout the course of the litigation—despite the government’s obligation to produce a strong factual predicate to support its program.<sup>42</sup> The plaintiff must persuade the court that the program is constitutionally flawed, either by challenging the government’s factual predicate for the program or by demonstrating that the program is overly broad.

Joining the majority in stating that the ultimate burden rests with the plaintiff, Justice O’Connor explained the nature of the plaintiff’s burden of proof in her concurring opinion in *Wygant v. Jackson Board of Education* (“*Wygant*”):<sup>43</sup>

[I]t is incumbent upon the nonminority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or

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

<sup>37</sup> *Id.* (citing *Associated Gen. Contractors v. New Haven*, 791 F. Supp. 941, 944 (D. Conn. 1992)).

<sup>38</sup> *Concrete Works II*, 36 F.3d at 1521-22 (citing *s.*, 476 U.S. 267, 292 (1986)).

<sup>39</sup> *Id.* at 1522.

<sup>40</sup> *Id.* (citing *Croson*, 488 U.S. at 498).

<sup>41</sup> See *Croson*, 488 U.S. at 488.

<sup>42</sup> See *Wygant*, 476 U.S. at 277-78, 293.

<sup>43</sup> *Id.* (O’Connor, S., concurrence).



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that the plan instituted on the basis of this evidence was not sufficiently “narrowly tailored.”<sup>44</sup>

In *Philadelphia VI*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether facts constitute a “strong basis” in evidence for race-based remedies.<sup>45</sup> That Court wrote that the allocation of the burden of persuasion is dependent upon the plaintiff’s argument against the constitutionality of the program. If the plaintiff’s theory is that an agency has adopted race-based preferences with a purpose other than remedying past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else.<sup>46</sup> On the other hand, if the plaintiff argues there is no existence of past discrimination within the agency, the plaintiff must successfully rebut the agency’s evidentiary facts and prove their inaccuracy.<sup>47</sup>

However, the ultimate issue of whether or not sufficient evidence exists to prove past discrimination is a question of law. The burden of persuasion in the traditional sense plays no role in the court’s resolution of that ultimate issue.<sup>48</sup>

*Concrete Works VI* made clear that the plaintiff’s burden is an evidentiary one; it cannot be discharged simply by argument. The court cited its opinion in *Adarand Constructors Inc. v. Slater*, 228 F.3d 1147, 1173 (10th Cir. 2000): “[g]eneral criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity study, is of little persuasive value.”<sup>49</sup> The requisite burden of proof needed to establish a factual predicate for race and gender-conscious goals as set forth by *Croson* and its progeny is described below in Section IV.

The Tenth Circuit and the Eleventh Circuit present alternative approaches to the legal evidentiary requirements of the shifting burden of proof in racial classification cases. This split among the circuits pertains to the allocation of the burden of proof once the initial burden of persuading the court that persisting vestiges of discrimination exist is met.<sup>50</sup>

The Tenth Circuit’s opinion in *Concrete Works VI* states that the burden of proof remains with the plaintiff to demonstrate that an ordinance is unconstitutional.<sup>51</sup> On the other hand, the Eleventh

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<sup>44</sup> *Wygant*, 476 U.S. at 277-78.

<sup>45</sup> *Philadelphia VI*, 91 F.3d at 597.

<sup>46</sup> *Id.* at 597.

<sup>47</sup> *Id.* at 597-598.

<sup>48</sup> At first glance, the Third Circuit and the Eleventh Circuit positions appear to be inconsistent as to whether the issue at hand is a legal issue or a factual issue. However, the two courts were examining the issues in different scenarios. For instance, the Third Circuit was examining whether enough facts existed to determine if past discrimination existed, and the Eleventh Circuit was examining whether the remedy the agency utilized was the appropriate response to the determined past discrimination. Therefore, depending upon the Plaintiff’s arguments, a court reviewing an MBE program is likely to be presented with questions of law and fact.

<sup>49</sup> *Concrete Works VI*, 321 F.3d at 979.

<sup>50</sup> *Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade Cnty.*, 333 F. Supp. 2d 1305, 1325 (S.D. Fla. 2004).



Circuit in *Hershell* contends that the government as the proponent of the classification bears the burden of proving that its consideration of race is narrowly tailored to serve a compelling state interest, and that the government must always maintain a “strong basis in evidence” for undertaking affirmative action programs.<sup>52</sup> Therefore, the proponent of the classification must meet a substantial burden of proof, a standard largely allocated to the government to prove that sufficient vestiges of discrimination exist to support the conclusion that remedial action is necessary. Within the Eleventh Circuit, judicial review of a challenged affirmative action program focuses primarily on whether or not the government entity can meet the burden of proof.

In practice, the standards prescribed in the Eleventh Circuit for proving the constitutionality of a proposed M/WBE framework are rooted in *Engineering Contractors Ass’n v. Metropolitan Dade County*, the same Eleventh Circuit case that was cited to in the Tenth Circuit.<sup>53</sup> In *Dade County I*, the court found that a municipality can justify affirmative action by demonstrating “gross statistical disparities” between the proportion of minorities awarded contracts and the proportion of minorities willing and able to do the work, or by presenting anecdotal evidence—especially if buttressed by statistical data.<sup>54</sup>

#### IV. *Croson* Evidentiary Framework

Government entities must construct a strong evidentiary framework to stave off legal challenges and ensure that the adopted MBE program comports with the requirements of the Equal Protection Clause of the United States Constitution. The framework must comply with the stringent requirements of the strict scrutiny standard. Accordingly, there must be a strong basis in evidence that tends to show past discrimination, 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.<sup>55</sup>

##### A. *Active or Passive Participation*

*Croson* requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program.<sup>56</sup> However, the local entity need not have been an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court’s strict scrutiny review.<sup>57</sup> An entity will be considered an “active” participant if the evidence shows it has created barriers that actively exclude MBEs from its contracting opportunities. An entity will

**Commented [FML1]:** This should more precisely be referred to as the “burden of production,” meaning that the defendant has the initial burden of producing a strong basis in evidence. However, the ultimate burden of proof still rests with the plaintiff, even in the Eleventh Circuit. *Hershell Gill* is a federal district court opinion and is an outlier on the ultimate burden of proof issue. In any event, the Supreme Court’s jurisprudence on this issue always places the ultimate burden of proof on plaintiffs, and that is controlling precedent even in Florida. In my view, through the *Hershell Gill* decision, the U.S. District Court of Southern Florida became the only jurisdiction in the nation to have ruled that the government defendant bears the ultimate burden of proof in persuading the court that its MBE program is constitutional. While it is important to note that the 11<sup>th</sup> Circuit has not yet adopted this standard in similar cases, and that the Supreme Court has been unambiguous in its rejection of such a shifting of the traditional burdens of proof away from plaintiffs and towards defendants, the current standard, in Southern Florida at least, is that the defendant should be prepared to satisfy the ultimate burden of proof at trial with its strong basis in evidence. On appeal, only a strong basis in evidence supporting its program will likely be required and the court will view the totality of the evidence in determining whether the *plaintiff* has met the ultimate burden of proof that the program is unconstitutional.

<sup>51</sup> *Concrete Works VI*, 321 F.3d at 959 (quoting *Adarand v. Peña*, 228 F.3d 1147, 1176 (10th Cir. 2000) (“We reiterate that the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of an affirmative-action program.”)).

<sup>52</sup> *Hershell*, 333 F. Supp. 2d at 1305 (stating that *Concrete Works* is not persuasive because it conflicts with the allocation of the burden of proof stated by Eleventh Circuit precedent in *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1244 (11th Cir. 2001)).

<sup>53</sup> 943 F. Supp. 1546 (S.D. Fla. 1996) (“*Dade County I*”).

<sup>54</sup> *Id.* at 907.

<sup>55</sup> *Croson*, 488 U.S. at 486.

<sup>56</sup> *Id.* at 488.

<sup>57</sup> *Id.* at 509.



be considered to be a “passive” participant in private sector discriminatory practices if it has infused tax dollars into that discriminatory industry.<sup>58</sup>

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. The Tenth Circuit, in *Concrete Works I*, considered a purely private sector definition of passive discrimination, holding that evidence of a government entity infusing its tax dollars into a discriminatory system can satisfy passive discrimination.<sup>59</sup>

In *Concrete Works I*, the district court granted summary judgment in favor of the City of Denver in 1993.<sup>60</sup> Concrete Works appealed to the Tenth Circuit, in *Concrete Works II*, in which the summary judgment in favor of the City of Denver was reversed and the case was remanded to the district court for trial.<sup>61</sup> The case was remanded with specific instructions permitting the parties “to develop a factual record to support their competing interpretations of the empirical data.”<sup>62</sup> On remand, the district court entered a judgment in favor of the plaintiff holding that the City’s ordinances violated the Fourteenth Amendment.<sup>63</sup>

The district court in *Concrete III* rejected the four disparity studies the city offered to support the continuation of Denver’s M/WBE program.<sup>64</sup> The court surmised that (1) the methodology employed in the statistical studies was not “designed to answer the relevant questions,”<sup>65</sup> (2) the collection of data was flawed, (3) important variables were not accounted for in the analyses, and (4) the conclusions were based on unreasonable assumptions.<sup>66</sup> The court deemed that the “most fundamental flaw” in the statistical evidence was the lack of “objective criteria [to] define who is entitled to the benefits of the program and [which groups should be] excluded from those benefits.”<sup>67</sup> The statistical analysis relied upon by the City to support its M/WBE program was conducted as a result of the ensuing litigation. The statistical evidence proffered by the City to the court was not objective since it lacked a correlation to the current M/WBE program goals.

The Tenth Circuit on appeal rejected the district court’s analysis because the district court’s queries required Denver to prove the existence of discrimination. Moreover, the Tenth Circuit explicitly held that “passive” participation included private sector discrimination in the marketplace. The

<sup>58</sup> *Crosen*, 488 U.S. at 492, accord *Coral Constr.*, 941 F.2d at 916.

<sup>59</sup> *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 823 F. Supp. 821, 824 (D. Colo. 1993) (“*Concrete Works I*”), rev’d, 36 F.3d 1513 (10th Cir. 1994), rev’d, 86 F. Supp. 2d 1042 (D. Colo. 2000), rev’d, 321 F.3d 950 (10th Cir. 2003).

<sup>60</sup> *Concrete Works I*, 823 F. Supp. at 994.

<sup>61</sup> *Concrete Works II*, 36 F.3d at 1530-31.

<sup>62</sup> *Id.*

<sup>63</sup> *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 86 F. Supp. 2d 1042, 1079 (D. Colo. 2000) (“*Concrete Works III*”).

<sup>64</sup> *Id.* at 1065-68.

<sup>65</sup> *Id.* at 1067.

<sup>66</sup> *Id.* at 1057-58, 1071.

<sup>67</sup> *Id.* at 1068.



court found that marketplace discrimination is relevant when the agency’s prime contractors’ practices are discriminatory against their subcontractors:

The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” (citation omitted). The City can satisfy this condition by identifying the discrimination “*public or private*, with some specificity.” (internal quotes and citation omitted).<sup>68</sup>

In *Concrete Works IV*, the Tenth Circuit held that the governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.”<sup>69</sup> The Tenth Circuit further held that the city was correct in its attempt to show that it “indirectly contributed to private discrimination by awarding public contracts to firms that, in turn, discriminated against MBE and/or WBE subcontractors in other private portions of their business.”<sup>70</sup> While the Tenth Circuit noted that the record contained “extensive evidence” of private sector discrimination, the question of the adequacy of private sector discrimination as the factual predicate for a race-based remedy was not before the court.<sup>71</sup>

Ten months after *Concrete Works IV*, the question of whether or not a particular public-sector race-based remedy is narrowly tailored when it is based solely on business practices within the private sector was at issue in *Builders Association of Greater Chicago v. City of Chicago*.<sup>72</sup> The plaintiff in *Builders Association of Greater Chicago* challenged the City’s construction set-aside program. The court considered pre-enactment and post-enactment evidence in support of the six-year-old M/WBE program.<sup>73</sup> The challenged program consisted of a 16.9 percent MBE subcontracting goal, a 10-percent MBE prime contracting goal, a 4.5 percent WBE subcontracting goal, and a 1 percent WBE prime contracting goal.<sup>74</sup>

The district court found that private sector business practices offered by the city, which were based on United States Census data and surveys, constituted discrimination against minorities in the Chicago market area.<sup>75</sup> However, the district court did not find the City’s M/WBE subcontracting goal to be a narrowly tailored remedy given the factual predicate. The court found that the study did not provide a meaningful individualized review of M/WBEs in order to formulate remedies

**Commented [FML2]:** I can find no basis for the conclusion that the adequacy of private sector discrimination in meeting the defendant’s burden of production through a strong basis in evidence was not before the court. To the contrary, the 10<sup>th</sup> Circuit devoted a significant portion of its opinion to summarizing the evidence of private sector discrimination, and cited *Adarand Wygant* and other Supreme Court decisions for this proposition that passive participation by the government in indirectly supporting such private sector discrimination could establish the requisite compelling interest for government action.

<sup>68</sup> *Concrete Works IV*, 321 F.3d at 975-76.

<sup>69</sup> *Id.* at 976 (quoting *Shaw v. Hunt*, 517 U.S. 804, 909 (1996)).

<sup>70</sup> *Id.* at 976.

<sup>71</sup> *Id.* at 959, 977, 990.

<sup>72</sup> *Builders Ass’n of Greater Chi. v. City of Chi.*, 298 F. Supp. 2d 725, 732 (N.D. Ill. 2003).

<sup>73</sup> *Id.* at 726, 729, 733-34.

<sup>74</sup> *Id.* at 729.

<sup>75</sup> *Id.* at 735-37.



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“more akin to a laser beam than a baseball bat.”<sup>76</sup> The City was ordered to suspend its M/WBE goals program.

As recently as 2010, the Fourth Circuit in *H.B. Rowe Co. v. Tippett* ruled that the State of North Carolina could not rely on private-sector data to demonstrate that prime contractors underutilized women subcontractors in the general construction industry.<sup>77</sup> The court found that the private sector data did not test if the underutilization was statistically significant or just mere chance.<sup>78</sup>

### B. Systemic Discriminatory Exclusion

The Court in *Croson* established that a local government enacting a race-conscious contracting program must demonstrate identified systemic discriminatory exclusion on the basis of race or any other illegitimate criteria (arguably gender).<sup>79</sup> Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.<sup>80</sup> Using appropriate evidence of the entity’s active or passive participation in the discrimination, as discussed above, past discriminatory exclusion must be identified for each racial group to which a remedy would apply.<sup>81</sup> Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

*Croson* enumerates two ways an entity may establish the requisite factual predicate of discrimination. First, a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by an entity or by the entity’s prime contractors may support an inference of discriminatory exclusion.<sup>82</sup> In other words, when the relevant statistical pool is used, a showing of statistically significant underutilization “may constitute prima facie proof of a pattern or practice of discrimination[.]”<sup>83</sup>

**Commented [FML3]:** This was only because the evidence presented was flawed. The proper comparison should have focused on the private sector underutilization of WBE firms in similar kinds of transportation-related construction, not general construction. The 4<sup>th</sup> Circuit found fault in MGT’s failure to establish a nexus between the prime contractors that underutilized MBES on private sector work and the prime contractors hired by NCDOT for public sector work. It did not, however, dismiss the “passive participant” theory as a possible justification for public sector race-conscious remedies. To the contrary, the Court stated, “To summarize, North Carolina has put forth strong evidence that discrimination against African American and Native American subcontractors continues to limit their participation on state-funded highway construction contracts. The State has a compelling interest, indeed an “absolute duty,” to remedy this injustice, affecting as it does the distribution of public funds. See *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment) (a “[s]tate has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself”). [emphasis added]

<sup>76</sup> *Builders Ass’n of Greater Chi. v. City of Chi.*, 298 F. Supp. 2d 725, 732 (N.D. Ill. 2003), at 737-39, 742.

<sup>77</sup> *Rowe*, 615 F.3d at 236.

<sup>78</sup> *Id.*

<sup>79</sup> *Croson*, 488 U.S. at 492; see *Monterey Mech. Co. v. Pete Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); see also *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218-20 (1999) (held the City’s MBE program was unconstitutional for construction contracts because minority participation goals were arbitrarily set and not based on any objective data. Moreover, the Court noted that had the City implemented the recommendations from the disparity study it commissioned, the MBE program may have withstood judicial scrutiny (the City was not satisfied with the study and chose not to adopt its conclusions)).

<sup>80</sup> *Croson*, 488 U.S. at 509.

<sup>81</sup> *Id.* at 506. (The Court stated 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 *N. Shore Concrete & Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 \* 55 (E.D.N.Y. April 12, 1998) (rejected the inclusion of Native Americans and Alaskan Natives in the City’s program).

<sup>82</sup> *Croson*, 488 U.S. at 509.

<sup>83</sup> *Id.* at 501 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977)).



The *Croson* Court made clear that both prime contract and subcontracting data were relevant.<sup>84</sup> 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.”<sup>85</sup> Subcontracting data are also important means by which to assess suggested future remedial actions. Because the decision makers are different for the awarding of prime contracts and subcontracts, the remedies for discrimination identified at a prime contractor versus subcontractor level may also be different.

Second, “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”<sup>86</sup> Thus, if a local government has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.<sup>87</sup> Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system “by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.”<sup>88</sup> *Croson* further states, “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”<sup>89</sup>

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.<sup>90</sup> The Court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.<sup>91</sup> The court explained that statistical evidence, standing alone often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.<sup>92</sup>

Likewise, anecdotal evidence, standing alone is unlikely to establish a systemic pattern of discrimination.<sup>93</sup> Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”<sup>94</sup>

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<sup>84</sup> *Croson*, 488 U.S. at 502-03.

<sup>85</sup> *Id.*

<sup>86</sup> *Croson*, 488 U.S. at 509.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> *Id.* (emphasis added).

<sup>90</sup> *Coral Constr.*, 941 F.2d at 917-18, 920-26.

<sup>91</sup> *Id.* at 919.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (“*Teamster*”).)

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## 1. Geographic Market

*Croson* did not speak directly to how the geographic market is to be determined. In *Coral Construction*, the Ninth Circuit Court of Appeals held that “an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction.”<sup>95</sup> Conversely, in *Concrete Works I*, the district court specifically approved the Denver Metropolitan Statistical Area (MSA) as the appropriate market area since 80 percent of the construction contracts were let there.<sup>96</sup>

Together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. Because *Croson* and its progeny did not provide a bright line rule for local market area, the determination should be fact-based. An entity may include consideration of evidence of discrimination within its own jurisdiction.<sup>97</sup> Extra-jurisdictional evidence may be permitted when it is reasonably related to where the jurisdiction contracts.<sup>98</sup>

## 2. Current Versus Historical Evidence

In assessing the existence of identified discrimination through demonstration of a disparity between MBE utilization and availability, the entity should examine disparity data both prior to and after the entity’s current MBE program was enacted. This is referred to as “pre-program” versus “post-program” data.

*Croson* requires that an MBE program be “narrowly tailored” to remedy current evidence of discrimination.<sup>99</sup> Thus, goals must be set according to the evidence of disparity found. For example, if there is a current disparity between the percentage of an entity’s utilization of Hispanic construction contractors and the availability of Hispanic construction contractors in that entity’s marketplace, then that entity can set a goal to bridge that disparity.

It is not mandatory to examine a long history of an entity’s utilization to assess current evidence of discrimination. In fact, *Croson* indicates that it may be legally fatal to justify an MBE program based on outdated evidence.<sup>100</sup> Therefore, the most recent two or three years of an entity’s utilization data would suffice to determine if a statistical disparity exists between current M/WBE utilization and availability.<sup>101</sup>

<sup>95</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>96</sup> *Concrete Works I*, 823 F. Supp. at 835-836 (D. Colo. 1993); rev’d on other grounds, 36 F.3d 1513 (10th Cir. 1994).

<sup>97</sup> *Cone Corp. v. Hillsborough Cnty.*, 908 F.2d 908, 915 (11th Cir. 1990); *Associated Gen. Contractors v. Coal. for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991) (“AGCC II”).

<sup>98</sup> 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.

<sup>99</sup> See *Croson*, 488 U.S. at 509-10.

<sup>100</sup> *Croson*, 488 U.S. at 499 (stating, “[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination”).

<sup>101</sup> See *AGCC II*, 950 F.2d at 1414 (consultant study looked at City’s MBE utilization over a one-year period).



### 3. Statistical Evidence

To determine if statistical evidence is adequate to infer discrimination, courts have looked to the “disparity index,” which consists of the percentage of minority or women contractor participation in local contracts divided by the percentage of minority or women contractor availability or composition in the population of available firms in the local market area.<sup>102</sup> Disparity indexes have been found highly probative evidence of discrimination where they ensure that the “relevant statistical pool” of minority or women contractors is being considered.<sup>103</sup>

The Third Circuit Court of Appeals, in *Philadelphia VI*, ruled that the “relevant statistical pool” includes those businesses that not only exist in the marketplace but also are qualified and interested in performing the public agency’s work. In that case, the Third Circuit rejected a statistical disparity finding in which the pool of minority businesses used in comparing utilization to availability was composed of those merely licensed to operate in the City of Philadelphia. A license to do business with the City, by itself, does not indicate either willingness or capability to do work for the City. The Court concluded that this particular statistical disparity did not satisfy *Croson*.<sup>104</sup>

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

Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between an entity’s award of contracts to available market area non-minority male businesses and the award of contracts to M/WBEs. Thus, in *AGCC II*, an independent consultant’s study “compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs” over a one-year period.<sup>105</sup> The study found that available MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-

<sup>102</sup> Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been taken into account. In addition to looking at Dade County’s contracting and subcontracting statistics, the district court also considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County’s Wainwright study (which compared construction business ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County’s Brimmer Study (which focused only on Black-owned construction firms and looked at whether disparities existed when the sales and receipts of Black-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms). The court affirmed the judgment that declared appellant’s affirmative action plan for awarding county construction contracts unconstitutional and enjoined the plan’s operation because there was no statistical evidence of past discrimination and appellant failed to consider race and ethnic-neutral alternatives to the plan.

<sup>103</sup> *Rowe*, 615 F.3d at 236; see *Dade County I*, 943 F. Supp. at 1546, aff’d, 122 F.3d 895 (11th Cir. 1997); see also *Concrete Works II*, 36 F.3d at 1513.

<sup>104</sup> *Philadelphia VI*, 91 F.3d at 601-602. The courts have not spoken to the non-M/WBE component of the disparity index. However, if only as a matter of logic, the “availability” of non-M/WBEs requires that their willingness to be government contractors be established. The same measures used to establish the interest of M/WBEs should be applied to non-M/WBEs.

<sup>105</sup> *AGCC II*, 950 F.2d at 1414.



minority counterparts.<sup>106</sup> AGCC argued to the Ninth Circuit that the preferences given to MBEs violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. The district court determined that AGCC only demonstrated a possibility of irreparable injury on the grounds that such injury is assumed where constitutional rights have been alleged to be violated, but failed to demonstrate a likelihood of success on the merits. On appeal, The Ninth Circuit affirmed the district court's ruling.<sup>107</sup>

Whether or not a disparity index supports an inference that there is discrimination in the market area depends not only on what is being compared but also on the statistical significance of any such disparity. In *Croson*, Justice O'Connor opined, "[w]here the gross statistical disparities can be shown, they alone, in a proper case, may constitute a *prima facie* proof of a pattern or practice of discrimination."<sup>108</sup> However, the Court has not assessed or attempted to cast bright lines for determining if a disparity index is sufficient to support an inference of discrimination. In the absence of such a formula, the Tenth Circuit determined that the analysis of the disparity index and the findings of its significance are to be judged on a case-by-case basis.<sup>109</sup>

Following the dictates of *Croson*, courts may carefully examine if there are data that show MBEs are qualified, ready, willing, and able to perform.<sup>110</sup> *Concrete Works II* made the same point: capacity—i.e., whether or not the firm is "able to perform"—is a ripe issue when a disparity study is examined on the merits:

[Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstates "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than non-minority owned firms." In other words, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that take into consideration the size of MBEs and WBEs.<sup>111</sup>

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

The Sixth Circuit Court of Appeals, in *Associated General Contractors of Ohio, Inc. v. Drabik*, concluded that for statistical evidence to meet the legal standard of *Croson*, it must consider the

<sup>106</sup> *AGCC II*, 950 F.2d at 1414. Specifically, the study found that MBE availability was 49.5 percent for prime construction, but MBE dollar participation was only 11.1 percent; that MBE availability was 36 percent prime equipment and supplies, but MBE dollar participation was 17 percent; and that MBE availability for prime general services was 49 percent, but dollar participation was 6.2 percent.

<sup>107</sup> *Id.* at 1401.

<sup>108</sup> *Croson*, 488 U.S. at 501 (quoting *Hazelwood Sch. Dist.*, 433 U.S. at 307-308).

<sup>109</sup> *Concrete Works II*, 36 F.3d at 1522.

<sup>110</sup> The *Philadelphia* study was vulnerable on this issue.

<sup>111</sup> *Concrete Works II*, 36 F.3d at 1528.



issue of capacity.<sup>112</sup> The State’s factual predicate study based its statistical evidence on the percentage of MBE businesses in the population. The statistical evidence “did not take into account the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.”<sup>113</sup> The court reasoned as follows:

Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to perform the work in question, would also fail to satisfy the Court’s criteria. If MBEs comprise 10 percent of the total number of contracting firms in the State, but only get 3 percent of the dollar value of certain contracts that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.<sup>114</sup>

Drabik also pointed out that the State not only relied on the wrong type of statistical data, but also the data were more than twenty years old. Therefore, an entity must study current data that indicate the availability and qualifications of the MBEs.

The opinions in *Philadelphia VI*<sup>115</sup> and *Dade County I*,<sup>116</sup> regarding disparity studies involving public sector contracting, are particularly instructive in defining availability. In *Philadelphia VI*, the earlier of the two decisions, contractors’ associations challenged a city ordinance that created set-asides for minority subcontractors on city public works contracts. A summary judgment was granted for the contractors.<sup>117</sup> The Third Circuit upheld the third appeal, affirming that there was no firm basis in evidence for finding that race-based discrimination existed to justify a race-based program and that the program was not narrowly tailored to address past discrimination by the City.<sup>118</sup>

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” that the court “chose not to make.”<sup>119</sup> It was unnecessary to make this determination because the court found that even if there were a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.<sup>120</sup>

<sup>112</sup> *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734-38 (6th Cir. 2000) (“*Drabik*”). The Court reviewed Ohio’s 1980, pre-Croson, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167, 176 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

<sup>113</sup> *Drabik*, 214 F.3d at 736.

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

<sup>115</sup> *Philadelphia VI*, 91 F.3d at 604-605.

<sup>116</sup> *Dade County I*, 943 F. Supp. at 1582-83.

<sup>117</sup> *Philadelphia VI*, 91 F.3d at 590.

<sup>118</sup> *Id.* at 609-10.

<sup>119</sup> *Id.* at 605.

<sup>120</sup> *Philadelphia VI*, 91 F.3d at 605.



When the court looked at subcontracting, it found that a firm basis in evidence did not exist. The only subcontracting evidence presented was a review of a random 25 to 30 percent of project engineer logs on projects valued at more than \$30,000.<sup>121</sup> The consultant determined that no MBEs were used during the study period based upon recollections of the former general counsel to the General and Specialty Contractors Association of Philadelphia regarding whether 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 area were discriminating against subcontractors.<sup>122</sup>

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that “[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE” and that it was a “reasonable choice” under the circumstances to use a list of M/WBE certified contractors as a source for available firms.<sup>123</sup> 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.<sup>124</sup>

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 works projects.”<sup>125</sup> 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.<sup>126</sup> Therefore, the court was somewhat flexible in evaluating the appropriate method of determining the availability of MBE firms in the statistical analysis of a disparity.

Furthermore, the court discussed whether or not bidding was required in prime construction contracts as the measure of “willingness” and stated, “[p]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work.”<sup>127</sup>

In *Dade County I*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program, because the statistically significant disparities upon

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<sup>121</sup> *Philadelphia VI*, 91 F.3d at 600.

<sup>122</sup> Another problem with the program was that the 15 percent goal was not based on data indicating that minority businesses in the market area were available to perform 15 percent of the City’s contracts. The court noted, however, that “we do not suggest that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides.” The court also found the program flawed because it did not provide sufficient waivers and exemptions, as well as consideration of race-neutral alternatives.

<sup>123</sup> *Philadelphia VI*, 91 F.3d at 603.

<sup>124</sup> *Philadelphia VI*, 91 F.3d at 603-605, 609.

<sup>125</sup> *Id.* at 603.

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

<sup>127</sup> *Id.*



which the County relied disappeared when the size of the M/WBEs was taken into account.<sup>128</sup> 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.<sup>129</sup> In addition, a comprehensive count of bidders is dependent on the adequacy of the agency's record-keeping.<sup>130</sup>

The appellate court in *Dade County* did not determine if the County presented sufficient evidence to justify the M/WBE program. It merely ascertained that the lower court was not clearly erroneous in concluding that the County lacked a strong basis in evidence to justify race-conscious affirmative action.<sup>131</sup> The appellate court did not prescribe the district court's analysis or any other specific analysis for future cases.

### C. Anecdotal Evidence

In *Croson*, Justice O'Connor opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."<sup>132</sup> Anecdotal evidence should be gathered to determine if minority contractors are systematically being excluded from contracting opportunities in the relevant market area. Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies, such as outreach to all segments of the business community regardless of race. They are not intrusive and, in fact, require no evidence of discrimination before implementation. Conversely, race-conscious measures, such as set-asides, fall at the other end of the spectrum and require a greater amount of evidence.<sup>133</sup>

As discussed below, anecdotal evidence alone is insufficient to establish the requisite predicate for a race-conscious program. Its great value lies in pointing to remedies that are "narrowly tailored," which is the second prong of a *Croson* study. The following types of anecdotal evidence have been presented to and relied on by the Ninth Circuit in both *Coral Construction* and *AGCC II* to justify the existence of an M/WBE program:

<sup>128</sup> *Dade County I*, 943 F. Supp. at 1560.

<sup>129</sup> *Cf. League of United Latin Am. Citizens v. Santa Ana*, 410 F. Supp. 873, 897 (C.D. Cal. 1976); *Reynolds v. Sheet Metal Workers, Local 102*, 498 F. Supp. 952, 964 n. 12 (D. D.C. 1980), *aff'd*, 702 F.2d 221 (D.C. Cir. 1981) (involving the analysis of available applicants in the employment context).

<sup>130</sup> *Cf. EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1981) (in the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).

<sup>131</sup> *Dade County I*, 943 F. Supp. at 1557.

<sup>132</sup> *Croson*, 488 U.S. at 509; see *Teamsters*, 431 U.S. at 338.

<sup>133</sup> *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.]").



- M/WBEs denied contracts despite being the low bidders — *Philadelphia*<sup>134</sup>
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs — *Cone Corporation v. Hillsborough County*<sup>135</sup>
- M/WBEs’ inability to obtain contracts for private sector work — *Coral Construction*<sup>136</sup>
- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties — *AGCC II*<sup>137</sup>
- Attempts to circumvent M/WBE project goals — *Concrete Works II*<sup>138</sup>
- Harassment of M/WBEs by an entity’s personnel to discourage them from bidding on an entity’s contracts — *AGCC II*<sup>139</sup>

Courts must assess the extent to which relief measures disrupt settled “rights and expectations” when determining the appropriate corrective measures.<sup>140</sup> Presumably, courts would look more favorably upon anecdotal evidence in support of a less intrusive program than they would in support of a more intrusive one. For example, if anecdotal accounts related experiences of discrimination in obtaining bonds, they may be sufficient evidence to support a bonding program that assists M/WBEs.<sup>141</sup> However, these accounts would not be evidence of a statistical availability that would justify a racially limited program such as a set-aside.

As noted above, the *Croson* Court found that the City of Richmond’s MBE program was unconstitutional, because the City failed to provide a factual basis to support its MBE program. However, the Court opined that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”<sup>142</sup>

In part, it was the absence of statistical evidence that proved fatal to the program. The Supreme Court stated that “[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”<sup>143</sup>

<sup>134</sup> *Philadelphia IV*, 6 F.3d at 1002.

<sup>135</sup> *Cone Corp.*, 908 F.2d at 916.

<sup>136</sup> For instance, where a small percentage of an MBE or WBE’s business comes from private contracts and most of its business comes from race or gender-based set-asides, this would demonstrate exclusion in the private industry. *Coral Constr.*, 941 F.2d at 933 (WBE’s affidavit indicated that less than 7 percent of the firm’s business came from private contracts and that most of its business resulted from gender-based set-asides).

<sup>137</sup> *AGCC II*, 950 F.2d at 1415.

<sup>138</sup> *Concrete Works II*, 36 F.3d at 1530.

<sup>139</sup> *AGCC II*, 950 F.2d at 1415.

<sup>140</sup> *Wygant*, 476 U.S. at 283.

<sup>141</sup> *Teamsters*, 431 U.S. at 339; *Coral Constr.*, 941 F.2d at 919.

<sup>142</sup> *Croson*, 488 U.S. at 509 (citing *Teamsters*, 431 U.S. at 338).

<sup>143</sup> *Id.* at 480.



This was not the situation confronting the Ninth Circuit in *Coral Construction*. There, the 700-plus page appellate records contained the affidavits of “at least 57 minority or women contractors, each of whom complain in varying degree of specificity about discrimination within the local construction industry. These affidavits certainly suggest that ongoing discrimination may be occurring in much of the King County business community.”<sup>144</sup>

Nonetheless, this anecdotal evidence standing alone was insufficient to justify King County’s MBE program since “[n]otably absent from the record, however, is any statistical data in support of the County’s MBE program.”<sup>145</sup> After noting the Supreme Court’s reliance on statistical data in Title VII employment discrimination cases and cautioning that statistical data must be carefully used, the court elaborated on its mistrust of purely anecdotal evidence:

Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices.<sup>146</sup>

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.”<sup>147</sup>

Two other circuit courts also suggested that anecdotal evidence might be dispositive in rare and exceptional cases, if ever, while rejecting it in the specific case before them. For example, in *Philadelphia IV*, the Third Circuit Court of Appeals noted that the Philadelphia City Council had “received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination,” which the district court had “discounted” because it deemed this evidence to be “impermissible” for consideration under *Croson*.<sup>148</sup> The Third Circuit Court disapproved of the district court’s actions, because, in its view, the court’s rejection of this evidence betrayed the court’s role in disposing of a motion for summary judgment.<sup>149</sup> “Yet,” the court stated:

Given *Croson*’s emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, we do not believe this amount of anecdotal evidence is sufficient to satisfy strict scrutiny [quoting *Coral*, supra]. Although

<sup>144</sup> *Coral Constr.*, 941 F.2d at 917-18.

<sup>145</sup> *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).

<sup>146</sup> *Coral Constr.*, 941 F.2d at 919.

<sup>147</sup> *Id.*

<sup>148</sup> *Philadelphia IV*, 6 F.3d at 1002.

<sup>149</sup> *Id.* at 1003.



anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.<sup>150</sup>

The District of Columbia Circuit Court echoed the Ninth Circuit’s acknowledgment of the rare case in which anecdotal evidence is singularly potent in *O’Donnell Construction v. District of Columbia*.<sup>151</sup> The court found that, in the face of conflicting statistical evidence, the anecdotal evidence there was not sufficient:

It is true that in addition to statistical information, the Committee received testimony from several witnesses attesting to problems they faced as minority contractors. Much of the testimony related to bonding requirements and other structural impediments any firm would have to overcome, no matter what the race of its owners. (internal citation omitted.) The more specific testimony about discrimination by white firms could not in itself support an industry-wide remedy (internal quotes and citation omitted). Anecdotal evidence is most useful as a supplement to strong statistical evidence—which the Council did not produce in this case.<sup>152</sup>

The Eleventh Circuit in *Dade County II* is also in accord. In applying the “clearly erroneous” standard to its review of the district court’s decision in *Dade County II*, it commented that “[t]he picture painted by the anecdotal evidence is not a good one.”<sup>153</sup> However, it held that this was not the “exceptional case” in which, unreinforced by statistics, the anecdotal evidence was enough.<sup>154</sup>

In *Concrete Works II*, the Tenth Circuit Court of Appeals described the anecdotal evidence that is most compelling as evidence within a statistical context. In approving of the anecdotal evidence marshaled by the City of Denver in the proceedings below, the court recognized that “[w]hile a fact finder should accord less weight to personal accounts of discrimination that reflect isolated 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.”<sup>155</sup> The court noted that the City had provided such systemic evidence.

The Ninth Circuit Court of Appeals has articulated what it deems to be permissible anecdotal evidence in *AGCC II*.<sup>156</sup> There, the court approved a “vast number of individual accounts of discrimination,” which included (1) numerous reports of MBEs denied contracts despite being the low bidder, (2) MBEs told that they were not qualified although they were later found to be qualified when evaluated by outside parties, (3) MBEs refused work even after they were awarded

<sup>150</sup> *Philadelphia IV*, 6 F.3d at 1003.

<sup>151</sup> 963 F.2d 420, 427 (D.C. Cir. 1992).

<sup>152</sup> *O’Donnell*, 963 F.2d at 427.

<sup>153</sup> *Dade County II*, 122 F.3d at 925.

<sup>154</sup> *Id.* at 926.

<sup>155</sup> *Concrete Works II*, 36 F.3d at 1530.

<sup>156</sup> *AGCC II*, 950 F.2d at 1401.



the contracts as low bidder, and (4) MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal, the City pointed to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the city's procurement processes, an "old boy's network" still exists, and racial discrimination is still prevalent within the San Francisco construction industry.<sup>157</sup> Based on *AGCC II*, it would appear that the Ninth Circuit's standard for acceptable anecdotal evidence is more lenient than other Circuits that have considered the issue.

Taken together, these statements constitute a taxonomy of appropriate anecdotal evidence. Anecdotal evidence alone may, in exceptional cases, show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan, but it must be so dominant and pervasive that it passes muster under the *Croson* standards.<sup>158</sup> Pursuant to *Croson* and its progeny, case law suggests that, to be optimally persuasive, anecdotal evidence collectively should satisfy six particular requirements. These requirements are that the accounts:

- Are gathered from minority contractors, preferably those that are "qualified"<sup>159</sup>
- Concern specific, verifiable instances of discrimination<sup>160</sup>
- Involve the actions of governmental officials<sup>161</sup>
- Involve events within the relevant jurisdiction's market area<sup>162</sup>
- Discuss the harm that the improper conduct has inflicted on the businesses in question<sup>163</sup>
- Collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.<sup>164</sup>

Given that neither *Croson*, nor its progeny identify the circumstances under which anecdotal evidence alone will carry the day, it is not surprising that none of these cases explicate bright line rules specifying the quantity of anecdotal evidence needed to support an MBE program. However, the foregoing cases provide some guidance by implication. *Philadelphia IV* makes clear that 14 anecdotal accounts standing alone will not suffice.<sup>165</sup> The court then turned to the statistical data.<sup>166</sup> While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type referenced above, were insufficient without statistical data to justify the program

<sup>157</sup> *AGCC II*, 950 F.2d at 1415.

<sup>158</sup> *Philadelphia IV*, 6 F.3d at 1003. The anecdotal evidence must be "dominant or pervasive."

<sup>159</sup> *Philadelphia VI*, 91 F.3d at 603.

<sup>160</sup> *Coral Constr.*, 941 F.2d at 917-18; but see *Concrete Works IV*, 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.").

<sup>161</sup> *Croson*, 488 U.S. at 509.

<sup>162</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>163</sup> *O'Donnell*, 963 F.2d at 427.

<sup>164</sup> *Coral Constr.*, 941 F.2d at 919.

<sup>165</sup> *Philadelphia IV*, 6 F.3d. at 1002-03.

<sup>166</sup> *Id.*



in *Coral Construction*. Therefore, no court has provided rules on the amount of anecdotal evidence needed in conjunction with statistical evidence to pass constitutional muster.

The amount of anecdotal evidence that a court would likely find acceptable will depend on the proposed remedy. The remedies that are least burdensome to non-targeted groups would likely require a lesser degree of evidence. Those remedies that are more burdensome on the non-targeted groups would require a stronger factual basis likely extending to verification.

#### **D. Remedial Statutory Scheme**

*H.B. Rowe Company v. Tippett*, (“Rowe”) challenged the constitutionality of the North Carolina General Assembly’s Statute 136-28.4 (Statute), promulgated in 1983.<sup>167</sup> The Statute set forth a general policy to promote the use of small, minority, physically handicapped, and women contractors in non-federally funded State construction projects.<sup>168</sup> The 1983 Statute directed North Carolina Department of Transportation (NCDOT) to encourage and promote the policy.<sup>169</sup> Seven years later, in 1990, the Statute was amended to include specific participation goals on state funded transportation construction contracts for minority and women-owned businesses.<sup>170</sup>

As a result of the amendment, NCDOT created a Minority Business Enterprise and Women Business Enterprise Program (M/WBE Program) for non-federally funded highway and bridge construction contracts.<sup>171</sup> In 1991, the constitutionality of the statute was challenged.<sup>172</sup> The court ruled in favor of the plaintiff, stating that, in order to implement race-conscious measures to remedy discrimination, the governmental entity must identify with “some specificity” the racial discrimination it seeks to remedy.<sup>173</sup> As a result of the challenge, NCDOT suspended its M/WBE program in 1991.<sup>174</sup>

In 1993, NCDOT commissioned a disparity study on state-funded transportation construction contracts.<sup>175</sup> The study determined that minority and women subcontractors were underutilized at a statistically significant level and the M/WBE Program was re-implemented.<sup>176</sup> In 1998, the North Carolina General Assembly again commissioned an update to the 1993 study.<sup>177</sup> The 1998 update

<sup>167</sup> *Rowe*, 615 F.3d at 236.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 237; see *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693 (1994).

<sup>173</sup> *Rowe*, 615 F.3d at 237 (citing *Croson*, 488 U.S. at 504).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Rowe*, 615 F.3d at 237.

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



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study concluded that minority and women-owned businesses continued to be underutilized in State-funded road construction contracts.<sup>178</sup>

In 2002, Rowe was denied a NCDOT contract because the company's bid included 6.6 percent women subcontractor participation and no minority subcontractor participation.<sup>179</sup> NCDOT claimed that Rowe failed to meet the good faith effort requirements of the M/WBE program.<sup>180</sup> A third study was commissioned in 2004 to again study minority and women contractor participation in the State's highway construction industry.<sup>181</sup> In 2006, relying on the 2004 study, the North Carolina General Assembly amended Statute 136-28.4.<sup>182</sup> The principal modifications were:

- Remedial action should be taken only when there is a strong basis in evidence of ongoing effects of past or present discrimination that prevents or limits disadvantaged minority and women-owned businesses from participating as subcontractors in State-funded projects.
- The minority/women classification was limited to those groups that suffered discrimination.
- A disparity study should be performed every five years to respond to changing conditions.
- Inclusion of a sunset provision.<sup>183</sup>

First, the court considered if the statutory scheme as it relates to minorities survives the strict scrutiny standard. The Fourth Circuit Court of Appeals reviewed the statistical evidence detailed in the 2004 disparity study to determine if the statutory scheme was based on strong statistical evidence to implement race-conscious subcontractor goals.<sup>184</sup> The statistical evidence was also examined to determine if the statute's definition of minorities was over-inclusive by including minority groups that did not suffer discrimination pursuant to the statistical results of the 2004 disparity study.<sup>185</sup>

The court did not consider if the statistical methodology employed in the 2004 disparity study was sufficient to support a compelling state interest. Rather, the court accepted the disparity index as the measure by which to determine the statistical significance of the underutilization of minorities in the State's subcontracts.<sup>186</sup> The methodology used in the 2004 disparity study calculated a disparity at .05 confidence level.<sup>187</sup> A statistical calculation is significant at the .05 confidence

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<sup>178</sup> *Rowe*, 615 F.3d at 237.

<sup>179</sup> *Rowe*, 615 F.3d at 237.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 238.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 238-39.

<sup>184</sup> *Id.* at 238.

<sup>185</sup> *Rowe*, 615 F.3d at 239.

<sup>186</sup> *Id.* at 243-44.

<sup>187</sup> *Id.* at 244.



level because the probability of that result occurring by chance is 5 percent or less.<sup>188</sup> The .05 confidence level is used in social and other sciences as a marker of when a result is a product of some external influence, rather than ordinary variation or sampling error.<sup>189</sup>

While the circuit court found that “*the study itself* sets out the standard by which one could confidently conclude that discrimination was at work[,]” the standard was not followed in the State’s statutory scheme.<sup>190</sup> The statistical evidence in the 2004 disparity study demonstrated that African American and Native American subcontractors were underutilized at a disparity index of less than 80 and that Hispanic American and Asian American subcontractors also were underutilized, but not at a .05 confidence level.<sup>191</sup> The 2004 Study determined that the underutilization of Hispanic American and Asian American contractors was not statistically significant.

Therefore, the only statutory scheme ruled narrowly tailored to achieve the State’s compelling interest was the one related to African American and Native American subcontractors. The statutory scheme pertaining to Hispanic American and Asian American subcontractors was deemed unconstitutional.<sup>192</sup> Thus, the State only provided a strong basis in evidence for the minority subcontractor participation goals pertaining to African American and Native American subcontractors.

Second, the court considered if 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.<sup>193</sup> The 2004 disparity study calculated the overutilization of women subcontractors as statistically significant at a .05 confidence level.<sup>194</sup> The circuit court further noted that the private sector evidence was insufficient to overcome the strong evidence of overutilization.<sup>195</sup> Consequently, the circuit court determined that the evidence in the 2004 disparity study did not provide “exceedingly persuasive justification” to include women-owned businesses in gender-based remedies.<sup>196</sup>

In light of the Rowe decision, caution should be exercised when determining which minority or gender group is appropriate for race-conscious or gender-conscious remedies. For an MBE program to be narrowly tailored, there must be a statistical finding of underutilization of minority

<sup>188</sup> Rowe, 615 F.3d at 261 n.12 (citing *Sherri L. Jackson, Research Methods and Statistics: A Critical Thinking Approach* 168-69 (3d ed. 2006) (noting that the .05 confidence level is generally used in the social sciences as indication that the result was produced as a consequence of an external influence)).

<sup>189</sup> Rowe, 615 F.3d at 261 n. 12 (citing *Earl Babbie, The Practice of Social Research* 483 (11th ed. 2007)).

<sup>190</sup> *Id.* at 261.

<sup>191</sup> *Id.* at 245.

<sup>192</sup> *Id.* at 254

<sup>193</sup> Rowe, 615 F.3d at 254.

<sup>194</sup> *Id.* at 254-55.

<sup>195</sup> *Id.* at 255.

<sup>196</sup> *Id.*



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.

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-based remedies when the statistical evidence demonstrates that the overutilization is not statistically significant.

## V. Consideration of Race-Neutral Options

A remedial program must address the source of the disadvantage faced by minority businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.<sup>197</sup> An MBE program cannot stand if the sole barrier to M/WBE participation is a barrier that is faced by all new businesses, regardless of ownership.<sup>198</sup> If the evidence demonstrates that the sole barrier to M/WBE participation is that M/WBEs disproportionately lack capital or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.<sup>199</sup> In other words, if the barriers to minority participation are race-neutral, then the program must be race-neutral.

The requirement that race-neutral measures be considered does not mean that they must be exhausted before race-conscious remedies can be employed. The Supreme Court explained that although “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” it “does require serious, good faith consideration of workable race-neutral alternatives that will achieve ... diversity[.]”<sup>200</sup>

If the barriers appear race-related but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found as detailed above in *Section IV*. If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, MBEs also face race discrimination in the awarding of contracts, then a race-conscious program will stand, as long as it also includes race-neutral measures to address the capital and bonding barriers.<sup>201</sup>

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.<sup>202</sup> Instead, an entity must make a serious,

<sup>197</sup> *AGCC II*, 950 F.2d at 1404.

<sup>198</sup> *Croson*, 488 U.S. at 508.

<sup>199</sup> *Id.* at 507.

<sup>200</sup> *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

<sup>201</sup> *Croson*, 488 U.S. at 507 (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

<sup>202</sup> *Coral Constr.*, 941 F.2d at 910.

**Commented [FML4]:** This is not necessarily true. There is considerable economic literature that suggests the disproportionate lack of access to capital by MBEs is affected by race even when controlling for other relevant variables (e.g., higher loan denial rates and higher interest rates charged by financial institutions to MBEs even when controlling for other variables typically taken into consideration by creditors such as age, firm size, home ownership, experience, equity, credit ratings, etc.)

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good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing MBE utilization, it is imperative to examine barriers to MBE participation that go beyond “small business problems.” The impact on the distribution of contract programs that have been implemented to improve MBE utilization should also be measured.<sup>203</sup>

## VI. Conclusion

The decision of the United States Supreme Court in the *Croson* case changed the legal landscape for business affirmative action programs. The United States Supreme Court altered the authority of a local government to use local and federal funds to institute remedial race-conscious public contracting programs. This chapter has examined what *Croson* and its progeny require for a local or state government agency to institute a constitutional race and/or gender-conscious public contracting program.

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

**Commented [FML5]:** On balance, this legal framework summary is thorough and consistent with relevant and controlling legal precedents that affect the County’s consideration and use of race- and gender-conscious remedies in its contracting practices.



<sup>203</sup> *Dade County II*, 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* section II, Standard of Review for the discussion of narrow tailoring in *Concrete Works IV*, *Adarand*, *County of Cook*, and *City of Chicago*.

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## VII. List of Authorities

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<i>Contractors Ass’n of E. Pa. v. City of Philadelphia (“Philadelphia VI”),</i> 91 F.3d 586 (3rd Cir. 1996) .....	<i>passim</i>
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**B. Statutes**

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

49 CFR Part 26.

Cal. Const., Article I, Section 31.

Cal. Public Contracting Code, Section 2002.



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# CHAPTER 2: Procurement and Contracting Analysis

## I. Introduction

This chapter is an overview of the Palm Beach County (County) policies that governed contracting and procurement during the January 1, 2009, to December 31, 2013, study period. The authority to promulgate procurement policy and procedures was granted to the Board of County Commissioners under a provision of the 1984 Palm Beach County Home Rule Charter.<sup>204</sup> The relevant codes and procedures of the County are also addressed herein.

The documents reviewed in the preparation of this Chapter include:

- State of Florida Statutes
- Palm Beach County, Florida Code of Ordinances
- Palm Beach County Policy and Procedure Manual
- Facilities Department of Operations Construction Procurement Program Memo

## II. Governing Laws and Regulations

The applicable laws governing the County's purchase of construction, design services, professional services, and goods and services are included in Table 2.1 below.<sup>205</sup> Significant changes were made to the County's Policy and Procedure Manual (PPM) in 2014, but they are not discussed in this document because this chapter is a review of the procurement policies, rules, and guidelines that governed contracting and procurement during the relevant study period, from January 1, 2009, to December 21, 2013.

**Commented [FML6]:** Good study period – length of four years is enough to include at least two years of utilization data when only race- and gender-neutral SBE programs were in effect. This strengthens the evidentiary basis regarding the need to consider race-conscious remedies to overcome identified disparities. However, the time frame is already ending four years ago. As evidence is generally considered somewhat stale after it is ten years old, it would be better to have covered time frame that included more recent years (e.g., 2015 and/or 2016).



<sup>204</sup> Unless otherwise required or prohibited by state law, Sections 2-51 through 2.58, Palm Beach County, Florida Code of Ordinances, governs the County's purchase of goods and services.

<sup>205</sup> The procurement categories listed here reflect the terminology used in the Purchasing Policy Manual, which enumerates the governing internal procurement procedures followed by Palm Beach County. These procurement policies govern the acquisition of the following industries: construction – horizontal and vertical, design services, professional services, and goods and services.

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**Table 2.1: Governing Laws and Regulations**

<b>STATE OF FLORIDA STATUTES</b>
Title XVIII, Chapter 255 (Public Property and Publicly Owned Buildings) Title XIX, Chapter 287 Procurement of Personal Property and Services, Part I Commodities, Insurance, and Contractual Services (CCNA)
<b>PALM BEACH COUNTY, FLORIDA CODE OF ORDINANCES</b>
Sections 2-51 through 2-58 Section 2-80.21 Sections 2-80.41 through 2-80.47
<b>PALM BEACH COUNTY POLICY AND PROCEDURE MANUAL</b>
CW-F-016: Bond Waiver Program CW-F-064: Requirements for Construction and Construction Related Contracts with Values of Less than \$200,000 to be Approved by Department Heads under the Authority of PBC Ordinance No. 96-17 CW-L-008: Purchasing Policy & Procedures CW-O-043: Small Business Enterprise Program Policies and Procedures Manual CW-O-048: Selection of Professional Engineers, Architects, Landscape Architects, Land Surveyors and Mappers

**A. Florida Statutes**

**1. Title XVIII, Chapter 255**

Title XVIII, Chapter 255 of the Florida Statutes, operating under the Public Lands and Property Code, governs the construction and improvement of public property and publicly owned buildings. Section 255.20 establishes standards for the procurement of contracts for public construction works, and requires that local governments employ competitive solicitation processes to award contracts to an appropriately licensed contractor for each project that falls within its jurisdiction.<sup>206</sup>

**2. Title XIX, Chapter 287, Part I, Section 287.055**

Section 287.055 in Part I of Title XIX of the Florida Statutes, referred to as the Consultants' Competitive Negotiation Act (CCNA), governs the procurement of design services and professional services related to construction projects valued \$325,000 or greater and studies that meet the minimum threshold requirement of \$35,000. Design services, as set forth in the CCNA, include architecture and engineering, landscape architecture, and registered surveying and mapping. The CCNA also provides procurement requirements for design-build projects.<sup>207</sup>



<sup>206</sup> FLA. STAT. TIT. XVIII, § 255.20 (2014).

<sup>207</sup> FLA. STAT. TIT. XIX, § 287.055 (2014).

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## **B. Palm Beach County Code of Ordinances**

### **1. Sections 2-51 through 2-58**

The Purchasing Code centralizes and standardizes the County's purchasing function and authorizes the County's Purchasing Department to establish policies and procedures to govern the procurement of construction, professional services, and goods and services.<sup>208</sup>

#### **a. Section 2-54: Sales Tax Recovery Program**

Goods, materials and equipment listed in construction bids can be purchased directly by the County under the provisions of the Sales Tax Recovery Program. Pursuant to this Program, goods, materials, and equipment that have been competitively priced as part of the construction bid are removed by a deductive change order to the contract in the amount equal to the value plus applicable sales tax percentage. Then, the County issues a purchase order for the goods, materials and equipment in the amount equal to the price in the construction bid.<sup>209</sup>

This Program is applicable to the purchase of goods, materials, and equipment in any dollar amount included in a capital improvement project. For the County to procure the items directly from the supplier at the prices listed in the construction bid, the purchase orders and corresponding change orders required to make purchases under this method must be approved by the Director of Purchasing or by the Director of the Construction Department.<sup>210</sup>

### **2. Section 2-80.20 through 2-80.35**

The Small Business Enterprise (SBE) code applies to the procurement of all goods and services that are governed by the County Purchasing Code. The SBE code sets annual goals for small business participation, and applies these requirements to every individual County procurement of construction, professional services, and goods and services contracts unless otherwise approved by the County Administrator. Even for items that are exempt from the requirements of the County Purchasing Code, the SBE code requires that the County utilize a solicitation process that encourages SBE participation whenever possible.<sup>211</sup>

### **3. Sections 2-80.41 through 2-80.47**

The County established two preference programs. The Local Preference Program promotes a local preference for the procurement of construction, professional services, and goods and services. The Glades Local Preference Program promotes a local preference for the use of Glades businesses as prime contractors and subcontractors.

<sup>208</sup> PALM BEACH COUNTY, FL., ORDINANCE 05-062 §§ 2-51-2-58 (2005).

<sup>209</sup> PALM BEACH COUNTY, FL., ORDINANCE 05-062 §§ 2-51-2-58 (2005).

<sup>210</sup> PALM BEACH COUNTY, FL., ORDINANCE 05-062 §§ 2-80.20-2-80.35 (2005).

<sup>211</sup> PALM BEACH COUNTY, FL., ORDINANCE 05-062 §§ 2-80.41-2-80.47 (2005).



## **C. Palm Beach County Policy and Procedure Manual**

### **1. PPM CW-F-016: Bond Waiver Program**

PPM CW-F-016 establishes the policies and procedures for the County's Bond Waiver Program. The Program is open to any business performing construction contracts valued \$200,000 and under. In lieu of the bond requirement, a contractor on an eligible project must comply with the procedures to apply to participate in the Program. The Bond Waiver provision applies to the contractor's subcontractors and suppliers as designated under this section.<sup>212</sup>

### **2. PPM CW-F-064: Requirements for Construction and Professional Services Contracts with Values of Less Than \$200,000 to be Approved by Department Heads Under the Authority of PBC Ordinance No. 96-17**

PPM CW-F-064 sets forth the purchasing authority for construction and professional services with a contract value of less than \$200,000. This section also standardizes contract procedures for department-executed contracts.<sup>213</sup>

### **3. PPM CW-L-008: Purchasing Policy and Procedures**

PPM CW-L-008 establishes the general policies and procedures for the County's procurement of non-CCNA professional services and goods and services.<sup>214</sup> This section applies to professional services and goods and services contracts at all dollar levels.

### **4. PPM CW-O-043: Small Business Enterprise Program Policies and Procedures Manual**

PPM CW-O-043 establishes policies and procedures for the SBE Program. The SBE Program was promulgated by the Board of County Commissioners to ensure that all businesses are afforded the opportunity for full participation in Palm Beach County contracts. This section also includes provisions to monitor Minority and Woman-owned Business Enterprise (M/WBE) participation on County contracts to identify any evidence of discrimination.<sup>215</sup>

### **5. PPM CW-O-048: Selection of Professional Engineers, Architects, Landscape Architects, Land Surveyors, and Mappers**

PPM CW-O-48 establishes policies and procedures for the acquisition of professional services from architects, engineers, landscape architects, land surveyors, and mappers for projects that meet the threshold requirements established under the CCNA. This section authorizes the CCNA

<sup>212</sup> Palm Beach County, FL, PPM CW-F-064 (May 13, 2011).

<sup>213</sup> Palm Beach County, FL, PPM CW-F-064 (May 13, 2011).

<sup>214</sup> Palm Beach County, FL, PPM CW-L-008 (April 23, 2012).

<sup>215</sup> Palm Beach County, FL, PPM CW-O-043 (January 1, 2011).



Architectural/Engineering Selection Committee (A/E Selection Committee) to implement the procedures to govern the procurement of professional services in compliance with CCNA. The CCNA selection procedures are administered by the directors of departments and divisions.<sup>216</sup>

### III. Definition of Industries

Three industries are analyzed in this Study: construction, professional services, and goods and services. Contracts classified as goods or services will be combined and analyzed as goods and services. Contracts classified as design services and professional services will be combined and analyzed as professional services. These industries were derived from five industry definitions set forth in the PPMs and Purchasing Code, which are listed below.

**Construction:** building, altering, improving, demolishing, repairing or renovating any structure or building, or other improvements of any kind to any real property, or other activity specifically related to, or part of, these processes, as determined by the Director of Purchasing.<sup>217</sup>

**Goods:** tangible personal property other than services or real property.<sup>218</sup>

**Design Services:** services within the scope of the practice of architecture, professional engineering, landscape architecture, registered surveying and mapping, or those performed by any architect, professional engineer, landscape architect, registered surveyor and mapper in connection with professional employment or practice.<sup>219</sup>

**Professional Services:** any narrow discipline in which a known practitioner has developed expert advisory and programming skills as a vocation through education and experience, any service performed primarily by vocational personnel which requires the analysis or certification of a professional before the services are acceptable to the user of the service, any other advisory study, or programming activity for which the Director of Purchasing determines that the levels of skills or creativity of the potential or known practitioner(s) warrants a competitive proposal or submittal process.<sup>220</sup>

**Services:** labor, time, or effort by a contractor for which the provisions of goods or other specific end products (other than reports, studies, plans, advisories, contractual documents, or other documents relating to the required performance) is incidental or secondary. This term shall not include construction, employment agreements, or collective bargaining agreements.<sup>221</sup>

<sup>216</sup> Palm Beach County, FL, PPM CW-O-043 (January 1, 2011).

<sup>217</sup> Palm Beach County, FL, PPM CW-F-064 (May 13, 2011).

<sup>218</sup> *Id.*

<sup>219</sup> FLA. STAT. TIT. XIX, § 287.055(2)(A) (2014).

<sup>220</sup> PALM BEACH COUNTY, FL., ORDINANCE 02-064 §§ 2-80.21 (2002).

<sup>221</sup> PALM BEACH COUNTY, FL., ORDINANCE 05-062 §§ 2-51-2-58 (2005).

**Commented [FML7]:** Given the court's criticism in *Hershell Gill* regarding Miami-Dade County's aggregation of architectural & engineering contracts into a broader industry category that includes other professional services contracts in its statistical analysis, MTA's similar aggregation of industry categories here might subject the resultant factual predicate to legal challenge to the extent it is used to support race- and gender-conscious remedies that are applied to A&E and other professional services contracts. (This is because potentially the overutilization or underutilization M/WBEs in one professional service could mask or distort disparities related to other segments of the broader category of professional services.) However, it is important to note that this legal risk is likely to diminish once the legal challenge progresses on appeal beyond the trial court in the Southern District of Florida. Traditionally, appellate courts have not been as demanding as the federal district court was in *Hershell Gill* in compelling separate disparity analysis for each discrete segment within broad industry categories. (For example, there is no language in the Supreme Court's ruling in *Croson* that suggests the appropriate disparity analysis should have been limited to the specialty trade of plumbing in that case since the contract at issue was for the installation of toilets. Instead, the Court spoke in terms of the need for a strong basis in evidence of ongoing effects of discrimination affecting the considerably broader industry category of construction.)

**Commented [FML8]:** Clarify which industry segments design-build, construction manager at risk, or construction management contracts are classified under and why.

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## IV. Construction Procurement Process Overview

As governed by the Palm Beach County, Florida Code of Ordinances, five departments have authority to procure construction, design, and construction services contracts, including Engineering, Water Utilities, Airports, Facilities Development & Operations, and Environmental Resources Management. These five departments are referred to as Construction Departments<sup>222</sup>

In addition to the legislative authority of the Director of Purchasing, the directors of the construction departments also have the authority to do the following: 1) approve source selection through a formal or informal competitive solicitation process; 2) provide for the solicitation, cancellation, or postponement of a procurement; 3) make procurement awards for contracts valued below \$200,000 and recommend procurement awards to the Board of County Commissioners for contracts valued at or above \$200,000; and 4) execute change orders after contract award. The construction departments have no additional or independent authority, and their authority is only a subsection of the authority of the Director of Purchasing.<sup>223</sup>

### A. Purchases Valued Less Than \$50,000

#### 1. Informal Competitive Procurement

Construction contracts valued less than \$50,000 are procured through the competitive quote process.<sup>224</sup> The County representative is required to solicit quotes based on a written scope from vendors registered with the County Purchasing Department.<sup>225</sup> Formal advertising is not required.

Construction contracts valued \$25,000 and under require receipt of competitive quotes from a minimum of five vendors.<sup>226</sup> Construction contracts valued from \$25,000 to \$50,000 require competitive quotations from a minimum of seven vendors.<sup>227</sup>

Solicitations must be sent to all registered SBE vendors and a minimum of five or seven majority vendors registered with Palm Beach County, depending on the size of the solicitation.<sup>228</sup> The director of the construction department authorizes the award.<sup>229</sup> Furthermore, bonding is not required.

<sup>222</sup> Palm Beach County, FL., Ordinance 05-062 § 2-53(F) (2005); Palm Beach County, FL., PPM CW-L-008(II)(B)(1)-(5) (April 23, 2012).

<sup>223</sup> Palm Beach County, FL., Ordinance 05-062 § 2-53(F) (2005). AND PPM CW-F-050

<sup>224</sup> Palm Beach County, FL., PPM CW-F-064 § Definitions (4) (May 13, 2011).

<sup>225</sup> Palm Beach County, FL., PPM CW-F-064 (May 13, 2011).

<sup>226</sup> Palm Beach County, FL., PPM CW-F-064(1)(D)(3)(a) (May 13, 2011).

<sup>227</sup> *Id.*

<sup>228</sup> Palm Beach County, FL., PPM CW-F-064(1)(D)(3) (May 13, 2011).

<sup>229</sup> Palm Beach County, FL., PPM CW-F-064(3) (May 13, 2011).



## 2. Pre-Qualification of Vendors

Vendors may be pre-qualified for solicited goods or services through a competitive solicitation process.<sup>230</sup> Vendors responding to solicitation are pre-qualified based upon the criteria or qualifications set forth in the solicitation.<sup>231</sup> Once vendors are pre-qualified, they can submit price offers or qualifications for each individual order for a good or service, or take turns via rotation, depending upon the language within the solicitation. Prequalified vendors may be selected for award so long as the value of a single good or service is under \$50,000.<sup>232</sup>

For solicitations that require a specifically designated number of pre-qualified vendors, the SBE preference is applied when the pre-qualified vendors are evaluated. For solicitations that have no requirement as to the number of pre-qualified vendors for a specific contract, the SBE preference is applied when the User Department evaluates the price offers or qualifications submitted by the pre-qualified vendors for each individual order for a good or service.

### **B. Purchases Valued Between \$50,000 and \$200,000**

#### **1. Formal Competitive Procurement**

Construction contracts valued between \$50,000 and \$200,000 are solicited through an Invitation for Bid (IFB) and must be procured through competitive bidding.<sup>233</sup> The construction department has the authority to select the procurement method and apply their internal solicitation guidelines.<sup>234</sup>

The County is permitted to follow established internal procedures for conducting the bidding process.<sup>235</sup> The Purchasing Procedures Manual identifies several procedural requirements that must be followed when employing the competitive bid process.

#### **a. Advertising Requirement**

Competitive bids must be publicly advertised twice. Advertising must be accomplished in sufficient time to allow bidders to prepare and submit their bids to meet the established public bid

<sup>230</sup> Palm Beach County, FL., Ordinance 05-062 § 2-54(f)(8) (2005); Palm Beach County, FL., Ordinance PPM CW-L-008(II)(H)(8) (April 23, 2012).

<sup>231</sup> Palm Beach County, FL., Ordinance 05-062 § 2-54(f)(8) (2005); Palm Beach County, FL., Ordinance PPM CW-L-008(II)(H)(8) (April 23, 2012). Please note, in the updated PPM the threshold for prequalification has increased to contracts valued under \$100,000. However, the threshold was limited to contracts valued under \$50,000 during the January 1, 2009, to December 31, 2013, study period.

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

<sup>233</sup> FLA. Stat. tit. XVIII, § 255.20 (2014) (requires a County seeking to construct or improve a public building, structure, or other public constructive work to competitively award each project to an appropriately licensed contractor; the statute defines "competitively award" as a process that awards contracts based on the submission of sealed bids, proposals in response to a request for qualifications, or proposals submitted for competitive negotiation).

<sup>234</sup> Palm Beach County, FL., Ordinance 05-062 § 2-53(f) (2005).

<sup>235</sup> FLA. Stat. tit. XVIII, § 255.20(3) (2014).



opening date. The second advertisement date must be a minimum of 21 days before the bid opening date.<sup>236</sup> The advertising requirement allows for broader bidder participation by promoting wider dissemination of the solicitation and aids the County in meeting the relevant SBE goals.<sup>237</sup>

When the specifications and requirements are complicated, a mandatory pre-bid conference must be held to explicate them to potential bidders.<sup>238</sup> The conference should permit sufficient time for interested bidders to learn of the solicitation and acquire a copy of the solicitation.<sup>239</sup> The County representative is responsible for conducting the pre-bid conference, and arranging for attendance of all appropriate user department and technical personnel.<sup>240</sup>

**b. Minimum Number of Bids**

The construction departments have the authority to approve the source selection process using either a formal or informal method, and to both approve and award the procurement.<sup>241</sup> Promulgated pursuant to this authority, the construction department's internal guidelines dictate the selection process to be used as described in the Code. There is no minimum number of bids, as required in the formal bid process.<sup>242</sup>

**c. Approval and Authorization of the Award**

Bids are required to be opened publicly in the presence of at least one witness at the place and time stipulated by the IFB.<sup>243</sup> The director of the construction department has the authority to make procurement awards for contracts valued under \$200,000.<sup>244</sup>

**2. Bond Waiver Program**

The bond waiver program can be applied in lieu of a bond for a project valued under \$200,000. Bond waivers are available to any prime contractor who holds a Florida contractor license. The bond waiver extends to the subcontractors retained by the prime contractor.

<sup>236</sup> Palm Beach County, FL, PPM CW-F-064(1)(D)(1)(a) (May 13, 2011).

<sup>237</sup> Palm Beach County, FL, PPM CW-F-064(1)(D)(1)(g) (May 13, 2011).

<sup>238</sup> Palm Beach County, FL, PPM CW-F-064(1)(D)(1)(b) (May 13, 2011) (the PPM was modified to make the pre-bid conferences optional).

<sup>239</sup> *Id.* at § CW-F-064(1)(D)(1)(b)(i)-(iv).

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

<sup>241</sup> Palm Beach County, FL., Ordinance 05-062 § 2-53(f) (2005).

<sup>242</sup> See generally Palm Beach County, FL., Ordinance 05-062 § 2-53(c) (2005).

<sup>243</sup> Palm Beach County, FL., PPM CW-F-064 (1)(D)(1)(d) (May 13, 2011) (must include the amount of each bid, the name of the bidder and other relevant information as specified by regulation; the record and each bid shall be open to public inspection; bid tabulation summary sheets must be kept, including SBE participation).

<sup>244</sup> *Id.*



To participate in the Program, the contractor must complete an affidavit entitled *Intent to Participate in Bond Waiver Program Bid Affidavit*.<sup>245</sup> To comply with the Bond Waiver Program, the contractor is required to provide written notice to all subcontractors and suppliers, notifying them that the project will be performed under the Bond Waiver Program.<sup>246</sup> Additionally, the contractor must provide the County a signed and dated list of all subcontractors and material suppliers with bids greater than \$2,500.<sup>247</sup>

### **C. Purchases Valued \$200,000 and Over**

Construction contracts valued \$200,000 and over are competitive solicitations procured through an IFB. The formal procurement process follows the guidelines as detailed above in *Section B: Purchases Valued Between \$50,000 and \$200,000*, with the exception of the approval process. For purchases valued \$200,000 and over, the Board of County Commissioners must authorize the award.<sup>248</sup>

### **D. Additional Competitive Procurements Programs**

The Facilities Development & Operations Department (FDO) uses four additional competitive methods to procure construction contracts.

#### **1. Single Trade Annual Contracts**

Single trade annual contracts are awarded to contractors who have been prequalified to provide services in a single trade specialty. The award of single trade annual contracts is limited to contractors in the pool of prequalified vendors.<sup>249</sup> The contracts are awarded to the lowest responsive and responsible vendor, and the SBE and Local Preference Program requirements are applied during the bid process.

##### **a. Advertising Requirement for Prequalification**

FDO invites contractors to participate in this Program by advertising in a newspaper for two consecutive weeks. The published advertisement is supplemented through community outreach by faxing and emailing to the following: 1) SBE vendors who are certified within the trade the solicitation requires; 2) Glades vendors identified within the yellow pages or registered vendors within the County's Advantage Financial System; and 3) other vendors registered within the Advantage Financial System.

<sup>245</sup> Palm Beach County, FL, PPM CW-F-016(D)(1)(a).

<sup>246</sup> *Id.* at § CW-F-016(E)(1) (April 3, 2013).

<sup>247</sup> *Id.* at § CW-F-016(E)(2).

<sup>248</sup> Palm Beach County, FL., Ordinance 05-062 § 2-53(f) (2005); Palm Beach County, FL, Ordinance CW-F-064 (May 13, 2011).

<sup>249</sup> Single Trade Annual Contracts refer to contracts for Electrical, HVAC, Flooring, Demolition, Asbestos Abatement, Handyman, and Low Voltage. The client identified that these programs are not reflected in the governing Ordinance or Purchasing Manual, but have been used as benchmarks for the procurement process in practice. The contracts that result from the Multi-Step Bid process are commonly known as Annual Contracts. A Multi-Step Bid process is used for single trades (ie: electrical, HVAC, flooring, demolition asbestos abatement, handyman, and low voltage as well as general contractors, each with their own solicitation and Pre-Qualification Questionnaire criteria relevant to that trade.



**b. Prequalification of Vendors**

FDO holds a mandatory pre-proposal conference to inform interested contractors about the opportunities that the Program provides, and the steps that need to be taken as part of the prequalification process. To be prequalified under the FDO program, contractors must respond by filling out the Prequalification Questionnaire. The vendors that meet the prequalification requirements are deemed to be responsive and responsible and are eligible to bid on single trade annual contracts.

In the first step, Contractors may be pre-qualified for solicited goods or services based on the Contractor’s submittal of Pre-Qualification Questionnaire, which specifically describes objective minimum experience and performance criteria. FDO holds a non-mandatory pre-proposal conference to inform interested contractors about the opportunities that the Multi-Step Bid provides, and the steps that need to be taken as part of the first or prequalification step. To be prequalified, contractors must respond by filling out the Pre-qualification Questionnaire.

All contractors meeting or exceeding the criteria in the Pre-Qualification Questionnaire execute a contract with the County that sets for the general conditions and requirements of the contract. Practically, this first step creates the pre-qualified contractors, creating a bidding pool for the individual projects.

**c. Approval and Authorization of Award**

Once prequalified, contractors are eligible to submit quotes on projects for which they have been prequalified. The contracts are awarded to the lowest responsive, responsible bidder. All contractors with executed annual contracts in a particular trade can submit price offers or qualifications for each individual order for a good or service. SBE program requirements and relevant preferences are evaluated and applied, as applicable, when determining the most responsible and responsive bidder. The most responsible and responsive bidder is then awarded the work order.

The terms of the annual contracts are for twelve months and include four one-year renewal options. The director of the construction department has the authority to make procurement awards for contracts valued under \$200,000, and the total of all awards (regardless of contractor) cannot exceed \$200,000 per year.

**2. Minor Construction Annual Contracts**

The process for minor construction annual contracts mirrors the process for single trade annual contracts. The primary difference is that contractors are invited to participate in the pool of prequalified vendors for a variety of minor trade projects as opposed to a single trade. Minor construction annual contracts are administered as bond waiver contracts. Therefore, bonding capacity is not required. The contract terms are for twelve months and include four one-year renewal options. Awards are approved by FDO.



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### 3. Construction Manager At-Risk Contracts

Construction Manager at Risk (CMAR) contracts are awarded annually or on a project-specific basis for projects of various sizes and types. The competitive process uses the RFP process described in *Section VI: Professional Services Procurement Process Overview*. The SBE and local preference policies are applied to the CMAR contract and to all subcontracts. The fee-for-service may or may not be considered in the selection and, depending on the solicitation language, if not considered during selection, is negotiated at the time of award. The CMAR is required to apply the County's competitive solicitation provisions (IFB or IFQ as well as preferences) when selecting subcontractors for each work order.

### 4. Job Order Contract

A job order contract (JOC) is a competitive IFB implemented through a fixed price indefinite quantity contract for repair and construction services. JOCs are solicited and awarded to perform services with predetermined unit pricing within specific regions of the County. Bidders submit two adjustment factors that are applied to the unit price for the scope of work. The two adjustment factors are for work to be completed during regular business hours, and work to be completed outside of regular business hours. The JOC is awarded to the bidder with the lowest adjustment factors. JOC contractors are guaranteed a minimum work order value of \$35,000. Cumulative work orders valued under \$200,000 are covered under the Bond Waiver Program. Bonds are required for work orders that exceed the \$200,000 threshold. Each JOC contract is for a term of twelve months, with a maximum value of \$2,500,000. A JOC can have up to four annual renewals. The contract is awarded by the BCC, and the individual work orders by the authority identified in PPM CW-F-050.

All JOC contractors are encouraged to work toward the 15% SBE goal during the life of the contract. A JOC that does not meet the SBE goal may not be renewed.

## V. Design Services Procurement Process Overview

Design services contracts for construction projects valued \$325,000 or greater, and planning and studies valued \$35,000 or greater must be procured in compliance with the provisions of CCNA.<sup>250</sup> Design services governed by CCNA are defined as the acquisition of professional architectural, engineering, landscape architectural or surveying and mapping services.<sup>251</sup> The procurement process has three statutorily-defined steps: 1) public announcement and qualification;<sup>252</sup> 2) competitive selection;<sup>253</sup> and 3) competitive negotiation.<sup>254</sup>

<sup>250</sup> Palm Beach County, FL, PPM CW-O-48 (December 1, 2013) (states that the purpose of the PPM is to establish procedures for the acquisition of professional services according to the rules established under the State of Florida's "Consultant's Competitive Negotiation Act").

<sup>251</sup> FLA. Stat. tit. XIX, § 287.055 (2014).

<sup>252</sup> *Id.* at § 287.055(3).

<sup>253</sup> *Id.* at § 287.055(4).

<sup>254</sup> *Id.* at § 287.055(5).

**Commented [FML9]:** Clarify which industry segments design-build, construction manager at risk, or construction management contracts are classified under and why.

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To determine if a firm has the capacity to perform the contract, the adequacy of the personnel and past records and experience of the firm or individual must be evaluated. The County must also determine if the firm is a State-certified MBE.

**A. Design Services for Construction Projects Over \$325,000**

Design services for a construction project over \$325,000 are procured through competitive solicitation in compliance with the CCNA.

**1. Advertising Requirements**

To be considered for public announcement, a project must first meet one or more of the following criteria:

- The project is part of a Master Plan approved by the Board of County Commissioners;
- The project is listed in the first two years of a Board of County Commissioner-approved Five-Year Road Plan or Mid-Year Adjustment;
- The project is listed in the Board of County Commissioners-adopted Capital Improvement Plan or equivalent budgeting document;
- Funding for the project is included in the user department’s current year budget; or
- The project has been presented to and approved by the County Administrator or the Board of County Commissioners.

Public announcements are required either by advertisement or by Board action.<sup>255</sup> If the project meets the criteria listed above, then the public announcement shall be made by advertisement.<sup>256</sup> If the project does not meet the criteria listed above, then the public announcement is made by Board action.<sup>257</sup>

**2. Minimum Number of Bids**

For each CCNA project, the current Statements of Qualifications and performance data for firms on file, and any qualifications submitted by other firms in response to the solicitation are evaluated. The County conducts discussions with at least three firms regarding the proposed approach to the project and ability to furnish the required services.<sup>258</sup>

To determine if a firm is qualified, the County must consider the following factors dictated by the CCNA: 1) the ability of professional personnel; 2) whether or not a firm is a certified MBE; 3) past performance; 4) willingness to meet time and budget requirements; 5) location; 6) recent,

<sup>255</sup> Palm Beach County, FL, PPM CW-O-48(II) (December 1, 2013) (“Public announcement, as required by s. 287.055(3)(a) F.S., shall be by advertisement or Board action as provided in Section III. Below”).

<sup>256</sup> Palm Beach County, FL, PPM CW-O-48(III)(A) (December 1, 2013).

<sup>257</sup> Palm Beach County, FL, PPM CW-O-48(III)(B) (December 1, 2013).

<sup>258</sup> FLA. Stat. tit. XIX, § 287.055(4)(a) (2014); Palm Beach County, FL, PPM CW-O-48 (V) (December 1, 2013).



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current, and projected workloads of the firm; and 7) the volume of work previously awarded to each firm by the agency, with the objective of effecting an equitable distribution of contracts among equally qualified firms.<sup>259</sup>

The County implements the evaluation factors that the CCNA requires in Sections V-VI of the PPM. At a minimum, the selection process stipulates minimum requirements that must be taken for formal contracting procedures: a review of qualifications and the post-review selection of a minimum of three firms by the Short List Committee;<sup>260</sup> an interview and ranking by the CCNA A/E Selection Committee;<sup>261</sup> approval and/or affirmation by the Board of County Commissioners;<sup>262</sup> contract negotiation by the appropriate staff;<sup>263</sup> a contract award; and written notification to the Inspector General.<sup>264</sup>

### 3. Approval and Authorization of the Award

The selection process entails an interview and ranking of submittals performed by the CCNA A/E Selection Committee, and the subsequent notification of the selection results to the Board of County Commissioners prior to commencing negotiations.<sup>265</sup>

After the most qualified firm is selected, the County shall enter the competitive negotiation process to negotiate a contract that is fair, competitive, and reasonable.<sup>266</sup> The County shall conduct a detailed cost analysis of the services required, in addition to considering the scope of services and complexity to make the determination that the consultant's fee is fair, competitive and reasonable. When that determination is made and the negotiations have otherwise concluded, the contract will be executed by the director of the construction department (if the value is less than \$200,000) and by the Board of County Commissioners (if the value is \$200,000 or greater).

If the County is unable to negotiate a contract with the firm considered to be the most qualified at a price determined to be fair, competitive, and reasonable, the County is required to formally terminate the negotiations and undertake negotiations with the second-most qualified firm.<sup>267</sup>

<sup>259</sup> FLA. STAT. tit. XIX, § 287.055(4)(a) (2014); Palm Beach County, FL, PPM CW-O-48(V) (December 1, 2013).

<sup>260</sup> Palm Beach County, FL, PPM CW-O-48(VI) (December 1, 2013) (explicates the short list committee procedures).

<sup>261</sup> Palm Beach County, FL, PPM CW-O-48(VII) (December 1, 2013) (explicates the CCNA A/E Selection Committee procedures).

<sup>262</sup> Palm Beach County, FL, PPM CW-O-48(VIII) (December 1, 2013) (identifies the procedures followed by the BCC in the approval or affirmation process).

<sup>263</sup> Palm Beach County, FL, PPM CW-O-48(IX) (December 1, 2013) (explicates guidelines for contract procedures).

<sup>264</sup> Palm Beach County, FL, PPM CW-O-48(V)(6) (December 1, 2013) (explicates the procedures for Inspector General notification).

<sup>265</sup> Palm Beach County, FL, PPM CW-O-48(V)(VII) (December 1, 2013).

<sup>266</sup> Palm Beach County, FL, PPM CW-F-064; FLA. STAT. tit. XIX, § 287.055(5) (2014); Palm Beach County, FL, PPM CW-O-48(IX) (December 1, 2013).

<sup>267</sup> FLA. STAT. tit. XIX, § 287.055(5)(b) (2014).



**B. Design Professional Services for Planning and Study Contracts Over \$35,000**

Design professional services selected for a planning or study activity valued over \$35,000 must conform with the guidelines outlined above in *Section V, Subsection A* for the selection of design professional services for construction projects valued over \$325,000.<sup>268</sup> The formal procurement guidelines for design professional services selected for a planning or study activity over \$35,000 have identical application as the requirements for professional services acquired for construction projects over \$325,000, as discussed above in *Section A*. These requirements extend to the legal advertising requirements. All submitted proposals are evaluated, with a minimum of three proposals identified as most qualified during the selection process, the negotiation process, and approval and authorization of award.<sup>269</sup>

**VI. Professional Services Procurement Process Overview**

The methods of procurement for professional services is set forth in the Purchasing Code. The competitive solicitation processes that the County utilizes to procure professional services include Invitations for Bids (IFB), Requests for Proposals (RFP), Requests for Quotes (RFQ), and Requests for Submittals (RFS).<sup>270</sup>

The County advertises solicitations on the Purchasing Department’s website, which is updated daily, and on Channel 20, the County’s local government channel. A notice is also placed in the Palm Beach Post on the first Sunday of every month advising persons interested in doing business with Palm Beach County to check the Purchasing Department website.<sup>271</sup> Advertisement for solicitations are also placed in trade and professional journals and magazines at the request of the department requesting the professional service (user department).

The Director of Purchasing is authorized to execute contracts, including contracts exempt from the Purchasing Code, that are valued under \$200,000 per annum as long as the contracts do not exceed a duration of five years.<sup>272</sup> The Director of Purchasing is also authorized to increase the value of an existing contract by 10%<sup>273</sup> and extend the term of the contract up to three months.<sup>274</sup>

<sup>268</sup> See generally FLA. STAT. tit. XIX, § 287.055 (2014); Palm Beach County, FL, PPM CW-O-48 (December 1, 2013).

<sup>269</sup> *Id.*

<sup>270</sup> See generally Palm Beach County, FL, PPM CW-L-008 (April 23, 2012).

<sup>271</sup> Palm Beach County, FL, PPM PA-O-002(III)(A)(3) (April 23, 2012).

<sup>272</sup> Palm Beach County, FL, PPM CW-L-008(II)(E)(1) (April 23, 2012).

<sup>273</sup> Palm Beach County, FL, PPM CW-L-008(II)(E)(2) (April 23, 2012) (the Purchasing Director may authorize increases of 10% or less so long as the total amount of the contract does NOT exceed \$200,000).

<sup>274</sup> Palm Beach County, FL, PPM CW-L-008(II)(E)(3) (April 23, 2012).

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## **A. Procurements Valued Under \$50,000**

Informal professional services contracts valued under \$50,000 are procured through informal competitive processes, including the request for quotes (RFQ) process or the request for submittals (RFS) process.<sup>275</sup>

### **1. Request for Quotes**

The RFQ process is utilized when definitive specifications can be used for a solicitation, and when the award can be based on the lowest price.<sup>276</sup> The award is made to the lowest responsive, responsible quote.<sup>277</sup> Quotes are evaluated for responsiveness by the Purchasing Department and for responsibility by the user department.

Awards must be made within the guidelines established by the County's SBE Program.<sup>278</sup> To comply with these guidelines, the Purchasing Department evaluates the quotes for responsiveness, then the user department evaluates all responsive quotes for responsibility. The Purchasing Department then evaluates all responsive, responsible quotes to determine if the vendor can receive SBE preference by verifying the SBE status of the vendor on the OSBA vendor list. A protest process is not available for procurements under the mandatory bid threshold, which was \$50,000 during the study period.

### **2. Request for Submittals**

The RFS process is utilized when the scope of work or specifications may not be closely defined, but the evaluation is based on established criteria that may include, but is not limited to, price.<sup>279</sup> Generally, the RFS process is used when it is not practical or advantageous to process the solicitation as an IFB or an RFQ, and when there are several differing potential methods of achieving the desired result in the solicitation.<sup>280</sup> The RFS is required to identify the evaluation factors in the solicitation.<sup>281</sup>

Submittals are evaluated for responsiveness by the Purchasing Department. All responsive submittals are evaluated then by the user department for responsibility. The Purchasing Department evaluates all responsive, responsible submittals for the SBE preference by verifying

<sup>275</sup> During the study period, the County's informal professional services contracts valued between \$1,000 and \$50,000 were procured through informal competitive processes.

<sup>276</sup> Palm Beach County, FL, PPM PA-O-002(III)(C)(1) (March 26, 2013).

<sup>277</sup> Palm Beach County, FL, PPM CW-L-008(II)(D)(4) (April 23, 2012).

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

<sup>279</sup> Palm Beach County, FL, PPM PA-O-002(III)(D) (March 26, 2013).

<sup>280</sup> *Id.* at § PA-O-002(III)(D)(1)(a) (note that price is not the only critical factor to be considered – this selection process is characteristically used for contracts that have several established and defined critical factors and evaluation criteria).

<sup>281</sup> *Id.* at § PA-O-002(III)(D)(3)(a).



the vendor's SBE status on the OSBA vendor list. The protest process is not available for procurements under the mandatory bid threshold, which was \$50,000 during the study period.<sup>282</sup>

### **B. Procurements Valued at \$50,000 and Over**

The procurement of professional services contracts valued \$50,000 and over must be awarded by a formal competitive bid or proposal process.<sup>283</sup> To satisfy this requirement, the County may use the IFB process or the RFP process, depending on the specifications of the solicitation.<sup>284</sup>

#### **1. Invitation for Bid**

The IFB process is generally used for complex procurements valued \$50,000 and over.<sup>285</sup> The County advertises IFBs on the Purchasing Department's website, which is updated daily, and on Channel 20, the County's local government channel. A notice is also placed in the Palm Beach Post on the first Sunday of every month advising persons interested in doing business with Palm Beach County to check the Purchasing Department website.<sup>286</sup>

Contract awards are generally based on price, and are awarded to the lowest responsive, responsible bidder. Bids are evaluated for responsiveness by the Purchasing Department and for responsibility by the user department. The OSBA evaluates the bids for designation of the SBE preference. The Director of Purchasing has the authority to award a contract if the value is less than \$200,000. If the value of the contract is \$200,000 or more, the Director of Purchasing will make a recommendation for award of the contract to the Board of County Commissioners.<sup>287</sup>

A formal protest process, as set forth in the Purchasing Code, is available to bidders under the IFB solicitation process.

#### **2. Request for Proposal**

The RFP solicitation process is used to purchase professional services contracts valued at \$50,000 and over when the scope of work or specifications may not be closely defined.<sup>288</sup> The County advertises RFPs on the Purchasing Department's website, which is updated daily, and on Channel 20, the County's local government channel. A notice is also placed in the Palm Beach Post on the first Sunday of every month advising persons interested in doing business with Palm Beach County

<sup>282</sup> Palm Beach County, FL, PPM CW-L-008(II)(D)(6) (April 23, 2012).

<sup>283</sup> During the study period, the procurement of professional services contracts valued \$50,000 and over was awarded by a formal competitive bid or proposal process.

<sup>284</sup> Palm Beach County, FL., Ordinance 05-062 § 2-54(a) (2005).

<sup>285</sup> Palm Beach County, FL, PPM CW-L-008(II)(D)(5).

<sup>286</sup> Palm Beach County, FL, PPM PA-O-002(III)(A)(3) (April 23, 2012).

<sup>287</sup> Palm Beach County, FL, PPM CW-L-008(II)(E)(1) (April 23, 2012) (the Purchasing Director has the authority to execute any contract on behalf of the County so long as it is valued under \$200,000).

<sup>288</sup> *Id.*



to check the Purchasing Department website.<sup>289</sup> Advertisement for solicitations are also placed in trade and professional journals and magazines at the request of the user department.

Proposals are evaluated for responsiveness by the Purchasing Department and all responsive proposals are then evaluated by a selection committee. This evaluation is based on established criteria that may include, but is not limited to, price. All responsive proposals are evaluated by OSBA for application of the SBE preference. OSBA has a representative on every selection committee. The Selection Committee makes the recommendation for award of the contract. The Director of Purchasing has the authority to award a contract if the value is less than \$200,000. If the value of the contract is \$200,000 or more, the Director of Purchasing will make a recommendation for award of the contract to the Board of County Commissioners.

A formal protest process, as set forth in the Purchasing Code, is available to proposers under the RFP solicitation process.

## **VII. Goods and Services Procurement Process Overview**

To procure goods and services, the County uses the same solicitation methods as those used to procure professional services.

### **A. Procurements Valued Under \$50,000**

Informal goods and services contracts valued under \$50,000 are procured through informal competitive processes including the RFQ process or the RFS process.

#### **1. Request for Quotes**

The RFQ process is utilized when definitive specifications can be used for a solicitation, and when the award can be based on the lowest price.<sup>290</sup> The award is made to the lowest responsive, responsible quote.<sup>291</sup> Quotes are evaluated for responsiveness by the Purchasing Department and for responsibility by the user department.

Awards must be made within the guidelines established by the County's SBE Program to comply with these guidelines, the Purchasing Department evaluates the quotes for responsiveness, then the user department evaluates all responsible quotes for responsibility. The Purchasing Department then evaluates all responsive, responsible quotes to determine if the vendor can receive SBE preference by verifying the SBE status of the vendor on the OSBA vendor list. A protest process is not available for procurements under the mandatory bid threshold, which was \$50,000 during the study period.

<sup>289</sup> Palm Beach County, FL, PPM PA-O-002(III)(A)(3) (April 23, 2012).

<sup>290</sup> Palm Beach County, FL, PPM PA-O-002(III)(C)(1) (March 26, 2013).

<sup>291</sup> Palm Beach County, FL, PPM CW-L-008(II)(D)(4) (April 23, 2012).



## 2. Request for Submittals

The RFS process is utilized when the scope of work or specifications may not be closely defined, but the evaluation is based on established criteria that may include, but is not limited to, price.<sup>292</sup> Generally, the RFS process is used when it is not practical or advantageous to process the solicitation as an IFB or an RFQ, and when there are several differing potential methods of achieving the desired result in the solicitation.<sup>293</sup> The RFS is required to identify the evaluation factors in the solicitation.<sup>294</sup>

Submittals are evaluated for responsiveness by the Purchasing Department. All responsive submittals are evaluated by the user department for responsibility. The Purchasing Department evaluates all responsive, responsible submittals for the SBE preference by verifying the vendor's SBE status on the OSBA vendor list. The protest process is not available for procurements under the mandatory bid threshold, which was \$50,000 during the study period.<sup>295</sup>

### B. Procurements Valued \$50,000 and Over

The procurement of goods and services contracts valued \$50,000 and over must be awarded by a formal competitive bid or proposal process.<sup>296</sup> To satisfy this requirement, the County may use the IFB process or the RFP process, depending upon the specifications of the solicitation.

### 1. Invitation for Bid

The IFB process is generally used for procurements valued \$50,000 and over.<sup>297</sup> The County advertises IFBs on the Purchasing Department's website, which is updated daily, and on Channel 20, the County's local government channel. A notice is also placed in the Palm Beach Post on the first Sunday of every month advising persons interested in doing business with Palm Beach County to check the Purchasing Department website.<sup>298</sup> Advertisement for solicitations are also placed in trade and professional journals and magazines at the request of the user department.

Contract awards are generally based on price, and are awarded to the lowest responsive, responsible bidder. Bids are evaluated for responsiveness by the Purchasing Department and for responsibility by the user department. OSBS evaluates the bids for designation of the SBE preference. The Director of Purchasing has the authority to award a contract if the value is less

<sup>292</sup> Palm Beach County, FL, PPM PA-O-002(III)(D) (March 26, 2013).

<sup>293</sup> *Id.* at § PA-O-002(III)(D)(1)(a) (note that price is not the only critical factor to be considered – this selection process is characteristically used for contracts that have several established and defined critical factors and evaluation criteria).

<sup>294</sup> *Id.* at § PA-O-002(III)(D)(3)(a).

<sup>295</sup> Palm Beach County, FL, PPM CW-L-008(II)(D)(6) (April 23, 2012).

<sup>296</sup> PALM BEACH COUNTY, FL., ORDINANCE 05-062 §§ 2-54(a) (2005).

<sup>297</sup> *Id.* at PPM CW-L-008(II)(D)(5).

<sup>298</sup> *Id.*



than \$200,000. If the value of the contract is \$200,000 or more, the Director of Purchasing will make a recommendation for award of the contract to the Board of County Commissioners.<sup>299</sup>

A formal protest process, as set forth in the Purchasing Code, is available to bidders under the IFB solicitation process.

## 2. Request for Proposal

The RFP solicitation process is used to purchase professional services contracts valued \$50,000 and over when the scope of work or specifications may not be closely defined.<sup>300</sup> The County advertises RFPs on the Purchasing Department's website, which is updated daily, and on Channel 20, the County's local government channel. A notice is also placed in the Palm Beach Post on the first Sunday of every month advising persons interested in doing business with Palm Beach County to check the Purchasing Department website.<sup>301</sup> Advertisement for solicitations are also placed in trade and professional journals and magazines at the request of the user department.

Proposals are evaluated for responsiveness by the Purchasing Department and all responsive proposals are then evaluated by a selection committee. This evaluation is based on previously established criteria that may include, but is not limited to, price. All responsive proposals are evaluated by OSBA for application of the SBE preference. OSBA has a representative on every selection committee. The Selection Committee makes a recommendation for award of the contract. The Director of Purchasing has the authority to award a contract if the value is less than \$200,000. If the value of the contract is \$200,000 or more, the Director of Purchasing will make a recommendation for award of the contract to the Board of County Commissioners. A formal protest process, as set forth in the Purchasing Code, is available to proposers under the RFP solicitation process.

## VIII. Contracts Exempt from Competition

### A. Sole Source Procurements

Construction, professional services, and goods and services may be purchased as a sole source if the user department provides supporting documentation to verify that the good or service requested is the only item that meets its essential needs, and that the good or service is only available through one source.<sup>302</sup>

The user department must perform a thorough analysis of the marketplace to show that a sole source procurement is the only viable alternative source selection process. The marketplace

<sup>299</sup> Palm Beach County, FL, PPM CW-L-008(II)(E)(1) (April 23, 2012) (the Purchasing Director has the authority to execute any contract on behalf of the County so long as it is valued under \$200,000).

<sup>300</sup> Palm Beach County, FL, PPM CW-L-008(II)(E)(1) (April 23, 2012) (the Purchasing Director has the authority to execute any contract on behalf of the County so long as it is valued under \$200,000).

<sup>301</sup> Palm Beach County, FL, PPM PA-O-002(III)(A)(3) (April 23, 2012).

<sup>302</sup> Palm Beach County, FL, PPM CW-L-008(II)(H) (2) (a) -(c) (April 23, 2012).



analysis must be performed using a three-step process.<sup>303</sup> First, there must be written documentation, signed by the director of the user department, justifying how the sole source for the requested good or service will meet the department's specific need. Second, written documentation must be supplied by the vendor or supplier stating that it is the only supply source for the requested good or service. Third, the user department must establish specific guidelines that delineate the process of determining: 1) that a sole source exists and that the process is justified and 2) if the County or sole source provider's terms and conditions will have a controlling effect.<sup>304</sup> Goods and services, including professional services and construction services, may be purchased as a sole source if the user department provides supporting documentation to verify that the good or service requested is the only item that meets its essential needs, and that the good or service is only available through one source.

### **B. Proprietary Purchases**

Construction, professional services, and goods and services may be purchased as a proprietary purchase if the user department provides supporting documentation to verify that the good or service requested is the only item that meets its essential needs, and that the good or service is available through more than one source.<sup>305</sup> The user department must provide written documentation, signed by the director of the user department, justifying how the requested good or service will meet the department's specific need. The Purchasing Department will then solicit the good or service in accordance with the Purchasing Code.

### **C. Piggyback Purchases**

Construction, professional services, and goods and services may be purchased under a contract awarded by another governmental entity if the entity utilized a competitive award process similar to that used by the County.<sup>306</sup>

The user department requesting a piggyback contract must obtain and review the terms and conditions of the originating entity's contract to ensure that it meets the required scope of work needed by the County. The user department cannot substantially change any term or condition of the contract. The Purchasing Department must review the solicitation, the originating contract, and the award process conducted by the originating entity to ensure that the procurement process was similar to that of the County. The Director of Purchasing has the authority to authorize awards under \$200,000.<sup>307</sup> The Board of County Commissioners authorizes awards valued \$200,000 and over.<sup>308</sup>

<sup>303</sup> Palm Beach County, FL, PPM CW-L-008(II)(H) (2) (a) -(c) (April 23, 2012).

<sup>304</sup> Palm Beach County, FL, PPM CW-F-064(1)(D)(4) (May 13, 2011).

<sup>305</sup> Palm Beach County, FL, PPM CW-L-008(II)(H)(3) (April 23, 2012).

<sup>306</sup> PALM BEACH COUNTY, FL., ORDINANCE 05-062 § 2-54(f)(5) (2005).

<sup>307</sup> Palm Beach County, FL, PPM CW-L-008(II)(H)(4)(a) (April 23, 2012).

<sup>308</sup> *Id.*



#### **D. Cooperative Purchase**

The County is permitted to participate in, sponsor, conduct, or administer a cooperative purchase with another governmental entity.<sup>309</sup> For the County to enter a cooperative purchase agreement, the governmental entities must: 1) require the same good or service; 2) agree on the terms and conditions set forth in the solicitation; and 3) set a common goal to achieve the best price based on economies of scale.<sup>310</sup> The Director of Purchasing has the authority to authorize awards under \$200,000.<sup>311</sup> The Board of County Commissioners authorizes awards valued \$200,000 and over.

#### **E. Direct Contracts or Purchases**

If no proposals, quotes, responses, or submittals are received in response to a solicitation, a direct purchase may be made.<sup>312</sup> The Director of Purchasing must document that there are no significant modifications to the specifications, qualifications, or terms and conditions that could encourage competition.<sup>313</sup> A direct purchase may be made from any vendor qualified and capable of meeting the original specifications for the construction, professionals services, and goods and services.<sup>314</sup> The Director of Purchasing (or the Director of a construction department in the case of construction services) has the authority to authorize awards under \$200,000.<sup>315</sup> The Board of County Commissioners authorizes awards valued \$200,000 and over.

#### **F. Small Purchases**

Small purchases, valued under \$1,000, are procured directly by County departments without formal advertisement. County departments are responsible for establishing informal competitive procedures for small purchases. However, any established departmental guidelines must include the consideration of SBEs that are willing and able to provide the goods or service.<sup>316</sup>

### **IX. Small Business Enterprise Program**

The Small Business Enterprise (SBE) Program was authorized by Ordinance No. 04-071 on October 1, 2002. The SBE Program was amended in 2008 to incorporate the Sheltered Market Program.

<sup>309</sup> Palm Beach County, FL, PPM CW-L-008(II)(H)(6) (April 23, 2012).

<sup>310</sup> *Id.*

<sup>311</sup> Palm Beach County, FL, PPM CW-L-008(II)(H)(4)(a) (April 23, 2012).

<sup>312</sup> Palm Beach County, FL., Ordinance 05-062 § 2-54 (2005); Palm Beach County, FL., Ordinance CW-L-008(II)(H)(7) (April 23, 2012).

<sup>313</sup> *Id.*

<sup>314</sup> Palm Beach County, FL., Ordinance 05-062 § 2-54(f)(7) (2005).

<sup>315</sup> Palm Beach County, FL, PPM CW-L-008(II)(H)(4)(a) (April 23, 2012).

<sup>316</sup> Palm Beach County, FL, PPM CW-L-008(II)(H)(1) (April 23, 2012).



## 1. Small Business Enterprise Program Policies and Procedures

The SBE Program established a SBE utilization goal to increase the number of contracts awarded to SBEs and the number of SBEs certified by the County. The annual SBE goal is 15%, which must be met by each department, unless otherwise approved by the County Administrator.<sup>317</sup> A goal adjustment can be granted upon the request of the user department.<sup>318</sup> The user department must notify the Office of Small Business Assistance (OSBA) prior to submitting the request for a goal adjustment.<sup>319</sup>

The SBE Program does not apply to exempt purchases or sole-source purchases. Contracting opportunities for SBEs on CCNA professional services contracts are regulated by Section 287.055 of the Florida Statutes, pursuant to County Code Section 2-80-29.<sup>320</sup>

The SBE Program is reviewed quarterly and an annual report is presented to the Board of County Commissioners.<sup>321</sup> The Director of OSBA may recommend appropriate programmatic modifications to the County Administrator based on the quarterly or annual reports if modifications will improve program performance and effectiveness.<sup>322</sup>

The coordination of the SBE Program and certification processes are the responsibility of the OSBA. OSBA maintains the responsibility to:

- Provide overall coordination of the SBE Program
- Certify eligible SBEs
- Facilitate the full participation of SBEs in the County procurement process
- Provide technical assistance to SBEs
- Monitor and track the performance of SBEs
- Prepare semi-annual reports and present annual reports to the Board of County Commissioners<sup>323</sup>

The OSBA is also responsible for increasing SBE utilization, increasing the number of SBEs that are certified, and maximizing the SBE Program's effectiveness by ensuring that process for ranking responsive bidders is implemented to meet the SBE goals.<sup>324</sup> Additionally, the OSBA administers a point system in the evaluation of proposals, oversees the certification, decertification,

<sup>317</sup> Palm Beach County, FL., Ordinance 02-064 §§ 2-80.23(A) (2002).

<sup>318</sup> Palm Beach County, FL., PPM CW-O-043(1.1) (January 1, 2011).

<sup>319</sup> Palm Beach County, FL., PPM CW-O-043(1.1) (January 1, 2011).

<sup>320</sup> Palm Beach County, FL., PPM CW-O-043(3.1) (January 1, 2011).

<sup>321</sup> Palm Beach County, FL., Ordinance 02-064 §§ 2-80.33 (2002).

<sup>322</sup> *Id.*

<sup>323</sup> Palm Beach County, FL., PPM CW-O-043(1.3)(a)-(e) (January 1, 2011).

<sup>324</sup> Palm Beach County, FL., PPM CW-O-043(1.4) (January 1, 2011).

**Commented [FML10]:** This SBE Program is comprehensive and fairly sophisticated. Moreover, it includes a number of robust features (e.g., sheltered market, universal application of SBE goals, technical assistance, compliance monitoring, certification) that will provide a very strong basis in evidence for concluding whether the administration of race- and gender-neutral remedies over the past 9 to 15 years, in and of themselves, have been adequate to fully remedy any ongoing disparities arising from marketplace discrimination in County contracts.

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and certification appeals process, and monitors the S/M/WBE utilization, compliance, and oversight process.<sup>325</sup>

**a. SBE Certification Standards**

To certify as an SBE, a business must perform a commercially useful function, have been in business for at least one year or have an owner with previous business experience, a business degree, or a certificate of small business competency issued by the Small Business Development Center, Palm Beach State College, or a completed course pre-approved by OSBA.

To support OSBA’s oversight function, the Purchasing Department is required to give OSBA a 90-day notice when a new contract will require review, comments, and recommendations, and when active contracts are renewed.<sup>326</sup> Prior notification allows OSBA to review the process and make any comments or recommendations.

**i. Annual Gross Revenue Limits**

An eligible small business is an independent for-profit business with gross receipts over three years within the standards defined in Section 2-80.21 of the Palm Beach County Ordinance.<sup>327</sup> The maximum average gross revenue for an SBE is \$9,000,000 for construction, \$5,000,000 for goods, \$5,000,000 for design services, and \$4,000,000 for professional services.

**ii. Ownership and Control**

Ownership and control shall be real, substantial, and continuing, and shall go beyond the pro forma ownership as reflected in the ownership document.<sup>328</sup> The SBE owners shall share in the risks and profits commensurate with their ownership interests as demonstrated by an examination of the substance, rather than the form, of the business’ arrangements.<sup>329</sup>

SBE owners shall possess the power to direct or cause the direction of the management and policies of the firm, and the authority to make day-to-day operations decisions as well as major decisions on matters of management, policy, and operation.<sup>330</sup> There shall be no restrictions on SBE owners’ authority through by-law provisions, partnership, arrangements or charter requirements for cumulative voting rights or any other arrangement that might prevent the SBE from controlling the firm.<sup>331</sup>

<sup>325</sup> *Id.*

<sup>326</sup> Palm Beach County, FL, PPM CW-O-043(2.1) (January 1, 2011).

<sup>327</sup> Palm Beach County, FL, PPM CW-O-043(7.10) (January 1, 2011).

<sup>328</sup> Palm Beach County, FL., Ordinance 02-064 §§ 2-80.31(B) (2002).

<sup>329</sup> *Id.*

<sup>330</sup> Palm Beach County, FL., Ordinance 02-064 §§ 2-80.31(B)(2) (2002).

<sup>331</sup> Palm Beach County, FL., Ordinance 02-064 §§ 2-80.31(B)(2) (2002).

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### iii. Location Requirements

An eligible business must have a permanent business establishment within the jurisdictional boundaries of Palm Beach County.<sup>332</sup> To document a permanent establishment within Palm Beach County, the following factors will be evaluated:

- A Palm Beach County Business Tax Receipt bearing the same address
- Documented business activities during the preceding 12 months at the Palm Beach County location and proof that sufficient full-time employees are maintained in the County to perform the contracted work
- Proof of occupation in the location with a lease agreement or property tax bill
- Public notice of occupancy with signage or listing in telephone directory and/or website or social media

### iv. Commercially Useful Function

The business must perform a value-added commercially useful function by maintaining storage and being responsible for the execution of distinct elements of work.<sup>333</sup> The business must have the personnel and experience necessary to perform, manage, and supervise the work.

## 2. Sheltered Market Program

The Sheltered Market Program was added to the SBE Program to assist the County in meeting its SBE goals.<sup>334</sup> Since the Sheltered Market Program allows certain contracts to be awarded only to certified SBEs, departments not meeting their SBE goals can award contracts directly to SBEs.<sup>335</sup>

### a. Sheltered Market Program Standards

Ordinance No. 04-071 was amended in 2008 to include a Sheltered Market Program to assist the County in meeting its SBE goals. The Sheltered Market Program allows contract to be set aside and awarded competitively to SBEs. The Sheltered Market Program can only be used by departments not regularly meeting their goals. OSBA notifies the SBE Opportunity Advisory Committee (SOC) of any County department or division that has not met the SBE utilization goal of 15% for an entire fiscal year.<sup>336</sup> Any non-complying department or division must submit a list of budgeted contracts to the SOC. The SOC will determine which projects will be sheltered in the subsequent fiscal year.<sup>337</sup>

<sup>332</sup> Palm Beach County, FL., Ordinance 02-064 §§ 2-80.21 (2002).

<sup>333</sup> *Id.*

<sup>334</sup> Palm Beach County, FL, PPM CW-O-043(9.4) (January 1, 2011).

<sup>335</sup> Palm Beach County, FL., Ordinance 02-064 §§ 2-80.21 (2002); Palm Beach County, FL., PPM CW-O-043(9.4) (January 1, 2011).

<sup>336</sup> Palm Beach County, FL, PPM CW-O-043(9.4) (January 1, 2011).

<sup>337</sup> *Id.*



**b. Sheltered Market Eligibility Standards**

**i. Construction Contracts Valued \$250,000 and Under**

Construction contracts valued \$250,000 and under may be eligible to be sheltered if it is feasible for SBEs to perform.<sup>338</sup> To ensure a competitive process, at least three qualified SBEs must be available and capable of performing the construction project scope of work that would be solicited under the Sheltered Market Program.

**ii. Professional Services Contracts Valued \$250,000 and Under**

The standards for sheltering professional services contracts valued \$250,000 and under are the same standards applied to construction contracts.

**iii. Goods and Services Contracts Valued Between \$50,000 and \$250,000**

The standards for sheltering goods and services contracts valued between \$50,000 and \$250,000 are the same standards applied to construction contracts.

**X. Preference Programs**

The County has two preference programs intended to increase business participation for County contracts: the Local Preference Program and the Glades Local Preference Program. Both preference programs are applicable to the procurement of construction, professional services, and goods and services contracts.<sup>339</sup>

**A. Local Preference Program**

The Local Preference Program is applied to procurements of construction services, professional services, goods, and services contracts valued \$50,000 and over.<sup>340</sup> A local business must have a permanent establishment in Palm Beach County and hold a valid business tax receipt issued by the County authorizing the business to provide the goods or services being solicited.<sup>341</sup>

The business tax receipt must be dated prior to the advertisement of the solicitation to which a local preference is applied.<sup>342</sup> In the IFB process, the local preference is worth 5% of the total

<sup>338</sup> Palm Beach County, FL, PPM CW-O-043(9.4) (January 1, 2011).

<sup>339</sup> Palm Beach County Ordinance 02-065 §§ 2-80.44; §§2-80.44.1.

<sup>340</sup> Palm Beach County, FL, PPM CW-L-008(IV)(B)(2) (April 23, 2012).

<sup>341</sup> Palm Beach County Ordinance 02-065 §§ 2-80.42(c).

<sup>342</sup> *Id.*



points awarded. In the RFP process, the local preference is awarded up to 5 points in the evaluation process.

Local preference is never applied when the responsive, responsible bidder with the lowest price is an SBE, or when the responsive, responsible proposer with the highest points is an SBE. The SBE preference supersedes the local preference.

**B. Glades Local Preference Program**

A Glades local preference is given to Glades businesses, when participating in the solicitation as a prime or a subcontractor. The Glades Program applies to solicitations for construction services, professional services, goods and services valued \$50,000 and over that are specifically utilized for County projects located in the Glades.<sup>343</sup> A Glades business must have a permanent location in the Glades and hold a valid business tax receipt issued by the County that authorizes the business to provide the goods or services to be purchased.<sup>344</sup>

The business tax receipt must be dated before the solicitation is advertised. In the IFB evaluation process, the Glades Local Preference is worth 5%. In the RFP evaluation process, the Glades Local Preference is worth 5 points. Glades Local Preference is never applied when the responsive, responsible bidder with the lowest price is an SBE, or when the responsive, responsible proposer with the highest points is an SBE.

**Commented [FML11]:** Is this local preference also applied in the form of a 5% bid price preference in lowest responsible bidder competition?



<sup>343</sup> Palm Beach County, FL, PPM CW-L-008(IV)(B)(1) (April 23, 2012).

<sup>344</sup> Palm Beach County Ordinance 02-065 §§ 2-80.42(a).

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# CHAPTER 3: Prime Contractor Utilization Analysis

## I. Introduction

This chapter documents Palm Beach County’s (County) utilization of Minority and Woman-owned Business Enterprise (M/WBE)<sup>345</sup> and non-minority male-owned Business Enterprise (non-M/WBE) prime contractors by ethnicity, gender, and industry during the January 1, 2009, to December 31, 2013, study period. The prime contracts awarded by the County during the study period are classified into three industries for the analysis — construction, professional services, and goods and services. The utilization analysis of professional services contracts includes design services contracts that require prime contractors to be certified by the County, in compliance with the Consultants Competitive Negotiation Act (CCNA).

The prime contracts awarded in each industry are analyzed at three size thresholds: (1) all contracts, (2) informal contracts valued under \$50,000, as defined by the County’s *Policy and Procedure Manual*,<sup>346</sup> and (3) formal contracts \$50,000 and over with the upper limits determined by a statistical calculation. While formal contracts, as defined by the *Policy and Procedure Manual*, are all contracts valued \$50,000 and over, an upper limit was set for each industry to exclude outliers. The methodology for defining the upper limits of the formal size threshold for each industry is detailed in *Section III: Thresholds for Analysis*.

The prime contractor utilization analysis, calculated by industry, is also described by ethnicity and gender. The seven ethnic groups are listed in Table 3.1.

**Table 3.1: Business Ethnic and Gender Groups**

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

<sup>345</sup> The three industries are derived from five industries defined in the PPM and Purchasing Code, as detailed in *Chapter 2: Procurement and Contracting Analysis*.

<sup>346</sup> Palm Beach County, FL, PPM CW-F-064 (May 13, 2011).

**Commented [FML12]:** While the four-year study period from January 1, 2009 through December 31, 2013 is a good length of time to examine the marketplace as it avoids over-emphasis of anomalous purchases or purchasing patterns, it would be more helpful if the study period included more recent years (e.g., 2015 and/or 2016) as data that is ten years old may be viewed as somewhat stale for policy deliberation purposes.

**Commented [FML13]:** Given the court’s criticism in *Hershell Gill* regarding Miami-Dade County’s aggregation of architectural & engineering contracts into a broader industry category that includes other professional services contracts in its statistical analysis, MTA’s similar aggregation of industry categories here might subject the resultant factual predicate to legal challenge to the extent it is used to support race- and gender-conscious remedies that are applied to A&E and other professional services contracts. (This is because potentially the overutilization or underutilization M/WBEs in one professional service could theoretically mask or distort disparities related to other segments of the broader category of professional services.) However, it is important to note that this legal risk is likely to diminish once the legal challenge progresses on appeal beyond the trial court in the Southern District of Florida. Traditionally, appellate courts have not been as demanding as the federal district court was in *Hershell Gill* in compelling separate disparity analysis for each discrete segment within broad industry categories. (For example, there is no language in the Supreme Court’s ruling in *Croson* that suggests the appropriate disparity analysis should have been limited to the specialty trade of plumbing in that case since the contract at issue was for the installation of toilets. Instead, the Court spoke in terms of the need for a strong basis in evidence of ongoing effects of discrimination affecting the considerably broader industry category of construction.)

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Ethnicity and Gender Category	Definition
Minority-owned Businesses	Businesses owned by male and female African Americans, Asian Americans, Hispanic Americans, and Native Americans
Caucasian Females	Businesses owned by Caucasian females
Non-minority Males	Businesses owned by Caucasian males and businesses that could not be identified as minority or female-owned <sup>347</sup>

## II. Prime Contract Data Sources

The prime contract utilization data were provided to Mason Tillman by the County’s Finance Department. The Finance Department extracted payment records by Advantage number from the County’s Advantage Financial System. The Finance Department extracted the data by County department. Mason Tillman then classified each payment record by industry as either construction, professional services, or goods and services. The dataset was scrubbed to identify duplicates and contracts awarded outside the study period. In addition, when the data were scrubbed, agreements with non-profits, government agencies, and utilities were identified for exclusion from the dataset.

The datasets comprised of payment records with industry classifications and the exclusions were submitted to the respective departments for review and approval. The approval of the prime contract industry classification extended over several months because the Facilities Development & Operations Department (FDO) could not readily reconcile its prime contract award records to the Advantage numbers and payment records were extracted from the County’s Advantage Financial System. Once each department approved the classifications, the prime contract utilization analysis was undertaken using the Advantage payment data.

The departments’ payment data were combined into a single dataset for analysis. Each unique agreement was referred to as a contract. A number of data sources were used to identify the contract, including the master agreement document identification number, the purchase order number, the advantage order document identification number, and the resolution number. For each closed contract, the total payment amount was analyzed. For open contracts and contracts without payment amount, the award amount was analyzed.

A number of steps were taken to determine the ethnicity and gender of each prime contractor. The initial step determined if the contractor was certified by the County or another certifying agency. When available, the ethnicity and gender of the certified firms were derived from the certification record. The sources used to determine the ethnicity and gender of non-certified contractors included chambers of commerce directories, and trade organization membership lists. For the businesses not identified in one of these public sources, internet research was conducted to

<sup>347</sup> See Section II: Prime Contract Data Sources for the methodology employed to identify the ethnicity and gender of the County’s utilized prime contractors.

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examine the company's website, social media, digital media, and business listings to determine the business owner's ethnicity and gender. As needed, the contractor was surveyed to solicit ethnicity and gender information directly.

**Commented [FML14]:** Good solid disparity study methodology; payment data is preferred measure of utilization.

### III. Thresholds for Analysis

#### A. Informal Thresholds for Procurements Valued Under \$50,000

The informal threshold for analysis consists of the County's small contracts valued under \$50,000.<sup>348</sup> The threshold for each industry is listed in Table 3.2.

**Table 3.2: Informal Contracts Threshold by Industry**

Industry	Informal Contracts Threshold
Construction	Under \$50,000
Professional Services	Under \$50,000
Goods and Services	Under \$50,000

#### B. Formal Thresholds for Procurements Valued \$50,000 and Over

The formal threshold for analysis includes contracts \$50,000 and over. To ensure the reliability of the Study's disparity findings, a distribution analysis of the County's formal contracts was undertaken. This analysis revealed a skewness in the data, which was caused by extreme outliers. Outliers distort the true nature of the central tendency of the dataset. In other words, the very large prime contracts distort the distribution of the dataset, therefore including these outliers in the utilization analysis would obscure the results of the disparity analysis. To address this issue, the Gaussian distribution theorem was applied to normalize the skewed data.

In the statistical model of a Gaussian distribution,<sup>349</sup> the percent of contract values would be equally distributed above and below the arithmetic mean, which is calculated by adding the dollar value of all contracts and dividing the total by the number of contracts in the dataset. However, in this dataset, the distribution of the formal contracts revealed that the dollar values were heavily skewed to the right, indicating a significant number of outliers.

The numeric value that defines the outliers was calculated using percentiles. It was determined that any prime contract with a dollar value above the 80<sup>th</sup> percentile was an outlier and therefore excluded from the utilization and disparity analysis. Limiting the formal prime contracts analyzed to those valued at and below the 80<sup>th</sup> percentile also removes formal prime contracts that require

<sup>348</sup> Palm Beach County, FL, PPM CW-F-064 § Definitions (4) (May 13, 2011). Palm Beach County, FL, PPM PA-O-002(III)(C)(1) (March 26, 2013).

<sup>349</sup> Also known as the bell-shaped or normal distribution.

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extensive capacity to perform. Consequently, considerably less capacity is needed to perform the prime contracts beneath the 80<sup>th</sup> percentile. The formal threshold for each of the three industries is listed in Table 3.3.

**Table 3.3: Formal Contracts Thresholds by Industry**

Industry	Formal Contracts Threshold
Construction	\$50,000 to \$1,296,000
Professional Services	\$50,000 to \$301,000
Goods and Services	\$50,000 to \$321,000

**IV. Prime Contractor Utilization**

**A. All Prime Contractors**

As depicted in Table 3.4, the County issued 13,499 prime contracts during the study period. The first threshold includes all prime contracts. Since this threshold includes the outliers, they are presented for illustrative purposes only. Thus, the disparity analysis was not conducted on all prime contracts because they include the outliers identified through the Gaussian distribution theorem analysis.

The 13,499 total number of prime contracts included 2,024 for construction, 1,493 for professional services, and 9,982 for goods and services. The payments made by the County during the study period totaled \$1,299,051,727 for all 13,499 prime contracts. Payments included \$622,158,149 for construction, \$173,535,625 for professional services, and \$503,357,953 for goods and services.

**Table 3.4: Total Prime Contracts and Dollars Expended:  
All Industries, January 1, 2009, to December 31, 2013**

Industry	Total Number of Contracts	Total Dollars Expended
Construction	2,024	\$622,158,149
Professional Services	1,493	\$173,535,625
Goods and Services	9,982	\$503,357,953
<b>Total Expenditures</b>	<b>13,499</b>	<b>\$1,299,051,727</b>



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## 1. Highly Used Construction Prime Contractors

The County awarded a total of 2,024 construction contracts during the study period. As depicted in Table 3.5, the County's 2,024 construction prime contracts were received by 289 unique vendors.

**Table 3.5: Construction Prime Contracts**

Total Prime Contracts	2,024
Total Utilized Vendors	289
<b>Total Expenditures</b>	<b>\$622,158,149</b>

Table 3.6 presents the distribution of the County's construction prime contracts by the number of vendors. Twenty-eight of the 289 vendors received \$436,845,094, or 70% of the total construction prime contract dollars. The findings illustrate that a small group of prime contractors received the majority of construction prime contract dollars spent by the County.

**Table 3.6: Construction Prime Contracts Distributed by Number of Vendors**

Vendors	Total Dollars	Percent of Dollars <sup>350</sup>	Number of Contracts	Percent of Contracts <sup>351</sup>
28 Highly Used Vendors	\$436,845,094	70%	323	16%
261 Vendors	\$185,313,055	30%	1,701	84%
<b>289 Total Vendors</b>	<b>\$622,158,149</b>	<b>100%</b>	<b>2,024</b>	<b>100%</b>

Table 3.7 presents the ethnicity and gender of the most highly used construction prime contractors who received approximately 50% of the construction prime contract dollars. Eleven of the 28 most highly used prime contractors were Caucasian females and non-minority males. The contracts received by these 11 businesses ranged from \$4,600 to \$29,312,351.

**Table 3.7: Top 11 Highly Used Construction Prime Contractors**

Ethnicity/ Gender <sup>352</sup>	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Caucasian Females	\$15,490,475	2.49%	5	0.25%
Non-minority Males	\$291,943,249	46.92%	83	4.10%

**Commented [FML15]:** Market concentration analysis is a useful tool for examining the general level of healthy competition in a market. It would also be useful to see the ranking of these top 28 vendors by ethnicity and gender according to market share.

<sup>350</sup> Percentages are rounded to the nearest whole number.

<sup>351</sup> Percentages are rounded to the nearest whole number.

<sup>352</sup> African Americans, Asian Americans, Hispanic Americans, and Native Americans were omitted from the table because they were not highly used.

**Deleted: December 2017**



## 2. Highly Used Professional Services Prime Contractors

The County awarded a total of 1,493 professional services contracts during the study period. As depicted in Table 3.8, the County's 1,493 professional services prime contracts were received by 360 unique vendors.

**Table 3.8: Professional Services Prime Contracts**

Total Prime Contracts	1,493
Total Utilized Vendors	360
<b>Total Expenditures</b>	<b>\$173,535,625</b>

Table 3.9 presents the distribution of the County's professional services prime contracts by the number of vendors. Twenty of the 360 vendors received \$121,567,820, or 70% of the total professional services prime contract dollars. The findings illustrate that a small group of prime contractors received the majority of professional services prime contract dollars spent by the County.

**Table 3.9: Professional Services Prime Contracts Distributed by Number of Vendors**

Vendors	Total Dollars	Percent of Dollars <sup>353</sup>	Number of Contracts	Percent of Contracts <sup>354</sup>
20 Highly Used Vendors	\$121,567,820	70%	264	18%
340 Vendors	\$51,967,804	30%	1,229	82%
<b>360 Total Vendors</b>	<b>\$173,535,625</b>	<b>100%</b>	<b>1,493</b>	<b>100%</b>

Table 3.10 presents the ethnicity and gender of the most highly used professional services prime contractors who received approximately 50% of the professional services prime contract dollars. Seven of the 20 most highly used prime contractors were Hispanic Americans, Caucasian females, and non-minority males. The contracts received by these seven businesses ranged from \$491 to \$41,983,731.

**Table 3.10: Top Seven Highly Used Professional Services Prime Contractors**

Ethnicity/ Gender <sup>355</sup>	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Hispanic Americans	\$9,553,814	5.51%	1	0.07%
Caucasian Females	\$5,564,202	3.21%	2	0.13%
Non-minority Males	\$72,155,634	41.58%	104	6.97%

<sup>353</sup> Percentages are rounded to the nearest whole number.

<sup>354</sup> Percentages are rounded to the nearest whole number.

<sup>355</sup> African Americans, Asian Americans, and Native Americans were omitted from the table because they were not highly used.



### 3. Highly Used CCNA Certified Professional Services Prime Contractors

The County awarded a total of 777 contracts to CCNA certified professional services contractors during the study period. The CCNA certified professional services contracts, which are included in the professional services prime contract analysis, are depicted here for illustrative purposes because the mandated CCNA certification process qualifies the businesses that can perform these contracts, and thereby defines the pool of contractors that can be awarded the County’s design contracts. As depicted in Table 3.11, the County CCNA certified list contained 419 vendors. The 777 prime contracts awarded to CCNA certified professional services prime contracts were received by 76 unique vendors.

**Table 3.11: Prime Contracts Awarded to CCNA Certified Professional Services Prime Contractors**

Total Prime Contracts	777
Total Utilized Vendors	76
<b>Total Expenditures</b>	<b>\$82,101,528</b>

Table 3.12 presents the distribution of the County’s professional services prime contracts awarded to CCNA certified contractors. Fifteen of the 76 vendors received \$57,661,146, or 70% of the total professional services prime contract dollars awarded to CCNA certified contractors. The findings illustrate that a small group of prime contractors received the majority of CCNA certified professional services prime contract dollars spent by the County.

**Table 3.12: Professional Services Prime Contracts Awarded to CCNA Certified Contractors Distributed by Number of Vendors**

Vendors	Total Dollars	Percent of Dollars <sup>356</sup>	Number of Contracts	Percent of Contracts <sup>357</sup>
15 Highly Used Vendors	\$57,661,146	70%	244	31%
61 Vendors	\$24,440,382	30%	533	69%
<b>76 Total Vendors</b>	<b>\$82,101,528</b>	<b>100%</b>	<b>777</b>	<b>100%</b>

Table 3.13 presents the ethnicity and gender of the most highly used CCNA certified professional services prime contractors who received approximately 50% of the professional services prime contract dollars awarded to CCNA certified contractors. Seven of the 15 most highly used prime contractors were Hispanic Americans, Caucasian females, and non-minority males. The contracts received by these seven businesses ranged from \$491 to \$11,627,270.



<sup>356</sup> Percentages are rounded to the nearest whole number.

<sup>357</sup> Percentages are rounded to the nearest whole number.

**Table 3.13: Top Seven Highly Used CCNA certified Professional Services Prime Contractors**

<b>Ethnicity/ Gender<sup>358</sup></b>	<b>Total Dollars</b>	<b>Percent of Dollars</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>
Hispanic Americans	\$16,299,229	19.85%	6	0.77%
Caucasian Females	\$5,564,202	6.78%	2	0.26%
Non-minority Males	\$19,990,023	24.35%	101	13.00%

**4. Highly Used Goods and Services Prime Contractors**

The County awarded a total of 9,982 goods and services contracts during the study period. As depicted in Table 3.14, the County’s 9,982 goods and services prime contracts were received by 1,967 unique vendors.

**Table 3.14: Goods and Services Prime Contracts**

Total Prime Contracts	9,982
Total Utilized Vendors	1,967
<b>Total Expenditures</b>	<b>\$503,357,953</b>

Table 3.15 presents the distribution of the County’s goods and services prime contracts by the number of vendors. Ninety-one of the 1,967 vendors received \$352,465,623, or 70% of the total goods and services prime contract dollars. The findings illustrate that a small group of prime contractors received the majority of goods and services prime contract dollars spent by the County.

**Table 3.15: Goods and Services Prime Contracts Distributed by Number of Vendors**

<b>Vendors</b>	<b>Total Dollars</b>	<b>Percent of Dollars<sup>359</sup></b>	<b>Number of Contracts</b>	<b>Percent of Contracts<sup>360</sup></b>
91 Highly Used Vendors	\$352,465,623	70%	2,141	21%
1,876 Vendors	\$150,892,330	30%	7,841	79%
<b>1,967 Total Vendors</b>	<b>\$503,357,953</b>	<b>100%</b>	<b>9,982</b>	<b>100%</b>

Table 3.16 presents the ethnicity and gender of the most highly used goods and services prime contractors who received approximately 50% of the goods and services prime contract dollars. Thirty-five of the 91 most highly used prime contractors were African Americans, Asian Americans, Caucasian females, and non-minority males. The contracts received by these 35 businesses ranged from \$103 to \$11,952,530.

<sup>358</sup> African Americans, Asian Americans, and Native Americans were omitted from the table because they were not highly used.

<sup>359</sup> Percentages are rounded to the nearest whole number.

<sup>360</sup> Percentages are rounded to the nearest whole number.



**Table 3.16: Top 35 Highly Used Goods and Services Prime Contractors**

<b>Ethnicity/ Gender<sup>361</sup></b>	<b>Total Dollars</b>	<b>Percent of Dollars</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>
African Americans	\$11,485,964	2.28%	3	0.03%
Asian Americans	\$5,155,447	1.02%	3	0.03%
Caucasian Females	\$8,395,864	1.67%	14	0.14%
Non-minority Males	\$227,409,238	45.18%	775	7.76%

**B. All Prime Contracts by Industry**

**1. Construction Prime Contract Utilization: All Contracts**

Table 3.17 summarizes all prime contract dollars expended by the County on construction prime contracts. Minority-owned businesses (MBE) received 3.02% of the construction prime contract dollars; Caucasian female-owned businesses (WBE) received 10.10%; and non-minority male-owned businesses (non-MWBE) received 86.88%.

*African Americans* received 217 or 10.72% of all construction prime contracts awarded during the study period, representing \$5,977,357 or 0.96% of the construction prime contract dollars.

*Asian Americans* received 36 or 1.78% of all construction prime contracts awarded during the study period, representing \$831,744 or 0.13% of the construction prime contract dollars.

*Hispanic Americans* received 64 or 3.16% of all construction prime contracts awarded during the study period, representing \$12,006,024 or 1.93% of the construction prime contract dollars.

*Native Americans* received 1 or 0.05% of all construction prime contracts awarded during the study period, representing \$2,446 or less than 0.01% of the construction prime contract dollars.

*Caucasian Females* received 322 or 15.91% of all construction prime contracts awarded during the study period, representing \$62,810,773 or 10.10% of the construction prime contract dollars.

*Non-minority Males* received 1,384 or 68.38% of all construction prime contracts awarded during the study period, representing \$540,529,805 or 86.88% of the construction prime contract dollars.



<sup>361</sup> Hispanic Americans and Native Americans were omitted from the table because they were not highly used.

**Table 3.17: Construction Prime Contract Utilization:  
All Contracts, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	217	10.72%	\$5,977,357	0.96%
Asian Americans	36	1.78%	\$831,744	0.13%
Hispanic Americans	64	3.16%	\$12,006,024	1.93%
Native Americans	1	0.05%	\$2,446	0.00%
Caucasian Females	322	15.91%	\$62,810,773	10.10%
Non-minority Males	1,384	68.38%	\$540,529,805	86.88%
<b>TOTAL</b>	<b>2,024</b>	<b>100.00%</b>	<b>\$622,158,149</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	1	0.05%	\$248,650	0.04%
African American Males	216	10.67%	\$5,728,707	0.92%
Asian American Females	3	0.15%	\$381,117	0.06%
Asian American Males	33	1.63%	\$450,627	0.07%
Hispanic American Females	27	1.33%	\$1,719,256	0.28%
Hispanic American Males	37	1.83%	\$10,286,768	1.65%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	1	0.05%	\$2,446	0.00%
Caucasian Females	322	15.91%	\$62,810,773	10.10%
Non-minority Males	1,384	68.38%	\$540,529,805	86.88%
<b>TOTAL</b>	<b>2,024</b>	<b>100.00%</b>	<b>\$622,158,149</b>	<b>100.00%</b>



## 2. Professional Services Prime Contract Utilization: All Contracts

Table 3.18 summarizes all contract dollars expended by the County on professional services prime contracts. MBEs received 19.35% of the professional services prime contract dollars; WBEs received 5.86%; and non-MWBEs received 74.79%.

*African Americans* received 31 or 2.08% of all professional services prime contracts awarded during the study period, representing \$793,855 or 0.46% of the professional services prime contract dollars.

*Asian Americans* received 63 or 4.22% of all professional services prime contracts awarded during the study period, representing \$5,033,312 or 2.90% of the professional services prime contract dollars.

*Hispanic Americans* received 171 or 11.45% of all professional services prime contracts awarded during the study period, representing \$27,745,293 or 15.99% of the professional services prime contract dollars.

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

*Caucasian Females* received 146 or 9.78% of all professional services prime contracts awarded during the study period, representing \$10,168,535 or 5.86% of the professional services prime contract dollars.

*Non-minority Males* received 1,082 or 72.47% of all professional services prime contracts awarded during the study period, representing \$129,794,631 or 74.79% of the professional services prime contract dollars.



**Table 3.18: Professional Services Prime Contract Utilization:  
All Contracts, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	31	2.08%	\$793,855	0.46%
Asian Americans	63	4.22%	\$5,033,312	2.90%
Hispanic Americans	171	11.45%	\$27,745,293	15.99%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	146	9.78%	\$10,168,535	5.86%
Non-minority Males	1,082	72.47%	\$129,794,631	74.79%
<b>TOTAL</b>	<b>1,493</b>	<b>100.00%</b>	<b>\$173,535,625</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	4	0.27%	\$82,462	0.05%
African American Males	27	1.81%	\$711,392	0.41%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	63	4.22%	\$5,033,312	2.90%
Hispanic American Females	78	5.22%	\$3,590,736	2.07%
Hispanic American Males	93	6.23%	\$24,154,557	13.92%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	146	9.78%	\$10,168,535	5.86%
Non-minority Males	1,082	72.47%	\$129,794,631	74.79%
<b>TOTAL</b>	<b>1,493</b>	<b>100.00%</b>	<b>\$173,535,625</b>	<b>100.00%</b>



### 3. Professional Services Prime Contract Utilization: CCNA Certified Contracts

Table 3.19 summarizes all contract dollars expended by the County on the professional services prime contracts awarded to CCNA certified professional service contractors. As previously indicated, CCNA certified professional services contracts are also included in the analysis of professional services contracts. The CCNA certified professional services contracts are segmented here for illustrative purposes because there is a CCNA mandated certification process, which limits the businesses that can perform these contracts. MBEs received 37.78% of the professional services prime contract dollars awarded to CCNA certified professional service prime contractors; WBEs received 10.63%; and non-MWBEs received 51.59%.

*African Americans* received 16 or 2.06% of all professional services prime contracts awarded to CCNA certified professional service contractors during the study period, representing \$595,556 or 0.73% of the CCNA certified professional services prime contract dollars.

*Asian Americans* received 63 or 8.11% of all professional services prime contracts awarded to CCNA certified professional service contractors during the study period, representing \$5,033,312 or 6.13% of the CCNA certified professional services prime contract dollars.

*Hispanic Americans* received 135 or 17.37% of all professional services prime contracts awarded to CCNA certified professional service contractors during the study period, representing \$25,392,545 or 30.93% of the CCNA certified professional services prime contract dollars.

*Native Americans* received 0 or 0.00% of all professional services prime contracts awarded to CCNA certified professional service contractors during the study period, representing \$0 or 0.00% of the CCNA certified professional services prime contract dollars.

*Caucasian Females* received 75 or 9.65% of all professional services prime contracts awarded to CCNA certified professional service contractors during the study period, representing \$8,726,704 or 10.63% of the CCNA certified professional services prime contract dollars.

*Non-minority Males* received 488 or 62.81% of all professional services prime contracts awarded to CCNA certified professional service contractors during the study period, representing \$42,353,412 or 51.59% of the CCNA certified professional services prime contract dollars.





**Table 3.19: Professional Services Prime Contract Utilization: All Contracts Awarded to CCNA Certified Contractors, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	16	2.06%	\$595,556	0.73%
Asian Americans	63	8.11%	\$5,033,312	6.13%
Hispanic Americans	135	17.37%	\$25,392,545	30.93%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	75	9.65%	\$8,726,704	10.63%
Non-minority Males	488	62.81%	\$42,353,412	51.59%
<b>TOTAL</b>	<b>777</b>	<b>100.00%</b>	<b>\$82,101,528</b>	<b>100.00%</b>

<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	0	0.00%	\$0	0.00%
African American Males	16	2.06%	\$595,556	0.73%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	63	8.11%	\$5,033,312	6.13%
Hispanic American Females	76	9.78%	\$3,561,266	4.34%
Hispanic American Males	59	7.59%	\$21,831,279	26.59%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	75	9.65%	\$8,726,704	10.63%
Non-minority Males	488	62.81%	\$42,353,412	51.59%
<b>TOTAL</b>	<b>777</b>	<b>100.00%</b>	<b>\$82,101,528</b>	<b>100.00%</b>

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#### 4. Goods and Services Prime Contract Utilization: All Contracts

Table 3.20 summarizes all contract dollars expended by the County on goods and services prime contracts. MBEs received 9.23% of the goods and services prime contract dollars; WBEs received 7.16%; and non-MWBEs received 83.61%.

*African Americans* received 182 or 1.82% of all goods and services prime contracts awarded during the study period, representing \$21,155,731 or 4.20% of the goods and services prime contract dollars.

*Asian Americans* received 359 or 3.60% of all goods and services prime contracts awarded during the study period, representing \$7,658,007 or 1.52% of the goods and services prime contract dollars.

*Hispanic Americans* received 582 or 5.83% of all goods and services prime contracts awarded during the study period, representing \$17,531,629 or 3.48% of the goods and services prime contract dollars.

*Native Americans* received 5 or 0.05% of all goods and services prime contracts awarded during the study period, representing \$82,038 or 0.02% of the goods and services prime contract dollars.

*Caucasian Females* received 1,036 or 10.38% of all goods and services prime contracts awarded during the study period, representing \$36,065,387 or 7.16% of the goods and services prime contract dollars.

*Non-minority Males* received 7,818 or 78.32% of all goods and services prime contracts awarded during the study period, representing \$420,865,160 or 83.61% of the goods and services prime contract dollars.



**Table 3.20: Goods and Services Prime Contract Utilization:  
All Contracts, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	182	1.82%	\$21,155,731	4.20%
Asian Americans	359	3.60%	\$7,658,007	1.52%
Hispanic Americans	582	5.83%	\$17,531,629	3.48%
Native Americans	5	0.05%	\$82,038	0.02%
Caucasian Females	1,036	10.38%	\$36,065,387	7.16%
Non-minority Males	7,818	78.32%	\$420,865,160	83.61%
<b>TOTAL</b>	<b>9,982</b>	<b>100.00%</b>	<b>\$503,357,953</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	11	0.11%	\$11,733,318	2.33%
African American Males	171	1.71%	\$9,422,414	1.87%
Asian American Females	49	0.49%	\$730,642	0.15%
Asian American Males	310	3.11%	\$6,927,365	1.38%
Hispanic American Females	189	1.89%	\$6,173,982	1.23%
Hispanic American Males	393	3.94%	\$11,357,647	2.26%
Native American Females	2	0.02%	\$757	0.00%
Native American Males	3	0.03%	\$81,281	0.02%
Caucasian Females	1,036	10.38%	\$36,065,387	7.16%
Non-minority Males	7,818	78.32%	\$420,865,160	83.61%
<b>TOTAL</b>	<b>9,982</b>	<b>100.00%</b>	<b>\$503,357,953</b>	<b>100.00%</b>



**C. Informal Prime Contracts by Industry**

**1. Construction Prime Contract Utilization: Informal Contracts Valued Under \$50,000**

Table 3.21 summarizes contract dollars expended by the County on informal construction prime contracts valued under \$50,000. MBEs received 18.82% of the construction prime contract dollars; WBEs received 19.14%; and non-MWBEs received 62.04%.

*African Americans* received 189 or 12.97% of the informal construction prime contracts valued under \$50,000 awarded during the study period, representing \$2,237,565 or 13.74% of the construction prime contract dollars.

*Asian Americans* received 32 or 2.20% of the informal construction prime contracts valued under \$50,000 awarded during the study period, representing \$241,696 or 1.48% of the construction prime contract dollars.

*Hispanic Americans* received 43 or 2.95% of the informal construction prime contracts valued under \$50,000 awarded during the study period, representing \$583,154 or 3.58% of the construction prime contract dollars.

*Native Americans* received 1 or 0.07% of the informal construction prime contracts valued under \$50,000 awarded during the study period, representing \$2,446 or 0.02% of the construction prime contract dollars.

*Caucasian Females* received 232 or 15.92% of the informal construction prime contracts valued under \$50,000 awarded during the study period, representing \$3,116,099 or 19.14% of the construction prime contract dollars.

*Non-minority Males* received 960 or 65.89% of the informal construction prime contracts valued under \$50,000 awarded during the study period, representing \$10,102,381 or 62.04% of the construction prime contract dollars.



**Table 3.21: Construction Prime Contract Utilization: Informal Contracts  
Valued Under \$50,000, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	189	12.97%	\$2,237,565	13.74%
Asian Americans	32	2.20%	\$241,696	1.48%
Hispanic Americans	43	2.95%	\$583,154	3.58%
Native Americans	1	0.07%	\$2,446	0.02%
Caucasian Females	232	15.92%	\$3,116,099	19.14%
Non-minority Males	960	65.89%	\$10,102,381	62.04%
<b>TOTAL</b>	<b>1,457</b>	<b>100.00%</b>	<b>\$16,283,340</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	0	0.00%	\$0	0.00%
African American Males	189	12.97%	\$2,237,565	13.74%
Asian American Females	1	0.07%	\$619	0.00%
Asian American Males	31	2.13%	\$241,077	1.48%
Hispanic American Females	21	1.44%	\$156,031	0.96%
Hispanic American Males	22	1.51%	\$427,123	2.62%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	1	0.07%	\$2,446	0.02%
Caucasian Females	232	15.92%	\$3,116,099	19.14%
Non-minority Males	960	65.89%	\$10,102,381	62.04%
<b>TOTAL</b>	<b>1,457</b>	<b>100.00%</b>	<b>\$16,283,340</b>	<b>100.00%</b>



## 2. Professional Services Prime Contract Utilization: Informal Contracts Valued Under \$50,000

Table 3.22 summarizes contract dollars expended by the County on informal professional services prime contracts valued under \$50,000. MBEs including CCNA certified professional service prime contractors received 17.38% of the professional services prime contract dollars. WBEs received 10.84%; and non-MWBEs received 71.78%.

*African Americans* received 27 or 2.29% of the informal professional services prime contracts valued under \$50,000 awarded during the study period, representing \$259,873 or 2.01% of the professional services prime contract dollars.

*Asian Americans* received 46 or 3.90% of the informal professional services prime contracts valued under \$50,000 awarded during the study period, representing \$436,896 or 3.38% of the professional services prime contract dollars.

*Hispanic Americans* received 127 or 10.78% of the informal professional services prime contracts valued under \$50,000 awarded during the study period, representing \$1,551,144 or 11.99% of the professional services prime contract dollars.

*Native Americans* received 0 or 0.00% of the informal professional services prime contracts valued under \$50,000 awarded during the study period, representing \$0 or 0.00% of the professional services prime contract dollars.

*Caucasian Females* received 118 or 10.02% of the informal professional services prime contracts valued under \$50,000 awarded during the study period, representing \$1,403,221 or 10.84% of the professional services prime contract dollars.

*Non-minority Males* received 860 or 73.01% of the informal professional services prime contracts valued under \$50,000 awarded during the study period, representing \$9,289,129 or 71.78% of the professional services prime contract dollars.



**Table 3.22: Professional Services Prime Contract Utilization: Informal Contracts Valued Under \$50,000, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	27	2.29%	\$259,873	2.01%
Asian Americans	46	3.90%	\$436,896	3.38%
Hispanic Americans	127	10.78%	\$1,551,144	11.99%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	118	10.02%	\$1,403,221	10.84%
Non-minority Males	860	73.01%	\$9,289,129	71.78%
<b>TOTAL</b>	<b>1,178</b>	<b>100.00%</b>	<b>\$12,940,264</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	4	0.34%	\$82,462	0.64%
African American Males	23	1.95%	\$177,411	1.37%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	46	3.90%	\$436,896	3.38%
Hispanic American Females	68	5.77%	\$768,409	5.94%
Hispanic American Males	59	5.01%	\$782,735	6.05%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	118	10.02%	\$1,403,221	10.84%
Non-minority Males	860	73.01%	\$9,289,129	71.78%
<b>TOTAL</b>	<b>1,178</b>	<b>100.00%</b>	<b>\$12,940,264</b>	<b>100.00%</b>



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### 3. Goods and Services Prime Contract Utilization: Informal Contracts Valued Under \$50,000

Table 3.23 summarizes contract dollars expended by the County on informal goods and services prime contracts valued under \$50,000. MBEs received 13.94% of the goods and services prime contract dollars; WBEs received 9.60%; and non-MWBEs received 76.46%.

*African Americans* received 141 or 1.60% of the informal goods and services prime contracts valued under \$50,000 awarded during the study period, representing \$1,799,200 or 2.50% of the goods and services prime contract dollars.

*Asian Americans* received 352 or 3.98% of the informal goods and services prime contracts valued under \$50,000 awarded during the study period, representing \$1,895,092 or 2.63% of the goods and services prime contract dollars.

*Hispanic Americans* received 516 or 5.84% of the informal goods and services prime contracts valued under \$50,000 awarded during the study period, representing \$6,271,471 or 8.70% of the goods and services prime contract dollars.

*Native Americans* received 5 or 0.06% of the informal goods and services prime contracts valued under \$50,000 awarded during the study period, representing \$82,038 or 0.11% of the goods and services prime contract dollars.

*Caucasian Females* received 925 or 10.46% of the informal goods and services prime contracts valued under \$50,000 awarded during the study period, representing \$6,919,990 or 9.60% of the goods and services prime contract dollars.

*Non-minority Males* received 6,901 or 78.07% of the informal goods and services prime contracts valued under \$50,000 awarded during the study period, representing \$55,118,689 or 76.46% of the goods and services prime contract dollars.



**Table 3.23: Goods and Services Prime Contract Utilization: Informal Contracts  
Valued Under \$50,000, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	141	1.60%	\$1,799,200	2.50%
Asian Americans	352	3.98%	\$1,895,092	2.63%
Hispanic Americans	516	5.84%	\$6,271,471	8.70%
Native Americans	5	0.06%	\$82,038	0.11%
Caucasian Females	925	10.46%	\$6,919,990	9.60%
Non-minority Males	6,901	78.07%	\$55,118,689	76.46%
<b>TOTAL</b>	<b>8,840</b>	<b>100.00%</b>	<b>\$72,086,480</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	6	0.07%	\$90,328	0.13%
African American Males	135	1.53%	\$1,708,871	2.37%
Asian American Females	46	0.52%	\$173,975	0.24%
Asian American Males	306	3.46%	\$1,721,118	2.39%
Hispanic American Females	164	1.86%	\$2,574,372	3.57%
Hispanic American Males	352	3.98%	\$3,697,099	5.13%
Native American Females	2	0.02%	\$757	0.00%
Native American Males	3	0.03%	\$81,281	0.11%
Caucasian Females	925	10.46%	\$6,919,990	9.60%
Non-minority Males	6,901	78.07%	\$55,118,689	76.46%
<b>TOTAL</b>	<b>8,840</b>	<b>100.00%</b>	<b>\$72,086,480</b>	<b>100.00%</b>



**D. Formal Prime Contracts by Industry**

**1. Construction Prime Contract Utilization: Formal Contracts Valued \$50,000 to \$1,296,000**

Table 3.24 summarizes contract dollars expended by the County on formal construction prime contracts valued \$50,000 to \$1,296,000. MBEs received 9.00% of the construction prime contract dollars; WBEs received 17.59%; and non-MWBEs received 73.40%.

*African Americans* received 28 or 6.17% of the formal construction prime contracts valued \$50,000 to \$1,296,000 awarded during the study period, representing \$3,739,792 or 3.09% of the construction prime contract dollars.

*Asian Americans* received 4 or 0.88% of the formal construction prime contracts valued \$50,000 to \$1,296,000 awarded during the study period, representing \$590,048 or 0.49% of the construction prime contract dollars.

*Hispanic Americans* received 18 or 3.96% of the formal construction prime contracts valued \$50,000 to \$1,296,000 awarded during the study period, representing \$6,562,009 or 5.42% of the construction prime contract dollars.

*Native Americans* received 0 or 0.00% of the formal construction prime contracts valued \$50,000 to \$1,296,000 awarded during the study period, representing \$0 or less than 0.01% of the construction prime contract dollars.

*Caucasian Females* received 79 or 17.40% of the formal construction prime contracts valued \$50,000 to \$1,296,000 awarded during the study period, representing \$21,287,322 or 17.59% of the construction prime contract dollars.

*Non-minority Males* received 325 or 71.59% of the formal construction prime contracts valued \$50,000 to \$1,296,000 awarded during the study period, representing \$88,814,425 or 73.40% of the construction prime contract dollars.



**Table 3.24: Construction Prime Contract Utilization: Formal Contracts Valued \$50,000 to \$1,296,000, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	28	6.17%	\$3,739,792	3.09%
Asian Americans	4	0.88%	\$590,048	0.49%
Hispanic Americans	18	3.96%	\$6,562,009	5.42%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	79	17.40%	\$21,287,322	17.59%
Non-minority Males	325	71.59%	\$88,814,425	73.40%
<b>TOTAL</b>	<b>454</b>	<b>100.00%</b>	<b>\$120,993,597</b>	<b>100.00%</b>

<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	1	0.22%	\$248,650	0.21%
African American Males	27	5.95%	\$3,491,142	2.89%
Asian American Females	2	0.44%	\$380,498	0.31%
Asian American Males	2	0.44%	\$209,550	0.17%
Hispanic American Females	6	1.32%	\$1,563,225	1.29%
Hispanic American Males	12	2.64%	\$4,998,785	4.13%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	79	17.40%	\$21,287,322	17.59%
Non-minority Males	325	71.59%	\$88,814,425	73.40%
<b>TOTAL</b>	<b>454</b>	<b>100.00%</b>	<b>\$120,993,597</b>	<b>100.00%</b>



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## 2. Professional Services Prime Contract Utilization: Formal Contracts Valued \$50,000 to \$301,000

Table 3.25 summarizes contract dollars expended by the County on formal professional services prime contracts valued \$50,000 to \$301,000. MBEs including CCNA certified professional service prime contractors received 20.07% of the professional services prime contract dollars. WBEs received 11.37%; and non-MWBEs received 68.56%.

*African Americans* received 4 or 1.58% of the formal professional services prime contracts valued \$50,000 to \$301,000 awarded during the study period, representing \$533,981 or 1.90% of the professional services prime contract dollars.

*Asian Americans* received 13 or 5.14% of the formal professional services prime contracts valued \$50,000 to \$301,000 awarded during the study period, representing \$1,496,480 or 5.32% of the professional services prime contract dollars.

*Hispanic Americans* received 30 or 11.86% of the formal professional services prime contracts valued \$50,000 to \$301,000 awarded during the study period, representing \$3,619,355 or 12.86% of the professional services prime contract dollars.

*Native Americans* received 0 or 0.00% of the formal professional services prime contracts valued \$50,000 to \$301,000 awarded during the study period, representing \$0 or 0.00% of the professional services prime contract dollars.

*Caucasian Females* received 26 or 10.28% of the formal professional services prime contracts valued \$50,000 to \$301,000 awarded during the study period, representing \$3,201,111 or 11.37% of the professional services prime contract dollars.

*Non-minority Males* received 180 or 71.15% of the formal professional services prime contracts valued \$50,000 to \$301,000 awarded during the study period, representing \$19,297,312 or 68.56% of the professional services prime contract dollars.



**Table 3.25: Professional Services Prime Contract Utilization: Formal Contracts  
Valued \$50,000 to \$301,000, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	4	1.58%	\$533,981	1.90%
Asian Americans	13	5.14%	\$1,496,480	5.32%
Hispanic Americans	30	11.86%	\$3,619,355	12.86%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	26	10.28%	\$3,201,111	11.37%
Non-minority Males	180	71.15%	\$19,297,312	68.56%
<b>TOTAL</b>	<b>253</b>	<b>100.00%</b>	<b>\$28,148,240</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	0	0.00%	\$0	0.00%
African American Males	4	1.58%	\$533,981	1.90%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	13	5.14%	\$1,496,480	5.32%
Hispanic American Females	7	2.77%	\$623,147	2.21%
Hispanic American Males	23	9.09%	\$2,996,208	10.64%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	26	10.28%	\$3,201,111	11.37%
Non-minority Males	180	71.15%	\$19,297,312	68.56%
<b>TOTAL</b>	<b>253</b>	<b>100.00%</b>	<b>\$28,148,240</b>	<b>100.00%</b>



**3. Goods and Services Prime Contract Utilization: Formal Contracts Valued \$50,000 to \$321,000**

Table 3.26 summarizes contract dollars expended by the County on formal goods and services prime contracts valued \$50,000 to \$321,000. MBEs received 10.35% of the goods and services prime contract dollars; WBEs received 9.98%; and non-MWBEs received 79.67%.

*African Americans* received 31 or 3.38% of the formal goods and services prime contracts valued \$50,000 to \$321,000 awarded during the study period, representing \$4,635,156 or 4.11% of the goods and services prime contract dollars.

*Asian Americans* received 4 or 0.44% of the formal goods and services prime contracts valued \$50,000 to \$321,000 awarded during the study period, representing \$306,690 or 0.27% of the goods and services prime contract dollars.

*Hispanic Americans* received 60 or 6.55% of the formal goods and services prime contracts valued \$50,000 to \$321,000 awarded during the study period, representing \$6,738,073 or 5.97% of the goods and services prime contract dollars.

*Native Americans* received 0 or 0.00% of the formal goods and services prime contracts valued \$50,000 to \$321,000 awarded during the study period, representing \$0 or 0.00% of the goods and services prime contract dollars.

*Caucasian Females* received 92 or 10.04% of the formal goods and services prime contracts valued \$50,000 to \$321,000 awarded during the study period, representing \$11,261,125 or 9.98% of the goods and services prime contract dollars.

*Non-minority Males* received 729 or 79.59% of the formal goods and services prime contracts valued \$50,000 to \$321,000 awarded during the study period, representing \$89,890,721 or 79.67% of the goods and services prime contract dollars.



**Table 3.26: Goods and Services Prime Contract Utilization: Formal Contracts  
Valued \$50,000 to \$321,000, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	31	3.38%	\$4,635,156	4.11%
Asian Americans	4	0.44%	\$306,690	0.27%
Hispanic Americans	60	6.55%	\$6,738,073	5.97%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	92	10.04%	\$11,261,125	9.98%
Non-minority Males	729	79.59%	\$89,890,721	79.67%
<b>TOTAL</b>	<b>916</b>	<b>100.00%</b>	<b>\$112,831,765</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	2	0.22%	\$157,025	0.14%
African American Males	29	3.17%	\$4,478,131	3.97%
Asian American Females	2	0.22%	\$190,223	0.17%
Asian American Males	2	0.22%	\$116,468	0.10%
Hispanic American Females	24	2.62%	\$3,268,410	2.90%
Hispanic American Males	36	3.93%	\$3,469,663	3.08%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	92	10.04%	\$11,261,125	9.98%
Non-minority Males	729	79.59%	\$89,890,721	79.67%
<b>TOTAL</b>	<b>916</b>	<b>100.00%</b>	<b>\$112,831,765</b>	<b>100.00%</b>



## V. Summary

The prime contractor utilization analysis examined the \$1,299,051,727 that the County expended on prime contracts awarded during the January 1, 2009, to December 31, 2013, study period. The \$1,299,051,727 expended included \$622,158,149 for construction, \$173,535,625 for professional services, and \$503,357,953 for goods and services. A total of 13,499 prime contracts were analyzed, which included 2,024 for construction, 1,493 for professional services, and 9,982 for goods and services.

The utilization analysis was performed for prime contracts in the three industries at three-dollar thresholds. The first threshold included all contracts regardless of award amount. A second threshold included the analysis of all informal contracts valued under \$50,000, as defined by the County's Policy and Procedure Manual. The third threshold included formal contracts valued \$50,000 and over, with thresholds set for each industry to eliminate outliers. Given the application of the thresholds, the formal contracts analyzed were valued \$50,000 to \$1,296,000 for construction, \$50,000 to \$301,000 for professional services, and \$50,000 to \$321,000 for goods and services. A separate analysis of the professional services prime contracts awarded to CCNA certified contractors was also performed for illustrative purposes only. *Chapter 7: Prime Contract Disparity Analysis* presents the statistical analysis of disparity in each of the three industries.

**Commented [FML16]:** Strong study methodology to undertake separate disparity analysis on the basis of dollar threshold. If there is disparity at the smaller contract level where there is more County discretion in the award of contracts, this is a strong indication of County discrimination in the absence of a race-conscious remedy. Analysis of disparity in contract awards for contracts below \$50,000 also removes the issue of firm capacity as a possible race-neutral explanation for race- and gender- disparities in utilization of firms. All firms generally have capacity to perform such small contracts.



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# CHAPTER 4: Subcontractor Utilization Analysis

## I. Introduction

A disparity study, as required by *City of Richmond v. J.A. Croson Co. (Croson)*,<sup>362</sup> must document the local government’s utilization of available Minority and Woman-owned Business Enterprises (M/WBE), and non-minority male-owned businesses (non-M/WBE) as prime contractors and subcontractors. The objective of this chapter is to present the utilization of M/WBEs and non-M/WBEs by ethnicity, gender, and industry as construction and professional services subcontractors. The analysis examined the subcontracts awarded by Palm Beach County’s (County) prime contractors during the January 1, 2009, through December 31, 2013, study period.<sup>363</sup>

## II. Data Sources

The County did not maintain comprehensive data on the subcontracts awarded by its prime contractors. Consequently, extensive research was required to reconstruct the subcontracts issued by the County’s construction and professional services prime contractors. Mason Tillman Associates, Ltd. (Mason Tillman) compiled the subcontract data in conjunction with the County. Since subcontract records had to be reconstructed, the analysis was limited to construction prime contracts valued \$350,000 and greater and professional services prime contracts valued \$200,000 and greater.

### A. Data Collection Process

Several methods were used to compile the subcontract data, in addition to the initial data collection from the Office of Small Business Assistance (OSBA) and from County department records. A survey was used to collect subcontract records from the County’s prime contractors. In addition to the survey, the prime contractors’ chief executive officers were contacted to solicit cooperation in the collection of subcontract data. Onsite data collection was also used to compile the most comprehensive dataset of subcontracts. The data collection process was undertaken between January, 2015 and May, 2017. Although the subcontractor data collection process was protracted and required an inordinate level of effort from the County, its prime contractors, and Mason Tillman, it yielded sufficient records to perform a subcontract utilization analysis.

**Commented [FML17]:** Good sound disparity study methodology regarding subcontractor data sources for subcontractor ownership status, availability, and utilization. Given the level of effort to reconstruct these data and records, this most likely represents the best available evidence on subcontracting on County contracts during the study period.

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<sup>362</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>363</sup> The goods and services industry was not included in the subcontract analysis because of its limited subcontracting.

### 1. OSBA Provided Subcontract Records

OSBA provided an electronic file containing Small Business Enterprise (SBE) subcontract award and payment records. The SBE subcontract data were extracted from the OSBA's forms that were completed by prime contractors and submitted throughout the duration of the contract.

### 2. Prime Contractor Expenditure Survey

A survey was conducted to collect the prime contractors' subcontractor and subconsultant data. The prime contractors were asked to provide the name, award, and payment amount for each subcontractor, subconsultant, and supplier who worked on each contract that the County awarded to the prime contractor during the study period. To maximize the response rate, a letter from the County Administrator requesting the prime contractor's cooperation accompanied each survey. Mason Tillman made follow-up calls to each prime contractor to address any questions concerning the Study and encouraged the business to submit its subcontract records. Of the 149 prime contractors surveyed, 44 provided subcontract data.

### 3. Department Provided Subcontract Records

Subcontract records were also requested directly from the County departments that awarded construction and professional service contracts during the study period. Nine departments were initially contacted. Five departments provided subcontract records for one or more of their prime contracts. Four departments did not provide subcontract records. The nine County departments contacted for subcontract data are listed in Table 4.1. Three departments reported that there were no subcontract records in their files.

The Facilities Development & Operations department (FDO) did not provide its subcontract records because the Advantage number generated by the County's Advantage Financial System could not be linked to the prime contract records in its contract management system. Before providing any subcontract records, FDO performed extensive research over several months in an effort to reconcile the prime contract awards in FDO's contract management system to the payments recorded in the Advantage Financial System. Mason Tillman's subcontractor data collection process was suspended while FDO reconciled the award data in their contract management system with the Advantage Number in the County's Advantage Financial System. Table 4.1 depicts the number of prime contracts with subcontract records provided by each department.

**Table 4.1: Data Provided by County Departments**

Department	Contracts Identified for Data Collection	Contracts Provided by Department
Airport	26	22
County Attorney Office	2	0
Engineering and Public Works	69	9



Department	Contracts Identified for Data Collection	Contracts Provided by Department
Environmental Resources Management	24	0
Facilities Development & Operations	26	0
Information Systems Services	2	0
Office of Financial Management & Budget	1	1
Tourist Development Council	1	1
Water Utilities	60	5

#### 4. Advantage Financial System Subcontract Records

Construction supplier payments were also identified in the County’s Advantage Financial System for those suppliers that participated in the Sales Tax Recovery Program. Suppliers utilized on construction prime contracts that participated in the Sales Tax Recovery Program can be paid directly from the County’s Advantage Financial System. Payment data for the suppliers that participated in the Sales Tax Recovery Program were captured in the Advantage Financial System. The prime contractors’ suppliers paid directly by the County included both SBEs and non-SBEs.

#### 5. County Administrator’s Letter

The County Administrator sent a letter to the Chief Executive Officer (CEO) of 57 businesses, which had received one or more County prime contracts for which no subcontract records had been identified during the data collection process. The County Administrator’s letter requested the name of the prime contractor’s subcontractors, subconsultants, and suppliers, and their payments. County staff made follow-up calls to the CEOs who did not respond to the County Administrator’s letter. Responses were received from 34 of the 57 CEOs contacted. Of the responses received from the 34 CEOs, 31 provided subcontractor information, one stated that no subcontractors were utilized, one asked for an extension and did not provide information by the deadline, and one refused to provide the requested information.

#### 6. On-Site Subcontract Data Collection

In the final effort to reconstruct the subcontracts awarded by the County’s prime contractors, Mason Tillman conducted on-site research at two departments—Engineering and Public Works Department and FDO. These departments had a significant number of construction and professional service prime contracts for which subcontractors had not been identified using the various methods described above. The on-site data collection was performed on contracts that Mason Tillman had not received prior data. Mason Tillman conducted on-site data collection research on contracts that the County submitted no prior subcontract data.

The on-site data collection was not scheduled until FDO reconciled its prime contract awards with the payment records that the Finance Department retrieved from the Advantage System. Prior to these reconciliation efforts, FDO could not provide subcontract award or payment information for

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any of its prime contractors. In anticipation of the onsite research, Mason Tillman asked the departments to pull the prime contract project files for examination by the field researchers. The collection strategies employed at both departments included retrieving subcontracts from prime contract documents pulled from document storage, and from contract and project management files located onsite. FDO also provided electronic copies of subcontract records retrieved from their Countywide Information Network for Electronic Media Access (CINEMA) database. All electronic and hard copy records made available by the two departments were reviewed for subcontract award and payment data.

**a. Engineering and Public Works Department**

Mason Tillman identified 106 Engineering and Public Works contracts over the thresholds. The list that was culled from the 106 included 77 construction contracts and 29 professional services contracts. The department provided hard copy project files, electronic files, and microfilm for 60 of the 106 prime contracts.

**b. Facilities Development & Operations Department**

Mason Tillman identified 51 FDO contracts for research. The list included 36 construction contracts and 15 professional services contracts. Of the 51 prime contracts requested, FDO provided hard copy contract files for 17 contracts, a USB file with nine contracts, and access to the CINEMA database for the remaining 25 prime contracts. Comprehensive subcontract data was secured for 48 contracts in total.

**B. Subcontract Data Analysis**

The subcontract records that Mason Tillman was able to reconstruct from the various sources listed above were appended to the relational database and cleaned to remove duplicate records. The ethnicity and gender of each subcontractor was verified through a combination of certification directories, Internet research, and telephone surveys. Once the data were cleaned, the subcontract utilization tables were prepared for the two industries, identifying the dollars and number of subcontracts awarded to each ethnic and gender group. Subcontractor utilization is organized by ethnicity and gender within the two industries analyzed and presented below.

**III. Subcontractor Utilization**

**A. All Subcontracts**

As listed in Table 4.2, 1,030 of the reconstructed subcontracts with either award or payment data were analyzed. The reconstructed subcontracts included 904 for construction and 126 for professional services subcontracts.

There were \$124,193,576 subcontract dollars analyzed for the January 1, 2009, to December 31, 2013, study period. These dollars included \$86,390,971 for construction and \$37,802,605 for professional services subcontracts.

**Commented [FML18]:** This exceptional effort in reconstructing the subcontract records due to lack of relevant data availability in the County's financial databases demonstrates that the subcontract utilization data analyzed here is most likely the best available data for such purposes despite the fact that it is admittedly incomplete. There is no apparent reason to conclude that the available data analysed here is in any way atypical of that data that was not available.

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**Table 4.2: Subcontracts Awarded and Dollars Expended by Industry, January 1, 2009, to December 31, 2013**

Industry	Total Number of Subcontracts	Total Amount Expended
Construction	904	\$86,390,971
Professional Services	126	\$37,802,605
<b>Total</b>	<b>1,030</b>	<b>\$124,193,576</b>

**Commented [FML19]:** Although not exhaustive, this represents a significant dollar total for purposes of subcontract utilization, availability, and disparity analysis.

**B. Subcontracts by Industry**

**1. Construction Subcontracts**

Table 4.3 shows the identified construction subcontracts awarded by the County’s prime contractors. Minority-owned businesses (MBE) received 10.13%; Caucasian female-owned businesses (WBE) received 9.38%; and non-minority male-owned businesses (non-M/WBE) received 80.49% of the construction subcontract dollars.

*African Americans* received 44 or 4.87% of the construction subcontracts during the study period, representing \$4,651,701 or 5.38% of the construction subcontract dollars.

*Asian Americans* received 18 or 1.99% of the construction subcontracts during the study period, representing \$533,469 or 0.62% of the construction subcontract dollars.

*Hispanic Americans* received 45 or 4.98% of the construction subcontracts during the study period, representing \$3,564,036 or 4.13% of the construction subcontract dollars.

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

*Caucasian Females* received 153 or 16.92% of the construction subcontracts during the study period, representing \$8,104,300 or 9.38% of the construction subcontract dollars.

*Non-minority Males* received 644 or 71.24% of the construction subcontracts during the study period, representing \$69,537,465 or 80.49% of the construction subcontract dollars.



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**Table 4.3: Construction Subcontractor Utilization,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	44	4.87%	\$4,651,701	5.38%
Asian Americans	18	1.99%	\$533,469	0.62%
Hispanic Americans	45	4.98%	\$3,564,036	4.13%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	153	16.92%	\$8,104,300	9.38%
Non-minority Males	644	71.24%	\$69,537,465	80.49%
<b>TOTAL</b>	<b>904</b>	<b>100.00%</b>	<b>\$86,390,971</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	7	0.77%	\$271,719	0.31%
African American Males	37	4.09%	\$4,379,982	5.07%
Asian American Females	2	0.22%	\$287,281	0.33%
Asian American Males	16	1.77%	\$246,188	0.28%
Hispanic American Females	6	0.66%	\$563,636	0.65%
Hispanic American Males	39	4.31%	\$3,000,400	3.47%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	153	16.92%	\$8,104,300	9.38%
Non-minority Males	644	71.24%	\$69,537,465	80.49%
<b>TOTAL</b>	<b>904</b>	<b>100.00%</b>	<b>\$86,390,971</b>	<b>100.00%</b>



## 2. Professional Services Subcontracts

Table 4.4 shows the professional services subcontracts issued by the County's prime contractors. MBEs received 7.58%; WBEs received 8.91%; and non-M/WBEs received 83.51% of the professional services subcontract dollars.

*African Americans* received 6 or 4.76% of the professional services subcontracts during the study period, representing \$344,221 or 0.91% of the professional services subcontract dollars.

*Asian Americans* received 5 or 3.97% of the professional services subcontracts during the study period, representing \$165,994 or 0.44% of the professional services subcontract dollars.

*Hispanic Americans* received 11 or 8.73% of the professional services subcontracts during the study period, representing \$2,355,016 or 6.23% of the professional services subcontract dollars.

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

*Caucasian Females* received 27 or 21.43% of the professional services subcontracts during the study period, representing \$3,370,076 or 8.91% of the professional services subcontract dollars.

*Non-minority Males* received 77 or 61.11% of the professional services subcontracts during the study period, representing \$31,567,297 or 83.51% of the professional services subcontract dollars.



**Table 4.4: Professional Services Subconsultant Utilization,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	6	4.76%	\$344,221	0.91%
Asian Americans	5	3.97%	\$165,994	0.44%
Hispanic Americans	11	8.73%	\$2,355,016	6.23%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	27	21.43%	\$3,370,076	8.91%
Non-minority Males	77	61.11%	\$31,567,297	83.51%
<b>TOTAL</b>	<b>126</b>	<b>100.00%</b>	<b>\$37,802,605</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	1	0.79%	\$31,753	0.08%
African American Males	5	3.97%	\$312,468	0.83%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	5	3.97%	\$165,994	0.44%
Hispanic American Females	4	3.17%	\$495,176	1.31%
Hispanic American Males	7	5.56%	\$1,859,841	4.92%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	27	21.43%	\$3,370,076	8.91%
Non-minority Males	77	61.11%	\$31,567,297	83.51%
<b>TOTAL</b>	<b>126</b>	<b>100.00%</b>	<b>37,802,605</b>	<b>100.00%</b>



#### IV. Summary

The construction and professional services subcontracts awarded by the County's prime contractors had to be reconstructed using a multi-faceted research methodology because the County did not maintain comprehensive subcontract records. The subcontract utilization analysis was therefore limited to the subcontract records that could be reconstructed through the combined effort of the County, the County's prime contractors, and Mason Tillman. The subcontract utilization analysis was limited to the construction and professional services prime contracts for which subcontracts records were complete or could be reconstructed. The reconstructed construction and professional services subcontracts were valued at \$124,193,576. The reconstructed subcontracts examined were awarded by the County's prime contractors from January 1, 2009, to December 31, 2013. The \$124,193,576 expended included \$86,390,971 for construction and \$37,802,605 for professional services subcontracts. A total of 1,030 subcontracts were analyzed, which included 904 construction subcontracts and 126 professional services subcontracts.

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## CHAPTER 5: Market Area Analysis

### I. Market Area Definition

#### A. Legal Criteria for Geographic Market Area

The Supreme Court's decision in *City of Richmond v. J.A. Croson Co. (Croson)*<sup>364</sup> held that programs established by local governments to set goals for the participation of Minority Business Enterprises (MBE) must be supported by evidence of past discrimination in the award of contracts. Prior to the *Croson* decision, local agencies could implement race-conscious programs without developing a detailed public record to document the underutilization of MBEs in their award of contracts. Instead, they relied on widely recognized societal patterns of discrimination.<sup>365</sup> *Croson* established that a local government could not rely on society-wide discrimination as the basis for a race-conscious program. Instead, a local government was required to identify discrimination within its own contracting jurisdiction.<sup>366</sup> In *Croson*, the United States Supreme Court found the City of Richmond, Virginia's MBE construction program to be unconstitutional because there was insufficient evidence of discrimination in the local construction market.

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

#### B. Application of the Croson Standard

While *Croson* emphasized the importance of the local market area, it provided little assistance in defining its parameters. However, it is informative to review the Court's definition of the City of Richmond, Virginia's market area. In discussing the geographic parameters of the constitutional violation that must be investigated, the Court interchangeably used the terms "relevant market," "Richmond construction industry,"<sup>367</sup> and "city's construction industry."<sup>368</sup>

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

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<sup>364</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>365</sup> *United Steelworkers v. Weber*, 433 U.S. 193, 198, n. 1 (1979).

<sup>366</sup> *Croson*, 488 U.S. at 497.

<sup>367</sup> *Croson*, 488 U.S. at 500.

<sup>368</sup> *Id.* at 470.



An analysis of the cases following *Croson* reveals a pattern that provides additional guidance for defining the market area. The body of cases examining the *reasonable* market area definition is *fact-based*, rather than dictated by a specific formula.<sup>369</sup> In *Cone Corporation v. Hillsborough County*,<sup>370</sup> the United States Court of Appeals for the Eleventh Circuit considered a study in support of Hillsborough County, Florida’s MBE Program, which used minority contractors located in Hillsborough County as the measure of available firms. The program was found to be constitutional under the compelling governmental interest element of the strict scrutiny standard. Hillsborough County’s program was based on statistics indicating that specific discrimination existed in the construction contracts awarded by Hillsborough County, not in the construction industry in general. Hillsborough County extracted data from within its own jurisdictional boundaries and assessed the percentage of minority businesses available in Hillsborough County. The Court stated that the disparity study was properly conducted within the “local construction industry.”<sup>371</sup>

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII)*,<sup>372</sup> the United States Court of Appeals for the Ninth Circuit found the City and County of San Francisco, California’s MBE Program to have the factual predicate necessary to survive strict scrutiny. The San Francisco MBE Program was supported by a study that assessed the number of available MBE contractors within the City and County of San Francisco, California. The court found it appropriate to use the City and County as the relevant market area within which to conduct a disparity study.<sup>373</sup>

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.”<sup>374</sup> In support of its MBE program, King County, Washington offered studies compiled by other jurisdictions, including entities completely within the County, others coterminous with the boundaries of the County, and a jurisdiction completely outside of King County. The plaintiffs contended that *Croson* required King County, Washington to compile its own data and cited *Croson* as prohibiting data sharing.

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

<sup>369</sup> See e.g., *Concrete Works of Colorado v. City of Denver, Colorado*, 36 F.3d 1513, 1528 (10th Cir. 1994) (“*Concrete Works*”).

<sup>370</sup> *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

<sup>371</sup> *Id.* at 915.

<sup>372</sup> *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991).

<sup>373</sup> *AGCCII*, 950 F.2d at 1415.

<sup>374</sup> *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

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The court concluded that data gathered by a neighboring county could not be used to support King County’s MBE program. The court noted, “It is vital that a race-conscious program align itself as closely to the scope of the problem sought to be rectified by the governmental entity. To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries.”<sup>375</sup> However, the court did note that the “world of contracting does not conform itself neatly to jurisdictional boundaries.”<sup>376</sup>

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)*<sup>377</sup>, the United States Court of Appeals for the Tenth Circuit directly addressed the issue of whether or not extra-jurisdictional evidence of discrimination can be used to determine the “local market area” for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver, Colorado Metropolitan Statistical Area (MSA) to support its MBE program. Plaintiffs argued that the federal constitution prohibited consideration of evidence beyond jurisdictional boundaries. The Tenth Circuit disagreed.

Critical to the court’s acceptance of the Denver MSA as the relevant local market was the finding that more than 80% of construction and design contracts awarded by the City and County of Denver were awarded to contractors within the MSA. Another consideration was that the City and County of Denver’s analysis was based on United States Census Bureau data, which was available for the Denver MSA but not for the City of Denver itself. There was no undue burden placed on nonculpable parties, as the City and County of Denver had expended a majority of its construction contract dollars within the area defined as the local market. Citing *AGCC II*,<sup>378</sup> the court noted “that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions that the City of Denver has taken in the past have visited racial discrimination on such individuals.”<sup>379</sup>

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.<sup>380</sup>

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.<sup>381</sup> The text of *Croson* itself suggests

<sup>375</sup> *Coral Construction Co. v. King County*, 941 F.2d 917 (9th Cir. 1991).

<sup>376</sup> *Id.*

<sup>377</sup> *Concrete Works*, 36 F.3d at 1528.

<sup>378</sup> *AGCC II*, 950 F.2d at 1401.

<sup>379</sup> *Concrete Works*, 36 F.3d at 1528.

<sup>380</sup> *Opportunity Denied! New York State’s Study*, 26 Urban Lawyer No. 3, Summer 1994.

<sup>381</sup> *Croson*, 488 U.S. at 501.



that the geographical boundaries of the government entity comprise an appropriate market area and other courts have agreed with this finding. It follows, then, that an entity may limit consideration of evidence of discrimination to discrimination occurring within its own jurisdiction.

## II. Market Area Analysis

Although *Croson* and its progeny do not provide a bright line rule for the delineation of the local market area, taken collectively, case law supports a definition of the market area as the geographical boundaries of the government entity. In arriving at the definition of the market area, the geographic distribution of businesses receiving one or more prime contracts was calculated. The analysis determined that the Palm Beach County (County) spent the majority (66.07%) of its dollars with businesses located in the County. Additionally, it was documented that less than 12% of the dollars were awarded to businesses domiciled in the adjacent counties of Broward (5.63%) and Miami Dade (5.94%), and 7.72% of the County’s dollars were awarded to businesses domiciled in 39 other counties in Florida. Given the percent of dollars awarded within the County’s jurisdiction, the Study’s market area is determined to be the geographical boundaries of Palm Beach County, Florida.

### A. Summary of the Distribution of All Prime Contracts Awarded

The County awarded 13,499 prime contracts valued at \$1,299,051,727 from January 1, 2009 to December 31, 2013, study period. The distribution of all prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area for the *Palm Beach County Disparity Study* appears in Table 5.1.

**Table 5.1: Distribution of All Contracts Awarded**

Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
PALM BEACH	\$858,299,774	7,090	66.07%	52.52%
MIAMI-DADE	\$77,210,969	500	5.94%	3.70%
BROWARD	\$73,149,028	1,022	5.63%	7.57%
HILLSBOROUGH	\$19,600,768	264	1.51%	1.96%
ORANGE	\$15,041,062	240	1.16%	1.78%
MARTIN	\$14,178,073	145	1.09%	1.07%
SAINT LUCIE	\$7,812,866	91	0.60%	0.67%
SEMINOLE	\$5,342,704	170	0.41%	1.26%
SARASOTA	\$4,975,198	24	0.38%	0.18%
POLK	\$4,043,294	150	0.31%	1.11%
VOLUSIA	\$4,011,104	58	0.31%	0.43%
DUVAL	\$3,979,142	119	0.31%	0.88%
PINELLAS	\$3,839,794	67	0.30%	0.50%
PASCO	\$2,647,637	38	0.20%	0.28%
LEE	\$2,027,656	31	0.16%	0.23%

**Commented [FML21]:** Other disparity studies performed recently by MTA In Southern Florida have used a different relevant geographic market definition that is somewhat broader and includes Palm Beach County, Broward County, and Miami-Dade County. However, this narrower geographic market definition determined for purposes of this Study to examine Palm Beach County purchases was likely affected by the strong SBE and Local Business Preference programs administered by the County. Both of these preference programs required program beneficiaries to be domiciled in Palm Beach County.

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Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
INDIAN RIVER	\$2,016,061	33	0.16%	0.24%
COLLIER	\$1,797,294	31	0.14%	0.23%
MANATEE	\$1,448,725	44	0.11%	0.33%
OKEECHOBEE	\$1,303,057	15	0.10%	0.11%
LEON	\$1,180,138	34	0.09%	0.25%
CHARLOTTE	\$1,154,525	3	0.09%	0.02%
BREVARD	\$676,701	46	0.05%	0.34%
MARION	\$566,993	12	0.04%	0.09%
ESCAMBIA	\$406,923	76	0.03%	0.56%
BAY	\$405,520	12	0.03%	0.09%
SAINT JOHNS	\$326,831	5	0.03%	0.04%
ALACHUA	\$231,418	21	0.02%	0.16%
CITRUS	\$193,117	31	0.01%	0.23%
HIGHLANDS	\$189,962	14	0.01%	0.10%
JACKSON	\$185,811	1	0.01%	0.01%
OSCEOLA	\$174,536	22	0.01%	0.16%
MONROE	\$154,184	4	0.01%	0.03%
LAKE	\$144,322	11	0.01%	0.08%
GLADES	\$72,560	5	0.01%	0.04%
SANTA ROSA	\$57,100	1	0.00%	0.01%
WALTON	\$42,960	4	0.00%	0.03%
ST. JOHNS	\$26,240	1	0.00%	0.01%
HENDRY	\$16,242	4	0.00%	0.03%
HERNANDO	\$8,121	2	0.00%	0.01%
GILCHRIST	\$1,920	3	0.00%	0.02%
CLAY	\$1,015	1	0.00%	0.01%
OKALOOSA	\$988	1	0.00%	0.01%
OUT-OF-STATE	\$189,727,199	3,034	14.61%	22.48%
OUT-OF-COUNTRY	\$382,199	19	0.03%	0.14%
TOTAL	\$1,299,051,727	13,499	100.00%	100.00%



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**B. Distribution of Construction Prime Contracts**

The County awarded 2,024 construction prime contracts valued at \$622,158,149 during the study period. Businesses located in the market area received 82.81% of the construction prime contracts and 80.21% of the dollars. The distribution of the construction prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area appears in Table 5.2.

**Table 5.2: Distribution of Construction Prime Contracts**

<b>Geographic Area</b>	<b>Total Dollars</b>	<b>Number of Contracts</b>	<b>Percent of Dollars</b>	<b>Percent of Contracts</b>
PALM BEACH	\$499,005,983	1,676	80.21%	82.81%
MIAMI-DADE	\$38,819,700	73	6.24%	3.61%
BROWARD	\$29,332,998	163	4.71%	8.05%
MARTIN	\$11,978,495	7	1.93%	0.35%
ORANGE	\$6,309,827	5	1.01%	0.25%
SARASOTA	\$4,588,442	1	0.74%	0.05%
SAINT LUCIE	\$3,312,604	11	0.53%	0.54%
HILLSBOROUGH	\$1,652,356	11	0.27%	0.54%
PINELLAS	\$1,467,544	2	0.24%	0.10%
VOLUSIA	\$1,448,684	3	0.23%	0.15%
SEMINOLE	\$1,041,534	3	0.17%	0.15%
LEE	\$699,511	2	0.11%	0.10%
PASCO	\$645,520	6	0.10%	0.30%
MARION	\$338,550	1	0.05%	0.05%
SAINT JOHNS	\$268,687	1	0.04%	0.05%
JACKSON	\$185,811	1	0.03%	0.05%
COLLIER	\$173,898	1	0.03%	0.05%
OKEECHOBEE	\$165,843	5	0.03%	0.25%
DUVAL	\$159,156	6	0.03%	0.30%
BREVARD	\$74,852	1	0.01%	0.05%
POLK	\$24,617	6	0.00%	0.30%
OUT-OF-STATE	\$20,463,537	39	3.29%	1.93%
TOTAL	\$622,158,149	2,024	100.00%	100.00%



**C. Distribution of Professional Services Prime Contracts**

The County awarded 1,493 professional services, including architecture and engineering (hereinafter referred to as professional services), prime contracts valued at \$173,535,625 during the study period. Businesses located in the market area received 63.50% of the professional services prime contracts and 78.58% of the dollars. The distribution of the professional services prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area appears in Table 5.3.

**Table 5.3: Distribution of Professional Services Prime Contracts**

<b>Geographic Area</b>	<b>Total Dollars</b>	<b>Number of Contracts</b>	<b>Percent of Dollars</b>	<b>Percent of Contracts</b>
PALM BEACH	\$136,360,135	948	78.58%	63.50%
MIAMI-DADE	\$2,190,835	37	1.26%	2.48%
BROWARD	\$2,188,179	33	1.26%	2.21%
HILLSBOROUGH	\$2,076,005	27	1.20%	1.81%
ORANGE	\$1,369,765	25	0.79%	1.67%
DUVAL	\$1,146,461	5	0.66%	0.33%
MARTIN	\$1,138,872	8	0.66%	0.54%
LEON	\$315,264	6	0.18%	0.40%
MANATEE	\$301,648	5	0.17%	0.33%
MONROE	\$154,184	4	0.09%	0.27%
OKEECHOBEE	\$65,377	6	0.04%	0.40%
MARION	\$39,268	2	0.02%	0.13%
WALTON	\$27,935	2	0.02%	0.13%
PASCO	\$14,620	1	0.01%	0.07%
COLLIER	\$9,900	1	0.01%	0.07%
INDIAN RIVER	\$9,650	4	0.01%	0.27%
CITRUS	\$9,472	1	0.01%	0.07%
OSCEOLA	\$8,970	4	0.01%	0.27%
SAINT LUCIE	\$7,560	2	0.00%	0.13%
VOLUSIA	\$5,200	2	0.00%	0.13%
SEMINOLE	\$4,565	7	0.00%	0.47%
PINELLAS	\$3,652	4	0.00%	0.27%
ALACHUA	\$3,500	2	0.00%	0.13%
CLAY	\$1,015	1	0.00%	0.07%
SARASOTA	\$1,000	1	0.00%	0.07%
OUT-OF-STATE	\$26,054,142	349	15.01%	23.38%
OUT-OF-COUNTRY	\$28,452	6	0.02%	0.40%
<b>TOTAL</b>	<b>\$173,535,625</b>	<b>1,493</b>	<b>100.00%</b>	<b>100.00%</b>



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**D. Distribution of Goods and Services Prime Contracts**

The County awarded 9,982 goods and services prime contracts valued at \$503,357,953 during the study period. Businesses located in the market area received 44.74% of the goods and services prime contracts and 44.29% of the dollars. The distribution of the goods and services prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area appears in Table 5.4.

**Table 5.4: Distribution of Goods and Services Prime Contracts**

Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
PALM BEACH	\$222,933,656	4,466	44.29%	44.74%
BROWARD	\$41,627,851	826	8.27%	8.27%
MIAMI-DADE	\$36,200,434	390	7.19%	3.91%
HILLSBOROUGH	\$15,872,406	226	3.15%	2.26%
ORANGE	\$7,361,470	210	1.46%	2.10%
SAINT LUCIE	\$4,492,702	78	0.89%	0.78%
SEMINOLE	\$4,296,605	160	0.85%	1.60%
POLK	\$4,018,676	144	0.80%	1.44%
DUVAL	\$2,673,525	108	0.53%	1.08%
VOLUSIA	\$2,557,221	53	0.51%	0.53%
PINELLAS	\$2,368,598	61	0.47%	0.61%
INDIAN RIVER	\$2,006,411	29	0.40%	0.29%
PASCO	\$1,987,496	31	0.39%	0.31%
COLLIER	\$1,613,496	29	0.32%	0.29%
LEE	\$1,328,145	29	0.26%	0.29%
CHARLOTTE	\$1,154,525	3	0.23%	0.03%
MANATEE	\$1,147,077	39	0.23%	0.39%
OKEECHOBEE	\$1,071,836	4	0.21%	0.04%
MARTIN	\$1,060,706	130	0.21%	1.30%
LEON	\$864,875	28	0.17%	0.28%
BREVARD	\$601,849	45	0.12%	0.45%
ESCAMBIA	\$406,923	76	0.08%	0.76%
BAY	\$405,520	12	0.08%	0.12%
SARASOTA	\$385,757	22	0.08%	0.22%
ALACHUA	\$227,918	19	0.05%	0.19%
HIGHLANDS	\$189,962	14	0.04%	0.14%
MARION	\$189,175	9	0.04%	0.09%
CITRUS	\$183,645	30	0.04%	0.30%
OSCEOLA	\$165,566	18	0.03%	0.18%
LAKE	\$144,322	11	0.03%	0.11%
GLADES	\$72,560	5	0.01%	0.05%

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Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
SAINT JOHNS	\$58,144	4	0.01%	0.04%
SANTA ROSA	\$57,100	1	0.01%	0.01%
ST. JOHNS	\$26,240	1	0.01%	0.01%
HENDRY	\$16,242	4	0.00%	0.04%
WALTON	\$15,025	2	0.00%	0.02%
HERNANDO	\$8,121	2	0.00%	0.02%
GILCHRIST	\$1,920	3	0.00%	0.03%
OKALOOSA	\$988	1	0.00%	0.01%
OUT-OF-STATE	\$143,209,520	2,646	28.45%	26.51%
OUT-OF-COUNTRY	\$353,747	13	0.07%	0.13%
TOTAL	\$503,357,953	9,982	100.00%	100.00%

### III. Summary

During the study period, the County awarded 13,499 contracts for construction, professional services, and goods and services prime contracts valued at \$1,299,051,727. The County awarded 52.52% of prime contracts and 66.07% of dollars to businesses domiciled within the market area. Table 5.5 presents an overview of the number of construction, professional services, and goods and services prime contracts the County awarded and the dollars spent in the market area.

**Construction Prime Contracts:** 1,676 (82.81%) of construction prime contracts were awarded to market area businesses. Construction prime contracts in the market area accounted for \$499,005,983 (80.21%) of the total construction prime contract dollars.

**Professional Services Prime Contracts:** 948 (63.50%) of professional services prime contracts were awarded to market area businesses. Professional services prime contracts in the market area accounted for \$136,360,135 (78.58%) of the total professional services prime contract dollars.

**Goods and Services Prime Contracts:** 4,466 (44.74%) of goods and services prime contracts were awarded to market area businesses. Goods and services prime contracts in the market area accounted for \$222,933,656 (44.29%) of the total goods and services prime contract dollars.



**Table 5.5: Palm Beach County Contract Distribution**

<b>Geographic Area</b>	<b>Total Dollars</b>	<b>Number of Contracts</b>	<b>Percent of Dollars</b>	<b>Percent of Contracts</b>
<b>All Industries</b>				
PALM BEACH COUNTY	\$858,299,774	7,090	66.07%	52.52%
OUTSIDE MARKET AREA	\$440,751,953	6,409	33.93%	47.48%
<b>TOTAL</b>	<b>\$1,299,051,727</b>	<b>13,499</b>	<b>100.00%</b>	<b>100.00%</b>
<b>Construction</b>				
PALM BEACH COUNTY	\$499,005,983	1,676	80.21%	82.81%
OUTSIDE MARKET AREA	\$123,152,166	348	19.79%	17.19%
<b>TOTAL</b>	<b>\$622,158,149</b>	<b>2,024</b>	<b>100.00%</b>	<b>100.00%</b>
<b>Professional Services</b>				
PALM BEACH COUNTY	\$136,360,135	948	78.58%	63.50%
OUTSIDE MARKET AREA	\$37,175,490	545	21.42%	36.50%
<b>TOTAL</b>	<b>\$173,535,625</b>	<b>1,493</b>	<b>100.00%</b>	<b>100.00%</b>
<b>Goods and Services</b>				
PALM BEACH COUNTY	\$222,933,656	4,466	44.29%	44.74%
OUTSIDE MARKET AREA	\$280,424,297	5,516	55.71%	55.26%
<b>TOTAL</b>	<b>\$503,357,953</b>	<b>9,982</b>	<b>100.00%</b>	<b>100.00%</b>



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# 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.<sup>382</sup> To determine the availability of Minority and Woman-owned Business Enterprises<sup>383</sup> (M/WBE) and non-minority male-owned businesses (non-M/WBE) 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 Palm Beach County (County).

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 or not 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 the 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

### A. Identification of Willing Businesses Within the Market Area

To identify willing and able businesses in the County that provide the construction, professional services, and goods and services contracts that the County procures, four main sources of information were used: (1) the County’s records, including vendors and bidders lists, (2) government certification directories, (3) business owners who attended the County’s Disparity Study business community meetings, and (4) business association membership lists. Only businesses on the membership lists that were determined to be willing, ready, and able were added to the availability list. Any business listed in more than one source was only counted once in the relevant industry. If a business was willing and able to provide goods or services in more than one industry, it was listed separately in each industry.

The four sources were ranked according to their reliability in determining a business’ willingness to contract with the County, with the highest ranking assigned to the utilized businesses, bidders, and vendors. Government certification lists ranked second, community meeting attendees ranked third, and business association membership lists ranked fourth. Therefore, the first document used

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<sup>382</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>383</sup> Hereinafter referred to as Minority and Caucasian female-owned businesses in the statistical tables.

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to build the availability database was the County’s utilized businesses. Bidders, businesses prequalified through the CCNA certification process, and vendor lists were then appended to the availability database. Businesses identified from federal and local government certification agencies were thereafter appended. The local certification lists included small, minority, and woman-owned businesses (S/M/WBE). The presence of a business at a business community meeting was the affirmation of the business’ willingness to contract with the County. Therefore, the registration list was appended to the availability list. Businesses identified from association membership lists that also affirmed their willingness through a survey of business association members were also appended. The business associations included trade organizations, professional organizations, and chambers of commerce.

**B. Prime Contractor Sources**

Extensive targeted outreach to business associations in the market area was performed to identify and secure business membership directories. Table 6.1 lists the County sources, certification directories, and business association listings.

**Commented [FML23]:** Sound disparity study methodology for determining relative M/WEE availability at prime and subcontract levels.

**Table 6.1: Prime Contractor Availability Data Sources**

Source	Type of Information
<b>County Records</b>	
Palm Beach County SBE Water Utilities Bidder List	M/WBEs and Non-M/WBEs
Palm Beach County Non-Certified Utilized Vendor List	M/WBEs and Non-M/WBEs
Palm Beach County Consultants Competitive Negotiation Act (CCNA) Vendor List	M/WBEs and Non-M/WBEs
<b>Government Certification Directories</b>	
Broward County Minority/Woman-Owned Business Enterprise Certified Vendors	M/WBEs
Broward County Florida Certified Firm Directory	M/WBEs and Non-M/WBEs
Broward County Florida Small Business Enterprise Certification	M/WBEs and Non-M/WBEs
City of West Palm Beach Small Business Enterprise Directory	M/WBEs and Non-M/WBEs
Federal Aviation Administration Certification	M/WBEs and Non-M/WBEs
Federal Aviation Administration Disadvantaged Business Enterprise Program	M/WBEs and Non-M/WBEs
Federal Transit Administration Disadvantaged Business Enterprise Program	M/WBEs and Non-M/WBEs
Florida Department of Management Services Office of Supplier Diversity Directory of Certified Business Enterprises	M/WBEs
Florida Department of Transportation Disadvantaged Business Enterprise Program	M/WBEs and Non-M/WBEs
Florida Department of Transportation Minority Business Enterprise as Certified by the State of Florida	M/WBEs
Miami-Dade County Community Business Enterprise Certification List	M/WBEs and Non-M/WBEs
Miami-Dade County Community Small Business Enterprise Certification List	M/WBEs and Non-M/WBEs
Miami-Dade County Public Schools Minority/Women Business Enterprise Certified Firms	M/WBEs
Miami-Dade County Small Business Development Certification List	M/WBEs and Non-M/WBEs
Miami-Dade County Small Business Enterprise Certification List	M/WBEs and Non-M/WBEs
Palm Beach County Office of Small Business Assistance Vendor Directory	M/WBEs and Non-M/WBEs

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Source	Type of Information
School District of Palm Beach County SBE and MWBE Certification List	M/WBEs and Non-M/WBEs
South Florida Water Management District Small Business Enterprise Directory	M/WBEs and Non-M/WBEs
The School District of Palm Beach County Minority/Women-owned Business Enterprise Programs	M/WBEs
The School District of Palm Beach County Small Business Enterprise	M/WBEs and Non-M/WBEs
United States Small Business Administration 8(a) Certified or 8(a) Joint Venture, Broward County, Florida	M/WBEs and Non-M/WBEs
United States Small Business Administration 8(a) Certified or 8(a) Joint Venture, Florida	M/WBEs and Non-M/WBEs
United States Small Business Administration 8(a) Certified or 8(a) Joint Venture, Palm Beach County, Florida	M/WBEs and Non-M/WBEs
United States Small Business Administration HUBZone Certification, Florida	M/WBEs and Non-M/WBEs
United States Small Business Administration Small Disadvantaged Business, Broward County, Florida	M/WBEs and Non-M/WBEs
United States Small Business Administration Small Disadvantaged Business, Florida	M/WBEs and Non-M/WBEs
United States Small Business Administration Small Disadvantaged Business, Palm Beach County, Florida	M/WBEs and Non-M/WBEs
United States Small Business Administration Veteran-Owned Small Business, Palm Beach County, Florida	M/WBEs and Non-M/WBEs
United States Small Business Administration Woman-Owned Small Business, Palm Beach County, Florida	M/WBEs
<b>Business Association Membership Lists</b>	
Air Conditioning Contractors of America	M/WBEs and Non-M/WBEs
American Council of Engineering Companies, Florida	M/WBEs and Non-M/WBEs
American Institute of Architects, Florida	M/WBEs and Non-M/WBEs
Associated General Contractors of America	M/WBEs and Non-M/WBEs
Associated General Contractors of America Florida East Coast Chapter	M/WBEs and Non-M/WBEs
Aventura Sunny Isles Beach Florida Chamber of Commerce	M/WBEs and Non-M/WBEs
Belle Glade Chamber of Commerce	M/WBEs and Non-M/WBEs
Black Chamber of Commerce of Palm Beach County	M/WBEs
Brazilian Chamber of Commerce of Florida	M/WBEs
Broward County Minority Builders Coalition, Inc.	M/WBEs
Building Trades Association	M/WBEs and Non-M/WBEs
Business Network International, Miami Dade	M/WBEs and Non-M/WBEs
Central Palm Beach County Chamber of Commerce	M/WBEs and Non-M/WBEs
Chamber of Commerce of the Palm Beaches	M/WBEs and Non-M/WBEs
Cold Spring Area Chamber of Commerce	M/WBEs and Non-M/WBEs
Davie-Cooper City Chamber of Commerce	M/WBEs and Non-M/WBEs
Florida Irrigation Society	M/WBEs and Non-M/WBEs
Florida Roofing Sheet Metal and Air Conditioning Contractors Association	M/WBEs and Non-M/WBEs
Florida Surveying and Mapping Society	M/WBEs and Non-M/WBEs
Florida Transportation Builders Association, Inc.	M/WBEs and Non-M/WBEs
Greater Boca Raton Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Boynton Beach Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Delray Beach Chamber of Commerce	M/WBEs and Non-M/WBEs



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Source	Type of Information
Greater Fort Lauderdale Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Kendall Business Association	M/WBEs and Non-M/WBEs
Greater Plantation Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Pompano Beach Chamber of Commerce	M/WBEs and Non-M/WBEs
Hollywood Chamber of Commerce	M/WBEs and Non-M/WBEs
Independent Electrical Contractors Florida West Coast Chapter	M/WBEs and Non-M/WBEs
Indoor Environment and Energy Efficiency Association	M/WBEs and Non-M/WBEs
Jamaica U.S.A Chamber of Commerce	M/WBEs
Key Biscayne Chamber of Commerce	M/WBEs and Non-M/WBEs
Lantana Chamber of Commerce	M/WBEs and Non-M/WBEs
Margate Chamber of Commerce	M/WBEs and Non-M/WBEs
Masonry Association of Florida, Inc.	M/WBEs and Non-M/WBEs
Mechanical Contractor Association of South Florida	M/WBEs and Non-M/WBEs
Mechanical Contractors Association of America	M/WBEs and Non-M/WBEs
Miami Beach Latin Chamber of Commerce	M/WBEs
Miramar Pembroke Pines Regional Chamber of Commerce	M/WBEs and Non-M/WBEs
National Association of Women Business Owners Fort Lauderdale/Broward County	M/WBEs
National Utility Contractors Association of Central Florida	M/WBEs and Non-M/WBEs
Northern Palm Beach County Chamber of Commerce	M/WBEs and Non-M/WBEs
Nursery Growers and Landscape Association	M/WBEs and Non-M/WBEs
Palm Beach Chamber of Commerce	M/WBEs and Non-M/WBEs
Palm Beach County Roofing and Sheet Metal Contractors Association	M/WBEs and Non-M/WBEs
Precast Concrete Structures Association of Florida, Inc.	M/WBEs and Non-M/WBEs
Puerto Rican/Hispanic Chamber of Commerce for Palm Beach County	M/WBEs
Roofing Contractors Association of South Florida	M/WBEs and Non-M/WBEs
South Dade Chamber of Commerce	M/WBEs and Non-M/WBEs
South Florida Air Conditioning Contractors Association	M/WBEs and Non-M/WBEs
South Florida Minority Pages	M/WBEs
Tamarac Chamber of Commerce	M/WBEs and Non-M/WBEs
The Greater Sunrise Chamber of Commerce	M/WBEs and Non-M/WBEs
United States Renewable Energy Association, LLC.	M/WBEs and Non-M/WBEs
Wellington Chamber of Commerce	M/WBEs and Non-M/WBEs
West Boca Chamber of Commerce	M/WBEs and Non-M/WBEs
Women Chamber Commerce of Palm Beach County	M/WBEs



### **C. Determination of Willingness**

From the four sources listed in the previous section, 1,976 unique market area businesses that can provide goods or services in one or more of the three industries were identified in the Study. An accounting of the willing businesses derived by source is listed below.

#### **1. County Records**

A total of 958 unique market area businesses were added to the availability database from the County records.

#### **2. Government Certification Lists**

A total of 682 unique market area businesses were added to the availability database from government certification lists.

#### **3. Business Community Meetings**

A total of 12 unique market area businesses were added to the availability database from the County's community meetings.

#### **4. Business Association Membership Lists**

A total of 1,779 unique market area businesses were identified from business association membership lists. These businesses were surveyed to determine their willingness to contract with the County. Of the 1,779 surveyed businesses, 232 refused to participate, 272 did not respond, 103 telephone numbers were disconnected, and 547 businesses completed the survey. Of those 547 businesses, 324 were deemed willing and added to the availability database.

**Commented [FML24]:** Sound methodology for determining availability of ready and willing firms.

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

Tables 6.2 through 6.4 present the distribution of willing prime contractors by source. A distribution of available businesses by source was calculated for each industry. As noted in Table 6.2, 88.16% of the construction businesses identified were derived from the County's records and bidders' lists, other government agencies' records, and government certification lists. Companies identified through the business association membership lists and community meeting attendee lists represent 11.84% of the willing businesses.

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**Table 6.2: Distribution of Prime Contractor Availability Data Sources, Construction**

Sources	M/WBE Percentage	Non-M/WBE Percentage	Source Percentage
Prime Contractor Utilization	27.81%	52.04%	42.11%
Certification Lists	65.24%	31.23%	45.18%
Bidders Lists	0.00%	1.49%	0.88%
<b>Subtotal</b>	<b>93.05%</b>	<b>84.76%</b>	<b>88.16%</b>
Community Meeting Attendees	0.53%	0.00%	0.22%
Willingness Survey	6.42%	15.24%	11.62%
<b>Subtotal</b>	<b>6.95%</b>	<b>15.24%</b>	<b>11.84%</b>
<b>Grand Total*</b>	<b>100.27%</b>	<b>100.00%</b>	<b>100.00%</b>

\*The percentages may not total 100% due to rounding.

Table 6.3 lists the data sources for the available professional services prime contractors. As noted, 72.26% of the professional services businesses identified were derived from the County’s records, other government agencies’ records, and government certification lists. Companies identified through the business association membership lists and community meeting attendee lists represent 27.74% of the willing businesses.

**Table 6.3: Distribution of Prime Contractor Availability Data Sources, Professional Services**

Sources	M/WBE Percentage	Non-M/WBE Percentage	Source Percentage
Prime Contractor Utilization	20.42%	32.73%	27.45%
Certification Lists	62.98%	31.17%	44.81%
<b>Subtotal</b>	<b>83.39%</b>	<b>63.90%</b>	<b>72.26%</b>
Community Meeting Attendees	1.38%	0.00%	0.59%
Willingness Survey	15.22%	36.10%	27.15%
<b>Subtotal</b>	<b>16.61%</b>	<b>36.10%</b>	<b>27.74%</b>
<b>Grand Total*</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>

\*The percentages may not total 100% due to rounding.

Table 6.4 lists the data sources for the available goods and services prime contractors. As noted, 90.29% of the goods and services businesses identified were derived from the County’s records and bidders’ list, other government agencies’ records, and government certification lists. Companies identified through the business association membership lists and community meeting attendee lists represent 9.71% of the willing businesses.



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**Table 6.4: Distribution of Prime Contractor Availability Data Sources, Goods and Services**

Sources	M/WBE Percentage	Non-M/WBE Percentage	Source Percentage
Prime Contractor Utilization	41.94%	77.50%	65.55%
Certification Lists	48.89%	12.10%	24.46%
Bidders Lists	0.00%	0.42%	0.28%
<b>Subtotal</b>	<b>90.83%</b>	<b>90.01%</b>	<b>90.29%</b>
Community Meeting Attendees	1.39%	0.28%	0.65%
Willingness Survey	7.78%	9.70%	9.06%
<b>Subtotal</b>	<b>9.17%</b>	<b>9.99%</b>	<b>9.71%</b>
<b>Grand Total*</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>

\*The percentages may not total 100% due to rounding.

### III. Capacity Analysis

The second component of the availability requirement set forth in *Croson* is to assess the capacity or ability of a business to perform the contracts awarded by the jurisdiction.<sup>384</sup> Capacity requirements are not delineated in *Croson*, but capacity has been considered in subsequent cases. Specifically, the United States Court of Appeals for the Third Circuit held certification to be a valid method of defining availability.<sup>385</sup> 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.<sup>386</sup> 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].”<sup>387</sup> As noted in *Philadelphia*, “[t]he issue of qualifications can be approached at different levels of specificity[.]”<sup>388</sup> Researchers have attempted to define capacity by profiling the age of the business, education of the business owner, revenue, number of employees, and bonding limits using census data. However, these conventional indices are themselves impacted by race and gender-based discrimination.<sup>389</sup>

Mason Tillman used five methods to compare the capacity of M/WBEs to similarly-situated Caucasian male-owned businesses, using measures that controlled for the impact of race and gender discrimination: (1) a review of the distribution of contracts to determine the size of the

<sup>384</sup> *Croson*, 488 U.S. 469.

<sup>385</sup> *Contractors Ass’n of E. Pa.*, 91 F.3d at 603.

<sup>386</sup> *Id.*

<sup>387</sup> *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.).

<sup>388</sup> *Contractors Ass’n of E. Pa.*, 91 F.3d at 610.

<sup>389</sup> David G. Blanchflower & Phillip B. Levine & David J. Zimmerman, 2003. “Discrimination in the Small-Business Credit Market,” *The Review of Economics and Statistics*, MIT Press, vol. 85(4).

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contracts that the County awarded, (2) identification of the largest contracts awarded to M/WBEs, (3) analysis of the frequency distribution of County contracts awarded to M/WBEs and Caucasian male-owned firms, (4) threshold analysis that limited the range of the formal prime contracts to be analyzed by eliminating outliers, and (5) an assessment of capacity-related economic factors of M/WBEs and Caucasian male-owned businesses using the results of the capacity eSurvey.

**A. Prime Contract Size Distribution**

All of the County’s contracts were ordered by the size of the award to determine the distribution of the awarded contracts. The purpose of this distribution is to gauge the capacity required to perform the County’s contracts. In Table 6.5, contract awards in the three industries were grouped into nine ranges<sup>390</sup> and are presented by non-minority females, non-minority males, minority females, and minority males.

More than 90% of the prime contracts awarded by the County were less than \$100,000. Additionally, 95.35% were less than \$250,000, 97.13% were less than \$500,000, 98.27% were less than \$1,000,000, and 99.33% were less than \$3,000,000. Only 0.67% of the awarded prime contracts were valued \$3,000,000 and greater.

**Commented [FML25]:** This is an important finding regarding average size of County contracts that eliminates differences in capacity as a plausible explanation for disparities in the utilization of M/WBE firms.

**Table 6.5: All Industry Contracts by Size  
January 1, 2009, to December 31, 2013**

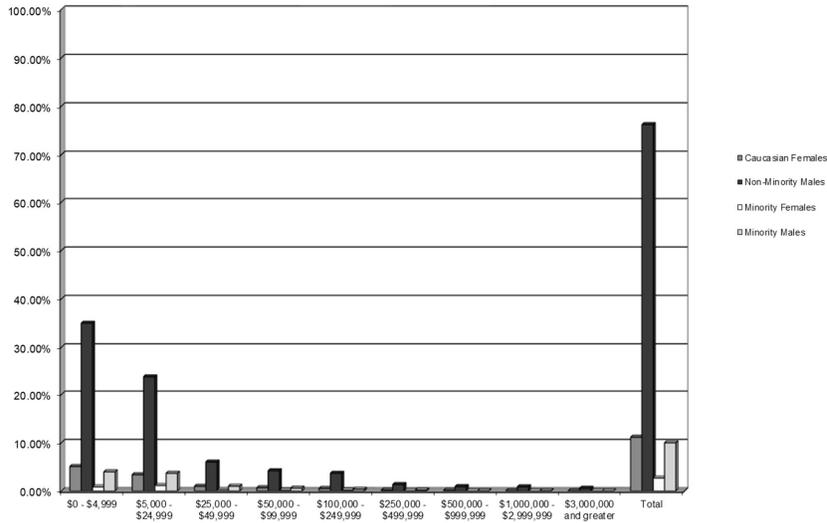
Size	Non-Minority				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$0 - \$4,999	687	5.09%	4,717	34.94%	116	0.86%	536	3.97%	6,056	44.86%
\$5,000 - \$24,999	456	3.38%	3,194	23.66%	155	1.15%	495	3.67%	4,300	31.85%
\$25,000 - \$49,999	132	0.98%	810	6.00%	41	0.30%	136	1.01%	1,119	8.29%
\$50,000 - \$99,999	91	0.67%	568	4.21%	16	0.12%	80	0.59%	755	5.59%
\$100,000 - \$249,999	73	0.54%	495	3.67%	23	0.17%	50	0.37%	641	4.75%
\$250,000 - \$499,999	27	0.20%	180	1.33%	7	0.05%	27	0.20%	241	1.79%
\$500,000 - \$999,999	20	0.15%	123	0.91%	3	0.02%	8	0.06%	154	1.14%
\$1,000,000 - \$2,999,999	10	0.07%	119	0.88%	1	0.01%	12	0.09%	142	1.05%
\$3,000,000 and greater	8	0.06%	78	0.58%	2	0.01%	3	0.02%	91	0.67%
<b>Total</b>	<b>1504</b>	<b>11.14%</b>	<b>10,284</b>	<b>76.18%</b>	<b>364</b>	<b>2.70%</b>	<b>1,347</b>	<b>9.98%</b>	<b>13,499</b>	<b>100.00%</b>



<sup>390</sup> The nine-dollar ranges are \$0 - \$4,999; \$5,000 - \$24,999; \$25,000 - \$49,999; \$50,000 - \$99,999; \$100,000 - \$249,999; \$250,000 - \$499,999; \$500,000 - \$999,999; \$1,000,000 - \$2,999,999; and \$3,000,000 and greater.

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**Chart 6.1: All Industry Contracts by Size  
January 1, 2009, to December 31, 2013**



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The size of the County’s prime contracts is a determinant of the capacity that a willing business needs to be competitive at the prime contract level. The fact that more than 90% of the County’s contracts are less than \$100,000 illustrates that the capacity needed to perform a significant number of the County’s contracts is not considerable.

**B. Largest M/WBE Prime Contracts Awarded by Industry**

Table 6.6 shows that M/WBEs demonstrated the capacity to perform contracts as large as \$5,488,608 in construction, \$9,553,814 in professional services, and \$5,775,417 in goods and services. The size of the largest prime contracts that the County awarded to M/WBEs illustrates that M/WBEs have the capacity to perform substantial formal contracts.

**Commented [FML26]:** Further strong evidence that differences in capacity cannot fully explain lower utilization of M/WBE firms.



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**Table 6.6: Largest Prime Contracts Awarded by Palm Beach County to M/WBE**

<b>Ethnic/Gender Group</b>	<b>Construction</b>	<b>Professional Services</b>	<b>Goods and Services</b>
African American Female	\$248,650	\$34,000	\$5,775,417
African American Male	\$462,717	\$250,583	\$570,704
Asian American Female	\$225,278	----	\$366,445
Asian American Male	\$136,325	\$1,631,815	\$3,015,426
Hispanic American Female	\$431,926	\$839,044	\$331,200
Hispanic American Male	\$1,703,147	\$9,553,814	\$2,250,702
Native American Female	----	----	\$650
Native American Male	\$2,446	----	\$35,614
Caucasian Female	\$5,488,608	\$3,277,904	\$3,873,968
<b>Largest Dollar Amounts MBEs</b>	<b>\$1,703,147</b>	<b>\$9,553,814</b>	<b>\$5,775,417</b>
<b>Largest Dollar Amounts WBEs</b>	<b>\$5,488,608</b>	<b>\$3,277,904</b>	<b>\$5,775,417</b>

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

**C. Frequency Distribution**

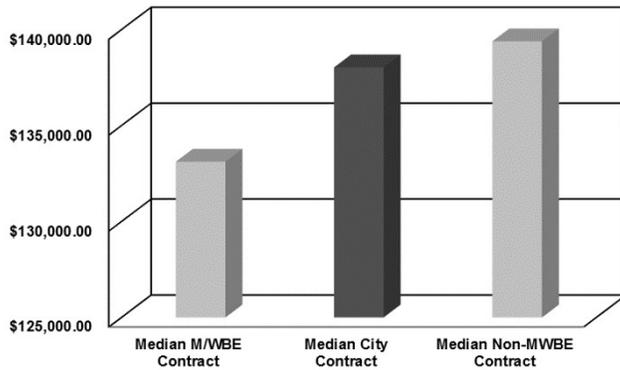
The County’s formal contracts range from \$50,091 to \$41,983,731. A frequency distribution was calculated for all County prime contracts to illustrate the center point of the dataset where the size of a contract marks the midpoint between the smallest and largest contracts. The same distribution was 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 center point of all County prime contracts for all industries was \$138,033. This center point marks the value where 50% of contracts were above and below \$138,033. The median prime contract awarded to M/WBEs was \$133,116 and to Caucasian males was \$139,389.

These statistics show only a \$4,917 difference between the median of all County prime contracts and the median prime contract performed by M/WBEs, illustrating that M/WBEs have comparable capacity to perform a significant number of the prime contracts awarded by the County. As depicted in Table 6.6, there are M/WBEs that have the capacity to perform very large contracts. Furthermore, there are other methods commonly used by prime contractors, such as subcontracting, joint ventures, and staff augmentation to increase capacity in the presence of contracting opportunities.



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**Chart 6.2: Median Contract Value**



**D. Formal Contract Threshold Analysis**

As a further measure to ensure that the available businesses have the capacity to perform the contracts analyzed in the disparity analysis, the prime contracts subject to the statistical analysis was limited. As discussed in Chapter 3: Prime Contractor Utilization Analysis, the analysis of formal contracts was limited to the awarded contracts with a dollar value beneath the 80th percentile. The decision to limit the analysis of disparity to contracts at or below the 80th percentile was made to eliminate outliers, which increased the reliability of the statistical findings, and reduced the business capacity requirements. Table 6.7 illustrates the contract distribution for each industry by percentile.

**Table 6.7: Threshold Analysis by Size and Industry**

Contract Distribution	All Industries	Construction	Professional Services	Goods and Services
Minimum	\$50,091	\$50,209	\$50,091	\$50,212
20th percentile	\$71,000	\$83,000	\$66,000	\$69,000
40th Percentile	\$108,000	\$148,000	\$96,000	\$103,000
60th Percentile	\$181,000	\$343,000	\$138,000	\$160,000
80th Percentile	\$466,000	\$1,296,000	\$301,000	\$321,000
Maximum	\$41,984,000	\$29,313,000	\$41,984,000	\$11,953,000



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## E. Business Capacity Assessment

To assess the relative capacity of the M/WBEs and Caucasian male-owned businesses enumerated in the availability analysis, an assessment of socioeconomic factors was administered to the willing businesses using an eSurvey, which was administered to the 1,976 available businesses and queried them for independent business-related socioeconomic factors.

### 1. Profile of Respondents

The business capacity survey was completed by 158 unique businesses: 17.09% were African American, 3.80% were Asian American, 13.92% were Hispanic American, 0.00% were Native American, 3.80% were other minorities, and 61.39% were Caucasian American. Of the 158 surveys, 40.51% were completed by females of all ethnicities and 59.49% were completed by males of all ethnicities.

**Table 6.8: Ethnicity and Gender of Businesses**

Response	African American	Asian American	Caucasian American	Hispanic American	Native American	Other Minority <sup>391</sup>	Total
Female	5.06%	1.27%	25.32%	6.96%	0.00%	1.90%	40.51%
Male	12.03%	2.53%	36.08%	6.96%	0.00%	1.90%	59.49%
Total	17.09%	3.80%	61.39%	13.92%	0.00%	3.80%	100.00%

Due to the limited number of responses, ethnic groups were combined and analyzed as “minority males” and “minority females.” As shown in Table 6.9, 27.85% of businesses provided construction services; 39.87% of businesses provided professional services; and 32.28% of businesses provided goods and services.

**Table 6.9: Business Owners’ Ethnicity, Gender and Primary Industry**

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Construction	3.16%	7.59%	5.06%	12.03%	27.85%
Professional Services	6.96%	13.92%	8.23%	10.76%	39.87%
Goods and Services	5.06%	1.90%	12.03%	13.29%	32.28%
Total Percent	15.19%	23.42%	25.32%	36.08%	100.00%

**Commented [FML27]:** Strong finding tending to show race and gender have a significant impact on County utilization of M/WBEs even when controlling for capacity as measured by revenue and when controlling for bidding frequency.



<sup>391</sup> Other Minority includes individuals who belong to two or more racial groups.

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## 2. Capacity Assessment Findings

Table 6.10 details business annual gross revenue, which shows that 50.33% of businesses earned \$500,000 and under; 11.26% of businesses earned \$500,001 to \$1,000,000; 18.54% of businesses earned \$1,000,001 to \$3,000,000; 6.62% of businesses earned \$3,000,001 to \$5,000,000; 4.64% of businesses earned \$5,000,001 to \$10,000,000; and 8.61% of businesses earned over \$10 million.

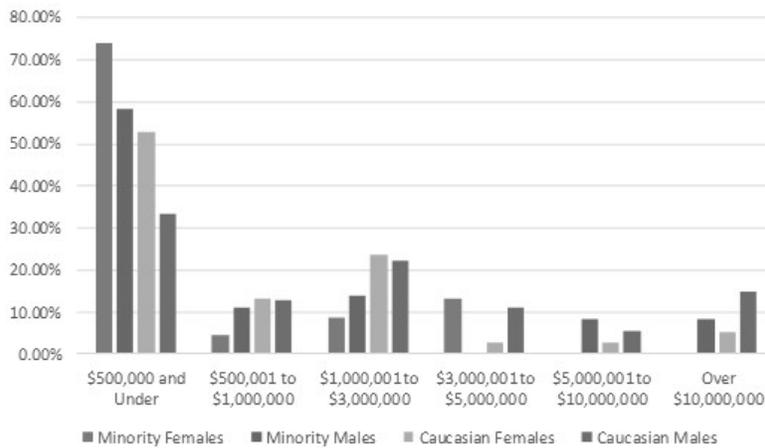
**Table 6.10: Annual Gross Revenue**

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
\$500,000 and Under	73.91%	58.33%	52.63%	33.33%	50.33%
\$500,001 to \$1,000,000	4.35%	11.11%	13.16%	12.96%	11.26%
\$1,000,001 to \$3,000,000	8.70%	13.89%	23.68%	22.22%	18.54%
\$3,000,001 to \$5,000,000	13.04%	0.00%	2.63%	11.11%	6.62%
\$5,000,001 to \$10,000,000	0.00%	8.33%	2.63%	5.56%	4.64%
Over \$10,000,000	0.00%	8.33%	5.26%	14.81%	8.61%
<b>Total Percent</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>

$\chi^2=34.9374$ ,  $df=15$ ,  $p\text{-value}=0.0693$

Chart 6.3 illustrates that minority female, minority male, Caucasian female, and Caucasian male revenue is most similar at the \$500,000 and under level. This finding infers that the majority of businesses are small, regardless of the ethnicity and gender of the owner.

**Chart 6.3: Annual Gross Revenue**



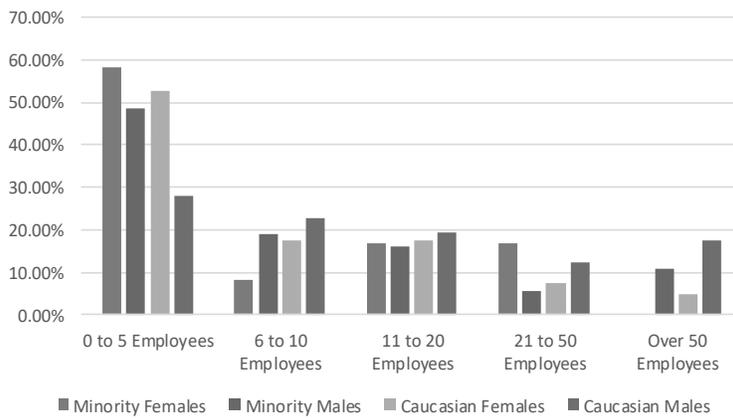
As shown in Table 6.11, 43.67% of business had 0 to 5 employees,<sup>392</sup> 18.35% had 6 to 10 employees, 17.72% had 11 to 20 employees, 10.13% had 21 to 50 employees, and 10.13% had more than 50 employees.

**Table 6.11: Number of Employees**

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
<b>0 to 5 Employees</b>	58.33%	48.65%	52.50%	28.07%	43.67%
<b>6 to 10 Employees</b>	8.33%	18.92%	17.50%	22.81%	18.35%
<b>11 to 20 Employees</b>	16.67%	16.22%	17.50%	19.30%	17.72%
<b>21 to 50 Employees</b>	16.67%	5.41%	7.50%	12.28%	10.13%
<b>Over 50 Employees</b>	0.00%	10.81%	5.00%	17.54%	10.13%
<b>Total Percent</b>	100.00%	100.00%	100.00%	100.00%	100.00%

Chart 6.4 illustrates that most businesses are small, including both M/WBEs and Caucasian male-owned businesses. As reported in the eSurvey, 62.02% of all businesses are small, employing 10 or fewer persons. While the responding businesses were small, they were larger than the average Palm Beach County business, as reported by the United States Census Survey of Business Owners. The Census reports that 80.59% of businesses in Palm Beach County employ 10 or fewer persons.<sup>393</sup>

**Chart 6.4: Number of Employees**



<sup>392</sup> Business owners are not counted as employees

<sup>393</sup> United States Census Bureau, 2007 Survey of Business Owners

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One consideration of capacity as discussed in the caselaw considered the ability to bid and perform multiple contracts.<sup>394</sup> This factor relates to the human resources and capital resources available to perform multiple contracts concurrently. Table 6.12 illustrates that most businesses, including M/WBEs and Caucasian male-owned businesses, performed multiple concurrent contracts within the previous calendar year. Only 3.25% of businesses reported only performing a single public or private contract.

**Table 6.12: Percent of Annual Contracts**

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Not Applicable	16.67%	10.81%	28.21%	16.67%	18.18%
1 Contract	4.17%	5.41%	2.56%	1.85%	3.25%
2 to 5 Contracts	25.00%	27.03%	15.38%	14.81%	19.48%
6 to 10 Contracts	16.67%	8.11%	10.26%	9.26%	10.39%
11 to 20 Contracts	12.50%	21.62%	10.26%	9.26%	12.99%
Over 20 Contracts	25.00%	27.03%	33.33%	48.15%	35.71%
Total Percent	100.00%	100.00%	100.00%	100.00%	100.00%

Chart 6.5 illustrates that most businesses, including M/WBEs and Caucasian male-owned businesses, performed over 20 contracts, illustrating that M/WBEs and Caucasian male-owned businesses have successfully performed multiple contracts concurrently.



<sup>394</sup> See *Rothe Development Corporation v. U.S. Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001); see also *Rothe Development Corporation v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

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**Chart 6.5: Number of Contracts**

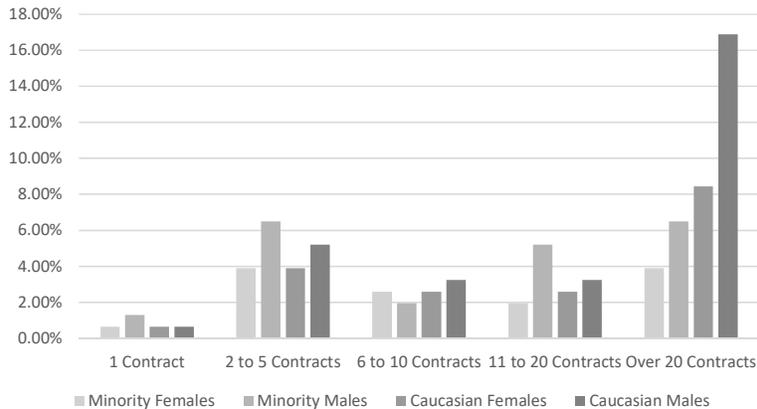


Table 6.13 shows that the majority of businesses are 21 to 50 years old (33.54%), illustrating that there are mature M/WBEs within the pool of available businesses. No minority male or minority female business is 50 years or older. This finding is consistent with the passage of anti-discrimination legislation, beginning with the Civil Rights Act of 1964, which spawned the 1971 Executive Order 11625. This early legislation applied to federally-funded contracts and minimally affected local laws. Local government affirmative action policies were not accelerated until the promulgation of the United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) regulations in 1983. The DBE regulations required states, counties, cities, and transportation agencies to implement affirmative action contracting programs as a condition of USDOT funding.

**Commented [FML28]:** Important context provided here reflects that M/WBE firms tend to be quite mature, although past formation of such firms was likely adversely affected by overt discrimination. This leads to a logical inference that ongoing effects of past discrimination could well account for a portion of relative lower availability of M/WBE firms today in relevant marketplace given characteristics of business owners and present demographic trends.

**Table 6.13: Years in Business Operation**

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Less than 5 Years	20.83%	21.62%	15.00%	5.26%	13.92%
6 to 10 Years	20.83%	16.22%	20.00%	15.79%	17.72%
11 to 20 Years	37.50%	29.73%	22.50%	28.07%	28.48%
21 to 50 Years	20.83%	32.43%	40.00%	35.09%	33.54%
Over 50 Years	0.00%	0.00%	2.50%	15.79%	6.33%
<b>Total Percent</b>	100.00%	100.00%	100.00%	100.00%	100.00%

Chart 6.6 also illustrates that M/WBEs are a growing group of entrepreneurs. However, the availability pool also includes mature M/WBEs with significant experience in their respective fields.

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**Chart 6.6: Years in Operation**

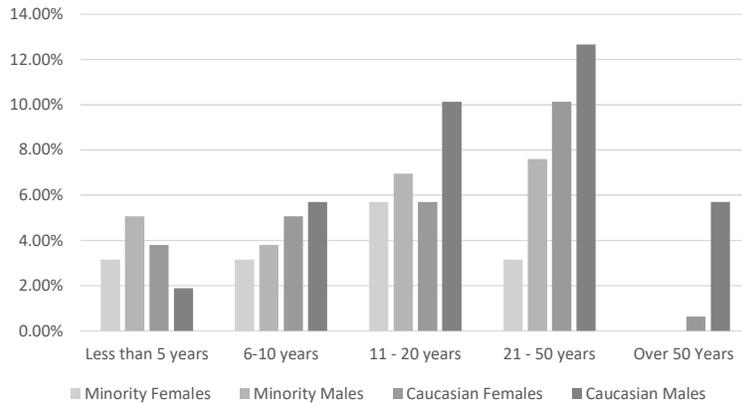


Table 6.14 shows that 36.18% of business owners have a bachelor’s degree. However, within this pool, minority males obtained graduate and professional degrees at a higher frequency than Caucasian male business owners. Despite lower levels of educational attainment, Caucasian male-owned businesses still received most of the County’s contracts as detailed in *Chapter 3: Prime Contractor Utilization Analysis* and *Chapter 4: Subcontractor Utilization Analysis*.

**Table 6.14: Education Level of Business Owners**

Response	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
High School Degree or Equivalent	16.67%	2.78%	7.89%	18.52%	11.84%
Trade/Technical Certificate or Degree	4.17%	11.11%	2.63%	11.11%	7.89%
Associate’s Degree	12.50%	8.33%	15.79%	9.26%	11.18%
Bachelor’s Degree	37.50%	25.00%	44.74%	37.04%	36.18%
Graduate Degree	20.83%	30.56%	18.42%	18.52%	21.71%
Professional Degree	8.33%	22.22%	10.53%	5.56%	11.18%
<b>Total Percent</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>

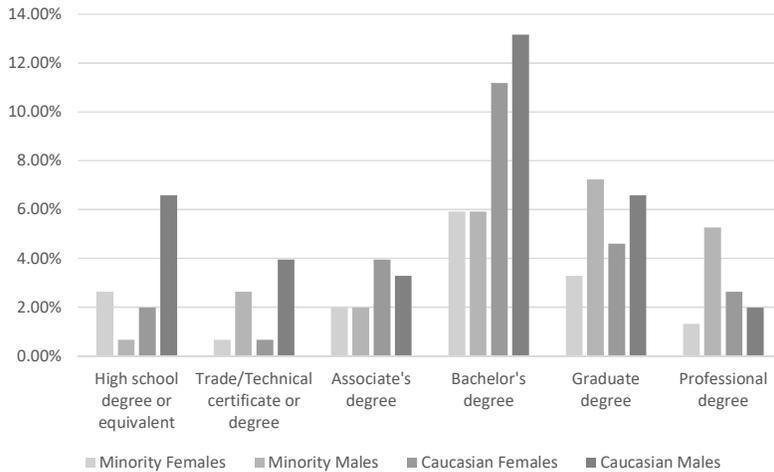
**Commented [FML29]:** This is consistent with other findings across the nation that show differences in personal “qualifications” of business owners cannot explain the disparity in business earnings between M/WBE firms and firms earned by Caucasian males.

Chart 6.7 illustrates that most business owners have a bachelor’s degree. However, of note is that Caucasian males are the majority of business owners with only a high school degree.



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**Chart 6.7: Educational Attainment**



**F. eSurvey Findings**

The analysis shows that among similarly-situated M/WBEs and Caucasian male-owned businesses, the relative capacity of firms is comparable. Most businesses enumerated in the availability analysis, including M/WBEs and Caucasian males, have the following profile:

- Employ ten or fewer persons
- Performed over 20 public and private contracts concurrently
- Have gross revenue of \$500,000 or less
- Operated their business for less than 50 years
- Have a bachelor’s degree

Considering the metrics reviewed in this analysis, Caucasian males are not awarded more contracts because of any single socioeconomic factor or combination of measures. That Caucasian males are awarded more contracts is more likely a function of discrimination in public- and private-sector business practices. The results of this eSurvey is evidence that willing M/WBEs have demonstrated capacity comparable to Caucasian male-owned businesses.

**Commented [FML30]:** Well-reasoned conclusion based upon a strong basis in evidence.

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#### **IV. Prime Contractor Availability Analysis**

The prime contractor availability analysis is based on the 1,976 willing market area businesses enumerated from the four availability sources described above. The availability of willing market area businesses is presented by ethnicity, gender, and industry in the sections below.

##### **A. Construction Prime Contractor Availability**

The distribution of available construction prime contractors is summarized in Table 6.15.

*African Americans* account for 13.16% of the construction prime contractors in the County's market area.

*Asian Americans* account for 1.54% of the construction prime contractors in the County's market area.

*Hispanic Americans* account for 12.94% of the construction prime contractors in the County's market area.

*Native Americans* account for 0.44% of the construction prime contractors in the County's market area.

*Caucasian Females* account for 12.94% of the construction prime contractors in the County's market area.

*Non-minority Males* account for 58.99% of the construction prime contractors in the County's market area.



**Table 6.15: Available Construction Prime Contractors,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Percent of Businesses</b>
African Americans	13.16%
Asian Americans	1.54%
Hispanic Americans	12.94%
Native Americans	0.44%
Caucasian Females	12.94%
Non-minority Males	58.99%
<b>TOTAL</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Percent of Businesses</b>
African American Females	1.97%
African American Males	11.18%
Asian American Females	0.66%
Asian American Males	0.88%
Hispanic American Females	4.17%
Hispanic American Males	8.77%
Native American Females	0.22%
Native American Males	0.22%
Caucasian Females	12.94%
Non-minority Males	58.99%
<b>TOTAL</b>	<b>100.00%</b>



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**B. Professional Services Prime Contractor Availability**

The distribution of available professional services prime contractors, including CCNA certified prime contractors, is summarized in Table 6.16.

*African Americans* account for 10.24% of the professional services prime contractors in the County's market area.

*Asian Americans* account for 4.01% of the professional services prime contractors in the County's market area.

*Hispanic Americans* account for 9.35% of the professional services prime contractors in the County's market area.

*Native Americans* account for 0.15% of the professional services prime contractors in the County's market area.

*Caucasian Females* account for 19.14% of the professional services prime contractors in the County's market area.

*Non-minority Males* account for 57.12% of the professional services prime contractors in the County's market area.



**Table 6.16: Available Professional Services Prime Contractors,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Percent of Businesses</b>
African Americans	10.24%
Asian Americans	4.01%
Hispanic Americans	9.35%
Native Americans	0.15%
Caucasian Females	19.14%
Non-minority Males	57.12%
<b>TOTAL</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Percent of Businesses</b>
African American Females	4.15%
African American Males	6.08%
Asian American Females	1.04%
Asian American Males	2.97%
Hispanic American Females	3.86%
Hispanic American Males	5.49%
Native American Females	0.00%
Native American Males	0.15%
Caucasian Females	19.14%
Non-minority Males	57.12%
<b>TOTAL</b>	<b>100.00%</b>



**C. CCNA Certified Professional Services Prime Contractor Availability**

Consultants Competitive Negotiation Act (CCNA) professional services contracts are included above in the analysis of the professional services industry. However, the CCNA professional services contracts are segmented here for illustrative purposes because there is a CCNA mandated certification process, which determines the available businesses that can perform these contracts. The distribution of the County's available CCNA certified professional services prime contractors is summarized in Table 6.17.

*African Americans* account for 8.06% of the CCNA certified professional services prime contractors in the County's market area.

*Asian Americans* account for 9.14% of the CCNA certified professional services prime contractors in the County's market area.

*Hispanic Americans* account for 10.75% of the CCNA certified professional services prime contractors in the County's market area.

*Native Americans* account for 0.00% of the CCNA certified professional services prime contractors in the County's market area.

*Caucasian Females* account for 10.22% of the CCNA certified professional services prime contractors in the County's market area.

*Non-minority Males* account for 61.83% of the CCNA certified professional services prime contractors in the County's market area.

**Commented [FML31]:** It is important to note that these availability figures for CCNA contracts have been prequalified independently by the County through an extensive process as being capable of performing the kinds of design contracts the County awards. Accordingly, any statistically significant disparity in M/WBE utilization by the County cannot be explained on the basis of qualifications or capacity. It is also important to note that by law, such CCNA contract awards cannot be based upon low price. By process of elimination, these kind of disparities are therefore likely affected by race and/or gender and the subjective process by which contracts are awarded by the County.



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**Table 6.17: Available CCNA Certified Professional Services Prime Contractors,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Percent of Businesses</b>
African Americans	8.06%
Asian Americans	9.14%
Hispanic Americans	10.75%
Native Americans	0.00%
Caucasian Females	10.22%
Non-minority Males	61.83%
<b>TOTAL</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Percent of Businesses</b>
African American Females	1.61%
African American Males	6.45%
Asian American Females	1.61%
Asian American Males	7.53%
Hispanic American Females	3.23%
Hispanic American Males	7.53%
Native American Females	0.00%
Native American Males	0.00%
Caucasian Females	10.22%
Non-minority Males	61.83%
<b>TOTAL</b>	<b>100.00%</b>



**D. Goods and Services Prime Contractor Availability**

The distribution of available goods and services prime contractors is summarized in Table 6.18.

*African Americans* account for 6.91% of the goods and services prime contractors in the County’s market area.

*Asian Americans* account for 1.68% of the goods and services prime contractors in the County’s market area.

*Hispanic Americans* account for 8.03% of the goods and services prime contractors in the County’s market area.

*Native Americans* account for 0.19% of the goods and services prime contractors in the County’s market area.

*Caucasian Females* account for 16.81% of the goods and services prime contractors in the County’s market area.

*Non-minority Males* account for 66.39% of the goods and services prime contractors in the County’s market area.



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**Table 6.18: Available Goods and Services Prime Contractors,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Percent of Businesses</b>
African Americans	6.91%
Asian Americans	1.68%
Hispanic Americans	8.03%
Native Americans	0.19%
Caucasian Females	16.81%
Non-minority Males	66.39%
<b>TOTAL</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Percent of Businesses</b>
African American Females	2.05%
African American Males	4.86%
Asian American Females	0.84%
Asian American Males	0.84%
Hispanic American Females	2.80%
Hispanic American Males	5.23%
Native American Females	0.09%
Native American Males	0.09%
Caucasian Females	16.81%
Non-minority Males	66.39%
<b>TOTAL</b>	<b>100.00%</b>



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## V. **Subcontractor Availability Analysis**

### A. **Source of Willing and Able Subcontractors**

All available prime contractors were included in the calculation of the subcontractor availability. Additional subcontractors in the County’s market area were identified using the source in Table 6.19.

Subcontractor availability was not calculated for goods and services because the subcontracting activity in that industry was limited.

**Table 6.19: Unique Subcontractor Availability Data Sources**

Type Record	Type Information
Subcontract Awards Provided by the County	M/WBEs and Non-M/WBEs

### B. **Determination of Willingness and Capacity**

Subcontractor availability was limited to utilized prime contractors and unique businesses utilized as subcontractors. Therefore, the determination of willingness and capacity was achieved. Furthermore, *Crososn* does not require a separate measure of subcontractor capacity in the analysis of subcontractor availability.



### **C. Construction Subcontractor Availability**

The distribution of available construction subcontractors is summarized in Table 6.20.

*African Americans* account for 11.15% of the construction subcontractors in the County's market area.

*Asian Americans* account for 1.55% of the construction subcontractors in the County's market area.

*Hispanic Americans* account for 11.61% of the construction subcontractors in the County's market area.

*Native Americans* account for 0.31% of the construction subcontractors in the County's market area.

*Caucasian Females* account for 14.40% of the construction subcontractors in the County's market area.

*Non-minority Males* account for 60.99% of the construction subcontractors in the County's market area.



**Table 6.20: Available Construction Subcontractors,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Percent of Businesses</b>
African Americans	11.15%
Asian Americans	1.55%
Hispanic Americans	11.61%
Native Americans	0.31%
Caucasian Females	14.40%
Non-minority Males	60.99%
<b>TOTAL</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Percent of Businesses</b>
African American Females	2.17%
African American Males	8.98%
Asian American Females	0.46%
Asian American Males	1.08%
Hispanic American Females	3.25%
Hispanic American Males	8.36%
Native American Females	0.15%
Native American Males	0.15%
Caucasian Females	14.40%
Non-minority Males	60.99%
<b>TOTAL</b>	<b>100.00%</b>



**D. Professional Services Subcontractor Availability**

The distribution of available professional services subcontractors is summarized in Table 6.21.

*African Americans* account for 10.62% of the professional services subcontractors in the County’s market area.

*Asian Americans* account for 4.31% of the professional services subcontractors in the County’s market area.

*Hispanic Americans* account for 10.00% of the professional services subcontractors in the County’s market area.

*Native Americans* account for 0.15% of the professional services subcontractors in the County’s market area.

*Caucasian Females* account for 20.92% of the professional services subcontractors in the County’s market area.

*Non-minority Males* account for 54.00% of the professional services subcontractors in the County’s market area.



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**Table 6.21: Available Professional Services Subcontractors,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Percent of Businesses</b>
African Americans	10.62%
Asian Americans	4.31%
Hispanic Americans	10.00%
Native Americans	0.15%
Caucasian Females	20.92%
Non-minority Males	54.00%
<b>TOTAL</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Percent of Businesses</b>
African American Females	4.31%
African American Males	6.31%
Asian American Females	1.08%
Asian American Males	3.23%
Hispanic American Females	4.15%
Hispanic American Males	5.85%
Native American Females	0.00%
Native American Males	0.15%
Caucasian Females	20.92%
Non-minority Males	54.00%
<b>TOTAL</b>	<b>100.00%</b>



## **VI. Summary**

This chapter presented the enumeration of 1,976 willing and able market area businesses by ethnicity, gender, and industry. The capacity of the enumerated businesses was assessed using five methods: 1) A review of the County's contract size distribution to identify the capacity needed to perform most County contracts; 2) A determination of the largest contracts the County awarded to M/WBEs; 3) A frequency distribution that defined the median size of contracts awarded to both M/WBE and non-M/WBEs; 4) A threshold analysis that defined the formal contracts within the 80th percentile in order to eliminate outliers and increase the reliability of the statistical findings; and 5) A business capacity analysis that assessed relevant socioeconomic factors in the private sector affecting business formation and revenue.

The findings from these analyses illustrate that M/WBEs have a socioeconomic profile comparable to similarly-situated Caucasian male-owned businesses and the capacity to perform large County contracts. Minority-owned businesses account for 21.15% of construction, professional services, and goods and services prime contractors. Caucasian female-owned businesses account for 16.70%, and non-minority male-owned business account for 62.15%. Minority-owned businesses account for 24.50% of construction and professional services subcontractors, Caucasian female-owned businesses account for 18.37%, and non-minority male-owned businesses account for 57.13%.



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## CHAPTER 7: Prime Contract Disparity Analysis

### I. Introduction

The objective of this chapter is to determine if available Minority and Woman-owned Business Enterprises (M/WBE) contractors were underutilized on Palm Beach County's (County) prime contracts during the January 1, 2009, to December 31, 2013, study period. Under a fair and equitable system of awarding prime contracts, the proportion of prime contract dollars awarded to M/WBEs should be relatively close to the corresponding proportion of available M/WBEs<sup>395</sup> in the relevant market area. If the ratio of utilized M/WBE prime contractors compared to available M/WBE prime contractors is less than one, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio. This analysis assumes a fair and equitable system.<sup>396</sup> *City of Richmond v. J.A. Croson Co. (Croson)*<sup>397</sup> 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/WBE) are not subjected to a statistical test of underutilization.

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

For parametric and non-parametric analyses, the p-value takes into account the number of contracts, amount of contract dollars, and variation in contract dollars. If the difference between the actual and expected number of contracts and total contract dollars has a p-value equal to or less than 0.05, the difference is statistically significant.<sup>398</sup>

In the simulation analysis, the p-value takes into account a combination of the distribution formulated from the empirical data and the contract dollar amounts. If the actual contract dollar amount, or actual contract rank, falls below the fifth percentile of the distribution, it denotes a p-value less than 0.05, which is statistically significant.

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<sup>395</sup> 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.

<sup>396</sup> 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.

<sup>397</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>398</sup> This study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.



Our statistical model employs all three methods simultaneously to each industry. 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.

**Commented [FML32]:** Standard best practice in calculating statistically significant disparities in utilization.

## II. Disparity Analysis

A prime contract disparity analysis was performed on the contracts awarded in the construction, professional services, and goods and services industries during the January 1, 2009, to December 31, 2013, study period. The informal thresholds were defined according to the County’s procurement policies. The informal thresholds for each industry are listed in Table 7.1.

**Table 7.1: Informal Thresholds for Analysis by Industry**

Industry	Contract Threshold
Construction	Under \$50,000
Professional Services	Under \$50,000
Goods and Services	Under \$50,000

The thresholds utilized in each industry for the formal contract analysis were derived from a statistical analysis, which calculated the contract values which would skew the disparity analysis. The statistical analysis was thus limited to data points representing the 80<sup>th</sup> percentile of the contracts the Count awarded in each of the three industries. Outliers over the 80<sup>th</sup> percentile were removed when the thresholds were set for each industry. The statistical analysis performed to define the formal contract thresholds analyzed is discussed in *Chapter 3: Prime Contractor Utilization Analysis*. The formal contract thresholds for each industry are listed in Table 7.2.

**Table 7.2: Formal Contract Thresholds for Analysis by Industry**

Industry	Contract Threshold
Construction	\$50,000 to \$1,296,000
Professional Services	\$50,000 to \$301,000
Goods and Services	\$50,000 to \$321,000

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The findings from the methods employed to calculate statistical significance, as discussed on page 7-1, are presented in the subsequent sections. The outcomes of the statistical analyses are presented in the “P-Value” column of the tables. A description of these statistical outcomes, as shown in the disparity tables, is presented below in Table 7.3.

**Table 7.3: Statistical Outcome Descriptions**

<b>P-Value Outcome</b>	<b>Definition of P-Value Outcome</b>
< .05 *	This underutilization is statistically significant.
not significant	<ul style="list-style-type: none"> <li>• MWBEs: This underutilization is not statistically significant.</li> <li>• Non-minority males: This overutilization is not statistically significant.</li> </ul>
< .05 †	This overutilization is statistically significant.
----	While this group was underutilized, there were too few available firms to determine statistical significance.
**	This Study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.



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**A. Disparity Analysis: Informal Prime Contracts by Industry**

**1. Construction Prime Contracts Valued Under \$50,000**

The disparity analysis of construction prime contracts valued under \$50,000 is described below and in Table 7.4 and Chart 7.1.

*African Americans* represent 13.16% of the available construction businesses and received 13.74% of the dollars on construction contracts valued under \$50,000. This Study does not test statistically the overutilization of minority or gender groups.

*Asian Americans* represent 1.54% of the available construction businesses and received 1.48% of the dollars on construction contracts valued under \$50,000. This underutilization is not statistically significant.

*Hispanic Americans* represent 12.94% of the available construction businesses and received 3.58% of the dollars on construction contracts valued under \$50,000. This underutilization is statistically significant.

*Native Americans* represent 0.44% of the available construction businesses and received 0.02% of the dollars on construction contracts valued under \$50,000. While this group was underutilized, there were too few available firms to determine statistical significance.

*Caucasian Females* represent 12.94% of the available construction businesses and received 19.14% of the dollars on construction contracts valued under \$50,000. This Study does not test statistically the overutilization of minority or gender groups.

*Non-minority Males* represent 58.99% of the available construction businesses and received 62.04% of the dollars on construction contracts valued under \$50,000. This overutilization is statistically significant.



**Table 7.4: Disparity Analysis: Construction Prime Contracts Valued Under \$50,000,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African Americans	\$2,237,565	13.74%	13.16%	\$2,142,545	\$95,020	1.04	**
Asian Americans	\$241,696	1.48%	1.54%	\$249,964	-\$8,267	0.97	not significant
Hispanic Americans	\$583,154	3.58%	12.94%	\$2,106,836	-\$1,523,682	0.28	< .05 *
Native Americans	\$2,446	0.02%	0.44%	\$71,418	-\$68,972	0.03	----
Caucasian Females	\$3,116,099	19.14%	12.94%	\$2,106,836	\$1,009,263	1.48	**
Non-minority Males	\$10,102,381	62.04%	58.99%	\$9,605,743	\$496,638	1.05	< .05 †
<b>TOTAL</b>	<b>\$16,283,340</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$16,283,340</b>			
<b>Ethnicity and Gender</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African American Females	\$0	0.00%	1.97%	\$321,382	-\$321,382	0.00	< .05 *
African American Males	\$2,237,565	13.74%	11.18%	\$1,821,163	\$416,402	1.23	**
Asian American Females	\$619	0.00%	0.66%	\$107,127	-\$106,508	0.01	----
Asian American Males	\$241,077	1.48%	0.88%	\$142,836	\$98,241	1.69	**
Hispanic American Females	\$156,031	0.96%	4.17%	\$678,473	-\$522,441	0.23	< .05 *
Hispanic American Males	\$427,123	2.62%	8.77%	\$1,428,363	-\$1,001,241	0.30	< .05 *
Native American Females	\$0	0.00%	0.22%	\$35,709	-\$35,709	0.00	----
Native American Males	\$2,446	0.02%	0.22%	\$35,709	-\$33,263	0.07	----
Caucasian Females	\$3,116,099	19.14%	12.94%	\$2,106,836	\$1,009,263	1.48	**
Non-minority Males	\$10,102,381	62.04%	58.99%	\$9,605,743	\$496,638	1.05	< .05 †
<b>TOTAL</b>	<b>\$16,283,340</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$16,283,340</b>			

( \* ) denotes a statistically significant underutilization.

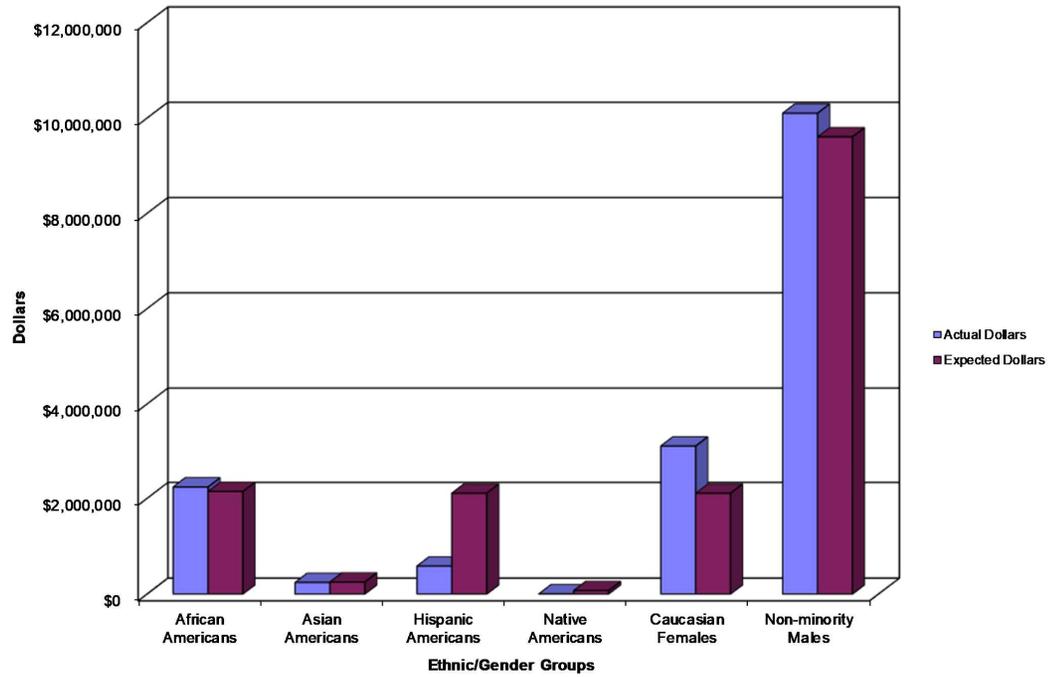
( † ) denotes a statistically significant overutilization.

( \*\* ) this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

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



**Chart 7.1: Disparity Analysis: Construction Prime Contracts Valued Under \$50,000,  
January 1, 2009, to December 31, 2013**



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## 2. Professional Services Prime Contracts Valued Under \$50,000

The disparity analysis of professional services prime contracts valued under \$50,000 is described below and shown in Table 7.5 and Chart 7.2.

*African Americans* represent 10.24% of the available professional services businesses and received 2.01% of the dollars on professional services contracts valued under \$50,000. This underutilization is statistically significant.

*Asian Americans* represent 4.01% of the available professional services businesses and received 3.38% of the dollars on professional services contracts valued under \$50,000. This underutilization is not statistically significant.

*Hispanic Americans* represent 9.35% of the available professional services businesses and received 11.99% of the dollars on professional services contracts valued under \$50,000. This Study does not test statistically the overutilization of minority or gender groups.

*Native Americans* represent 0.15% of the available professional services businesses and received 0.00% of the dollars on professional services contracts valued under \$50,000. While this group was underutilized, there were too few available firms to determine statistical significance.

*Caucasian Females* represent 19.14% of the available professional services businesses and received 10.84% of the dollars on professional services contracts valued under \$50,000. This underutilization is statistically significant.

*Non-minority Males* represent 57.12% of the available professional services businesses and received 71.78% of the dollars on professional services contracts valued under \$50,000. This overutilization is statistically significant.



**Table 7.5: Disparity Analysis: Professional Services Prime Contracts Valued Under \$50,000,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African Americans	\$259,873	2.01%	10.24%	\$1,324,745	-\$1,064,872	0.20	< .05 *
Asian Americans	\$436,896	3.38%	4.01%	\$518,379	-\$81,482	0.84	not significant
Hispanic Americans	\$1,551,144	11.99%	9.35%	\$1,209,550	\$341,594	1.28	**
Native Americans	\$0	0.00%	0.15%	\$19,199	-\$19,199	0.00	----
Caucasian Females	\$1,403,221	10.84%	19.14%	\$2,476,697	-\$1,073,476	0.57	< .05 *
Non-minority Males	\$9,289,129	71.78%	57.12%	\$7,391,694	\$1,897,435	1.26	< .05 †
<b>TOTAL</b>	<b>\$12,940,264</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$12,940,264</b>			
<b>Ethnicity and Gender</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African American Females	\$82,462	0.64%	4.15%	\$537,578	-\$455,115	0.15	< .05 *
African American Males	\$177,411	1.37%	6.08%	\$787,167	-\$609,757	0.23	< .05 *
Asian American Females	\$0	0.00%	1.04%	\$134,394	-\$134,394	0.00	< .05 *
Asian American Males	\$436,896	3.38%	2.97%	\$383,984	\$52,912	1.14	**
Hispanic American Females	\$768,409	5.94%	3.86%	\$499,179	\$269,230	1.54	**
Hispanic American Males	\$782,735	6.05%	5.49%	\$710,371	\$72,364	1.10	**
Native American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Native American Males	\$0	0.00%	0.15%	\$19,199	-\$19,199	0.00	----
Caucasian Females	\$1,403,221	10.84%	19.14%	\$2,476,697	-\$1,073,476	0.57	< .05 *
Non-minority Males	\$9,289,129	71.78%	57.12%	\$7,391,694	\$1,897,435	1.26	< .05 †
<b>TOTAL</b>	<b>\$12,940,264</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$12,940,264</b>			

( \* ) denotes a statistically significant underutilization.

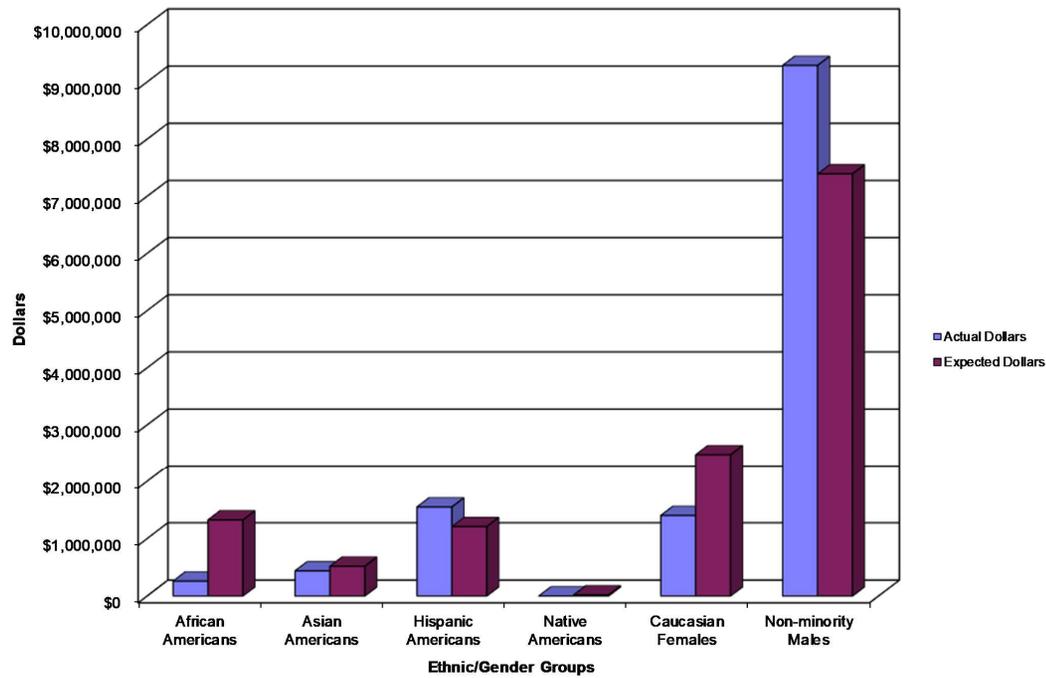
( † ) denotes a statistically significant overutilization.

( \*\* ) this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

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



**Chart 7.2: Disparity Analysis: Professional Services Prime Contracts Valued Under \$50,000, January 1, 2009, to December 31, 2013**



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### 3. Goods and Services Prime Contracts Valued Under \$50,000

The disparity analysis of goods and services prime contracts valued under \$50,000 is described below and shown in Table 7.6 and Chart 7.3.

*African Americans* represent 6.91% of the available goods and services businesses and received 2.50% of the dollars on goods and services contracts valued under \$50,000. This underutilization is statistically significant.

*Asian Americans* represent 1.68% of the available goods and services businesses and received 2.63% of the dollars on goods and services contracts valued under \$50,000. This Study does not test statistically the overutilization of minority or gender groups.

*Hispanic Americans* represent 8.03% of the available goods and services businesses and received 8.70% of the dollars on goods and services contracts valued under \$50,000. This Study does not test statistically the overutilization of minority or gender groups.

*Native Americans* represent 0.19% of the available goods and services businesses and received 0.11% of the dollars on goods and services contracts valued under \$50,000. While this group was underutilized, there were too few available firms to determine statistical significance.

*Caucasian Females* represent 16.81% of the available goods and services businesses and received 9.60% of the dollars on goods and services contracts valued under \$50,000. This underutilization is statistically significant.

*Non-minority Males* represent 66.39% of the available goods and services businesses and received 76.46% of the dollars on goods and services contracts valued under \$50,000. This overutilization is statistically significant.



**Table 7.6: Disparity Analysis: Goods and Services Prime Contracts Valued Under \$50,000, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African Americans	\$1,799,200	2.50%	6.91%	\$4,980,765	-\$3,181,565	0.36	< .05 *
Asian Americans	\$1,895,092	2.63%	1.68%	\$1,211,537	\$683,555	1.56	**
Hispanic Americans	\$6,271,471	8.70%	8.03%	\$5,788,457	\$483,014	1.08	**
Native Americans	\$82,038	0.11%	0.19%	\$134,615	-\$52,577	0.61	----
Caucasian Females	\$6,919,990	9.60%	16.81%	\$12,115,375	-\$5,195,385	0.57	< .05 *
Non-minority Males	\$55,118,689	76.46%	66.39%	\$47,855,730	\$7,262,958	1.15	< .05 †
<b>TOTAL</b>	<b>\$72,086,480</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$72,086,480</b>			
<b>Ethnicity and Gender</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African American Females	\$90,328	0.13%	2.05%	\$1,480,768	-\$1,390,440	0.06	< .05 *
African American Males	\$1,708,871	2.37%	4.86%	\$3,499,997	-\$1,791,126	0.49	< .05 *
Asian American Females	\$173,975	0.24%	0.84%	\$605,769	-\$431,794	0.29	----
Asian American Males	\$1,721,118	2.39%	0.84%	\$605,769	\$1,115,349	2.84	**
Hispanic American Females	\$2,574,372	3.57%	2.80%	\$2,019,229	\$555,143	1.27	**
Hispanic American Males	\$3,697,099	5.13%	5.23%	\$3,769,228	-\$72,129	0.98	not significant
Native American Females	\$757	0.00%	0.09%	\$67,308	-\$66,551	0.01	----
Native American Males	\$81,281	0.11%	0.09%	\$67,308	\$13,973	1.21	**
Caucasian Females	\$6,919,990	9.60%	16.81%	\$12,115,375	-\$5,195,385	0.57	< .05 *
Non-minority Males	\$55,118,689	76.46%	66.39%	\$47,855,730	\$7,262,958	1.15	< .05 †
<b>TOTAL</b>	<b>\$72,086,480</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$72,086,480</b>			

(\* ) denotes a statistically significant underutilization.

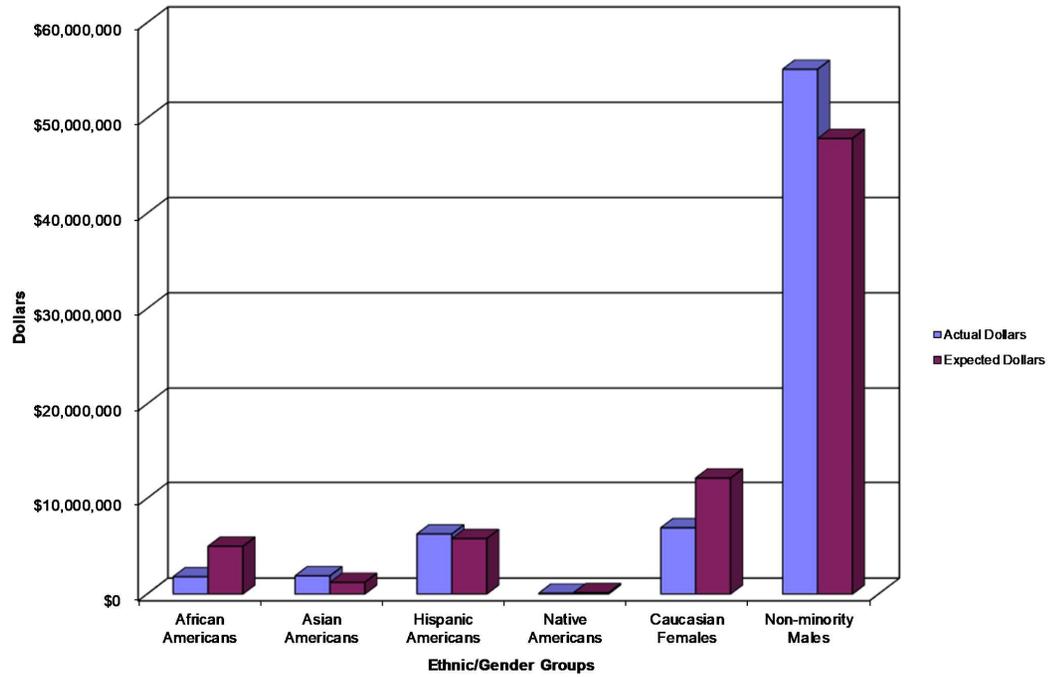
( † ) denotes a statistically significant overutilization.

( \*\* ) this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

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



**Chart 7.3: Disparity Analysis: Goods and Services Prime Contracts Valued Under \$50,000,  
January 1, 2009, to December 31, 2013**



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**B. Disparity Analysis: Formal Prime Contracts by Industry**

**1. Construction Prime Contracts Valued \$50,000 to \$1,296,000**

The disparity analysis of construction prime contracts valued \$50,000 to \$1,296,000 is described below and shown in Table 7.7 and Chart 7.4.

*African Americans* represent 13.16% of the available construction businesses and received 3.09% of the dollars on construction contracts valued \$50,000 to \$1,296,000. This underutilization is statistically significant.

*Asian Americans* represent 1.54% of the available construction businesses and received 0.49% of the dollars on construction contracts valued \$50,000 to \$1,296,000. This underutilization is not statistically significant.

*Hispanic Americans* represent 12.94% of the available construction businesses and received 5.42% of the dollars on construction contracts valued \$50,000 to \$1,296,000. This underutilization is statistically significant.

*Native Americans* represent 0.44% of the available construction businesses and received 0.00% of the dollars on construction contracts valued \$50,000 to \$1,296,000. While this group was underutilized, there were too few available firms to determine statistical significance.

*Caucasian Females* represent 12.94% of the available construction businesses and received 17.59% of the dollars on construction contracts valued \$50,000 to \$1,296,000. This Study does not test statistically the overutilization of minority or gender groups.

*Non-minority Males* represent 58.99% of the available construction businesses and received 73.40% of the dollars on construction contracts valued \$50,000 to \$1,296,000. This overutilization is statistically significant.



**Table 7.7: Disparity Analysis: Construction Prime Contracts Valued \$50,000 to \$1,296,000,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African Americans	\$3,739,792	3.09%	13.16%	\$15,920,210	-\$12,180,418	0.23	< .05 *
Asian Americans	\$590,048	0.49%	1.54%	\$1,857,358	-\$1,267,310	0.32	not significant
Hispanic Americans	\$6,562,009	5.42%	12.94%	\$15,654,873	-\$9,092,864	0.42	< .05 *
Native Americans	\$0	0.00%	0.44%	\$530,674	-\$530,674	0.00	----
Caucasian Females	\$21,287,322	17.59%	12.94%	\$15,654,873	\$5,632,449	1.36	**
Non-minority Males	\$88,814,425	73.40%	58.99%	\$71,375,609	\$17,438,817	1.24	< .05 †
<b>TOTAL</b>	<b>\$120,993,597</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$120,993,597</b>			
<b>Ethnicity and Gender</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African American Females	\$248,650	0.21%	1.97%	\$2,388,032	-\$2,139,382	0.10	< .05 *
African American Males	\$3,491,142	2.89%	11.18%	\$13,532,179	-\$10,041,036	0.26	< .05 *
Asian American Females	\$380,498	0.31%	0.66%	\$796,011	-\$415,512	0.48	----
Asian American Males	\$209,550	0.17%	0.88%	\$1,061,347	-\$851,797	0.20	----
Hispanic American Females	\$1,563,225	1.29%	4.17%	\$5,041,400	-\$3,478,175	0.31	< .05 *
Hispanic American Males	\$4,998,785	4.13%	8.77%	\$10,613,473	-\$5,614,689	0.47	< .05 *
Native American Females	\$0	0.00%	0.22%	\$265,337	-\$265,337	0.00	----
Native American Males	\$0	0.00%	0.22%	\$265,337	-\$265,337	0.00	----
Caucasian Females	\$21,287,322	17.59%	12.94%	\$15,654,873	\$5,632,449	1.36	**
Non-minority Males	\$88,814,425	73.40%	58.99%	\$71,375,609	\$17,438,817	1.24	< .05 †
<b>TOTAL</b>	<b>\$120,993,597</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$120,993,597</b>			

( \* ) denotes a statistically significant underutilization.

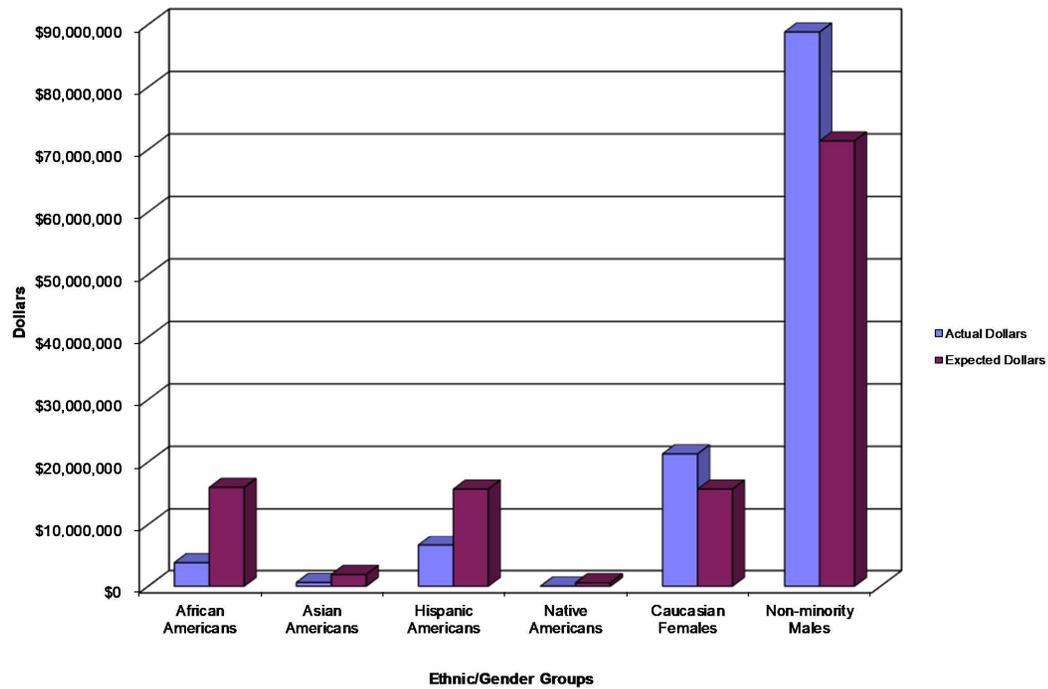
( † ) denotes a statistically significant overutilization.

( \*\* ) this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

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



**Chart 7.4: Disparity Analysis: Construction Prime Contracts Valued \$50,000 to \$1,296,000, January 1, 2009, to December 31, 2013**



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## 2. Professional Services Prime Contracts Valued \$50,000 to \$301,000

The disparity analysis of professional services prime contracts including CCNA prime contracts valued \$50,000 to \$301,000 is described below and shown in Table 7.8 and Chart 7.5.

*African Americans* represent 10.24% of the available professional services businesses and received 1.90% of the dollars on professional services contracts valued \$50,000 to \$301,000. This underutilization is statistically significant.

*Asian Americans* represent 4.01% of the available professional services businesses and received 5.32% of the dollars on professional services contracts valued \$50,000 to \$301,000. This Study does not test statistically the overutilization of minority or gender groups.

*Hispanic Americans* represent 9.35% of the available professional services businesses and received 12.86% of the dollars on professional services contracts valued \$50,000 to \$301,000. This Study does not test statistically the overutilization of minority or gender groups.

*Native Americans* represent 0.15% of the available professional services businesses and received 0.00% of the dollars on professional services contracts valued \$50,000 to \$301,000. While this group was underutilized, there were too few available firms to determine statistical significance.

*Caucasian Females* represent 19.14% of the available professional services businesses and received 11.37% of the dollars on professional services contracts valued \$50,000 to \$301,000. This underutilization is statistically significant.

*Non-minority Males* represent 57.12% of the available professional services businesses and received 68.56% of the dollars on professional services contracts valued \$50,000 to \$301,000. This overutilization is statistically significant.



**Table 7.8: Disparity Analysis: Professional Services Prime Contracts Valued \$50,000 to \$301,000, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African Americans	\$533,981	1.90%	10.24%	\$2,881,645	-\$2,347,663	0.19	< .05 *
Asian Americans	\$1,496,480	5.32%	4.01%	\$1,127,600	\$368,880	1.33	**
Hispanic Americans	\$3,619,355	12.86%	9.35%	\$2,631,067	\$988,288	1.38	**
Native Americans	\$0	0.00%	0.15%	\$41,763	-\$41,763	0.00	----
Caucasian Females	\$3,201,111	11.37%	19.14%	\$5,387,423	-\$2,186,311	0.59	< .05 *
Non-minority Males	\$19,297,312	68.56%	57.12%	\$16,078,742	\$3,218,570	1.20	< .05 †
<b>TOTAL</b>	<b>\$28,148,240</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$28,148,240</b>			
<b>Ethnicity and Gender</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African American Females	\$0	0.00%	4.15%	\$1,169,363	-\$1,169,363	0.00	< .05 *
African American Males	\$533,981	1.90%	6.08%	\$1,712,282	-\$1,178,300	0.31	< .05 *
Asian American Females	\$0	0.00%	1.04%	\$292,341	-\$292,341	0.00	not significant
Asian American Males	\$1,496,480	5.32%	2.97%	\$835,259	\$661,221	1.79	**
Hispanic American Females	\$623,147	2.21%	3.86%	\$1,085,837	-\$462,690	0.57	not significant
Hispanic American Males	\$2,996,208	10.64%	5.49%	\$1,545,230	\$1,450,978	1.94	**
Native American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Native American Males	\$0	0.00%	0.15%	\$41,763	-\$41,763	0.00	----
Caucasian Females	\$3,201,111	11.37%	19.14%	\$5,387,423	-\$2,186,311	0.59	< .05 *
Non-minority Males	\$19,297,312	68.56%	57.12%	\$16,078,742	\$3,218,570	1.20	< .05 †
<b>TOTAL</b>	<b>\$28,148,240</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$28,148,240</b>			

( \*) denotes a statistically significant underutilization.

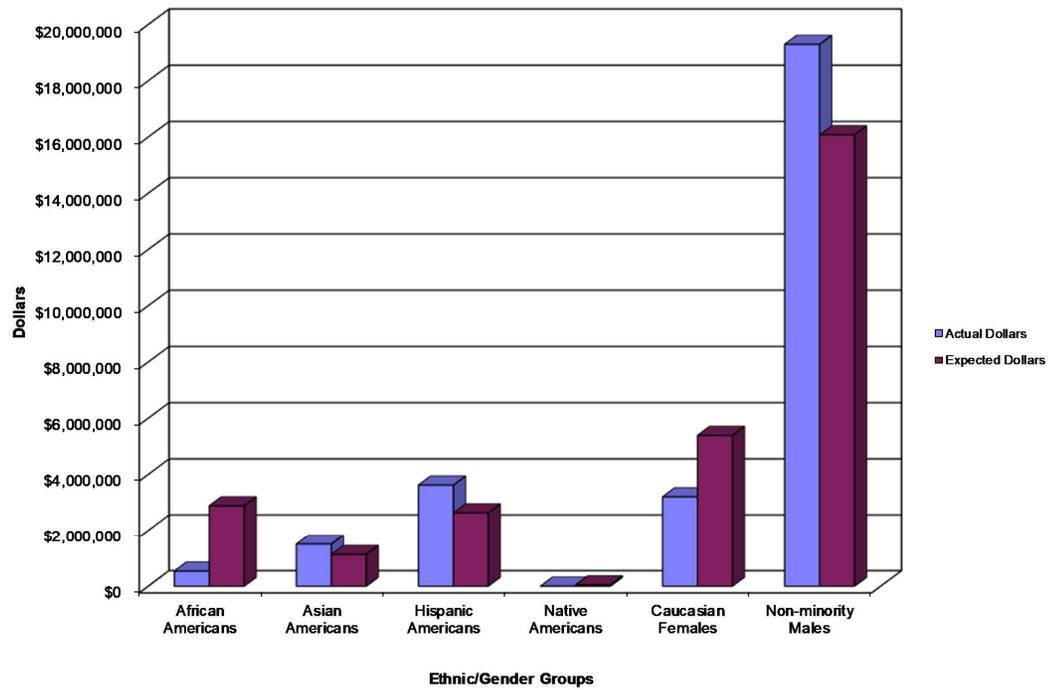
( † ) denotes a statistically significant overutilization.

( \*\* ) this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

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



**Chart 7.5: Disparity Analysis: Professional Services Prime Contracts Valued \$50,000 to \$301,000, January 1, 2009, to December 31, 2013**



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### 3. All CCNA Certified Professional Services Prime Contracts

The disparity analysis of only CCNA certified professional services prime contracts is described below and shown in Table 7.9 and Chart 7.6.

**African Americans** represent 8.06% of the available CCNA certified professional services businesses and received 0.73% of the CCNA certified professional services prime contract dollars. This underutilization is statistically significant.

**Asian Americans** represent 9.14% of the available CCNA certified professional services businesses and received 6.13% of the CCNA certified professional services prime contract dollars. This underutilization is not statistically significant.

**Hispanic Americans** represent 10.75% of the available CCNA certified professional services businesses and received 30.93% of the CCNA certified professional services prime contract dollars. This Study does not test statistically the overutilization of minority or gender groups.

**Native Americans** represent 0.00% of the available CCNA certified professional services businesses and received 0.00% of the CCNA certified professional services prime contract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

**Caucasian Females** represent 10.22% of the available CCNA certified professional services businesses and received 10.63% of the CCNA certified professional services prime contract dollars. This Study does not test statistically the overutilization of minority or gender groups.

**Non-minority Males** represent 61.83% of the available CCNA certified professional services businesses and received 51.59% of the CCNA certified professional services prime contract dollars. This Study does not test statistically the underutilization of non-minority males.

**Commented [FML33]:** This is a particularly compelling analysis since all CCNA vendors are prequalified by the County. A disparity of this size is very difficult to account for on the basis of factors other than race or gender since price, by law, cannot be the determining factor for awards in this category of contracts.



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**Table 7.9: Disparity Analysis: All CCNA Certified Professional Services Prime Contracts,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African Americans	\$595,556	0.73%	8.06%	\$6,621,091	-\$6,025,535	0.09	< .05 *
Asian Americans	\$5,033,312	6.13%	9.14%	\$7,503,903	-\$2,470,591	0.67	not significant
Hispanic Americans	\$25,392,545	30.93%	10.75%	\$8,828,121	\$16,564,424	2.88	**
Native Americans	\$0	0.00%	0.00%	\$0	\$0	----	----
Caucasian Females	\$8,726,704	10.63%	10.22%	\$8,386,715	\$339,989	1.04	**
Non-minority Males	\$42,353,412	51.59%	61.83%	\$50,761,697	-\$8,408,286	0.83	**
<b>TOTAL</b>	<b>\$82,101,528</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$82,101,528</b>			
<b>Ethnicity and Gender</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African American Females	\$0	0.00%	1.61%	\$1,324,218	-\$1,324,218	0.00	< .05 *
African American Males	\$595,556	0.73%	6.45%	\$5,296,873	-\$4,701,317	0.11	< .05 *
Asian American Females	\$0	0.00%	1.61%	\$1,324,218	-\$1,324,218	0.00	< .05 *
Asian American Males	\$5,033,312	6.13%	7.53%	\$6,179,685	-\$1,146,373	0.81	not significant
Hispanic American Females	\$3,561,266	4.34%	3.23%	\$2,648,436	\$912,829	1.34	**
Hispanic American Males	\$21,831,279	26.59%	7.53%	\$6,179,685	\$15,651,595	3.53	**
Native American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Native American Males	\$0	0.00%	0.00%	\$0	\$0	----	----
Caucasian Females	\$8,726,704	10.63%	10.22%	\$8,386,715	\$339,989	1.04	**
Non-minority Males	\$42,353,412	51.59%	61.83%	\$50,761,697	-\$8,408,286	0.83	**
<b>TOTAL</b>	<b>\$82,101,528</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$82,101,528</b>			

( \* ) denotes a statistically significant underutilization.

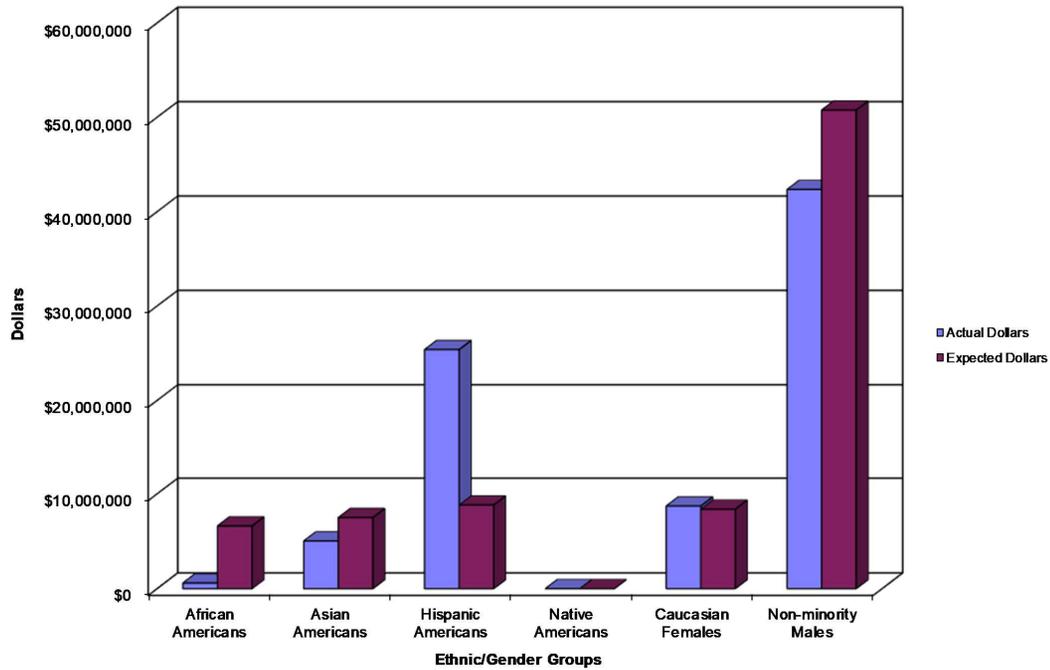
( † ) denotes a statistically significant overutilization.

( \*\* ) this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

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



**Chart 7.6: Disparity Analysis: All CCNA Certified Professional Services Prime Contracts, January 1, 2009, to December 31, 2013**



#### 4. Goods and Services Prime Contracts Valued \$50,000 to \$321,000

The disparity analysis of goods and services prime contracts valued \$50,000 to \$321,000 is described below and shown in Table 7.10 and Chart 7.7.

**African Americans** represent 6.91% of the available goods and services businesses and received 4.11% of the dollars on goods and services contracts valued \$50,000 to \$321,000. This underutilization is statistically significant.

**Asian Americans** represent 1.68% of the available goods and services businesses and received 0.27% of the dollars on goods and services contracts valued \$50,000 to \$321,000. This underutilization is statistically significant.

**Hispanic Americans** represent 8.03% of the available goods and services businesses and received 5.97% of the dollars on goods and services contracts valued \$50,000 to \$321,000. This underutilization is statistically significant.

**Native Americans** represent 0.19% of the available goods and services businesses and received 0.00% of the dollars on goods and services contracts valued \$50,000 to \$321,000. While this group was underutilized, there were too few available firms to determine statistical significance.

**Caucasian Females** represent 16.81% of the available goods and services businesses and received 9.98% of the dollars on goods and services contracts valued \$50,000 to \$321,000. This underutilization is statistically significant.

**Non-minority Males** represent 66.39% of the available goods and services businesses and received 79.67% of the dollars on goods and services contracts valued \$50,000 to \$321,000. This overutilization is statistically significant.



**Table 7.10: Disparity Analysis: Goods and Services Prime Contracts Valued \$50,000 to \$321,000, January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African Americans	\$4,635,156	4.11%	6.91%	\$7,796,032	-\$3,160,876	0.59	< .05 *
Asian Americans	\$306,690	0.27%	1.68%	\$1,896,332	-\$1,589,642	0.16	< .05 *
Hispanic Americans	\$6,738,073	5.97%	8.03%	\$9,060,254	-\$2,322,181	0.74	< .05 *
Native Americans	\$0	0.00%	0.19%	\$210,704	-\$210,704	0.00	----
Caucasian Females	\$11,261,125	9.98%	16.81%	\$18,963,322	-\$7,702,197	0.59	< .05 *
Non-minority Males	\$89,890,721	79.67%	66.39%	\$74,905,121	\$14,985,600	1.20	< .05 †
<b>TOTAL</b>	<b>\$112,831,765</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$112,831,765</b>			
<b>Ethnicity and Gender</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African American Females	\$157,025	0.14%	2.05%	\$2,317,739	-\$2,160,714	0.07	< .05 *
African American Males	\$4,478,131	3.97%	4.86%	\$5,478,293	-\$1,000,162	0.82	not significant
Asian American Females	\$190,223	0.17%	0.84%	\$948,166	-\$757,944	0.20	----
Asian American Males	\$116,468	0.10%	0.84%	\$948,166	-\$831,698	0.12	----
Hispanic American Females	\$3,268,410	2.90%	2.80%	\$3,160,554	\$107,856	1.03	**
Hispanic American Males	\$3,469,663	3.08%	5.23%	\$5,899,700	-\$2,430,037	0.59	< .05 *
Native American Females	\$0	0.00%	0.09%	\$105,352	-\$105,352	0.00	----
Native American Males	\$0	0.00%	0.09%	\$105,352	-\$105,352	0.00	----
Caucasian Females	\$11,261,125	9.98%	16.81%	\$18,963,322	-\$7,702,197	0.59	< .05 *
Non-minority Males	\$89,890,721	79.67%	66.39%	\$74,905,121	\$14,985,600	1.20	< .05 †
<b>TOTAL</b>	<b>\$112,831,765</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$112,831,765</b>			

(\* ) denotes a statistically significant underutilization.

( † ) denotes a statistically significant overutilization.

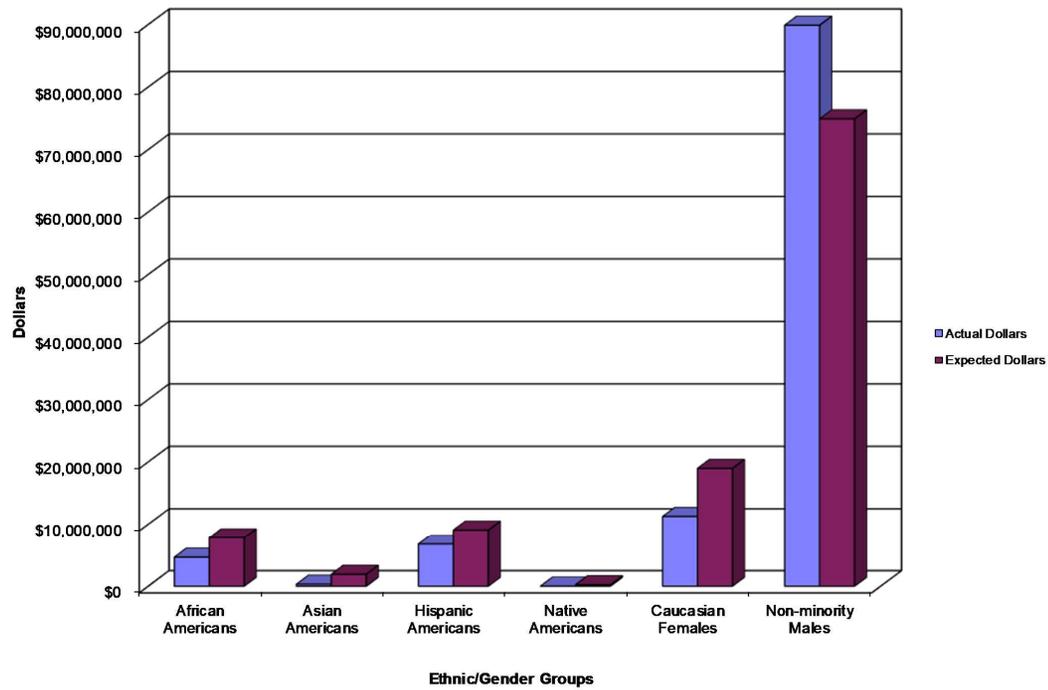
( \*\* ) this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

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



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**Chart 7.7: Disparity Analysis: Goods and Services Prime Contracts Valued \$50,000 to \$321,000, January 1, 2009, to December 31, 2013**



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### III. Disparity Analysis Summary

#### A. Construction Prime Contracts

As indicated in Table 7.11 below, disparity was found for Hispanic American prime contractors on construction contracts valued under \$50,000. Disparity was also found for African American and Hispanic American prime contractors on construction contracts valued \$50,000 to \$1,296,000.

Table 7.11: Disparity Summary: Construction Prime Contract Dollars, January 1, 2009, to December 31, 2013

Ethnicity/Gender	Construction	
	Contracts Valued Under \$50,000	Contracts Valued \$50,000 to \$1,296,000
African Americans	No Disparity	<i>Disparity</i>
Asian Americans	No Disparity	No Disparity
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>
Native Americans	Too Few Available Firms to Perform Statistical Analysis	Too Few Available Firms to Perform Statistical Analysis
Caucasian Females	No Disparity	No Disparity



**B. Professional Services Prime Contracts**

As indicated in Table 7.12 below, disparity was found for African American and Caucasian female prime contractors on professional services contracts valued under \$50,000. Disparity was also found for African American and Caucasian female prime contractors on professional services contracts valued \$50,000 to \$301,000, which included contracts awarded to CCNA certified professional service contractors. The disparity analysis calculated for CCNA certified prime contractors found disparity for African American CCNA certified prime contractors on contracts awarded to CCNA certified professional services contractors.

**Table 7.12: Disparity Summary: Professional Services Prime Contract Dollars, January 1, 2009, to December 31, 2013**

Ethnicity/Gender	Professional Services		
	Contracts Valued Under \$50,000	Contracts Valued \$50,000 to \$301,000	All CCNA Contracts
African Americans	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	No Disparity	No Disparity	No Disparity
Hispanic Americans	No Disparity	No Disparity	No Disparity
Native Americans	Too Few Available Firms to Perform Statistical Analysis	Too Few Available Firms to Perform Statistical Analysis	Too Few Available Firms to Perform Statistical Analysis
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>	No Disparity



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**C. Goods and Services Prime Contracts**

As indicated in Table 7.13 below, disparity was found for African American and Caucasian female prime contractors on goods and services contracts valued under \$50,000. Disparity was also found for African American, Asian American, Hispanic American, and Caucasian female prime contractors on goods and services contracts valued \$50,000 to \$321,000.

**Table 7.13: Disparity Summary: Goods and Services Prime Contract Dollars, January 1, 2009, to December 31, 2013**

Ethnicity/Gender	Goods and Services	
	Contracts Valued Under \$50,000	Contracts Valued \$50,000 to \$321,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	No Disparity	<i>Disparity</i>
Hispanic Americans	No Disparity	<i>Disparity</i>
Native Americans	Too Few Available Firms to Perform Statistical Analysis	Too Few Available Firms to Perform Statistical Analysis
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>



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# CHAPTER 8: Subcontract Disparity Analysis

## I. Introduction

The objective of this analysis is to determine if available Minority and Woman-owned Business Enterprise (M/WBE) subcontractors were underutilized in the award of Palm Beach County's (County) subcontracts during the January 1, 2009, to December 31, 2013, study period. A detailed discussion of the statistical procedures for conducting a disparity analysis is set forth in *Chapter 7: Prime Contract Disparity Analysis*. The same statistical methodology is used to perform the subcontract disparity analysis.

Under a fair and equitable system of awarding subcontracts, the proportion of subcontract dollars awarded to M/WBE subcontractors should be relatively close to the proportion of available M/WBE subcontractors in the County's market area. Availability is defined as the number of willing and able market area 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.<sup>399</sup> The Court in *Croson* states that an inference of discrimination can be made *prima facie* if the observed disparity is statistically significant. Under the *Croson* standard, non-minority male-owned businesses (non-M/WBE) are not subjected to a statistical test of underutilization.<sup>400</sup>

## II. Disparity Analysis

As detailed in *Chapter 4: Subcontractor Utilization Analysis*, an extensive effort was undertaken to obtain subcontract records for the County's construction and professional services prime contracts. The disparity analysis was performed on the reconstructed subcontracts issued during the January 1, 2009, to December 31, 2013, study period.

The subcontract disparity findings in the two industries under consideration are detailed in *Section III, Disparity Analysis: All Subcontracts, by Industry*. The outcomes of the statistical analyses are presented in the "P-Value" column of the tables. A description of the statistical outcomes in the disparity tables are presented in Table 8.1.

**Commented [FML34]:** Standard best practice in calculating statistically significant disparities in utilization.

<sup>399</sup> 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.

<sup>400</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

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**Table 8.1: Statistical Outcome Descriptions**

<b>P-Value Outcome</b>	<b>Definition of P-Value Outcome</b>
< .05 *	This underutilization is statistically significant.
not significant	<ul style="list-style-type: none"> <li>• MWBEs: This underutilization is not statistically significant.</li> <li>• Non-minority males: This overutilization is not statistically significant.</li> </ul>
< .05 †	This overutilization is statistically significant.
----	While this group was underutilized, there were too few available firms to determine statistical significance.
**	This Study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.



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### **III. Disparity Analysis: All Subcontracts by Industry**

#### **A. Construction Subcontracts**

The disparity analysis of construction subcontracts is described below and shown in Table 8.2 and Chart 8.1.

*African Americans* represent 11.15% of the available construction businesses and received 5.38% of the construction subcontract dollars. This underutilization is statistically significant.

*Asian Americans* represent 1.55% of the available construction businesses and received 0.62% of the construction subcontract dollars. This underutilization is not statistically significant.

*Hispanic Americans* represent 11.61% of the available construction businesses and received 4.13% of the construction subcontract dollars. This underutilization is statistically significant.

*Native Americans* represent 0.31% of the available construction businesses and received 0.00% of the construction subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

*Caucasian Females* represent 14.40% of the available construction businesses and received 9.38% of the construction subcontract dollars. This underutilization is not statistically significant.

*Non-minority Males* represent 60.99% of the available construction businesses and received 80.49% of the construction subcontract dollars. This overutilization is statistically significant.



**Table 8.2: Disparity Analysis: Construction Subcontracts,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African Americans	\$4,651,701	5.38%	11.15%	\$9,628,715	-\$4,977,014	0.48	< .05 *
Asian Americans	\$533,469	0.62%	1.55%	\$1,337,322	-\$803,853	0.40	not significant
Hispanic Americans	\$3,564,036	4.13%	11.61%	\$10,029,911	-\$6,465,876	0.36	< .05 *
Native Americans	\$0	0.00%	0.31%	\$267,464	-\$267,464	0.00	----
Caucasian Females	\$8,104,300	9.38%	14.40%	\$12,437,090	-\$4,332,790	0.65	not significant
Non-minority Males	\$69,537,465	80.49%	60.99%	\$52,690,468	\$16,846,996	1.32	< .05 †
<b>TOTAL</b>	<b>\$86,390,971</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$86,390,971</b>			
<b>Ethnicity and Gender</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African American Females	\$271,719	0.31%	2.17%	\$1,872,250	-\$1,600,531	0.15	not significant
African American Males	\$4,379,982	5.07%	8.98%	\$7,756,465	-\$3,376,483	0.56	not significant
Asian American Females	\$287,281	0.33%	0.46%	\$401,196	-\$113,916	0.72	----
Asian American Males	\$246,188	0.28%	1.08%	\$936,125	-\$689,937	0.26	not significant
Hispanic American Females	\$563,636	0.65%	3.25%	\$2,808,375	-\$2,244,739	0.20	not significant
Hispanic American Males	\$3,000,400	3.47%	8.36%	\$7,221,536	-\$4,221,137	0.42	< .05 *
Native American Females	\$0	0.00%	0.15%	\$133,732	-\$133,732	0.00	----
Native American Males	\$0	0.00%	0.15%	\$133,732	-\$133,732	0.00	----
Caucasian Females	\$8,104,300	9.38%	14.40%	\$12,437,090	-\$4,332,790	0.65	not significant
Non-minority Males	\$69,537,465	80.49%	60.99%	\$52,690,468	\$16,846,996	1.32	< .05 †
<b>TOTAL</b>	<b>\$86,390,971</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$86,390,971</b>			

( \* ) denotes a statistically significant underutilization.

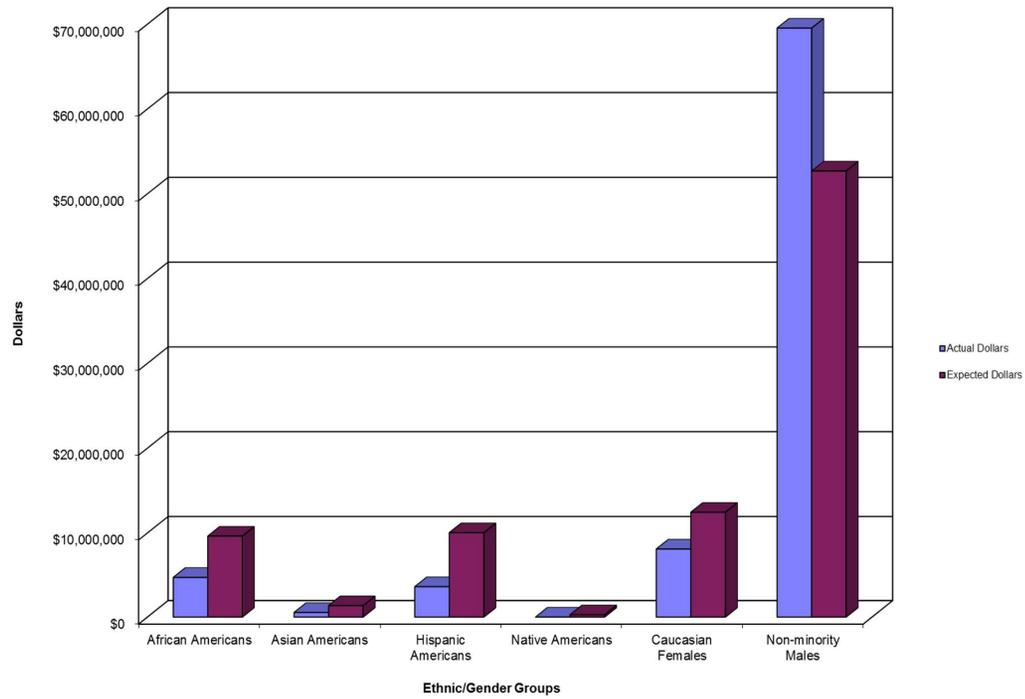
( † ) denotes a statistically significant overutilization.

( \*\* ) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

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



**Chart 8.1: Disparity Analysis: Construction Subcontracts,  
January 1, 2009, to December 31, 2013**



## **B. Professional Services Subcontracts**

The disparity analysis of professional services subcontracts is described below and shown in Table 8.3 and Chart 8.2.

**African Americans** represent 10.62% of the available professional services businesses and received 0.91% of the professional services subcontract dollars. This underutilization is statistically significant.

**Asian Americans** represent 4.31% of the available professional services businesses and received 0.44% of the professional services subcontract dollars. This underutilization is not statistically significant.

**Hispanic Americans** represent 10.00% of the available professional services businesses and received 6.23% of the professional services subcontract dollars. This underutilization is not statistically significant.

**Native Americans** represent 0.15% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

**Caucasian Females** represent 20.92% of the available professional services businesses and received 8.91% of the professional services subcontract dollars. This underutilization is not statistically significant.

**Non-minority Males** represent 54.00% of the available professional services businesses and received 83.51% of the professional services subcontract dollars. This overutilization is statistically significant.



**Table 8.3: Disparity Analysis: Professional Services Subcontracts,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African Americans	\$344,221	0.91%	10.62%	\$4,012,892	-\$3,668,670	0.09	< .05 *
Asian Americans	\$165,994	0.44%	4.31%	\$1,628,420	-\$1,462,426	0.10	not significant
Hispanic Americans	\$2,355,016	6.23%	10.00%	\$3,780,260	-\$1,425,244	0.62	not significant
Native Americans	\$0	0.00%	0.15%	\$58,158	-\$58,158	0.00	----
Caucasian Females	\$3,370,076	8.91%	20.92%	\$7,909,468	-\$4,539,392	0.43	not significant
Non-minority Males	\$31,567,297	83.51%	54.00%	\$20,413,407	\$11,153,891	1.55	< .05 †
<b>TOTAL</b>	<b>\$37,802,605</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$37,802,605</b>			
<b>Ethnicity and Gender</b>	<b>Actual Dollars</b>	<b>Utilization</b>	<b>Availability</b>	<b>Expected Dollars</b>	<b>Dollars Lost</b>	<b>Disp. Ratio</b>	<b>P-Value</b>
African American Females	\$31,753	0.08%	4.31%	\$1,628,420	-\$1,596,667	0.02	< .05 *
African American Males	\$312,468	0.83%	6.31%	\$2,384,472	-\$2,072,004	0.13	not significant
Asian American Females	\$0	0.00%	1.08%	\$407,105	-\$407,105	0.00	not significant
Asian American Males	\$165,994	0.44%	3.23%	\$1,221,315	-\$1,055,321	0.14	not significant
Hispanic American Females	\$495,176	1.31%	4.15%	\$1,570,262	-\$1,075,087	0.32	not significant
Hispanic American Males	\$1,859,841	4.92%	5.85%	\$2,209,998	-\$350,158	0.84	not significant
Native American Females	\$0	0.00%	0.00%	\$0	\$0	----	----
Native American Males	\$0	0.00%	0.15%	\$58,158	-\$58,158	0.00	----
Caucasian Females	\$3,370,076	8.91%	20.92%	\$7,909,468	-\$4,539,392	0.43	not significant
Non-minority Males	\$31,567,297	83.51%	54.00%	\$20,413,407	\$11,153,891	1.55	< .05 †
<b>TOTAL</b>	<b>\$37,802,605</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$37,802,605</b>			

( \* ) denotes a statistically significant underutilization.

( † ) denotes a statistically significant overutilization.

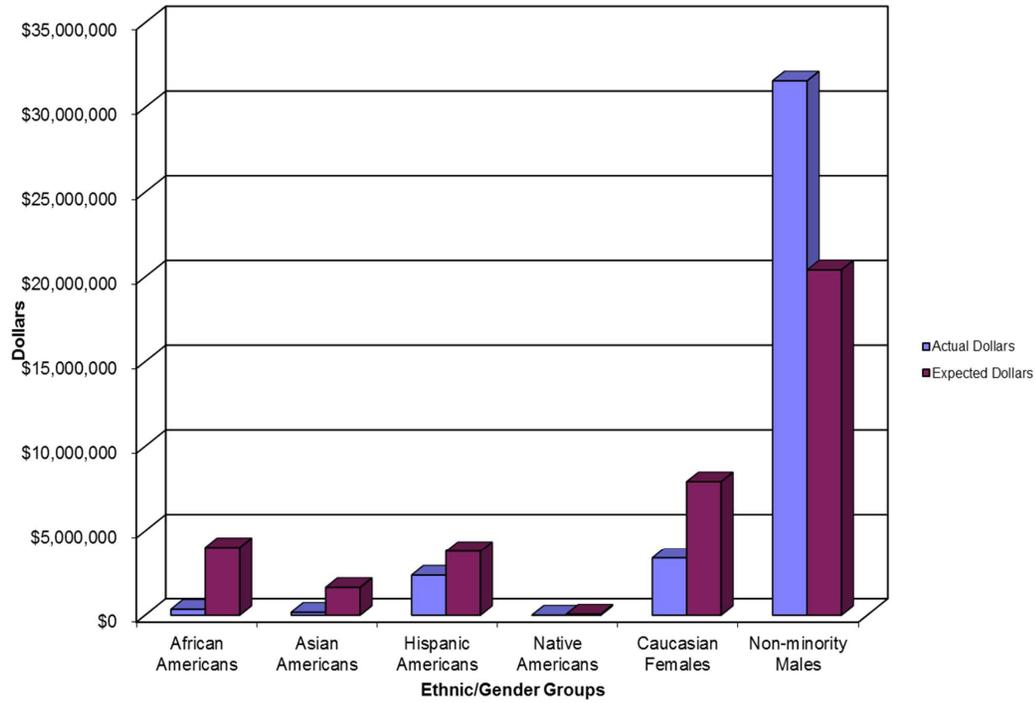
( \*\* ) denotes that this study does not test statistically the overutilization of minority or gender groups or the underutilization of non-minority males.

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





**Chart 8.2: Disparity Analysis: Professional Services Subcontracts, January 1, 2009, to December 31, 2013**



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#### IV. Subcontract Disparity Summary

As indicated in Table 8.4, disparity was found for African American and Hispanic American construction subcontractors and for African American professional services subcontractors.

**Table 8.4: Subcontract Disparity Summary,  
January 1, 2009, to December 31, 2013**

<b>Ethnicity / Gender</b>	<b>Construction</b>	<b>Professional Services</b>
<b>African Americans</b>	<b><i>Disparity</i></b>	<b><i>Disparity</i></b>
<b>Asian Americans</b>	<b>No Disparity</b>	<b>No Disparity</b>
<b>Hispanic Americans</b>	<b><i>Disparity</i></b>	<b>No Disparity</b>
<b>Native Americans</b>	<b>Too Few Available Firms to Perform Statistical Analysis</b>	<b>Too Few Available Firms to Perform Statistical Analysis</b>
<b>Caucasian Females</b>	<b>No Disparity</b>	<b>No Disparity</b>



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## CHAPTER 9: Regression Analysis

### I. Introduction

A regression analysis can identify private sector business practices that are indicators of marketplace conditions that may adversely affect the formation and growth of minority and woman-owned businesses. However, the controlling legal precedent for race-based contracting programs, set forth in the 1989 *City of Richmond v. J.A. Croson Co. (Croson)*<sup>401</sup> decision, authorized local governments to apply race-specific remedies in the award of public contracts when the documented discrimination is related to the government's conduct. Government discrimination, according to *Croson*, must be either active, meaning perpetuated by the government, or passive, meaning perpetuated by the government's prime contractors. Since *Croson*, several federal circuit courts of appeal have considered the probative value of private sector discrimination derived from a regression analysis as the predicate for a race-conscious public contracting program. The application of private sector discrimination findings in formulating a race-conscious public contracting program has been considered in several federal circuit courts, including the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit held that a regression analysis based on private sector data could not provide the predicate for race-conscious programs by the County.<sup>402</sup> The Tenth Circuit found private sector data could be used to determine the presence of discrimination in the marketplace, although the question of the application of the data to the government's contracting program was not considered.<sup>403</sup> The Seventh Circuit found that discrimination derived from private sector data needed a nexus to the actions of the government. Finally, the district court in the Southern District of Texas, Houston Division, found that disparities in private sector data is a sufficient factual predicate for a race conscious public contracting program.<sup>404</sup>

In *Engineering Contractors Association of South Florida Inc., (ECA) v. Metropolitan Dade County*,<sup>405</sup> the district court addressed the efficacy of a regression analysis of private sector data as a capacity measure of the available businesses enumerated in the County's disparity study. *ECA* argued that some of the disparity findings could be accounted for by the M/WBE firm's size. *ECA* asserted that the statistical disparity documented in the County's disparity study was due to limited M/WBE capacity. The district court agreed and ruled that the County's statistical findings of disparity were better explained by firm size than by discrimination.<sup>406</sup> Upon appeal, the Eleventh Circuit found that the regression analysis findings were insufficient to provide a strong basis in

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<sup>401</sup> 488 U.S. 469 (1989).

<sup>402</sup> *Engineering Contractors Association of South Florida Inc. v. Metropolitan Dade County*, 122 F.3d 895 (1997).

<sup>403</sup> *Concrete Works v. City & County of Denver*, 321 F.3d at 966-67 (*Concrete Works IV*).

<sup>404</sup> *Kosman Contracting Company, Inc. v. City of Houston (Kosman)*, No. 4:14-cv-01203 (S.D.T. Mar. 22, 2016).

<sup>405</sup> 122 F.3d 895 (11<sup>th</sup> Cir. 1997).

<sup>406</sup> *Id.*



evidence of discrimination. The court opined that the private sector findings “were too weak to support the weight of an MWBE program in light of the applicable constitutional requirements.”<sup>407</sup>

In 1994, *Concrete Works v. City & County of Denver (Concrete Works I)* extended the scope of passive discrimination analysis to include the investigation of private sector discriminatory barriers that minority group members and Caucasian females encountered in the formation and development of a business.<sup>408</sup> In 2003, *Concrete Works IV* defined the private sector data as appropriate to measure the impact of passive discrimination.<sup>409</sup> However, the Tenth Circuit did not consider if private sector discrimination, when not within the purview of government, could serve as a predicate for the City’s M/WBE program. The question before the court was whether sufficient facts existed to determine if private sector business practices constituted discrimination.

In *Builders Association of Greater Chicago v. City of Chicago (City of Chicago)*<sup>410</sup>, the court reviewed the application of private sector discrimination as the predicate for the government’s race-based contracting program. The *City of Chicago* established that even when there is evidence of private sector discrimination, the findings cannot be used as the factual predicate for a race-based public contracting program unless there is a nexus between the private sector data and the public agency’s actions. The *City of Chicago* court concurred with the analysis in *Concrete Works I*, that established private sector discrimination cannot have probative value for a government-sponsored, race-based program without establishing a sufficient nexus to the government’s actions.

The Southern District Court of Texas, Houston Division, in *Kossmann Contracting Company, Inc. v. City of Houston*<sup>411</sup> (*Kossmann*) found that implicit bias evident in the private sector can be a predicate for government remediation. *Kossmann* found that discrimination can be inferred from an analysis of private sector data described as unremediated markets data.<sup>412</sup> Unremediated markets data are conditions that exist in private sectors not subject to government imposed race and gender-conscious remedies. *Kossmann* found that implicit bias in the private sector is discrimination that can depress the current availability of minority and woman-owned businesses. In *Kossmann* the City of Houston used unremediated markets data to apply the City of Houston’s M/WBE Program’s subcontract goals to an ethnic group for which the City’s disparity study did not document disparity.

Since *Croson*, the probative value of discrimination evidence generated from regression analyses has not been interpreted consistently in the circuit courts. However, the Eleventh Circuit, which is the controlling law for the County, will conclude that a significant statistical disparity in prime contract and subcontract utilization will provide strong basis in evidence for race-based contracting

**Commented [FML35]:** I disagree. See earlier comment on page 1-10. Through building permit data, the trial court in *Concrete Works* had developed an extensive record whereby the City directly connected prime contractors that it had used and paid money to on its own contracts, with racially exclusionary patterns of subcontracting on private sector contracts. The City also confirmed and documented at trial through dozens of sworn affidavits from M/WBE subcontractors that those named prime contractors with whom they had successfully worked with on City contracts never used them, or provided them an opportunity to work, on their non-City contracts. This trial record was part of what the 10<sup>th</sup> Circuit relied upon in concluding that the City had a strong basis in evidence to establish a compelling interest for the consideration of race-conscious remedies to address the ongoing effects of past discrimination. The “nexus” between the tax dollars paid to those prime contractors by the City (wherein they were required to use M/WBE subcontractors), and the exclusion by those same prime contractors of those M/WBE subcontractors from participation on their private sector construction projects represented precisely the kind of “passive participation” by the City in private discrimination that the Supreme Court had alluded to in *Croson* as a legitimate basis for local government’s consideration of the use of narrowly tailored race-conscious remedies. Local government has a “compelling interest” (and is therefore not powerless to act) to ensure that the tax dollars collected from all of its citizens do not serve to “finance the evil of private prejudice.” See *Croson*.

**Commented [FML36]:** See comment above on how the City of Denver successfully demonstrated the requisite “nexus” between private sector discrimination and its own contracts.

**Commented [FML37]:** The regression analysis, however, can on its own, support a reasonable argument that the size of subcontracting goals can be somewhat higher than current availability and still meet narrowly tailored remedies for the ongoing effects of marketplace discrimination that has been demonstrated to artificially constrain M/WBE availability and capacity.

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<sup>407</sup> *Engineering Contractors Association of South Florida Inc. v. Metropolitan Dade County*, 122 F.3d 895 (1997).  
<sup>408</sup> *Concrete Works v. City & County of Denver*, 36 F.3d 1513 (September 23, 1994) (*Concrete Works I*).  
<sup>409</sup> *Concrete Works v. City & County of Denver*, 321 F.3d at 966-67 (*Concrete Works IV*).  
<sup>410</sup> *Builders Ass’n of Greater Chicago v. Chicago*, 298 F. Supp. 2d 725 (N.D. Ill. 2003).  
<sup>411</sup> *Kossmann Contracting Company, Inc. v. City of Houston*, No. 4:14-cv-01203 (S.D.T. Mar. 22, 2016).  
<sup>412</sup> *Kossmann*, Doc. 32-3, Ex. 1.1A to Def. City’s Mot. for Summ. J., “The State of Minority- & Women-Owned Bus. Enter. In Constr.: Evid. from Hous.” (“The NERA Study”), page 46.



programs. Given the legal precedent in the Eleventh Circuit, the statistical evidence of discrimination documented in the Study provides sufficient probative evidence to apply race-conscious remedies to the County's award of prime and subcontracts. Nevertheless, findings of discrimination in the private sector are indicators of conditions that could adversely affect the formation and growth of minority and woman-owned businesses. Thus, the findings from a regression analysis can be used to develop race-neutral public contracting programs to address barriers to the formation and development of all businesses, including public contracting.

The model for the regression analysis of private sector data used in this chapter derives from *Concrete Works IV* which provides the analytical framework for a regression analysis of private sector data. The regression model includes two outcome variables—business ownership, and business earnings—to determine if private sector race and gender-based discrimination exists.<sup>413</sup> The two outcome variables can discern possible impediments to minority and woman-owned business formation and development in the market area. It is this analytical model that is applied in the regression analysis presented in this chapter.

## II. Regression Analysis Methodology

### A. Data Sources

Two separate, court-approved, regression analyses were conducted<sup>414</sup> – the Business Ownership Analysis and the Business Earnings Analysis. These analyses take into consideration race and gender-neutral factors, such as age, education, and creditworthiness, in assessing if the explanatory factors examined disproportionately affect minorities and Caucasian females when compared to Caucasian males.

Each of the two regression analyses compared minority group members<sup>415</sup> and Caucasian females to Caucasian males by controlling for race and gender-neutral explanatory variables. The findings present the impact of explanatory variables on outcome variables. The findings represent unremediated market characteristics that elucidate the socioeconomic conditions in the County's market area that could adversely affect the relative availability of minority and woman-owned businesses and Caucasian male-owned businesses.

The United States Census Public Use Microdata Sample (PUMS) was used to compare the probability of minorities and Caucasian females owning a business to the probability of Caucasian males owning a business. PUMS data is a subset of the American Community Survey (ACS), conducted by the United States Census Bureau, and compiled through yearly telephone and mail surveys. The survey estimates demographic information on occupations, education, and home and business ownership. The PUMS data allowed for an analysis by an individual's race and gender.

**Commented [FML38]:** In certain circumstances, (for example regression analysis that demonstrates access to capital is affected by race and/or gender after controlling for other relevant neutral variables), race- and gender-conscious remedies may also be considered. One example of such race-conscious remedies that a local government may consider under such circumstances are MBE Linked Deposit Policies. A "Linked Deposit Policy" permits government to include MBE financing assessments or enhancements as criteria to be used in the selection of financial institutions to hold government deposits.

<sup>413</sup> *Concrete Works v. City & County of Denver*, 321 F.3d at 966-67 (*Concrete Works IV*).

<sup>414</sup> Detailed description of the steps taken to clean and merge data are listed in Regression Analysis Technical Appendix.

<sup>415</sup> Minority group members include both males and females.

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Data can be derived from PUMS by geographic areas, which are referred to as Public Use Microdata Areas (PUMA) datasets.<sup>416</sup>

The PUMS data for Palm Beach County, Florida, derived from the 2009 to 2013 PUMS dataset, was used to analyze business ownership and business earnings within the County. The PUMS datasets did not allow for a match to the goods and services industry analyzed in the County's Disparity Study (Study). Therefore, the goods and services described in the following analysis were those that most closely mirrored the goods and services industry definition in the Study.

Logistic regression was used to determine if race and gender have a statistically significant effect on the probability of business ownership. Ordinary Least Squares (OLS) regression was utilized to analyze the PUMA data for disparity in owner-reported incomes when controlling for race and gender-neutral factors. Using PUMA data, business ownership rates and business earnings of minorities and Caucasian females were compared to similarly-situated Caucasian males.

**Commented [FML39]:** This is sound disparity study methodology.

## **B. Regression Analytical Models**

### **1. Business Ownership Analysis**

The Business Ownership Analysis examined the relationship between the likelihood of being a business owner and independent socioeconomic variables. Business ownership, as a dependent variable, included business owners of incorporated and unincorporated firms. The business ownership variable utilized 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. Two logistic models were run to predict the probability of business ownership in each of the three industries examined in the County's Study. Categories of the independent variables analyzed include educational level, citizenship status, personal characteristics, race, and gender.

In Tables 9.34 to 9.5, a finding of disparity is denoted by an asterisk (\*) when the independent variable is statistically significant at or above the 95% confidence level ( $p < .05$ ). A finding of disparity indicates that there is a non-random relationship between the probability of owning a business and the independent variable. The regression results indicate the sign of each variable's coefficient—if the coefficient sign is positive, it indicates that there is a positive relationship between the dependent and independent variables. For example, having an advanced degree is positively related to the likelihood of being a business owner, holding all other variables constant. If the coefficient sign for the independent variable is negative, this implies an inverse relationship between the dependent and independent variables. For instance, an individual with children under the age of six has a lower likelihood of owning a business, holding all other variables constant.

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<sup>416</sup> Public Use Microdata Areas (PUMAs) are statistical geographic areas defined for the dissemination of Public Use Microdata Sample (PUMS) data. The PUMS data were collected by the United States Census Bureau from a five-percent sample of United States households. The observations were weighted to preserve the representative nature of the sample in relation to the population as a whole.



For each of the three industries, the logistic regression was used to identify the likelihood of an individual owning a business given his/her background, including race, gender, and other 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. Table 9.1 presents the independent variables used for the Business Ownership Analysis.<sup>417</sup>

**Table 9.1: Independent Variables Used for the Business Ownership Analysis**

Personal Characteristics	Educational Attainment	Ethnicity	Gender
Age	Bachelor's Degree	Caucasian American	Female
Age-squared	Advanced Degree	African American	
Home Ownership		Asian American	
Home Value		Hispanic American	
Monthly Mortgage Payment		Native American	
Interest and Dividends		Other Minority*	
Language Spoken at Home			
A Child Under the Age of Six in the Household			
Marital Status			

(\*) Other Minority includes individuals who belong to two or more racial groups.

## 2. Business Earnings Analysis

The Business Earnings Analysis examines the relationship between annual self-employment wages and independent socioeconomic variables. Wages are defined as the total dollar amount earned in the previous 12 months. The independent socioeconomic variables analyzed include educational level, citizenship status, personal characteristics, business characteristics, race, and gender.

All the independent variables are regressed against wages in an OLS regression model. The OLS model estimates a linear relationship between the independent variables and the dependent variable. This multivariate regression model estimates a line similar to the standard  $y=mx+b$  format, but with additional independent variables. The mathematical purpose of a regression analysis is to estimate a best-fit line for the model and assess which findings are statistically significant.

In Tables 9.7 to 9.9, a finding of disparity is denoted by an asterisk (\*) when an independent variable is statistically significant at or above the 95% confidence level ( $p<.05$ ). A finding of disparity indicates that there is a non-random relationship between wages and the independent variable. Tables of regression results indicate the sign of each variable’s coefficient from the regression output. If the coefficient sign is positive, it means there is a positive relationship between the dependent and independent variables. For example, if age is positively related to wages, this implies that older business owners have higher business earnings, holding all other variables constant. If the coefficient sign for the independent variable is negative, it implies an inverse relationship between the dependent and independent variables. For example, if the

<sup>417</sup> Note: The terms “business owner” and “self-employed” are used interchangeably throughout this chapter.



coefficient for having a child under the age of six is negative, it implies that business owners with children under the age of six have lower business earnings.

An OLS regression analysis is used to assess the presence of business earning disparities. OLS regressions have been conducted separately for each industry. Table 9.2 presents the independent variables used for the Business Earnings Analysis.<sup>418</sup>

**Table 9.2: Independent Variables Used for the Business Earnings Analysis**

Personal Characteristics	Educational Attainment	Ethnicity	Gender
Age	Bachelor's Degree	Caucasian American	Female
Age-squared	Advanced Degree	African American	
Incorporated Business		Asian American	
Home Ownership		Hispanic American	
Home Value		Native American	
Monthly Mortgage Payment		Other Minority*	
Interest and Dividends			
Language Spoken at Home			
A Child Under the Age of Six in the Household			
Marital Status			

(\* ) Other Minority includes individuals who belong to two or more racial groups.

### III. Findings

#### A. Business Ownership Analysis

The business ownership variable is defined by the number of self-employed individuals in each of the three industries: construction, professional services, and goods and services. The data in this section come from Palm Beach County, Florida, which was specified using a PUMA dataset.<sup>419</sup>

Previous studies have shown that many non-discriminatory factors, such as education, age, and marital status, are associated with self-employment. In this analysis, race and gender-neutral factors are combined with race and gender-specific factors in a logistic regression model to determine if observed race or gender disparities are independent of the 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. Caucasian females are less likely to have advanced degrees and the regression results show that individuals with advanced degrees are more likely to own a business at a statistically significant level. Caucasian females may be doubly disadvantaged. Caucasian females may have statistically significant lower business ownership rates, so they face a direct disadvantage as a

<sup>418</sup> If an independent variable is a binary variable, it will be coded as "1" or "0" if the individual has that variable present (i.e. for the Hispanic American variable, it is coded as "1" if the individual is Hispanic American and "0" if not). If an independent variable is a continuous variable, that variable will be used (i.e. one's age can be labeled as 35).

<sup>419</sup> Public Use Microdata Areas (PUMAs) are statistical geographic areas defined for the dissemination of Public Use Microdata Sample (PUMS) data. The PUMS data were collected by the United States Census Bureau from a five-percent sample of United States households. The observations were weighted to preserve the representative nature of the sample in relation to the population as a whole.

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group. They may also be indirectly disadvantaged since fewer tend to have advanced degrees, which increases one's chances of owning a business at a statistically significant level.

### 1. Logistic Model Results for Construction Business Ownership

Table 9.3 presents the logistic regression results for the likelihood of owning a business in the construction industry based on the 21 variables analyzed in this model.

**Table 9.3: Construction Industry Logistic Model**

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.1346293	*	0.0251361	5.36	0
Age-squared	-0.0011736	*	0.0002534	-4.63	0
Bachelor's Degree (a)	0.3674479	*	0.1412541	2.6	0.009
Advanced Degree	0.139647		0.3438004	0.41	0.685
Home Owner	0.2192812		0.1379876	1.59	0.112
Home Value	0.0000005	*	0.0000002	2.98	0.003
Monthly Mortgage Payment	0.0001146		0.0000639	1.79	0.073
Interest and Dividends	0.0000003		0.0000002	1.3	0.194
Speaks English at Home	-0.2718622		0.1870737	-1.45	0.146
Has a Child under the Age of Six	0.1737182		0.5242909	0.33	0.74
Married	0.1335569		0.121619	1.1	0.272
Caucasian Female (b)	-1.010242	*	0.2281602	-4.43	0
African American	-0.932453	*	0.2380504	-3.92	0
Asian American	-0.3594702		0.6970605	-0.52	0.606
Hispanic American	-0.7800401	*	0.2164677	-3.6	0
Native American	-0.2735266		1.22325	-0.22	0.823
Other Minority	-1.138736	*	0.5738827	-1.98	0.047
Year 2010 (c)	0.1548495		0.1702087	0.91	0.363
Year 2011	0.4258999	*	0.1749946	2.43	0.015
Year 2012	0.140289		0.1845421	0.76	0.447
Year 2013	0.10361		0.1701798	0.61	0.543
Constant	-4.647616	*	0.6573587	-7.07	0

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

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

(c) For the year variables, the baseline variable is Year 2009.

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

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



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The construction industry logistic regression results indicate the following:<sup>420</sup>

- The likelihood of construction business ownership is positively associated with increased age. Older individuals are more likely to be business owners in the construction industry at a statistically significant level. However, as individuals age, the likelihood of being a business owner decreases in the construction industry at a statistically significant level.
- Individuals with a bachelor’s degree are more likely to be business owners in the construction industry at a statistically significant level. Individuals with an advanced degree are more likely to be business owners in the construction industry, but not at a statistically significant level.
- Individuals who have a higher-valued home are more likely to be business owners in the construction industry at a statistically significant level.
- Caucasian females, African Americans, Hispanic Americans, and other minorities are less likely than Caucasian males to be business owners in the construction industry at a statistically significant level.
- Asian Americans and Native Americans are less likely to be business owners than Caucasian males in the construction industry, but not at a statistically significant level.
- Individuals were more likely to be business owners in the construction industry in 2011 than in 2009 at a statistically significant level.

## 2. Logistic Model Results for Professional Services Business Ownership

Table 9.4 presents the logistic regression results for the likelihood of owning a business in the professional services industry based on the 21 variables analyzed in this model.

**Table 9.4: Professional Services Industry Logistic Model**

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.080029	*	0.0191903	4.17	0
Age-squared	-0.000435	*	0.0001775	-2.45	0.014
Bachelor's Degree (a)	0.2041372	*	0.1041162	1.96	0.05
Advanced Degree	0.4628726	*	0.1153673	4.01	0
Home Owner	0.0171376		0.1200081	0.14	0.886
Home Value	0.0000003	*	0.0000001	3.39	0.001
Monthly Mortgage Payment	0.0000261		0.0000417	0.63	0.531
Interest and Dividends	0.0000001		0.0000001	0.61	0.544
Speaks English at Home	-0.168596		0.1371807	-1.23	0.219
Has a Child under the Age of Six	0.4556297	*	0.2053335	2.22	0.026
Married	0.1899077	*	0.0937091	2.03	0.043
Caucasian Female (b)	-0.2509934	*	0.1016079	-2.47	0.014
African American	-0.6563642	*	0.1853569	-3.54	0

<sup>420</sup> For the Business Ownership Analysis, the results are presented for the age, education, race, and gender variables only.



Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Asian American	-0.6673867		0.3949246	-1.69	0.091
Hispanic American	-0.1218543		0.1757003	-0.69	0.488
Native American	-		-	-	-
Other Minority	-0.6373581		0.3886902	-1.64	0.101
Year 2010 (c)	0.2999633	*	0.1335666	2.25	0.025
Year 2011	0.3807634	*	0.1343911	2.83	0.005
Year 2012	0.284531	*	0.1353866	2.1	0.036
Year 2013	0.0071056		0.1298353	0.05	0.956
Constant	-4.139762	*	0.543818	-7.61	0

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

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

(c) For the year variables, the baseline variable is year 2009.

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

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

(-) denotes a variable with too few available data to determine statistical significance.

The professional services industry logistic regression results indicate the following:<sup>421</sup>

- The likelihood of professional services business ownership is positively associated with increased age. Older individuals are more likely to be business owners in the professional services industry at a statistically significant level. However, as individuals age, the likelihood of being a business owner decreases in the professional services industry at a statistically significant level.
- Individuals with a bachelor's or an advanced degree are more likely to be business owners in the professional services industry at a statistically significant level.
- Individuals who have a higher-valued home are more likely to be business owners in the professional services industry at a statistically significant level.
- Individuals who have a child under the age of six are more likely to be business owners in the professional services industry at a statistically significant level.
- Married individuals are more likely to be business owners in the professional services industry at a statistically significant level.
- Caucasian females and African Americans are less likely to be business owners than Caucasian males in the professional services industry at a statistically significant level.
- Asian Americans, Hispanic Americans, and other minorities are less likely to be business owners than Caucasian males in the professional services industry, but not at a statistically significant level.
- Individuals were more likely to be business owners in the professional services industry in 2010, 2011, and 2012 than in 2009 at a statistically significant level.



<sup>421</sup> For the Business Ownership Analysis, the results are presented for the age, education, race, and gender variables only.

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### 3. Logistic Model Results for Goods and Services Business Ownership

Table 9.5 presents the logistic regression results for the likelihood of owning a business in the goods and services industry based on the 21 variables analyzed in this model.

**Table 9.5: Goods and Services Industry Logistic Model**

Business Ownership Model	Coefficient	Significance	Standard Error	Z-score	P> z
Age	0.1185084	*	0.0267104	4.44	0
Age-squared	-0.0010138	*	0.0002721	-3.73	0
Bachelor's Degree (a)	-0.0782887		0.1538808	-0.51	0.611
Advanced Degree	-0.4015653		0.3313926	-1.21	0.226
Home Owner	0.5802071	*	0.1715238	3.38	0.001
Home Value	-0.0000001		0.0000003	-0.58	0.565
Monthly Mortgage Payment	0.0000999		0.0000734	1.36	0.173
Interest and Dividends	0.0000005	*	0.0000002	2.33	0.02
Speaks English at Home	0.3504819		0.221652	1.58	0.114
Has a Child under the Age of Six	0.1121459		0.455557	0.25	0.806
Married	0.3910946	*	0.144308	2.71	0.007
Caucasian Female (b)	-0.588515	*	0.1923859	-3.06	0.002
African American	-0.2708584		0.2253142	-1.2	0.229
Asian American	-0.5281926		0.6010035	-0.88	0.379
Hispanic American	-0.19985		0.2593878	-0.77	0.441
Native American	-		-	-	-
Other Minority	0.8205156		0.4900823	1.67	0.094
Year 2010 (c)	0.1232615		0.2000878	0.62	0.538
Year 2011	-0.072859		0.2104764	-0.35	0.729
Year 2012	-0.0333882		0.2055721	-0.16	0.871
Year 2013	0.0950652		0.2017539	0.47	0.638
Constant	-5.431223	*	0.6899173	-7.87	0

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

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

(c) For the year variables, the baseline variable is year 2009.

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

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

(-) denotes a variable with too few available data to determine statistical significance.



The goods and services industry logistic regression results indicate the following:<sup>422</sup>

- The likelihood of goods and services business ownership is positively associated with increased age. Older individuals are more likely to be business owners in the goods and services industry at a statistically significant level. However, as individuals age, the likelihood of being a business owner decreases in the goods and services industry at a statistically significant level.
- Home owners are more likely to be business owners in the goods and services industry at a statistically significant level.
- Individuals who have higher interest and dividends income are more likely to be business owners in the goods and services industry at a statistically significant level.
- Married individuals are more likely to be business owners in the goods and services industry at a statistically significant level.
- Caucasian females are less likely than Caucasian males to be business owners in the goods and services industry at a statistically significant level.
- African Americans, Asian Americans, and Hispanic Americans are less likely than Caucasian males to be business owners in the goods and services industry, but not at a statistically significant level.
- Other minorities are more likely to be business owners than Caucasian males in the goods and services industry, but not at a statistically significant level.

**B. Business Ownership Analysis Summary**

The Business Ownership Analysis examined the different explanatory variables’ impact on an individual’s likelihood of owning a business in 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 when compared to Caucasian males.

Caucasian females experienced disparity in business ownership in more industries than the minority groups—they are less likely to own a business in the construction, professional services, and goods and services industries than Caucasian males at a statistically significant level. African Americans are also less likely to own a business in the construction and professional services industries at a statistically significant level. Hispanic Americans and other minorities are also less likely to own a business in the construction industry at a statistically significant level. Table 9.6 shows the business ownership regression analysis results by ethnicity, gender, and industry.

**Table 9.6: Statistically Significant Business Ownership Disparities**

Ethnicity/Gender	Construction	Professional Services	Goods and Services
Caucasian Female	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
African American	<i>Disparity</i>	<i>Disparity</i>	No Disparity
Asian American	No Disparity	No Disparity	No Disparity
Hispanic American	<i>Disparity</i>	No Disparity	No Disparity

<sup>422</sup> For the Business Ownership Analysis, the results are presented for the age, education, race, and gender variables only.

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Native American	No Disparity	No Disparity	No Disparity
Other Minority	<b>Disparity</b>	No Disparity	No Disparity

**C. Business Earnings Analysis**

The business earnings variable is identified by self-employment income<sup>423</sup> from 2009 to 2013 for the three industries: construction, professional services, and goods and services. The analysis considered incorporated and unincorporated businesses.

Previous studies have shown that many non-discriminatory factors, such as education, age, and marital status are associated with self-employment income.<sup>424</sup> In this analysis, race and gender-neutral factors are combined with race and gender groups in an OLS regression model to determine if observed race or gender disparities are independent of the race and gender-neutral factors known to be associated with self-employment income.

**1. OLS Regression Results in the Construction Industry**

Table 9.7 presents the results of the OLS regression for business earnings in the construction industry based on the 22 variables analyzed in this model.



<sup>423</sup> The terms “business earnings” and “self-employment income” are used interchangeably.

<sup>424</sup> Mason Tillman Associates, Ltd. *State Of New York 2016 MWBE Disparity Study Personal Net Worth Final Report* (2016).

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**Table 9.7: Construction Industry OLS Regression**

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	2253.832	*	564.686	3.99	0
Age-squared	-21.113	*	6.947	-3.04	0.002
Incorporated Business	-4063.436		3453.794	-1.18	0.24
Bachelor's Degree (a)	14699.54	*	3403.814	4.32	0
Advanced Degree	8935.633		6434.244	1.39	0.165
Home Owner	1483.214		1969.167	0.75	0.451
Home Value	0.026	*	0.008	3.38	0.001
Monthly Mortgage Payment	4.214	*	2.115	1.99	0.046
Interest and Dividends	0.038		0.021	1.84	0.066
Speaks English at Home	4654.501	*	2260.009	2.06	0.04
Has a Child under the Age of Six	6123.754		7446.16	0.82	0.411
Married	7138.289	*	1815.89	3.93	0
Caucasian Female (b)	-17725.28	*	3352.821	-5.29	0
African American	-14837.89	*	2057.511	-7.21	0
Asian American	-13993.95		9738.352	-1.44	0.151
Hispanic American	-9936.375	*	2308.067	-4.31	0
Native American	-7042.356		7426.632	-0.95	0.343
Other Minority	-7643.716	*	3133.324	-2.44	0.015
Year 2010 (c)	-3360.449		3002.048	-1.12	0.263
Year 2011	-2585.048		3157.904	-0.82	0.413
Year 2012	-6265.491	*	2832.462	-2.21	0.027
Year 2013	-2109.039		3386.043	-0.62	0.533
Constant	-25111.14	*	11256.15	-2.23	0.026

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

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

(c) For the year variables, the baseline variable is year 2009.

(P>|t|) of less than 0.05 denotes findings of statistical significance.

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

The OLS regression results for business earnings in the construction industry indicate the following:<sup>425</sup>

- Older business owners have higher business earnings in the construction industry at a statistically significant level. However, as business owners age, they have lower business earnings in the construction industry at a statistically significant level.



<sup>425</sup> For the Business Earnings Model, the results are presented for the age, education, race, and gender variables only.

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- Business owners with a bachelor’s degree have higher business earnings in the construction industry at a statistically significant level. Business owners with an advanced degree have higher business earnings in the construction industry, but not at a statistically significant level.
- Business owners who have a higher-valued home have higher business earnings in the construction industry at a statistically significant level.
- Business owners who pay higher monthly mortgages have higher business earnings in the construction industry at a statistically significant level.
- Business owners who speak English at home have higher business earnings in the construction industry at a statistically significant level.
- Married business owners have higher business earnings in the construction industry at a statistically significant level.
- Caucasian female, African American, Hispanic American, and other minority business owners have lower business earnings than Caucasian males in the construction industry at a statistically significant level.
- Asian American and Native American business owners have lower business earnings than Caucasian males in the construction industry, but not at a statistically significant level.
- Business owners had lower adjusted business earnings in 2012 than in 2009 in the construction industry at a statistically significant level.
- Business owners had lower adjusted business earnings in 2010, 2011, and 2013 than in 2009 in the construction industry, but not at a statistically significant level.

**2. OLS Regression Results in the Professional Services Industry**

Table 9.8 presents the results of the OLS regression for business earnings in the professional services industry based on the 22 variables analyzed in this model.

**Table 9.8: Professional Services Industry OLS Regression**

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	4189.508	*	408.305	10.26	0
Age-squared	-42.794	*	4.629	-9.24	0
Incorporated Business	-8938.705	*	4205.009	-2.13	0.034
Bachelor's Degree (a)	18685.03	*	2385.652	7.83	0
Advanced Degree	55854.01	*	4599.833	12.14	0
Home Owner	3346.962		2534.793	1.32	0.187
Home Value	0.031	*	0.006	5.14	0
Monthly Mortgage Payment	6.411	*	1.945	3.3	0.001
Interest and Dividends	0.018		0.01	1.73	0.084
Speaks English at Home	10941.72	*	3433.489	3.19	0.001
Has a Child under the Age of Six	4281.232		5931.405	0.72	0.47
Married	11755.95	*	2558.565	4.59	0
Caucasian Female (b)	-34033.17	*	3092.296	-11.01	0

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Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
African American	-31004.05	*	3244.775	-9.56	0
Asian American	-24454.88	*	7348.412	-3.33	0.001
Hispanic American	-27430.28	*	4149.833	-6.61	0
Native American	-26979.21		16869.25	-1.6	0.11
Other Minority	-21018.83	*	9789.187	-2.15	0.032
Year 2010 (c)	-2249.139		3822.392	-0.59	0.556
Year 2011	4654.695		4073.247	1.14	0.253
Year 2012	2144.243		4026.931	0.53	0.594
Year 2013	6161.18		4060.689	1.52	0.129
Constant	-63777.99	*	8940.51	-7.13	0

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

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

(c) For the year variables, the baseline variable is year 2009.

(P>|t|) of less than 0.05 denotes findings of statistical significance.

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

The OLS regression results for business earnings in the professional services industry indicate the following:<sup>426</sup>

- Older business owners have higher business earnings in the professional services industry at a statistically significant level. However, as business owners age, they have lower business earnings in the professional services industry at a statistically significant level.
- Incorporated businesses have lower business earnings in the professional services industry at a statistically significant level.
- Business owners with a bachelor's or advanced degree have higher business earnings in the professional services industry at a statistically significant level.
- Individuals who have a higher-valued home are more likely to have higher business earnings in the professional services industry at a statistically significant level.
- Business owners who pay higher monthly mortgages have higher business earnings in the professional services industry at a statistically significant level.
- Business owners who speak English at home have higher business earnings in the professional services industry at a statistically significant level.
- Married business owners have higher business earnings in the professional services industry at a statistically significant level.
- Caucasian female, African American, Asian American, Hispanic American, and other minority business owners have lower business earnings than Caucasian males in the professional services industry at a statistically significant level.
- Native American business owners have lower business earnings than Caucasian males in the professional services industry, but not at a statistically significant level.



<sup>426</sup> For the Business Earnings Model, the results are presented for the age, education, race, and gender variables only.

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- Business owners had lower adjusted business earnings in 2010 than in 2009 in the professional services industry, but not at a statistically significant level.
- Business owners had higher adjusted business earnings in 2011, 2012, and 2013 than in 2009 in the professional services industry, but not at a statistically significant level.

### 3. OLS Regression Results in the Goods and Services Industry

Table 9.9 presents the results of the OLS regression for business earnings in the goods and services industry based on the 22 variables analyzed in this model.



**Table 9.9: Goods and Services Industry OLS Regression**

Business Earnings Model	Coefficient	Significance	Standard Error	t-value	P> t
Age	2308.084	*	406.453	5.68	0
Age-squared	-22.958	*	4.858	-4.73	0
Incorporated Business	-5674.405		3929.719	-1.44	0.149
Bachelor's Degree (a)	19803.09	*	2770.481	7.15	0
Advanced Degree	58734.83	*	9165.31	6.41	0
Home Owner	-130.491		2241.772	-0.06	0.954
Home Value	0.027	*	0.01	2.58	0.01
Monthly Mortgage Payment	4.472	*	2.056	2.18	0.03
Interest and Dividends	0.086	*	0.015	5.91	0
Speaks English at Home	6225.385	*	2761.952	2.25	0.024
Has a Child under the Age of Six	2790.986		4870.704	0.57	0.567
Married	4024.46	*	1923.521	2.09	0.037
Caucasian Female (b)	-12653.59	*	2992.132	-4.23	0
African American	-13466.49	*	2617.119	-5.15	0
Asian American	-15049.09	*	6205.906	-2.42	0.015
Hispanic American	-10051.01	*	3096.5	-3.25	0.001
Native American	-		-	-	-
Other Minority	-12620.14		6584.823	-1.92	0.055
Year 2010 (c)	-8462.622	*	2563.321	-3.3	0.001
Year 2011	-4956.761		2871.47	-1.73	0.084
Year 2012	-2539.068		2889.187	-0.88	0.38
Year 2013	-52.809		2828.306	-0.02	0.985
Constant	-24126.43	*	9403.267	-2.57	0.01

(a) For the variables bachelor's degree and advanced degree, the baseline variable is no degree.

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

(c) For the year variables, the baseline variable is year 2009.

(P>|t|) of less than 0.05 denotes findings of statistical significance.

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

(-) denotes a variable with too few available data to determine statistical significance.

The OLS regression results for business earnings in the goods and services industry indicate the following:<sup>427</sup>

- Older business owners have higher business earnings in the goods and services industry at a statistically significant level. However, as business owners age, they have lower business earnings in the goods and services industry at a statistically significant level.

<sup>427</sup> For the Business Earnings Model, the results are presented for the age, education, race, and gender variables only.



- Business owners with a bachelor’s or advanced degree have higher business earnings in the goods and services industry at a statistically significant level.
- Business owners who have a higher-valued home have higher business earnings in the goods and services industry at a statistically significant level.
- Business owners who pay higher monthly mortgages have higher business earnings in the goods and services industry at a statistically significant level.
- Business owners who have higher interest and dividends income are more likely to have higher business earnings in the goods and services industry at a statistically significant level.
- Business owners who speak English at home have higher business earnings in the goods and services industry at a statistically significant level.
- Married business owners have higher business earnings in the goods and services industry at a statistically significant level.
- Caucasian female, African American, Asian American, and Hispanic American business owners have lower business earnings than Caucasian males in the goods and services industry at a statistically significant level.
- Other minority business owners have lower business earnings than Caucasian males in the goods and services industry, but not at a statistically significant level.
- Business owners had lower adjusted business earnings in 2010 than in 2009 in the goods and services industry at a statistically significant level.
- Business owners had lower adjusted business earnings in 2011, 2012, and 2013 than in 2009 in the goods and services industry, but not at a statistically significant level.

**D. Business Earnings Analysis Summary**

Controlling for race and gender-neutral factors, the Business Earnings Analysis documented statistically significant disparities in business earnings for minorities and Caucasian females compared to similarly-situated Caucasian males. Caucasian females, African Americans, Hispanic Americans, and other minorities have lower business earnings in the construction, professional services, and goods and services industries at a statistically significant level. Asian Americans have significantly lower business earnings in the professional services and goods and services industries at a statistically significant level. Table 9.10 shows the business earnings regression results by ethnicity, gender, and industry.

**Table 9.10: Statistically Significant Business Earnings Disparities**

Ethnicity/Gender	Construction	Professional Services	Goods and Services
Caucasian Female	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
African American	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian American	No Disparity	<i>Disparity</i>	<i>Disparity</i>
Hispanic American	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Native American	No Disparity	No Disparity	No Disparity
Other Minority	<i>Disparity</i>	<i>Disparity</i>	No Disparity

**Commented [FML40]:** Further compelling evidence that when controlling for neutral characteristics of business ownership, race and gender appear to affect market outcomes for business earnings of firms.

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#### IV. Conclusion

The two outcome variables examined in the regression analysis were business ownership and business earnings. The regression analyses reviewed private sector business practices, which are indicators of marketplace conditions that adversely affected the formation and growth of minority and woman-owned businesses. The two regression analyses were performed for the three industries in the County’s Study—construction, professional services, and goods and services. The analyses examined the effect of race and gender on the two outcome variables. The Business Ownership Analysis and the Business Earnings Analysis used data from the 2009 to 2013 PUMS datasets for Palm Beach County, Florida and compared business ownership rates and earnings for minority group members to those of similarly-situated Caucasian males.<sup>428</sup>

Even though minority and woman-owned businesses’ age, education, business characteristics, and creditworthiness were comparable to Caucasian males’ socioeconomic profiles, the regression analysis of business ownership documented a disparity for minority and woman-owned businesses compared to similarly-situated Caucasian males with all other factors being equal. As indicated in Table 9.11, business ownership disparity was found for Caucasian females in the construction, professional services, and goods and services industries; for African Americans in the construction and professional services industries; and for Hispanic Americans and other minorities in the construction industry.

**Table 9.11: Statistically Significant Business Ownership Disparities**

Ethnicity/Gender	Construction	Professional Services	Goods and Services
African American	<i>Disparity</i>	<i>Disparity</i>	No Disparity
Asian American	No Disparity	No Disparity	No Disparity
Hispanic American	<i>Disparity</i>	No Disparity	No Disparity
Native American	No Disparity	No Disparity	No Disparity
Other Minority	<i>Disparity</i>	No Disparity	No Disparity
Caucasian Female	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>

The regression analysis of business earnings also determined that there is disparity for minority and woman-owned businesses in comparison to similarly-situated Caucasian males, with all other factors being equal. As indicated in Table 9.12, business ownership disparity was found for African Americans, Hispanic Americans, and Caucasian females in the construction, professional services, and goods and services industries; for Asian Americans in the professional services and goods and services industries; and for Other Minorities in the construction and professional services industries.



<sup>428</sup> Controlling for race- and gender-neutral factors, such as age, education, and creditworthiness, the results show the likelihood of owning a business exist and earnings for minorities and Caucasian females compared to Caucasian males.

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**Table 9.12: Statistically Significant Business Earnings Disparities**

<b>Ethnicity/Gender</b>	<b>Construction</b>	<b>Professional Services</b>	<b>Goods and Services</b>
African American	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Asian American	No Disparity	<i>Disparity</i>	<i>Disparity</i>
Hispanic American	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>
Native American	No Disparity	No Disparity	No Disparity
Other Minority	<i>Disparity</i>	<i>Disparity</i>	No Disparity
Caucasian Female	<i>Disparity</i>	<i>Disparity</i>	<i>Disparity</i>

Though minority and woman-owned businesses have comparable experience and education, they were less likely to own a business and they earned less than similarly-situated Caucasian males, at a statistically significant level. Although these statistical disparities are probative of private discrimination in the unremediated markets, the statistical findings do not provide a predicate for a race-conscious program in the Eleventh Circuit. Nevertheless, the regression findings provide guidance in the formulation of race-neutral recommendations to increase M/WBE utilization. *Chapter 12: Remedy Analysis* includes race-neutral recommendations derived from the findings in this chapter.



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## CHAPTER 10: Anecdotal Analysis

### I. Introduction

This chapter presents anecdotal testimony gathered through business community meetings and in-depth, one-on-one interviews. The purpose of this chapter is to garner anecdotal evidence of acts that may have prevented Minority and Women-owned Business Enterprises' (M/WBE) access to Palm Beach County (County) contract opportunities. The anecdotal testimony analyzed supplements the statistical findings of the County's Disparity Study.

The utility of anecdotal testimony in a disparity study was discussed in the landmark case, *City of Richmond v. J.A. Croson Co.*<sup>429</sup> (*Croson*) in 1989. In this decision, the United States Supreme Court considered the use of anecdotal testimony to determine if 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."<sup>430</sup> However, the Court found anecdotal evidence alone cannot provide the predicate for a race-based remedy.

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 of M/WBEs. Anecdotal testimony, when paired with statistical data, can document the routine practices affecting M/WBEs' access to contracting opportunities. The statistical data can quantify the results of discriminatory practices, while anecdotal testimony provides the human context to understand the numbers. Anecdotal testimony was solicited from a diverse group of prime contractors, subcontractors, and suppliers in Palm Beach County to provide a comprehensive perspective of experiences.

#### A. Anecdotal 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 the award of prime contracts or acts of exclusion committed by contractors working on behalf of a governmental entity. The second line of anecdotal inquiry examines the government's passive support of exclusionary practices that occur in the market area in which its funds are infused.

Anecdotal evidence of passive exclusion pertains to the discriminatory activities of private sector entities. Passive exclusion results from government officials who 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.<sup>431</sup>

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<sup>429</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 509 (1989).

<sup>430</sup> *Id.*

<sup>431</sup> *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. Less weight should be afforded to personal accounts of discrimination that reflect isolated incidents compared to anecdotal evidence of a municipality’s institutional practices because of the impact that institutional practices have on market conditions.<sup>432</sup> Nonetheless, when paired with appropriate statistical data, anecdotal evidence of either active or passive forms of discrimination can support the imposition of a race or gender-conscious remedial program.<sup>433</sup>

As *Croson* points out, jurisdictions have at their disposal “a whole array of race-neutral devices to increase the accessibility of [County] contracting opportunities to small entrepreneurs of all races.”<sup>434</sup> Nevertheless, 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. According to *Croson*, these narratives can identify specific generic practices that the governmental entity 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.

**B. Anecdotal Methodology**

The methods used to collect the anecdotal information consisted of soliciting public comment from business community meetings and one-on-one interviews. All the business owners interviewed were domiciled in the geographical market area. The boundaries of the market area are described in *Chapter 5: Market Area Analysis*.

**1. Business Community Meetings**

The initial phase of the anecdotal process was the collection of public comment at two business community meetings. The meetings were held at the times and locations listed in *Table 10.1*.

**Table 10.1: Palm Beach County Community Meeting Dates and Locations**

Location	Date	Time
Central Palm Beach County Government Center, West Palm Beach	January 24, 2015	10:00 a.m.
West County Senior Center, Belle Glade	January 24, 2015	2:00 p.m.

These meetings offered the County an opportunity to announce the Study and inform the business community about the Study’s legal framework, methodology, and timeline. Business owners were also afforded the opportunity to speak with County representatives regarding contracting

<sup>432</sup> *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.”

<sup>433</sup> *Croson*, 488 U.S. at 509.

<sup>434</sup> *Id.*

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opportunities. The meetings sought to solicit the business community's support for the Study and to identify business owners willing to participate in the anecdotal interviews.

The outreach efforts to promote the two meetings targeted businesses in the construction, professional services, and goods and services industries. Testimony from these meetings has been incorporated in this chapter.

## 2. One-on-One Interviews

The second phase of the anecdotal process included screening businesses for their interest in being interviewed. The screener collected basic demographic data and specific information to determine the relevant experiences of the business owners. The screener also captured information regarding the interviewee's experiences with public contracting and 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 County's formal or informal contracting practices had a positive or adverse impact on M/WBEs during the January 1, 2009, to December 31, 2013, study period.

A total of 35 interviews were completed with African American, Asian American, Hispanic American, Native American, Caucasian female, and non-minority male business owners who provide the types of goods and services procured by the County.

## II. Anecdotal Findings

The anecdotal testimony culled from the comments at the business community meetings and one-on-one interviews describe general market conditions and the range of discriminatory experiences encountered by interviewees doing business or attempting to do business with the County. Many of the anecdotes could be corroborated with statistical data to document the effect that the described experiences had on M/WBEs' access to the County's contracting opportunities.

### A. Racial Barriers

Interviewees expressed concern that they were prevented from obtaining work from the County because of their ethnicity. A minority male owner of a professional services company believes that certain County departments are hesitant to work with minority-owned companies:

**Commented [FML41]:** These are valid methodologies for gathering relevant anecdotal evidence regarding the nature of barriers encountered by small M/WBE firms, the manifestations of marketplace discrimination, and the efficacy of race- and gender neutral remedies.

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*I think that without question race plays a big role in the likelihood of getting a contract. There seems to be a reluctance in certain County departments to work with minorities and in particular African-American-owned companies. I would say this is more prevalent in the Facilities Development & Operations Department. Very few Black or African American companies have received professional services contracts from this Department. They have a longstanding history of being reluctant to deal with certain companies because of the race of the owner.*

---

African American contractors received less than 1% of the dollars on the County's professional services contracts during the five-year study period. There was also a documented disparity in the award of professional service contracts to African American businesses certified as Consultants Competitive Negotiation Act

Chapter 3, Prime Contractor Utilization Analysis

A minority male owner of a professional services company reported that the qualifications of his staff is viewed with skepticism because of their race:

---

*My staff's credentials are typically questioned because we are a minority-owned firm. County prime contractors will ask "Where did you go to school? Do you have a degree? Are you a CPA?" This occurred quite often, and it has a negative impact on us because these views can inhibit the growth of our company.*

---

A minority male owner of a professional services company reported that he is discriminated against by majority-owned architecture and engineering firms:

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*There have been times that we were interviewed by prime contractors, and I knew we were the best qualified local firm and we still didn't get the job. I'm not going to mention their name because I will get in trouble. There is still discrimination in the market, without a doubt. I'm an open-minded guy, but it is usually White engineering prime consultants that discriminate.*

---

Asian American subcontractors received 0.44% of the dollars on the County's professional services contracts during the five-year study period.

Chapter 4, Subcontractor Utilization Analysis



A minority male owner of a professional services company reported that commonly utilized County contractors will not include him on their team because of his race:

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*The architectural firms prefer to use someone else, not because we're unqualified, it's because we are minority. That is my belief. They are not going to give us any work. That I know.*

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A minority male owner of a construction company believes that minority businesses are unfairly perceived as less qualified than non-minority owned businesses:

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*I personally feel that there is a disparity when it comes to African American-owned businesses regarding their ability to get a piece of that pie. Historically, many believe that African American, minority-owned and woman-owned businesses aren't as sophisticated and qualified as a non-minority-owned business. So, that is a stereotype that is out there, and it needs to be broken down.*

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Less than 4% of the dollars the County awarded for construction prime contracts were received by African American, Hispanic American, and Asian American contractors combined.

Chapter 3, Prime Contractor Utilization Analysis

## **B. Sexism**

Interviewees expressed concern that they were unable to receive work on County projects because of their gender. A Caucasian female owner of a professional services company described a situation in which she believed her subcontract was not renewed because her company is female-owned:

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*When County bids go out for jobs, these prime consultants would most often not come to our firm because we are women-owned. We have a very hard time during the bidding process because they focus on other firms. We were working as a subconsultant on a small portion of work with another firm that was run by a male friend in the construction industry. Subsequently, all of our business was taken from us and given to this man. The company that I was working for was [company name withheld]. We just have a lot of difficulty getting construction type clients, and it's not a lack of experience, because we have 20-plus years in the construction industry. I actually started veering*

Caucasian female subcontractors were underutilized on the professional services prime contracts awarded by the County during the five-year study period.

Chapter 8, Subcontractor Disparity Analysis



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*away from going through the County's RFP process because it's a costly and lengthy process, and in the end, we lose money.*

A minority male owner of a professional services company spoke about his knowledge of sexism in the architecture and engineering industry:

*I think there is a deterrence when it comes to gender. Generally speaking, male department heads are accustomed to certain standards, and they are not used to working with female engineering firms. Sometimes, they feel that it's more appropriate for a male company to handle engineering tasks. I know of several minority female-owned engineering firms who are trying to get in the door, but they fall short because of the longstanding relationships the department heads have with the engineering firms. I think it is more widespread than a few isolated instances.*

African American females received 0.05% of the dollars on the County's professional services contracts. And, Asian American females were not awarded any of the County's professional services contracts during the five-year study period.

Chapter 3, Prime Contractor Utilization Analysis

A Caucasian female owner of a goods and services company discussed her experience at local networking events:

*When I go to the events in the big convention centers, some of the men that are the heavy-hitters don't spend as much time with the women as they do with the men on a serious basis.*

Caucasian females had a disparity in the goods and services prime contracts awarded by the County during the five-year study period. Minority females also had a disparity in the award of goods and services prime contracts. African American females received 2% and Asian and Hispanic females received less than 1% of the dollars the County awarded for goods and services prime contracts.

Chapter 7, Prime Contractor Disparity Analysis

A Caucasian female owner of a construction company reported on the disparate treatment she received compared to her brother when she sought financing for her company:

*I have been in business for several decades, and we still have problems getting financing. The banks do not consider the time that we have been in business. I believe we get rejected because of my gender. My brother started a new business, and he had no problems getting loans.*



### C. Preferred Contractors

Interviewees expressed concern that County managers prefer to work with the same few design consultants. The procurement of design services for the County's professional services for construction projects valued \$325,000 or greater and studies valued at \$35,000 or greater are governed by the Consultants' Competitive Negotiation Act (CCNA). The County certifies the eligibility of businesses to perform its architecture and engineering, landscape architecture, and registered surveying and mapping services contracts in compliance with CCNA. To determine if a firm is CCNA qualified, the County considers the following factors: 1) the ability of professional personnel; 2) whether a firm is a certified MBE; 3) past performance; 4) willingness to meet time and budget requirements; 5) location; 6) recent, current, and projected workloads of the firm; and 7) the volume of work previously awarded to each firm by the County, with the objective of effecting an equitable distribution of contracts among equally qualified firms.<sup>435</sup>

The County's CCNA Vendor List and Work Categories contained 438 businesses. CCNA-certified businesses received 777 prime contracts during the five-year study period. The 777 prime contracts were awarded to 76 businesses. Fifteen of these businesses received 70% of the contracts. Despite the County's policies to equitably award CCNA contracts, CCNA-certified minority businesses were underutilized at a statistically significant level. The disparity in the utilization of each of the ethnic groups is depicted in the table below. The disparity statistics substantiate the anecdotal accounts of barriers to the design contracts awarded by the three departments.

A minority male owner of a professional services company has experienced barriers trying to team up with established architecture firms to obtain work from the County:

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*We have faced a lot of difficulty getting design work from the County. We send our marketing information to the architectural firms, but they are very stern about what team gets the work. Palm Beach County seem to be ignoring us.*

---

African Americans represent 10.62% of the professional services subcontractors in the County's market area, and they received less than 1% of the total dollars awarded to professional services subcontractors

Chapter 4, Subcontractor Utilization Analysis

A minority male owner of a professional services company discussed what he believes led to the demise of African American architecture and engineering firms in Palm Beach County.

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*It's difficult to survive in Palm Beach County. It's a miracle that I am still in business. If you look at Palm Beach County right now, you will see that no Black firms are getting architecture and engineering contracts. Absolutely none.*

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African American males received 0.41% of the dollars on the County's professional services contracts, while African American females received 0.05% of the dollars during the five-year study period.

Chapter 3, Prime Contractor Utilization Analysis

<sup>435</sup> FLA. STAT. tit. XIX, § 287.055(4)(a) (2014); Palm Beach County, FL, PPM CW-O-48(V) (December 1, 2013).



*Most of the architects that are Black have gone out of business. There are one or two still hanging on.*

---

A minority male owner of a professional services company fears retaliation if he lodges a complaint against the Engineering and Public Works Department for repeatedly using the same consultants:

*The Engineering Department absolutely has preferred contractors. I'm talking about the department that is in charge of the design services. I don't complain because it's like shooting yourself in the head. You don't complain or you will never survive in this environment. They put you on a black list and just never call you anymore.*

---

A minority male owner of a professional services company described his frustration trying to get on a proposal team to obtain work from the Engineering and Public Services Department:

*It's hard to get work with the Engineering Department. You have to get on a team. I can't get on a team because most of the teams are already full. So, it's very discouraging if you are not part of the teams that are getting the work. I've never been contacted by the County. When I reached out to the Engineering Department, they said we needed to get on a team to get work. I have tried for three to four years and nothing.*

---

African Americans represent 10.62% of the available professional services subcontractors and received 0.91% of the professional services subcontract dollars.

Chapter 3, Prime Contractor Utilization Analysis

A minority male owner of a professional services company is confident that he has been unsuccessful obtaining work from the County because of preferred consultants:

*I have responded to roughly 40 proposals from the County within the last several years. I have won zero awards. I believe I was rejected because they award contracts to the same large companies. Even though the County claims they look out for MBEs and*

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African American and Asian American CCNA certified professional services prime contractors did not receive any of the dollars on the County's CCNA professional services contracts, although they represent 3.22% of the available CCNA certified professional service prime contractors.

Chapter 3, Prime Contractor Utilization Analysis



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*other small businesses, I think it's a cover-up because I have been a MBE for a long time and these large companies continue to get the work.*

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A minority female owner of a professional services firm opted to work for another governmental agency since she was unable to obtain architecture work from the County:

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*I would be glad to join a team to get work with Palm Beach County. But, I have not been successful. I have been able to get work with Florida DOT.*

---

A Caucasian female owner of a professional services company has been unable to obtain work from several County departments. She discontinued her outreach because she believed that her efforts would not be fruitful:

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*I have not received any business with the County. I contacted the Department of Economy Sustainability and the Procurement Department. After some time, it was very clear that I was annoying the managers, and it became obvious that they had no interest in working with my company. I didn't want to step on anyone's toes by being aggressive so I stopped reaching out to them. I feel like I wasted almost three years trying to do business with the County. The incumbent contractors hold the long-term contracts which is a blockade to small businesses getting business.*

---

A minority male owner of a professional services company is discouraged that the same contractors are awarded contracts from the County's Purchasing Department:

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*I believe that the Purchasing Department's procurement managers definitely have their preferred vendors. They are the people that they have built relationships with over the years. The procurement process requires the cultivation of relationships with the purchasing agents themselves, and small and minority businesses have very little information about that process or probably don't even know that the process is available. So, there's barriers there.*

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A minority male owner of a construction company has been unable to get work with the Facilities Development & Operation Department because he is not one of their preferred contractors:

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*The Facilities Development & Operations Department definitely has preferred contractors. They select the same companies over and over again. Their preferred contractors are [company names withheld]. And, [name withheld] was selected even though they failed to meet the SBE requirements. There should be opportunities for other companies to get work with the County.*

---

A total of 289 vendors received construction prime contracts during the five-year study period. Twenty-eight of the 289 vendors received \$436,845,094 or 70% of the total construction prime contract dollars.

Chapter 3, Prime Contractor Utilization Analysis

A minority male owner of a construction company explained why the County prefers to work with the same contractors:

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*The County in many respects work with firms that they already have previously established relationships. There is a level of comfort between those firms and the County. There are unspoken preferences towards those companies that they have done business with for a number of years. It is a challenge to break in the middle of that environment.*

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#### **D. Good Old Boy Network**

The good old boy network is an informal network that advantages friends, colleagues, and associates in the award of prime contracts and subcontracts. The good old boy network is perceived by the interviewees as being comprised of Caucasian males, and their exclusionary networks operate as a barrier to M/WBEs participation on the County's contracts.

A minority male owner of a professional services company believes that he has not received architecture and engineering work from the County because of the exclusionary practices of the good old boy network:

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*I've had real serious difficulties in getting work in Palm Beach County. I've found it difficult in my profession as an engineer, to get on teams for County projects. No matter how much marketing I do, regardless of how many emails I send, or calls I do. When it comes to a project where the architect is the lead on a project, it's always difficult to get on that architect team because they have their own old boys that they have worked with for a long time. There is no way to work around it. That's*

Caucasian males received 75% of the dollars on the County's professional services prime contracts during the five-year study period. The utilization exceeded their availability.

Chapter 3, Prime Contractor Utilization Analysis



*just the way it is. I believe that systems should be in place at the County where they insure that smaller firms can get on the team because we are capable of doing the work.*

---

This same minority business owner believes that procurement opportunities that are not required to be advertised offer opportunities for County managers to award small purchases to the good old boys:

*The good old boys go to school together, play bridge and a lot of other stuff. They are all friends, and they know each other by their first name. The County managers have a certain threshold where they can call three companies for services, and the good old boys are called. We are never called. They call their friends and just ask for a price. They always call the same people all the time. I believe they can spend up to \$50,000 by just seeking quotes. So, they call who they want. They call their friends and colleagues, and the old network kicks in. I will stand before anybody including congress and tell them the same thing. I have been doing this a long time, and I have a lot of scars.*

Caucasian males received 73.01% of the informal professional services prime contracts valued under \$50,000, 65.89% of the informal construction prime contracts, and 78.07% of the informal goods and services prime contracts valued under \$50,000.

Chapter 3, Prime Contractor Utilization Analysis

A minority male owner of a professional services company believes the County's capital improvement projects are controlled by the good old boy network:

*Facilities Development & Operation supports the good old boy network in many ways, shapes, and forms. The capital improvement projects are run like a good old boy system. The same old guys get the same old work. There's a lock on the work. It is very difficult for a small business or a minority-owned business to even crack the door open.*

The County procures construction and professional services contracts through master agreements. A master agreement can be used by more than one department to award multiple projects, with additional multi-year renewal options.

Palm Beach County's Policy and Procedure Manual



A minority female owner of a professional services company described her frustration at trying to penetrate the good old boy network:

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*The good old boy network is ever present in my industry, and I am still fighting through it. You have to know who the key players are, and that's a big hurdle. I find myself just running around in circles trying to break into the network.*

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A minority male owner of a construction company reported that subcontractors are more impacted than prime contractors by the good old boy network:

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*In Palm Beach County, there is definitely a good old boy network who provide business opportunities to each other. It impacts subcontractors more because prime contractors, typically White male-owned businesses, prefer to do business with their own kind.*

---

Caucasian males received 86.88% of the prime contracts and 80% of the subcontract dollars on the County construction contracts during the study period. They also received 62.04% of the construction prime contracts valued under \$50,000 which did not have to be advertised.

Chapter 3, Prime Contractor Utilization Analysis; Chapter 4, Subcontractor Utilization Analysis

A Caucasian female owner of a construction company described her industry as dominated by the good old boy network:

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*My industry is the good old boys. I am called "Girlie," even though I'm over 60. The construction industry is a male-dominated White industry. If you are not in the club, you are ignored. The good old boy network is present and thriving. For example, when I go to pre-bid meetings, it is predominantly White men. You may see a sprinkling of Hispanic and Black men and every once in a while. And maybe, a few women. You will hardly ever see a Black woman. But for the most part, I still see tons of White men. So, to me that's the good old boy network.*

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A Caucasian female owner of a goods and services company reported that unlicensed contractors are utilized by the County because they belong to the good old boy network:

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*The good old boy exists because they are not supposed to work with companies that are not licensed contractors. But people at the County have worked with these unlicensed contractors for years. The contractors are friends with the County managers so they never get cited or fined for being unlicensed.*

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**E. Difficulty Obtaining Financing**

Many business owners reported that they experienced difficulties obtaining financing for their small businesses. A minority female owner of a professional services company only received a small line of credit for her business despite ten years as a business owner:

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*I have experienced a lot of issues trying to get financing. I was only able to get a \$5,000 line of credit from [finance institution withheld]. A year later, it dropped to \$2,000. So, it's been very difficult. Even today, I still cannot get a penny to grow my business.*

---

A minority male owner of a professional services company reported that he has been unable to receive any financial assistance for his small business:

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*We had a very difficult time getting financing. It obviously has put a strain on my business. We had to make business decisions to not seek certain work. The banks perceived my minority company as a business risk even though we had a great business plan that indicated that we were a minimal risk.*

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A minority male owner of a professional services company reported that certain financial institutions' small business marketing campaigns are not genuine:

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*I have not received financing with any banks including the bank where I have an account. That bank is [name withheld]. I tried to get financing through them and we were denied. [Bank representative name withheld] told me that even though they promote small business financing, it's really tough to get a loan. He claimed that I could run the risk of not being able to pay my employees or be unable to buy the necessary supplies to sustain a contract. Since I don't have any financial support, I am swayed from bidding on certain projects. So, it's been pretty detrimental. And, my situation has not improved. I have sought assistance from family members and church associates so I can go after small contracts.*

---

A minority male owner of a professional services company reported that he only pursues work on small projects because he is unable to obtain financing:

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*A major obstacle is access to capital. Positive cash flow is needed to start and grow a business. Access to capital through traditional commercial means and*

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*municipalities is very limited. A lot of minority businesses are unable to expand or even grow their business. Access to financing is needed to work on large scale public and private construction projects.*

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A minority male owner of a professional services company had to relinquish his office space because of his inability to receive financing:

*I used my retirement to keep my business afloat. The biggest problem I had was staffing because I could not get financing. It put me in a difficult position. I had to close my office and work completely mobile. I restructured my business because I was not able to secure any loans or financing.*

---

A Caucasian female owner of a construction company reported that she is forced to rent equipment that is not cost effective:

*I was unable to purchase equipment that I need to compete on construction projects. After two years of trying to get financing I gave up. I had to rent the equipment which is costly compared to buying the equipment. Also, I cannot consider the equipment an asset because it is rented.*

---

A minority male owner of a professional services company explained the importance of a line of credit for a small business:

*No cash flow ruins businesses. Without financial support, I am unable to take care of my payroll and expenses. A line of credit can bridge the gap during the period when we are waiting on payment from our client. I usually have to wait 30 to 60 days to get paid.*

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A minority male owner of a professional services company was only able to secure financing at an exorbitant interest rate:

*I could only get a line of credit with high interest terms. I finished paying off a loan for \$5,000, but I had to pay back \$9,000.*

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**F. Effectiveness of the SBE Program**

The interviewees reported on their observations regarding the benefits of the County’s SBE Program. Recommendations to enhance the programs were also offered by the business owners.

A minority male owner of a construction company described the negative impact his company would experience if the SBE Program was discontinued:

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*I think the SBE Program levels the playing field to some degree. If the County did not have the SBE Program, the opportunities for us would go away. It’s fantastic that the County has SBE goals. I would not want to see the SBE Program go away. We would be impacted tremendously.*

---

A minority female owner of a professional services company believes that the good faith effort requirements can be used as a tactic by prime contractors to circumvent meeting the SBE goals:

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*I think the SBE Program is valuable, but I think it could be better. Prime contractors can use the good faith efforts as a means to not meet the requirements.*

---

A minority male owner of a professional services company explained why he believes the SBE Program is beneficial for the County and local small businesses:

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*The SBE Program is a win-win for the County and small businesses. The program is geared to helping the County receive cost competitive quality services. Small businesses are hungry and want to be competitive in the marketplace. It also creates jobs for the local community.*

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A Caucasian male owner of a construction company described why he believes the SBE Program is beneficial to small businesses and the County:

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*There is a need to assist smaller businesses in getting business by providing an opportunity for them to do work. I don’t think it does any good to have just one contractor doing most of the work. There should be competition. There is a value for the County to have many contractors to choose from that can do different work. It increases the tax base which is a good thing too.*

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A minority female owner of a professional services company attributed the success of her company to the County's SBE Program:

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*I truly believe the SBE Program has allowed us to provide services to the County, where we otherwise could not compete with the larger companies. It has provided value to our company and it ensures the County is getting the best price.*

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A Caucasian male owner of a construction company believes that the SBE Program is critical to the competitiveness of small businesses:

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*The SBE Program is valuable because otherwise people will deal with people that they know. I believe it provides opportunities.*

---

A Caucasian female owner of a professional services company credits the SBE Program for the work she was awarded by the County:

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*I think the SBE Program is effective for M/WBEs. A lot of the jobs, at least accounting and auditing services, are given to SBEs because of the SBE Program. It gives us the opportunity to shine in our own capacity.*

---

A Caucasian female owner of a professional services company described the benefits she received as a certified SBE:

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*For me, the SBE Program has been valuable for my company. After I got certified, I started receiving jobs from the County.*

---

A minority male owner of a professional services company spoke highly of the Office of Small Business Assistance staff:

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*I think the SBE Program is working as best it could. The folks in that office are very good-hearted.*

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A Caucasian female owner of a professional services company credits the SBE Program as a valuable resource for small businesses; however, she believes the program could be strengthened to increase the participation of SBEs on the County's contracts:

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*I think the SBE Program is important and valuable because it opens the door to discussions with County managers. But, I can't say that we have gained work from participating in the program. So, there is a lot more work to do. I think the Office of Small Business Assistance could do more to assist us so we can better understand how we can get work from the County.*

---

A Caucasian female owner of a goods and services company explained that although the SBE Program has benefitted her company, she fears that her company may graduate out of the program before she can effectively compete against large established companies:

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*The SBE Program has been valuable for my company. It certainly has given us the opportunity to work on more jobs than we would have received had we not been an SBE. My concern is that the cap for being an SBE will be changed. When we renew our certification, we will probably exceed the three-year eligibility size limit. This concerns me because it may look like you've got a lot of money, but then when you consider the cost to do the work and the type of jobs we are doing, there is not much profit left to be competitive. So, I think the eligibility cap needs to be reviewed.*

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A minority male owner of a professional services company described the helpful assistance he received from the Office of Small Business Assistance:

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*[Name withheld] has been phenomenal in communicating with us. We have a good shot at getting work with the County because of her involvement in the SBE Program. She is doing wonderful work there. There is no doubt in my mind that the program is valuable. When they rate our proposal, we get extra points because we are an SBE.*

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A minority male owner of a professional services company is disappointed that he has not received work from the County despite his SBE certification:

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*Judging on my specific results, I think the program is flawed. I haven't received any jobs.*

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Minority SBEs received 3.43% of the total dollars and non-SBE certified minority businesses received 4.17 of the County's total dollars.

Chapter 11, Recommendations

### **G. Exemplary Practices of the County**

Many business owners credited the work they received from the County for growing their small business. Others lauded the County's management practices as influential in gaining access to contracting opportunities.

A minority male owner of a professional services company spoke highly of the County's executive team:

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*I can go down the list of County staff that have been helpful. From everyone from the Deputy County administrator, Assistant County administrator, and the County administrator. These people have been very helpful.*

---

A minority male owner of a construction company spoke positively regarding his interactions with the Office of Small Business Assistance:

---

*The Office of Small Business Assistance do a fantastic job at notifying the certified small businesses of projects that are coming up or out for bid. So, they do a great job.*

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A minority male owner of a professional services company learned about the County's procurement process through the Office of Small Business Assistance:

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*Palm Beach County Office of Small Business Assistance has been very good to me. My business has survived because of the SBE Program. [Name withheld] gives me guidance on what I need to do to get work from the County. He is very helpful in explaining the County's procurement process. The County has been excellent to us.*

---



A minority female owner of a professional services company described the County's vendor notification system as user friendly:

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*I truly believe that the County's vendor system with notifications of current RFPs. It is really helpful and easy to use.*

---

A Caucasian male owner of a construction company received helpful information from the Office of Small Business Assistance's outreach programs:

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*We have had some very positive experiences with various programs offered by the Office of Small Business Assistance. They do a good job reaching out to the local small business community. We have attended many of their programs.*

---

A Caucasian female owner of a construction company received guidance from a County manager when she started her company. She went on to explain that the relationship developed into a beneficial connection for growing her small business:

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*[Name withheld], a construction manager encouraged me to bid with the County when he learned that I had a new company. We have worked on many projects over the past several decades. He had knowledge regarding the specification requirements on the County's construction projects. Whenever I had any questions, he would answer them. I experienced this with most County workers.*

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#### **H. Recommendations to Enhance the County's Procurement Standards**

The interviewees provided recommendations to enhance the County's procurement standards to make them more transparent and efficient. The implementation of a M/WBE program was recommended by many interviewees.



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A minority male owner of a construction company recommended that an MBE program be implemented:

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*I think an MBE program should be implemented. From an African American business owner's standpoint working in the construction industry for decades, I personally feel that there is a disparity when it comes to African American- owned construction businesses.*

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A disparity, which is the predicate for a legally sound M/WBE program was found for African Americans and Hispanic Americans on the County's construction prime contracts valued \$50,000 to \$1,296,000. African American and Hispanic American subcontractors also had a disparity on the County's construction contracts.

Chapters 7 and 8, *Prime Contractor Disparity Analysis and Subcontractor Disparity Analysis*

A minority male owner of a professional services company also recommended that an MBE program be implemented:

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*Absolutely, the County should implement an M/WBE program. Without a program, small minority businesses would not get any work. And, the prime contractors would use their folks as subcontractors.*

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A minority female owner of a professional services company also recommended that an MBE program be implemented:

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*I think an M/WBE program is needed because it can help expose M/WBEs to County managers and offer more networking opportunities.*

---

African American, Hispanic American, Asian American, and Caucasian female contractors were found to have a disparity on the County's goods and services prime contracts valued from \$50,000 to \$321,000.

Chapter 7, *Prime Contractor Disparity Analysis*

Another minority male owner of a professional services company also recommended that an MBE program be implemented:

---

*I believe a carefully crafted MBE program could be an enhancement to the small business environment in general. A program is only as good as its eligibility criteria, objectives, and compliance structure. If properly structured, the obstacles faced by minority businesses could be addressed.*

---



However, a Caucasian male owner of a construction company does not believe an M/WBE program is needed:

*No, an M/WBE program is not needed. I think the SBE Program is working fine.*

Over 50% of the SBEs utilized to meet the 15% SBE utilization goal was with Caucasian male SBEs. There was also a disparity of the utilization of African American and Asian American SBEs.

Chapter 11, Recommendations

A minority female owner of a professional services company recommends that the County sponsor more networking events:

*I feel that there needs to be more networking opportunities with the County. I would like to see events where established companies meet with minority companies.*

A minority female owner of a goods and services company suggests a small rotation program for SBEs:

*I think they need a rotation program for small businesses to compete against other small businesses. The program should include janitorial services.*

African Americans received only 2.15% of the total dollars on the County's Job Order Contracts (JOC), Asian Americans received 1.04% and Hispanic Americans received 4.41% of the total dollars on JOC contracts during the study period. Non-minority males received 84% of the total dollars on the JOC contracts.

Chapter 11, Recommendations

A minority male owner of a professional services company recommends diversifying the County's pool of utilized architecture and engineering consultants:

*The door is still not open for engineering opportunities because of the relationships with the consultants and front-end users. They need to be more open to working with other consultants. There is more local, minority, and small business talent that could provide the services. The structure of the solicitation for architecture services should be reviewed to allow small entities to compete.*

African Americans and Asian Americans represent 14.19% of available CCNA certified professional services contractors in the County's market area and received 6.86% of the total dollars on the County's CCNA professional services contracts

Chapter 7, Prime Disparity



A Caucasian female owner of a professional services company would like to be informed on how to secure design build services on the County's construction contracts:

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*I would like to learn how the process works for getting work on construction projects. Especially, how to work on the architecture and design services portion of the project.*

---

A minority male owner of a professional services company recommends more opportunities for small businesses on professional services contracts:

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*I would like to see more opportunities for audit and IT consulting services for small businesses. This is the only way small businesses can get work and try to grow their companies. We don't have the ability to go after the larger contracts.*

---

The findings from the Prime Contractor Utilization Analysis revealed that a small group of contractors received the majority of the County's professional services prime contract dollars.

Chapter 3, Prime Contractor Utilization Analysis

A Caucasian female owner of a professional services company suggests that the County consider reducing the amount of long term contracts to create opportunities for small businesses:

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*Something needs to be done to stop incumbent consultants from holding onto long term contracts. This blocks opportunities for small businesses.*

---

A minority male owner of a professional services company suggests unbundling design services projects into small projects to create prime contracting opportunities for SBEs:

---

*The County should do more to include smaller firms on their architecture and engineering projects. We are capable, and we can do the work. As a professional engineer, I've found it difficult to get on teams for County projects. If there is a project that require architects and engineers, it's almost impossible to get on the teams. I don't want to be part of a mentorship program because I have been an engineer for decades. I have trained and mentored many engineers over the years by helping them get their licenses.*

---



A Caucasian female owner of a professional services company recommends unbundling design services projects to create more opportunities for SBEs:

---

*My main recommendation is to unbundle large projects to create greater participation of small businesses. We provide engineering services on construction contracts, and they should look into breaking up their large projects. My industry is a predominantly male-oriented industry, and it is difficult to get work.*

---

A minority male owner of a professional services company also recommends the County unbundle large architecture and engineering projects:

---

*I would recommend unbundling the large contracts to create smaller contracts for small firms. The County should set aside a portion of the architecture and engineering contracts strictly for small businesses.*

---

Another minority male owner of a professional services company suggests the County create more contracting opportunities for small businesses on design build projects:

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*My suggestion is to unbundle large contracts. The small guy isn't getting the architecture and engineering work. It's not fair because small businesses are not getting any jobs.*

---

The findings from the Prime Contractor Utilization Analysis revealed that a small group of CCNA certified contractors received the majority of the professional services dollars on the County's CCNA contracts.

Chapter 3, Prime Contractor Utilization Analysis

A minority male owner of a professional services company recommends smaller prime contracting opportunities for M/WBEs and SBEs:

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*The County should unbundle some of their big projects. This would create more opportunities for M/WBE or SBE subconsultants on their professional services projects.*

---



A Caucasian male owner of a construction company recommends that the County ensure that the SBE Directory is updated frequently to avoid publishing outdated SBE contact information:

*When we use the County's online database, a lot of times the contact information is out of date or many of the companies are out of business. It would be great if they updated the system more often. It is difficult locating SBEs because we have to chase down people to meet the goals.*

A minority male owner of a professional services company recommends stricter monitoring of the utilization of MBE subcontractors on the County's prime contracts and revisions to the solicitation process for informal purchases:

*There should be a monitoring system to ensure large companies are subcontracting with MBEs. They have to be forced to subcontract with MBEs. Secondly, the County needs to do away with the short list of contractors that doesn't have to bid to get work. They get the contracts up to \$50,000 without solicitations.*

Caucasian males received 72.47% of the dollars on the County's professional services contracts and 62.81% of the dollars on the County's CCNA contracts.  
Chapter 3, Prime Contractor Utilization Analysis

A minority male owner of a professional services company suggests financing opportunities for MBEs to help maintain and grow their businesses:

*One of the obvious obstacles for M/WBEs is access to capital in terms of positive cash flow which is needed for start-up businesses. This is the number one concern for a lot of businesses who were trying to expand or even start their business.*

African American and Hispanic American subcontractors were found to have a disparity on the County's construction contracts. Caucasian males received 65.89% of the dollars on the County's construction contracts valued under \$50,000.  
Chapter 3, Prime Contractor Utilization Analysis



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### III. Summary

This chapter presented a qualitative analysis of the barriers and exemplary practices business owners experienced while working on or seeking work from the County. The interviewees were identified from business community meetings and outreach efforts. The anecdotes were solicited through one-on one interviews and the public comment period at two business community meetings.

An overwhelming number of interviewees described their frustrated efforts in obtaining County contracts. The use of preferred contractors or the good old boy network was credited for creating a barrier for M/WBEs seeking County contract opportunities. Many interviewees reported that they were unable to receive prime contracts from the County and subcontracts from their prime contractors. The anecdotes contextualized the statistical findings which revealed that significant disparities were found on the County's formal and informal contracts at both the prime contract and subcontract level. And multi-year contracts were awarded for professional services and construction which bundled small contracts and limited opportunities for M/WBE to compete.

Commendations were given to the efforts of the Office of Small Business Assistance to increase the utilization of SBEs on the County's prime contracts and subcontracts. Recommendations were also offered to improve the program's effectiveness in fulfilling its mission. This anecdotal information, together with the statistical findings, will inform the remedies presented in *Chapter 12: Remedy Analysis*.



# CHAPTER 11: Program Comparison Analysis

## I. Introduction

This chapter reviews the Minority and Woman-owned Business Enterprise (M/WBE) and Small Business Enterprise (SBE) programs of six Florida counties—Broward, Miami-Dade, Hillsborough, Pinellas, Orange, and Duval—to determine if the participation of M/WBEs increased as a result of the programs. The most recently published disparity studies by the six counties were also analyzed to determine if the methodologies are consistent with the legal standard established in the Eleventh Judicial Circuit Court of Florida (Eleventh Circuit) which governs Palm Beach County (County). The analysis also includes a review of the decisions in the eleventh judicial circuit governing the use of race- and gender-conscious measures to eliminate disparity in government contracting. Specifically, the eleventh judicial circuit cases that address disparity in public contracting are examined to determine the standard that must be applied by the County if its government seeks to increase contracting with M/WBEs by employing race or gender-conscious measures.

## II. Assessment of the Eleventh Judicial Circuit Court Legal Precedent for Florida Contracting Programs

This section presents a review of the decisions in the Eleventh Circuit to determine the program options the County may employ to address the identified disparity detailed in the Disparity Study and any concerns related to the effectiveness of the County's existing SBE program. The County's current SBE program evolved from an M/WBE program, which was replaced in 2002 when M/WBEs achieved parity in the award of the County's contracts. The disparity analysis, detailed in *Chapter 7: Prime Contract Disparity Analysis and Chapter 8: Subcontract Disparity Analysis*, found that M/WBEs were statistically significantly underutilized in the award of the County's prime and subcontracts.

The Eleventh Circuit has consistently held that there is a compelling governmental interest in remedying documented disparity. Since 1994, courts in the Eleventh Circuit have reviewed several challenges to M/WBE programs promulgated by the state of Florida and its local governments. The courts have consistently found that racial and gender classifications used to remedy documented disparity are consistent with the standard set forth in *City of Richmond v. J.A. Croson*.<sup>436</sup> The courts have also abided by *Croson's* requirement that a government's race-conscious program must establish a factual predicate with statistical evidence of discrimination and narrowly tailor the program's race-conscious remedies to the statistical findings.

The most recent Eleventh Circuit case, *Florida AGC Council, Inc. v. Florida (AGC)*, was decided in 2004.<sup>437</sup> The issue before the court in *AGC* was whether or not the statute's race and gender-

**Commented [FML42]:** This Chapter helps to satisfy the legal requirement of good faith consideration of the efficacy of race- and gender-neutral remedies prior to consideration of race- and gender-conscious remedies as necessary to fully eliminate significant disparities in the utilization of available M/WBE prime contractors and subcontractors. However, comparing these programs to one another is of limited value in determining which program is best or most effective. Each market is different, and has different challenges in terms of relative availability, the kinds of goods and services purchased, and the volumes of each good or service that is purchased.

<sup>436</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>437</sup> *Florida AGC Council, Inc. v. Florida*, 303 F. Supp. 2d 1307 (N.D. Fla. 2004).

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conscious goals were narrowly tailored to further a compelling governmental interest. In 2000, the Florida legislature acknowledged evidence of racial discrimination against M/WBEs in the State’s procurement system. The Florida AGC Council challenged the State’s M/WBE program that was codified in Florida Statute, Title XIX, Chapter 287.09451, which authorized race and gender-conscious remedial measures to increase the participation of MWBEs on the State’s contracts. The remedial measures included race and gender-conscious goals. The statute encouraged State agencies to spend 21% of their total dollars with M/WBEs on construction contracts, 25% on architecture and engineering contracts, 24% on commodities, and 50.5% on contractual services contracts. Table 11.1 below lists the State’s M/WBE goals challenged in *AGC*.

**Table 11.1: M/WBE Goals Challenged in *Florida AGC Council, Inc. v. Florida***

Ethnicity	Construction	Architecture and Engineering	Contractual Services	Commodities
African American	4.00%		6.00%	2.00%
Asian American		1.00%	1.00%	.50%
Hispanic American	6.00%	9.00%	7.00%	4.00%
Native American			.50%	0.50%
Caucasian Female	11.00%	15.00%	36.00%	17.00%

*AGC* argued that the statute violated the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment prohibits state and local governments from discriminating based on race to undo the effects of past discrimination, except where it is necessary to eliminate the government’s own participation in racial discrimination. Both parties sought a summary judgment from the United States District Court for the Northern District of Florida, Tallahassee Division. The State argued that the race and gender-conscious contracting program did not violate the Fourteenth Amendment and claimed that the race and gender-conscious goals were aspirational and not mandatory.

The court concurred with the State that the intent to remedy past or present discrimination in public contracting is a compelling government interest and can be remedied by a narrowly tailored race-conscious contracting program. However, the court, referencing *Croson*,<sup>438</sup> found that racial classifications are subject to strict scrutiny, which is the highest legal standard and is the standard that requires statistically significant evidence of existing disparity to justify any race-conscious remedies. The race-conscious provisions of Statute 287.09451 were based on evidence of racial discrimination in the State’s procurement process but not on a statistical finding of disparity. The court also found that the goals were not narrowly tailored to further a compelling governmental interest. The court concluded that the State agencies were pressured to meet goals that were not predicated on the evidence *Croson* required.

The State argued that the goals were not mandatory but merely a target. Therefore, the statute did not need to be narrowly tailored or meet the strict scrutiny standard. The court disagreed with the State and ruled that the statute included racial classifications, which meant that the strict scrutiny

<sup>438</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

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standard described in *Croson* applied. *Croson* requires the government to justify race-conscious remedial measures with a strong evidentiary basis.

*AGC* decided that when applying goals, mandatory or not, the State is required to demonstrate that a statistically significant disparity existed between the number of minority contractors willing and able to perform a particular service and the number of contractors engaged by the State or its prime contractors. The court opined that the statistical finding of disparity is required to implement race-conscious measures, and the M/WBE program components must be narrowly tailored to comply with *Croson*. The court stipulated the State's requirements as:

1. The necessity for the relief and the efficacy of alternative measures
2. The flexibility and duration of the relief, including the availability of waiver provisions
3. The relationship of numerical goals to the relevant labor market
4. The impact of the relief on the rights of innocent third parties<sup>439</sup>

As with race-conscious remedies, programs aiming to establish equity along gender lines must also meet specific legal standards, albeit at a lesser intermediate standard. The court acknowledged that the standard for gender-conscious remedies is not strict scrutiny but the lesser intermediate scrutiny legal standard. The intermediate scrutiny standard permits a gender-conscious law to be upheld when it furthers an important governmental interest. However, in *AGC*, the court ruled that the gender-conscious remedies also failed to meet the intermediate scrutiny standard. The court found that to comply with the intermediate standard, gender-conscious measures must likewise be supported by evidence of past discrimination, which the State failed to establish.<sup>440</sup> Accordingly, the court held that Statute 287.09451 was not narrowly tailored and thus did not serve a compelling governmental interest.

Since the State failed to establish the requisite factual predicate demonstrating statistical evidence of discrimination within its relevant market area, a summary judgement was granted in favor of *AGC*. The State was required to discontinue the application of race and gender-conscious remedial measures without first establishing a factual predicate pursuant to the legal standards set forth in *Croson* and its progeny.

The other relevant cases addressing the use of race and gender-conscious remedies in public contracting that were decided in the Eleventh Circuit, prior to *AGC*, are detailed in Table 11.2. Each of these cases applied the principles in *Croson* and its progeny, and affirmed that there is a compelling governmental interest to address race and gender discrimination when the factual predicate is based on a statistically significant disparity.



<sup>439</sup> *Florida A.G.C. Council, Inc., et al., v. The State of Florida*, 303 F. Supp. 2d 1307; 2004.

<sup>440</sup> *Engineering Contractors Association*, 122 F.3d at 910 (quoting *Ensley Branch*, 31 F.3d at 1581).

**Table 11.2: Eleventh Circuit Precedent**

<b>Eleventh Judicial Circuit Challenges to Affirmative Action Public Contracting Programs</b>	
<b>Case Name</b>	<b>Holding</b>
<i>Engineering Contractors Assoc. of South Florida Inc., v. Metropolitan Dade County</i> , 122 F.3d 895 (11 <sup>th</sup> Cir. 1997).	The Engineering Contractors Association challenged Dade County's use of census data to calculate business availability. The court concluded that there was not a strong basis in evidence to justify the program because the census data did not account for firms that were qualified to perform the contract requirements nor the size of the firms, which would impact the dollar value of contracts. It further concluded that a municipality can justify affirmative action by demonstrating "gross statistical disparities" between the proportion of minorities awarded contracts and the proportion of minorities willing and able to do the work, especially if supported by statistical data.  Citing <i>Ensley Branch N.A.A.C.P. v. Seibels</i> , 31 F. 3d 1548, 1579-80 (11th Cir. 1994), the court noted the attempted to clarify the evidentiary requirement applicable to WBE programs. It was determined that the government requires "evidence of past discrimination in the economic sphere at which the affirmative action program is directed." The court also stated that "a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."
<i>Hershell Gill Consulting Eng., Inc. v. Miami-Dade County</i> , 333 F. Supp. 2d 1305 (S.D. Fla. 2004)	The court concluded that the government bears the burden of proving that its consideration of race is narrowly tailored to serve a compelling state interest, and that the government must always maintain a "strong basis in evidence" for undertaking affirmative action programs.

**III. Assessment of Peer Programs**

The business diversity programs in Broward, Miami-Dade, Hillsborough, Pinellas, Orange, and Duval counties were assessed to determine if M/WBE participation had increased with the promulgation of the programs. Each of the six counties had at least one business diversity program. In total, the six counties implemented nine programs. Table 11.3 lists each county's program(s) and the year established. When available, each program's utilization reports were reviewed for documentation that the utilization of M/WBEs increased under its program.



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**Table 11.3: Peer Agency Programs**

County	Business Diversity Program	Year Established
Broward County	County Business Enterprise (CBE)	2009
	Small Business Enterprise (SBE)	2001
Miami-Dade County	Local Developing Business (LDB)	2004
	Small Business Enterprise (SBE)	2005
Hillsborough County	Disadvantaged Minority/Disadvantaged Woman Business Enterprise (DM/DWBE)	1988
	Small Business Enterprise (SBE)	1988
Pinellas County	Small Business Enterprise (SBE)	1999
Orange County	Minority and Woman Business Enterprise (M/WBE)	1994
Duval County	Small and Emerging Business (SEB)	2004

**A. Assessment Methodology**

The first step in the assessment was a comparison of the M/WBE and SBE programs of the peer counties. A review of each program’s website was conducted to gather information on the use of goal requirements, certification criteria, compliance, business outreach, and technical assistance. The results are detailed in *Section B. Comparison of Peer Business Enterprise Programs*.

The second step in the assessment was to download annual business utilization reports from each county’s website. For the utilization reports that were not posted online, program managers were contacted to request copies. The reports were reviewed to ascertain if M/WBE participation increased from January 1, 2010 to December 31, 2016. The review also determined if the percentage of M/WBE utilization and the total M/WBE expenditures increased during the study period. Program managers were contacted to give their explanations for the reported utilization.

Duval County was the only county that posted annual utilization reports online. Broward, Miami-Dade, and Pinellas counties did not publish utilization reports,<sup>441</sup> so an assessment of utilization was not possible. Hillsborough County provided its utilization reports in response to a Freedom of Information Act request. Orange County agreed to generate a utilization report for fiscal years 2013 to 2016, but the report was not provided.

**B. Comparison of Peer Business Enterprise Programs**

Each of the six peer counties reviewed had either an SBE or M/WBE program. The counties’ program components were compared to identify any best management practices that may enhance the County’s SBE program. The results of the peer program comparison are detailed below in Tables 11.4 through Table 11.7. Table 11.4 depicts the business diversity programs operated by the counties, applicable industries, and goal requirements.



<sup>441</sup> Miami-Dade County is currently in the process of purchasing a proprietary program that will allow the tracking of contract award and payment history and collecting demographic information such as the business owner’s ethnicity and gender.

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**Table 11.4: Peer Program Goals**

County	Palm Beach County	Broward County	Miami-Dade County	Hillsborough County	Pinellas County	Orange County	Duval County
<b>Program</b>	SBE	<ul style="list-style-type: none"> <li>• CBE</li> <li>• SBE</li> </ul>	<ul style="list-style-type: none"> <li>• LDB</li> <li>• SBE</li> </ul>	<ul style="list-style-type: none"> <li>• DM/WBE</li> <li>• SBE</li> </ul>	SBE	M/WBE	SBE
<b>Applicable Industries (Prime Contracts)</b>	Goods, Services and Construction	Construction, Contractual Services, Professional, and Commodities	Construction, Architectural and Engineering, and Goods and Services	Not Specified	Not Specified	Construction, Professional Services, Other Services, Goods	Not Specified
<b>Applicable Industries (Subcontracts)</b>	Goods, Services and Construction	Construction, Contractual Services, Professional, and Commodities	Construction, Architectural and Engineering, and Goods and Services	Construction, Contractual Services, Professional Services, and Commodities	Not Specified	Construction, Professional Services, Other Services, Goods	Not Specified
<b>Goal (Prime Contracts)</b>	15%	<ul style="list-style-type: none"> <li>• CBE: 25%</li> <li>• SBE: N/A</li> </ul>	<ul style="list-style-type: none"> <li>• LDB: Not Specified</li> <li>• SBE: 10% for Contracts Valued \$100,000 and Under</li> </ul>	<ul style="list-style-type: none"> <li>• Construction: MBE Goals for Projects Valued Over \$200,000</li> <li>• Capital Projects Less than \$500,000 May Be Set Aside for SBE Bidding</li> <li>• Contractual Services, Professional Services, and Commodities May Be Set Aside for SBE Competition</li> </ul>	No Goal Specified	<ul style="list-style-type: none"> <li>• Construction: 25%</li> <li>• Professional Services: 27%</li> <li>• Goods: 10%</li> <li>• Services: 24%</li> </ul>	20%



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County	Palm Beach County	Broward County	Miami-Dade County	Hillsborough County	Pinellas County	Orange County	Duval County
Goal (Subcontracts)	15%	Not Specified	Not Specified	Not Specified	Not Specified	Not Specified	Not Specified
Goal Duration (Prime Contracts)	Annual	Not Specified	Not Specified	Not Specified	Not Specified	Not Specified	Annual
Goal Duration (Subcontracts)	Annual	Not Specified	Not Specified	Not Specified	Not Specified	Not Specified	Not Specified
Goal Scope (Prime Contracts)	Agency-wide	Not Specified	Not Specified	Not Specified	Not Specified	Agency-wide	Agency-wide
Goal Scope (Subcontracts)	Overall	Not Specified	Not Specified	Not Specified	Not Specified	Not Specified	Not Specified
Good Faith Effort Requirement	Yes	<ul style="list-style-type: none"> <li>• SBE: No</li> <li>• CBE: Yes</li> </ul>	Yes	Yes	Yes	Yes	Yes
Penalties for Not Achieving Goal	Suspension/Debarment	Bid Rejection	Not Specified	Bid Rejection	Not Specified	<ul style="list-style-type: none"> <li>• Payment of Damages</li> <li>• Removal from Vendor List</li> <li>• Suspension</li> <li>• Permanent Debarment,</li> <li>• Termination of Present Contracts</li> <li>• Withholding Retainage or Payment to Contractors</li> <li>• Revocation of Certification</li> </ul>	Bid Rejection

Table 11.5 details the certification criteria, including length of certification, location requirements, maximum annual revenue, processing fee, and continued education requirement for each program.



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**Table 11.5: Peer Program Certification Criteria**

County	Palm Beach County	Broward County	Miami-Dade County	Hillsborough County	Pinellas County	Orange County	Duval County
<b>Certification Duration</b>	Three Years	Not Specified	<ul style="list-style-type: none"> <li>Construction and Architecture &amp; Engineering: One Year</li> <li>Goods and Services: Not Specified</li> </ul>	Bi-annual	Not Specified	Not Specified	One Year
<b>Commodity Code</b>	Not Specified	Not Specified	Not Specified	Yes	Yes	Yes	Yes
<b>Domiciled in County</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Business Revenue Size Standard<sup>442</sup></b>	<ul style="list-style-type: none"> <li>Construction: ≤ \$9,000,000</li> <li>Commodities: ≤ \$5,000,000</li> <li>Professional Services (CCNA): ≤ \$5,000,000</li> <li>Professional Services (non-CCNA): ≤ \$4,000,000</li> </ul>	<ul style="list-style-type: none"> <li>CBE: ≤ \$5,000,000</li> </ul> <p><u>SBE</u></p> <ul style="list-style-type: none"> <li>Construction: ≤ \$3,000,000</li> <li>Contractual Services: ≤ \$1,000,000</li> <li>Professional Consultants: ≤ \$500,000</li> <li>Commodities: N/A</li> </ul>	<ul style="list-style-type: none"> <li>LDB: ≤ \$22,410,000</li> </ul> <p><u>SBE</u></p> <ul style="list-style-type: none"> <li>Construction: ≤ \$10,000,000</li> <li>Architectural &amp; Engineering: ≤ \$5,000,000</li> <li>Goods: ≤ \$5,000,000</li> <li>Services: ≤ \$5,000,000</li> </ul>	<ul style="list-style-type: none"> <li>DM/WBE: Not Applicable</li> <li>SBE: ≤ \$3,000,000</li> </ul>	≤ \$3,000,000	Not Applicable	< \$12,000,000
<b>Personal Net Worth</b>	Not Applicable	≤ \$750,000	<ul style="list-style-type: none"> <li>LDB: Not Specified</li> <li>SBE: ≤ \$1,500,000 for each owner</li> </ul>	<ul style="list-style-type: none"> <li>DM/WBE: ≤ \$2,000,000</li> <li>SBE: Not Applicable</li> </ul>	Not Applicable	<ul style="list-style-type: none"> <li>Construction and Suppliers: ≤ \$2,300,000</li> <li>Professional Services: ≤ \$2,300,000</li> </ul>	< \$1,325,000



<sup>442</sup> Average annual revenue over the last three years.

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County	Palm Beach County	Broward County	Miami-Dade County	Hillsborough County	Pinellas County	Orange County	Duval County
<b>Number of Employees</b>	Not Applicable	Not Applicable	Not Applicable	<ul style="list-style-type: none"> <li>DM/WBE: ≤ 50</li> <li>SBE: ≤ 25</li> </ul>	≤ 50	Not Applicable	Not Applicable
<b>Stock Ownership</b>	Not Applicable	Not Applicable	Qualifier Must Own a Minimum % of Business' Certified stock <ul style="list-style-type: none"> <li>Construction: 10%</li> <li>Architecture and Engineering: 25%</li> <li>Goods and Services: 10%</li> </ul>	Not Applicable	Not Applicable	Not Applicable	Not Applicable
<b>Processing Fee</b>	\$150	\$0	\$0	\$0	\$0	\$0	\$0
<b>Commercially Useful Function</b>	Yes	Yes	Yes	<ul style="list-style-type: none"> <li>DM/WBE: Not Specified</li> <li>SBE: Yes</li> </ul>	Yes	Yes	Yes
<b>Continuing Education</b>	No	No	No	No	No	No	Obtain 20 Points of Continuing Education During each Year of Certification

The business development and outreach and compliance components of each peer program was reviewed for illustrative purposes. Table 11.6 details the program components utilized to increase business development and outreach within the respective counties. Table 11.7 describes the strategies used for program compliance.



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**Table 11.6: Peer Program Business Development and Outreach Components**

County	Palm Beach County	Broward County	Miami-Dade County	Hillsborough County	Pinellas County	Orange County	Duval County
Solicitation Notifications	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Networking Events	Not Specified	Yes	Not Specified	Yes	Not Specified	Not Specified	Yes
Targeted Outreach	Not Specified	Yes	Not Specified	Not Specified	Not Specified	Not Specified	Yes
Workshops	Not Specified	Yes	Yes	Yes	Not Specified	Yes	Yes
Bid Preference	Yes	No	Yes	No	No	Yes	No
Mentor-Protégé Program	No	Yes	<ul style="list-style-type: none"> <li>• LDB: No</li> <li>• SBE: Yes</li> </ul>	No	No	No	No
Rotation Program	No	No	No	No	No	No	No
Vendor Directory	Yes	Yes	Yes	Yes	Yes	Yes	Yes

**Table 11.7: Peer Program Compliance Components**

County	Palm Beach County	Broward County	Miami-Dade County	Hillsborough County	Pinellas County	Orange County	Duval County
Reciprocal Certifications	State of Florida CCNA or MWBE Certifications	No	No	State of Florida MBE Certification for One Six-month Period	Yes	Yes	Yes
Monthly and Final Utilization Report Submissions	No	<ul style="list-style-type: none"> <li>• CBE: Yes</li> <li>• SBE: No</li> </ul>	Yes	No	No	No	No
Onsite Inspection	Yes	Construction	Construction	Construction	Construction	Construction	Construction



County	Palm Beach County	Broward County	Miami-Dade County	Hillsborough County	Pinellas County	Orange County	Duval County
Prompt Payment Provision	Yes	Yes	Yes	Yes	Professional Services: Yes	Yes	Yes
Published Goal Attainment	No	No	No	No	No	No	No
Published Utilization Report	No	No	No	Yes	No	No	Yes
Advisory Committee	<ul style="list-style-type: none"> <li>Members: 15</li> <li>Term: Staggered 3-years</li> </ul>	<ul style="list-style-type: none"> <li>Members: 11</li> <li>Term: Not Specified</li> </ul>	Construction <ul style="list-style-type: none"> <li>Members: 14</li> <li>Term: 2-years</li> </ul> Architecture/Engineering <ul style="list-style-type: none"> <li>Members: 14</li> <li>Term: Not to Exceed Four Consecutive Years</li> </ul> Goods/Services: <ul style="list-style-type: none"> <li>Members: 14</li> <li>Term: Not to Exceed Four Consecutive Years</li> </ul>	<ul style="list-style-type: none"> <li>Members: 9</li> <li>Term: 2-years</li> </ul>	N	<ul style="list-style-type: none"> <li>Members: 7</li> <li>Term: Not Specified</li> </ul>	N



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## 1. Summary of Comparison of Peer Business Enterprise Programs

The results of the peer program comparison revealed that the counties have similar M/WBE and SBE program components. Most of the components are aimed to increase the participation of M/WBEs and SBEs on their contracts:

- Industry specific remedies
- Good faith effort requirements
- Penalties for contractors that do not achieve the goals
- Business domicile restrictions
- Business revenue size standards
- Personal net worth requirements
- No application processing fee
- Commercially useful function requirement
- Solicitation notifications
- Workshops targeted to M/WBEs and SBEs
- Online vendor directories
- Onsite inspections for construction projects
- Prompt payment provisions
- Program advisory committee

The relevant best practices identified from the peer program comparison were incorporated in *Chapter 12: Remedy Analysis*.

### C. Assessment of Peer Program Findings

Duval and Hillsborough counties were the only agencies that provided M/WBE or SBE utilization reports. The reports were reviewed for any evidence of increased contracting with M/WBEs. The report results can be found in the subsections below.

#### 1. Duval County Utilization Reports

Duval County's SEB (Small Emerging Business) annual utilization reports were available online for fiscal years 2009-2010, 2010-2011, 2013-2014, and 2014-2015. Table 11.4-8 shows Duval County's SEB utilization for fiscal years 2010, 2011, and 2015. Year 2013-2014 is not included in Table 11.8 because the utilization reports for this year did not disaggregate business utilization by ethnicity or gender. It is also worth noting that Duval County's utilization reports only detail the contract dollars awarded to SEBs and do not provide award amounts for contracts awarded to non-SEBs. Consequently, it is not possible to determine what percentage of Duval County's total contract dollars were awarded to SEBs. The data only report the dollars that the county awarded to SEBs. The percentage of the spent dollars is categorized by ethnicity and gender. Therefore, the only pattern that can be discerned from the reported data is the rate of change in the percentage of SEB contract dollars that each ethnic group received for the three reported years.

**Commented [FML43]:** Is there a way to determine the total dollars spent by Duval County by industry for each of these periods (i.e., SEB and non-SEB dollars combined)? This should be public record in Florida.

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**Table 11.8: Duval County Annual SEB Utilization**

Ethnicity	2009-2010		2010-2011		2014-2015	
	Dollar	Percent	Dollar	Percent	Dollar	Percent
African American	\$4,153,312	19.93%	\$3,577,037	21.79%	\$5,284,153	25.96%
Asian American	\$1,753,190	8.41%	\$909,951	5.54%	\$3,080,255	15.13%
Hispanic American	\$2,331,575	11.19%	\$1,069,360	6.51%	\$96,247	0.47%
Native American	\$508,676	2.44%	\$54,890	0.33%	\$470,884	2.31%
Caucasian Female	\$8,189,655	39.30%	\$7,842,168	47.78%	\$7,485,251	36.77%
Non-M/WBE	\$3,901,585	18.72%	\$2,960,821	18.04%	\$3,939,604	19.35%
<b>Total</b>	<b>\$20,837,993</b>	<b>100.00%</b>	<b>\$16,414,227</b>	<b>100.00%</b>	<b>20,356,394</b>	<b>100.00%</b>

**2. Hillsborough County Utilization Report**

Hillsborough County provided Disadvantaged Minority/Disadvantaged Woman Business Enterprise (DM/DWBE) utilization reports for fiscal years 2012-2013, 2013-2014, and 2014-2015. Table 11.9 shows the Hillsborough County’s DM/DWBE utilization for years 2012-2013, 2013-2014, and 2014-2015. An increase in M/WBE participation could not be substantiated because there was no discernable pattern in which M/WBE participation either increased or decreased during these years. Additionally, all contract awards were included in the data provided without information about the certification status of the ethnic and gender groups.

**Table 11.9: Hillsborough County Annual DM/DWBE Utilization**

Ethnicity	2012-2013		2013-2014		2014-2015	
	Dollar	Percent	Dollar	Percent	Dollar	Percent
African American	\$1,807,847	1.09%	\$162,556	0.15%	\$16,644,225	4.99%
Hispanic American	\$6,063,779	3.66%	\$1,145,545	1.07%	\$5,393,063	1.62%
Other Minorities	\$42,050	0.03%	\$79,000	0.07%	\$1,010,146	0.30%
Caucasian Female	\$6,201,451	3.74%	\$629,858	0.59%	\$12,261,412	3.68%
Non-M/WBE	\$151,770,794	91.49%	\$105,333,986	98.12%	\$298,373,416	89.44%
<b>Total</b>	<b>\$165,885,922</b>	<b>100.00%</b>	<b>\$107,350,946</b>	<b>100.00%</b>	<b>\$333,588,442</b>	<b>100.00%</b>

**D. Conclusion**

There is no evidence in the utilization reports examined for Duval and Hillsborough counties that the M/WBE participation in either county had increased during the years reported. Since there are no reports for Broward, Miami-Dade, Pinellas, and Orange counties, it could be assumed that there has been no significant increase in their M/WBE contracting, as agencies generally promote program successes. Since there was no evidence of increased contracting with M/WBEs in the six counties, there was no basis to assert that any one of these counties had program components that could qualify as best management practices.



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#### IV. Assessment of Peer Disparity Studies

In the absence of M/WBE utilization data indicating an increase in M/WBE contracting, disparity studies commissioned by the six counties were reviewed to determine if they produced findings of statistically significant disparity based on the *Croson* standard. The Eleventh Circuit has found that a government entity has a compelling interest to eliminate documented disparity in the award of its contracts. Thus, research was undertaken to determine if disparity studies had been commissioned by the six counties from 2010 to 2016 and if the study methodology comported with the legal standard set forth in the Eleventh Circuit. The research determined that four counties commissioned a disparity study within the last six years, and one within the last 12 years. Three of the four disparity studies commissioned since 2010 were found online. The fourth disparity study had been terminated before completion.<sup>443</sup> The disparity study commissioned in 2005 by Orange County was obtained directly from the County.

Table 11.10 lists the disparity studies that the four counties published within the last 12 years. The four studies were reviewed to determine if the methodology that the consultant used comported with the constitutional standard as set forth in the cases decided in the Eleventh Circuit since the *Croson* decision. The review assessed the utilization, availability, and disparity analysis methodology used in each of the studies.

**Table 11.10: Disparity Studies Published from 2005 to 2016**

Agency	Disparity Study	Consultant	Year Published
<b>Broward County</b>	The State of Minority- and Women-Owned Business Enterprise: Evidence from Broward County	NERA Economic Consulting	2010
<b>Orange County</b>	Study of the M/WBE Utilization and Goal Setting of Orange County, Florida	MGT Consulting Group	2005
<b>Miami-Dade County</b>	Miami-Dade County Comprehensive Disparity Study	Mason Tillman Associates	2015
<b>Duval County</b>	Jacksonville Multi-Jurisdictional Disparity Study	Mason Tillman Associates	2013

##### A. Assessment of Disparity Study Methodology

According to the Eleventh Circuit, the government may apply race-conscious goals if it documents a statistically significant disparity between the number of minority contractors willing and able to perform the government's contracts and the number of dollars awarded to minority contractors by the government and its prime contractors. The three components of the methodology required to assess the presence of disparity are: (1) utilization analysis, (2) availability analysis, and (3) disparity analysis. The disparity studies commissioned by Broward, Orange, Miami-Dade, and Duval counties were analyzed to determine if the court-approved methodology was the standard

<sup>443</sup> Orange County commissioned a more recent disparity study in 2015, which was awarded to MGT Consulting Group. However, the study was discontinued for undisclosed reasons, and a new study has not been issued as of the time of this report.



used to perform the disparity analysis. The methodology prescribed by *Croson* and affirmed in the three cases decided in the Eleventh Circuit are described in *Subsection 1* below:

## 1. Court Approved Methodology

### a. Utilization Analysis

The utilization analysis, according to *Croson*, must review the contracts awarded by the government and its prime contractors by industry, ethnicity, and gender. *Croson* made clear that both prime contract and subcontract data are required to perform a legally sound analysis of both active and passive discrimination. 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.”<sup>444</sup> The Eleventh Circuit concurred with the *Croson* standard. The court quoted *Croson* in stating, “[if] there is a significant disparity between the number of minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”<sup>445</sup> To confirm the disparity, a government must enumerate the contractors engaged separately by the government and its prime contractors. Thus, the data must be compiled to formulate remedies at both the prime contract and subcontract levels.

### b. Availability Analysis

According to *Croson* and its progeny, availability is defined as the number of qualified M/WBEs within the jurisdiction’s market area that are willing and able to provide the goods and services procured by the government.<sup>446</sup> The Eleventh Circuit has further determined that neither bidder nor census data can solely be used to establish availability. In the Eleventh Circuit’s *Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County et al.*, Dade County’s availability analysis was based solely on bidder data, and the court found the data to be inadequate to support race-conscious remedies. The court further found that the census data used to enumerate available businesses did not account for firms that were actually qualified to perform the contract requirements, nor for the size of the firms, which would impact the dollar value of the contracts.<sup>447</sup> The court held that Dade 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 available M/WBEs was taken into account.<sup>448</sup> The court accepted the disparity study’s limiting of “available” prime construction contractors to those who had bid at least once in the study period. However, the court cautioned that there should not be sole reliance on previously identified bidders to establish the pool of available firms. The court

<sup>444</sup> *Croson*, 488 U.S. at 502-03.

<sup>445</sup> *See Croson*, 488 U.S. at 509, 109 S. Ct. at 730

<sup>446</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>447</sup> *Engineering Contractors Association of South Florida Inc., et al. v. Metropolitan Dade County et al.*, 122 F.3d 895 (11th Cir. 1997).

<sup>448</sup> *Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Florida 1996).



noted that a biased bidding process could produce a biased bidders list.<sup>449</sup> A comprehensive count of bidders is dependent on the adequacy of the agency's record keeping.<sup>450</sup> Additionally, the Eleventh Circuit rejected the bidding data relied on in *Daniel Webster v. Fulton County, GA*, pointing out that it understated willing and able firms because of the "unavailability of minority firms to bid on and obtain large construction contracts."<sup>451</sup>

### c. Disparity Analysis

*Croson* found that the disparity index measures the percentage of minority and woman-owned business utilization divided by the percentage of minority or woman-owned business availability in the local market area.<sup>452</sup> The Eleventh Circuit has looked to the "disparity index" to determine if the statistical evidence reviewed is adequate to infer discrimination. The Eleventh Circuit applied the *Croson* standard, requiring that underutilization must be statistically significant, and the statistical analysis must be segmented by ethnicity, gender, and industry for both prime contracts and subcontracts. Only with the disparity analysis disaggregated at this level can the required facts be established to narrowly tailor the remedies.<sup>453</sup> The Eleventh Circuit contends that the government, as the proponent of the classification, bears the burden of proving that its consideration of race is narrowly tailored to serve a compelling state interest, and that the government must always maintain a "strong basis in evidence" for undertaking affirmative action programs.<sup>454</sup>

The methodology of the four most recent disparity studies published by the six counties were reviewed for their adherence to the *Croson* standard. The results of the disparity study reviews are provided in the subsections below.

<sup>449</sup> *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).

<sup>450</sup> *Cf. EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir.), cert. denied, 459 U.S. 923 (1981). (In the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).

<sup>451</sup> *Webster v. Fulton County, Ga.*, 51 F. Supp. 2d 1354 (N.D. Ga. 1999)

<sup>452</sup> Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been taken into account. In addition to looking at Dade County's contracting and subcontracting statistics, the district court also considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County's Wainwright study (which compared construction business ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County's Brimmer Study (which focused only on Black-owned construction firms and looked at whether disparities existed when the sales and receipts of Black-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms). The court affirmed the judgment that declared appellant's affirmative action plan for awarding county construction contracts unconstitutional and enjoined the plan's operation because there was no statistical evidence of past discrimination and appellant failed to consider race and ethnic-neutral alternatives to the plan.

<sup>453</sup> *Concrete Works II*, 36 F.3d at 1528.

<sup>454</sup> *Hershell*, 333 F. Supp. 2d at 1305 (stating that Concrete Works is not persuasive because it conflicts with the allocation of the burden of proof stated by Eleventh Circuit precedent in *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1244 (11th Cir. 2001)).

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## 2. Broward County Disparity Study

The Broward County disparity study, *State of Minority- and Women-Owned Business Enterprise: Evidence from Broward County Disparity Study*, was completed in 2010 by NERA Economic Consulting.

### a. Utilization Analysis

Broward County's disparity study analyzed prime contractor utilization by ethnicity and gender, but it did not perform a separate subcontractor utilization analysis. The method utilized in this study does not meet the legal standard, which requires separate prime contractor and subcontractor utilization analysis.

### b. Availability Analysis

The availability analysis of the Broward County disparity study enumerates the willing and able minority and woman-owned businesses that provide the goods and services procured by the agency. Broward County's disparity study used data supplied by Dun & Bradstreet's Hoovers subsidiary to determine the number of businesses operating in the relevant market area. The Dun & Bradstreet dataset undercounts M/WBEs, new businesses, and small businesses, a fact widely acknowledged by disparity study consultants, legislators, and even Dun & Bradstreet itself. In the 2007 Caltrans Disparity Study, the consultant stated that the Dun & Bradstreet dataset had "a peculiar way of collecting data, which suggests that MBEs and WBEs might be underrepresented in the final database of surveyed available firms."<sup>455</sup> The business lists that Dun & Bradstreet sells also stipulate in their terms and conditions that its information contains a notable degree of error.<sup>456</sup>

Additionally, the chairperson of the State of Indiana Black Legislative Caucus, Inc. expressed concern that the 2009 State of Indiana Disparity Study, which relied on Dun & Bradstreet data, understated the availability of MBEs and WBEs. The chairperson offered the following opinion regarding the availability analysis methodology:

- The outreach to identify firms within the state was limited to the D&B MarketPlace listing. While the D&B listing is extensive, by the [disparity consultant's] own admission, it likely undercounts new firms and home-based businesses, and therefore increases the potential of under representing the available MBEs and WBEs reported in the study database.
- It failed to use other potential sources of availability data, such as organizations like the National Association of Women Business Owners (NAWBO) and the Indiana Minority Supplier Diversity Council (IMSDC).
- Also omitted from the availability data that could have supplemented the D&B listing were sources from major Indiana cities and Metropolitan Statistical Areas (MSAs) outside of Indianapolis.<sup>457</sup>

<sup>455</sup> BBC Research and Consulting. *California Department of Transportation, Availability and Disparity Study*. 2007. Appendix C, page 12.

<sup>456</sup> *Dun & Bradstreet, Master Agreement (10-12 CT)*, Section 5.1. (2017)

<sup>457</sup> Summers, Vanessa J. Letter to Commissioner Wynkoop. 25 Feb. 2011. MS. Indiana Black Legislative Caucus, Inc., Indianapolis, Indiana.



Since Dun & Bradstreet does not determine if the enumerated businesses are “willing” to work with the county and “able” to perform the county’s contracts, the dataset used by Broward County does not meet the *Croson* standard. By using Dun & Bradstreet as the availability source, the Broward County disparity study assumes that all market area businesses identified are willing and able to perform the county’s contracts.

**c. Disparity Analysis**

Broward County’s disparity analysis results would not meet the strict scrutiny standard established in *Croson* and *AGC*, because the utilization analysis upon which it was based did not separate subcontracts from the prime contracts. Additionally, the availability analysis does not properly identify all businesses in that market area that meet the standard of willing and able to perform the county’s contracts.

**d. Conclusion**

The Broward County disparity study methodology produced results that were inadequate as a predicate for an M/WBE program because they did not meet the strict scrutiny the court required. It’s notable that Broward County limited the application of the study findings to support a SBE program.

**3. Orange County Disparity Study**

The Orange County disparity study, *Study of the M/WBE Utilization and Goal Setting of Orange County*, was completed in 2005. The disparity study was conducted by MGT Consulting Group.

**a. Utilization Analysis**

In accordance with the *Croson* standard, Orange County’s disparity study analyzed the prime contractor and subcontractor utilization separately. However, the subcontractor utilization analysis was conducted based on verified M/WBE subcontract award amounts. The non-M/WBE subcontractor award amounts were estimates. Without any corroborating evidence, the consultant made the assumption that 20% of the subcontract awards went to non-M/WBE subcontractors, a method that is questionable at best.

**b. Availability Analysis**

The study compiled separate prime contractor and subcontractor availability lists using Orange County’s vendor list, firms that registered to do business with the County, and businesses that submitted bids. The Eleventh Circuit, in *Engineering Contractors Association of South Florida Inc., et al. v. Metropolitan Dade County, et al*, found that Dade County’s prime contract statistical analysis based on bidder data was inadequate to support race-conscious remedies. The analysis did not include the non-certified contractors without a bidding history.<sup>458</sup> The Eleventh Circuit decided that only using lists of businesses known to the county is not sufficient to establish accurate

<sup>458</sup> *Engineering Contractors Association of South Florida Inc., et al. v. Metropolitan Dade County et al.*, 122 F.3d 895 (11th Cir. 1997).

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availability of contractors in a specific jurisdiction, as it does not account for new businesses and businesses that have not had previous interaction with the county. Considering this decision, Orange County's availability analysis would not meet the strict scrutiny standard established in *Croson* and *AGC*.

**c. Disparity Analysis**

Furthermore, the disparity analysis results would not meet the strict scrutiny standard established in *Croson* and *AGC* because the availability analysis was based on inadequate data. The method used to enumerate the businesses has been found by the court to potentially undercount the available business.

**d. Conclusion**

The Orange County disparity study results are adequate as a predicate for an SBE program, but do not meet the strict scrutiny required for an M/WBE program. Orange County limited the application of the study findings to support an SBE program.

**4. Miami-Dade County Disparity Study**

The *Miami-Dade County Comprehensive Disparity Study* was completed in 2015. The disparity study was completed by Mason Tillman Associates, Ltd.

**a. Utilization Analysis**

Miami-Dade County's disparity study analyzed separate prime contractor and subcontractor utilization by ethnicity and gender for each industry. The method meets the legal standard to produce a narrowly tailored finding, as the data were properly segmented to analyze the prime contracts awarded by the county and the subcontracts awarded by the county's prime contractors.

**b. Availability Analysis**

The study meets the legal standard, as it conducts separate prime contractor and subcontractor availability analysis of willing and able businesses. Businesses classified as willing had either bid on a government contract, secured government certification, attended a business community meeting, or listed on a business organization's membership list. The willingness to contract with the County was confirmed for businesses listed on a business organization list. An eSurvey was administered to determine the relative capacity of the enumerated businesses to perform contracts awarded by the County and its prime contractors.

**c. Disparity Analysis**

The disparity analysis results meet the strict scrutiny standard established in *Croson* and *AGC*. The utilization analysis was performed separately for prime contractors and subcontractors by ethnicity, gender, and industry. The availability analysis of willing and able businesses was also



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conducted separately for prime contractors and subcontractors by ethnicity, gender, and industry. The disparity index measured the percentage of M/WBE utilization divided by the percentage of available M/WBEs in the market area. The findings of underutilization were subject to the disparity index to determine if the statistical evidence was adequate to infer discrimination. Thus, the results of the disparity analyses meet the legal standard to recommend race-conscious recommendations and could provide race-conscious contracting program recommendations.

**d. Conclusion**

The disparity study methodology results meet the strict scrutiny required for a race and gender-conscious M/WBE program. Miami-Dade County is currently considering the implementation of an M/WBE program based on the findings.

**5. Duval County Disparity Study**

The *Duval County Comprehensive Disparity Study* was completed in 2013. The disparity study was completed by Mason Tillman Associates, Ltd., the same consultant that performed the Miami-Dade County Comprehensive Disparity Study.

The methodology used in the Miami-Dade County study was employed to conduct the utilization, availability, and disparity analyses in the Duval County study. Therefore, the methodology that produced the disparity study results meet the strict scrutiny standard established in *Croson* and *AGC*. Duval County has used race-neutral recommendations from the study to bolster its SEB program.

**V. Conclusion**

*AGC* and the Eleventh Circuit have been consistent with *Croson* in finding that there is a compelling government interest to remedy documented disparity, and justifying the use of race and gender-specific remedies. According to the Eleventh Circuit, the government must establish statistical evidence of discrimination and narrowly tailor its remedy to the statistical findings by ethnicity and gender.

None of the peer county programs were found to have significant increases in M/WBE participation. The data needed to analyze year-to-year levels of M/WBE participation was limited, since only one county published its utilization reports online.

The review of the methodology used to conduct the disparity studies commissioned by Broward, Orange, Miami-Dade, and Duval counties found that only the two studies performed by Mason Tillman Associates, Ltd. comported with the legal precedent established in the Eleventh Circuit for a race and gender-conscious contracting program. It should be noted that the counties did not use the findings as a precedent for a race and gender-conscious program. The *Palm Beach County Disparity Study* methodology meets the legal requirements as set forth in the Eleventh Circuit. The remedies presented in *Chapter 12: Remedy Analysis* are formulated in accordance with the *AGC* ruling, and are supported by the relevant legal precedent for race and gender-conscious remedies.



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## CHAPTER 12: Remedy Analysis

### I. Introduction

The 1989 landmark decision of *City of Richmond v. J. A. Croson Co. (Croson)*<sup>459</sup> requires local governments to demonstrate a strong basis in evidence of ongoing effects of past or present discrimination in the relevant marketplace prior to the enactment of race-conscious remedies. To establish a compelling interest to employ racial classifications, the evidence of discrimination must be statistically significant.<sup>460</sup> This Disparity Study (Study), authorized by the Palm Beach County (County) Board of County Commissioners in 2015, documented a disparity in the utilization of Minority and Woman Business Enterprises (M/WBE) that are ready, willing, and able to provide construction, professional services, and goods and services to the County and its prime contractors. Pursuant to the United States Court of Appeals for the Eleventh Circuit's decision, *Engineering Contractors Ass'n v. Metropolitan Dade County*,<sup>461</sup> the statistical findings provide the factual predicate required for the County to demonstrate a compelling governmental interest to remedy the disparity in the award of its contracts to available market area M/WBEs.

This chapter summarizes the statistical disparity in the M/WBE participation documented in *Chapter 7: Prime Contract Disparity Analysis* and *Chapter 8: Subcontract Disparity*. The extent to which the effects of discrimination may have been mitigated by the County's Small Business Enterprise (SBE) Program is also analyzed in this chapter. Additionally, this chapter identifies race and gender-conscious as well as race and gender-neutral programs and administrative policies that could remedy the effects of the documented discrimination.

The chapter is organized into six sections. The first section is the *Introduction*. An assessment of the effectiveness of the County's SBE Program is presented in the second section, *Small Business Enterprise Program Assessment*. The third section, *Disparity Analysis Findings*, presents the statistically significant findings of disparity in the award of both prime contracts and subcontracts. The fourth section, *Race and Gender-Conscious Remedies*, provides narrowly tailored recommendations necessary to address the statistically significant disparities. *Race and Gender-neutral Remedies* are presented in the fifth section as program and administrative policy changes to address marketplace discrimination. The sixth section, *Website Enhancement Strategies*, presents recommendations for the County's management of its websites.

**Commented [FML44]:** This Chapter provides a very compelling strong basis in evidence for concluding that despite the very well-administered and aggressive use of neutral remedies over the past nine to fifteen years by the County, statistically significant disparities in the utilization of M/WBEs persist across most industry segments, and therefore consideration of a combination of narrowly tailored race- and gender-conscious remedies and enhancements to race- and gender-neutral remedies is appropriate and legally defensible.

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<sup>459</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>460</sup> *Id.*

<sup>461</sup> 943 F. Supp. 1546 (S.D. Fla. 1996) (“*Dade County I*”).



## II. Small Business Enterprise Program Assessment

The efficacy of the County's SBE Program is assessed in this section. The utilization of certified Small Business Enterprises (SBE) is also analyzed by ethnicity and gender. The Small Business Enterprise Program was established in 2002 by the Palm Beach County Board of County Commissioners (BCC) to afford all businesses the opportunity for full and equitable participation in the County's contracts. The program employs SBE goals and race-neutral program remedies. However, as indicated by the disparity findings, parity has not been achieved in the award of contracts to available M/WBEs since the SBE Program has been in place.

Prior to the BCC's promulgation of the SBE Program, the County utilized an M/WBE Program that predated the 1989 *Croson* decision. In 1991, pursuant to the *Croson* decision, the County conducted a disparity study which determined that M/WBEs were significantly underutilized on the County's contracts. The County's M/WBE Program was updated to reflect the findings from the 1991 disparity study. The revised M/WBE Program was in effect until 2002.

In 2002, the County's M/WBE Program was again assessed to determine if the race and gender-conscious goals were met. The assessment revealed that the majority of the goals were met, which led to the M/WBE Program being replaced with the County's current SBE Program.

The current SBE Program, which has been in effect since 2002, has an utilization goal for the award of construction, professional services, and goods and services contracts to SBEs. The SBE Program has an annual goal of 15%.

In 2013, the County considered the efficacy of reenacting a race and gender-conscious program, which resulted in the commission of the current Disparity Study. This Study determined that the County had met the overall 15% SBE goal, but there is a statistically significant disparity in the County's award of prime contracts to certified minority SBEs. Furthermore, the Study revealed that the majority of the certified SBEs that were awarded prime contracts in the three industries were non-minority SBEs.

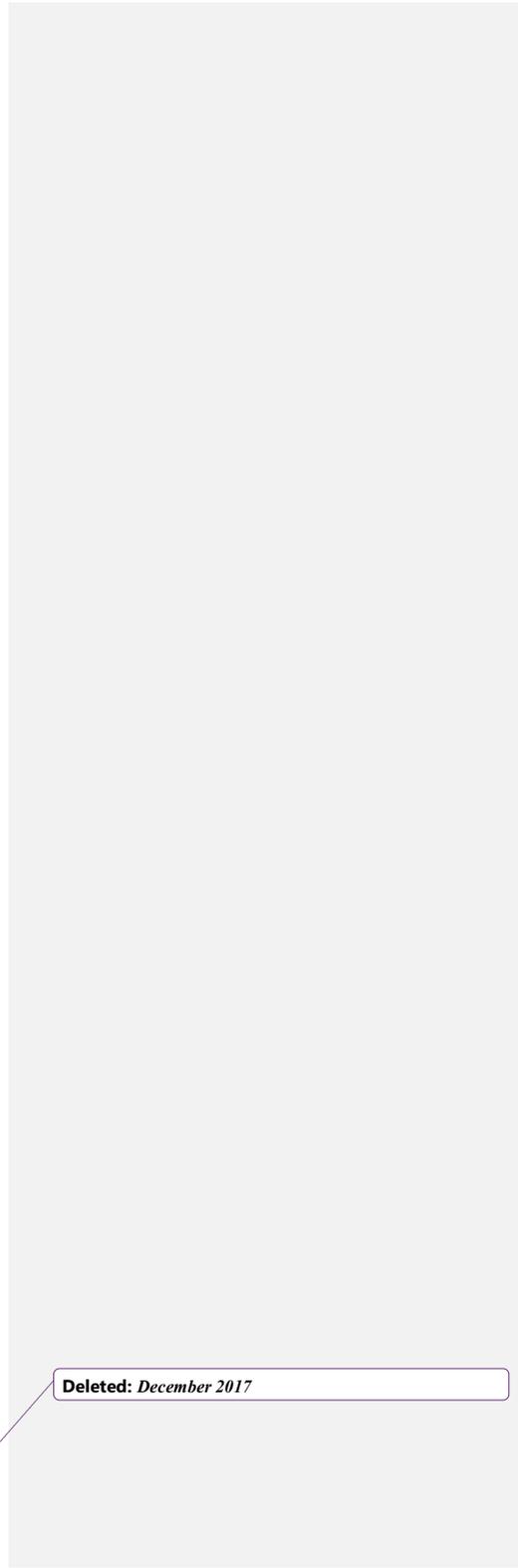
While the SBE Program achieved its utilization goal of 15%, as set forth in the *SBE Program Policies and Procedures Manual*, it failed to meet its stated goal to afford all businesses, both minority and non-minority SBEs, the opportunity for full and equitable participation in the County's contracts. Equitable participation, as defined by *Croson*, occurs when the level of contracting with MBEs is in parity with their availability.<sup>462</sup> As illustrated in the disparity findings, the SBE Program did not achieve parity in the award of contracts to certified SBEs that were minority-owned.



<sup>462</sup> City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

**A. Small Business Enterprise Utilization Findings**

The analysis of the SBE Program’s effectiveness found an underutilization of certified minority SBEs on the County’s contracts during the January 1, 2009, to December 31, 2013, study period. When the utilization of certified minority SBEs was compared to the County’s list of certified SBEs, underutilization was found for most minority groups. The utilization analysis of all SBE certified prime contractors is described by ethnicity and gender in Table 12.1.



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**Table 12.1: SBE Certified Prime Contract Utilization:  
All Industries, January 1, 2009 to December 31, 2013**

<b>Ethnicity</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African Americans	261	11.18%	\$21,181,576	10.17%
Asian Americans	89	3.81%	\$5,412,039	2.60%
Hispanic Americans	283	12.13%	\$17,975,458	8.63%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	685	29.35%	\$46,281,577	22.23%
Non-minority Males	1,016	43.53%	\$117,369,605	56.37%
<b>TOTAL</b>	<b>2,334</b>	<b>100.00%</b>	<b>\$208,220,254</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Contracts</b>	<b>Percent of Contracts</b>	<b>Amount of Dollars</b>	<b>Percent of Dollars</b>
African American Females	4	0.17%	\$11,509,509	5.53%
African American Males	257	11.01%	\$9,672,066	4.65%
Asian American Females	3	0.13%	\$381,303	0.18%
Asian American Males	86	3.68%	\$5,030,736	2.42%
Hispanic American Females	252	10.80%	\$8,473,727	4.07%
Hispanic American Males	31	1.33%	\$9,501,732	4.56%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	685	29.35%	\$46,281,577	22.23%
Non-minority Males	1,016	43.53%	\$117,369,605	56.37%
<b>TOTAL</b>	<b>2,334</b>	<b>100.00%</b>	<b>\$208,220,254</b>	<b>100.00%</b>



## **B. Summary of the SBE Program's Effectiveness**

The County has operated a comprehensive SBE Program since 2002. Despite the rigorous race and gender-neutral program components and the County's capable professional staff, statistically significant disparity was found in the award of County contracts to African American and Asian American certified SBEs. Hispanic American certified SBEs were also underutilized, although not at a statistically significant level. The analysis also revealed that non-minority male certified SBEs were awarded the majority of the contracts SBEs were awarded. As illustrated in *Chapter 7: Prime Contract Disparity Analysis* and *Chapter 8: Subcontract Disparity Analysis*, the disparity analysis also revealed statistically significant underutilization of M/WBEs on all County prime and subcontracts.

In 2002, when the SBE Program was promulgated, there was parity in the award of County contracts to available M/WBEs. However, the statistically significant disparity in the award of County contracts, documented in this Study, is evidence that the SBE Program has been ineffective in maintaining full and equitable participation of all available County businesses, including minority-owned businesses and woman-owned businesses. The evidence of M/WBE statistical disparity documented in *Section III: Disparity Analysis Findings* provides a sufficient predicate for the race and gender-conscious program recommended in this chapter.

## **III. Disparity Analysis Findings**

The statistical findings of disparity are detailed in *Chapter 7: Prime Contract Disparity Analysis* and *Chapter 8: Subcontract Disparity Analysis* and summarized in this section. The statistically significant findings of disparity in the award of prime contracts and subcontracts were calculated in compliance with the constitutional parameters set forth in *Croson*<sup>463</sup> and its progeny.

### **A. Prime Contract Disparity Findings**

A prime contract disparity analysis was performed on construction, professional services, and goods and services contracts awarded during the January 1, 2009, to December 31, 2013, study period. The prime contractor disparity analysis was conducted for the informal and formal thresholds. The informal thresholds for each industry were defined by the County's Policy and Procedure Manual that was in operation during the study period. The informal thresholds for each industry are listed in Table 12.2.



<sup>463</sup> *Croson*, at 488 U.S. 469 (1989).

**Table 12.2: Informal Thresholds for Analysis by Industry**

Industry	Contract Threshold
Construction	Under \$50,000
Professional Services	Under \$50,000
Goods and Services	Under \$50,000

The formal threshold, as defined in the County’s Policy and Procedure Manual, includes contracts valued at \$50,000 and greater. In this analysis, the formal threshold was capped for each industry to ensure that contracts defined as outliers in size were removed from the analysis because they distort the distribution of the dataset and the statistical analysis.

To eliminate the outliers, the formal prime contracts analyzed were limited by dollar value to contracts representing the 80th percentile of the contracts the County awarded in each of the three industries. The thresholds for the analysis of formal contracts are listed by industry in Table 12.3. The methodology used to set the threshold for the statistical disparity analysis is discussed in Chapter 3: Prime Contractor Utilization Analysis.

**Table 12.3: Competitive Contract Thresholds for Analysis by Industry**

Industry	Contract Threshold
Construction	\$50,000 to \$1,296,000
Professional Services	\$50,000 to \$301,000
Goods and Services	\$50,000 to \$321,000

**1. Construction Prime Contract Disparity Findings**

Table 12.4 depicts the construction prime contract disparity findings at the two contract thresholds, informal contracts valued under \$50,000 and formal prime contracts valued from \$50,000 to \$1,296,000. Disparity was found for African American and Hispanic American-owned businesses on formal prime contracts. On informal contracts disparity was found for Hispanic American-owned businesses.



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**Table 12.4: Prime Contract Disparity Summary: Construction,  
January 1, 2009, to December 31, 2013**

Ethnicity/Gender	Construction	
	Contracts Valued From \$50,000 to \$1,296,000	Contracts Valued Under \$50,000
African Americans	<i>Disparity</i>	**
Asian Americans	No Disparity	No Disparity
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>
Native Americans	----	----
Caucasian Females	**	**

(\*\*) this Study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

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

## 2. Professional Services Prime Contract Disparity Findings

Table 12.5 depicts the professional services prime contract disparity findings at two thresholds, informal contracts valued under \$50,000 and formal prime contracts valued from \$50,000 to \$301,000. As depicted in Table 12.5, disparity was found for African American and Caucasian female-owned businesses on formal prime contracts and for African American and Caucasian female-owned businesses on informal prime contracts.



**Table 12.5: Prime Contract Disparity Summary: Professional Services,  
January 1, 2009, to December 31, 2013**

Ethnicity/Gender	Professional Services	
	Contracts Valued From \$50,000 to \$301,000	Contracts Valued Under \$50,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	**	No Disparity
Hispanic Americans	**	**
Native Americans	----	----
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>

(\*\*) this Study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

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

For construction projects valued at \$325,000 and over or a study valued at \$35,000 and over, the State of Florida requires that the professional services contractor be certified under the CCNA.<sup>464</sup> The County conducts the CCNA certification process that qualifies the businesses that can perform design services contracts. The County also maintains a list of CCNA-certified contractors. Disparity was found for the listed CCNA-certified African American contractors on professional services contracts. Table 12.6 depicts the disparity in the award of professional service contracts to CCNA certified professional services contractors. While a disparity was found in the County’s award of contracts to CCNA-certified African American contractors, there is no separate race-based remedy proposed for CCNA contracts because they were included in the professional services analysis.



<sup>464</sup> FLA. STAT. TIT. XIX, § 287.055 (2014).

**Table 12.6: Prime Contract Disparity Summary: CCNA Certified Contractors, January 1, 2009, to December 31, 2013**

Ethnicity/Gender	CCNA Certified Contractors
African Americans	<i>Disparity</i>
Asian Americans	No Disparity
Hispanic Americans	**
Native Americans	----
Caucasian Females	**

(\*\*) this Study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

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

### 3. Goods and Services Prime Contract Disparity Findings

Table 12.7 depicts the goods and services prime contract disparity findings at two contract thresholds, informal contracts valued under \$50,000 and formal prime contracts valued from \$50,000 to \$321,000. Disparity was found for African American, Asian American, Hispanic American, and Caucasian female-owned businesses on formal prime contracts. On informal contracts, disparity was also found for African American and Caucasian female-owned businesses.

**Table 12.7: Prime Contract Disparity Summary: Goods and Services, January 1, 2009, to December 31, 2013**

Ethnicity/Gender	Goods and Services	
	Contracts Valued From \$50,000 to \$321,000	Contracts Valued Under \$50,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Americans	<i>Disparity</i>	**
Hispanic Americans	<i>Disparity</i>	**
Native Americans	----	----
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>

(\*\*) this Study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

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



## **B. Subcontractor Disparity Findings**

The subcontractor disparity analysis was limited to two industries—construction and professional services subcontracts. The subcontracts issued for these two industries during the January 1, 2009, to December 31, 2013 study period had to be reconstructed. As detailed in *Chapter 4: Subcontractor Utilization Analysis*, an extensive effort was undertaken to identify subcontracts awarded by the County’s construction and professional services prime contractors.

### **1. Construction Contract Disparity Findings**

As indicated in Table 12.8, disparity was found in the award of construction subcontracts to African American and Hispanic American-owned businesses.

**Table 12.8: Subcontract Disparity Summary: Construction, January 1, 2009, to December 31, 2013**

<b>Ethnicity/Gender</b>	<b>Construction</b>
<b>African Americans</b>	<b><i>Disparity</i></b>
<b>Asian Americans</b>	<b>No Disparity</b>
<b>Hispanic Americans</b>	<b><i>Disparity</i></b>
<b>Native Americans</b>	<b>----</b>
<b>Caucasian Females</b>	<b>No Disparity</b>

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

### **2. Professional Services Prime Contract Disparity Findings**

As indicated in Table 12.9, disparity was found in the award of professional services subcontracts to African American-owned businesses.



**Table 12.9: Subcontract Disparity Summary: Professional Services,  
January 1, 2009, to December 31, 2013**

Ethnicity/Gender	Professional Services
African Americans	<i>Disparity</i>
Asian Americans	No Disparity
Hispanic Americans	No Disparity
Native Americans	----
Caucasian Females	No Disparity

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

#### **IV. Race and Gender-Conscious Remedies**

This section presents recommendations to remedy the statistically significant findings of disparity documented in the Study. The remedies are narrowly tailored to the Study findings to meet the *Croson* standard. Pursuant to the *Croson* standard, the Court permits the implementation of race and gender-conscious remedies after consideration of a race and gender-neutral remedies. Since the SBE Program that the County has operated since 2002 is a comprehensive race and gender-neutral program, the SBE Program meets the *Croson* standard that consideration of a race and gender-neutral remedies must be employed before enacting race and gender-conscious remedies.<sup>465</sup> Although the SBE Program has been operated by the County for more than a decade, the statistical evidence clearly demonstrates that the race and gender-neutral program has been ineffective in achieving equity in the award of prime contracts and subcontracts to available M/WBEs.

The United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit), in *Engineering Contractors Ass'n v. Metropolitan Dade County*,<sup>466</sup> ruled that local governments in Florida has a compelling governmental interest in remedying disparity in the award of its contracts to available market area M/WBEs. Given the Eleventh Circuit's holding, the race and gender-conscious recommendations set forth in this chapter are narrowly tailored to the statistical evidence of discrimination documented in the Study. The proposed race and gender-conscious remedies are based on the disparity findings and only apply to the ethnic and gender groups in the industries in which they were underutilized at a statistically significant level.



<sup>465</sup> Florida A.G.C. Council, Inc., et al., v. State of Florida, 303 F. Supp. 2d 1307; 2004

<sup>466</sup> 943 F. Supp. 1546 (S.D. Fla. 1996) (“*Dade County I*”).

**A. M/WBE Program Remedies**

**1. Promulgate an M/WBE Contracting Policy**

The Palm Beach County Board of County Commissioners (BCC) should enact an M/WBE contracting policy. The policy should authorize the establishment of an M/WBE Program with race and gender-conscious remedial measures, narrowly tailored to remedy the statistically significant disparity documented in the Study. The M/WBE policy should incorporate provisions to achieve parity in the award of contracts to available businesses. The M/WBE Program should be managed by an M/WBE Department, and implemented as a subdivision of the County’s Office of Small Business Assistance (OSBA). The County should require that an updated disparity study be conducted at least every five years to assess the M/WBE Program’s effectiveness. The recommended M/WBE Program provisions are detailed below.

**2. M/WBE Eligibility Standards**

The designations for minority and woman business enterprises should be consistent with definitions provided in Palm Beach County Code.<sup>467</sup>

**a. Minority Business Enterprise Definition**

The Palm Beach County Code states that a business owned by an individual who is African American, Hispanic American, Asian American, or Native American is defined as a minority business enterprise. The business must be 51-percent owned and controlled by one or more of these minorities.<sup>468</sup>

**Commented [FML45]:** These definitions may need to vary by industry based upon disparity findings.

**b. Women Business Enterprise Definition**

The Palm Beach County Code states that a business that is owned and controlled by one or more women is defined as a woman business enterprise. The business must be 51-percent owned and controlled by one or more women.<sup>469</sup>

**c. Business Location**

Eligible businesses must be domiciled in the market area of Palm Beach County. Proof of a permanent office in Palm Beach County must be required.

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<sup>467</sup> Palm Beach County Code, Article III, Division 2, Part C. Small Business Enterprise Program, Sec. 2-80. 2013

<sup>468</sup> Id. at Sec. 2-80.21

<sup>469</sup> Id.



### 3. Implement Prime Contract Remedies

The County should implement prime contract remedies for ethnic and gender groups that have statistically significant disparity. Potential prime contract remedies include bid discounts, incentive credits, and a contract rotation award process.

#### a. Apply Bid Discount to Construction Prime Contracts

The County should apply a bid discount for groups with statistically significant disparity on construction prime contracts. The bid discount would reduce the bidder's price for evaluation purposes. A bid discount should be given during the evaluation process to construction prime contractors who are members of the statistically significant underutilized groups. The value of the bid discount will be determined by the County. The bid discount would apply to awards that are based on the lowest bid or where review pricing is part of the qualifications. Offsetting this disadvantage could help mitigate the disparity in this industry. The groups with statistically significant disparity that would be eligible for bid discount are listed in Table 12.10.

**Commented [FML46]:** It may be very difficult to narrowly tailor such a bid discount remedy appropriately given the scarcity of data on the existence and size of any cost disparities experienced by M/WBE prime contractors in the construction industry. Joint venture incentives and evaluation preferences for design-build and CMAR firms may be more workable alternatives for construction prime contract remedies.

**Table 12.10: Groups Eligible for Construction Bid Discounts**

Ethnicity/Gender	Construction Contracts
African Americans	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>

#### b. Establish Incentive Credits for Professional Services Prime Contracts

Incentive credits should be offered on professional service prime contracts to mitigate the disparity for the groups that were underutilized at a statistically significant level. An incentive credit should be given during the evaluation process to professional services prime contractors who are members of the statistically significant underutilized groups. One of the evaluation criteria should be whether the firm is M/WBE certified as one of the groups that had a statistically significant disparity. The value of the evaluation criterion will be determined by the County. The incentive credit would apply to awards that are based on qualifications. Offsetting this disadvantage could help mitigate the disparity in this industry. The groups with statistically significant disparity that would be eligible for incentive credits are listed in Table 12.11.

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**Table 12.11: Groups Eligible for Professional Services Evaluation Points**

Ethnicity/Gender	Professional Services Contracts	CCNA Certified Contractors
African Americans	<i>Disparity</i>	<i>Disparity</i>
Caucasian Females	<i>Disparity</i>	No Disparity

**c. Host Informational Meetings for Design Services Solicitations**

As noted above, prime contractors must be certified pursuant to the Consultants Competitive Negotiation Act (CCNA) to bid on design contracts when the construction project is valued at \$325,000 and over or the study is valued at \$35,000 and over.<sup>470</sup> The CCNA certification process that the County administers is highly rigorous, and designed to ensure that all businesses that are certified have the requisite capacity to perform the County’s CCNA contracts. Notwithstanding the diversity in the County’s list of CCNA-certified businesses, this Study revealed a disparity in the County’s award of contracts to CCNA certified African Americans. African Americans represent 8.06% of the certified CCNA contractors, but only received 0.73% of the total dollars awarded to CCNA certified contractors. African American CCNA certified contractors were underutilized at a statically significant level.

To ensure the solicitation and award of contracts to CCNA certified contractors is objective, informational meetings should be held prior to publication of the advertisement. These meetings should target African American CCNA certified businesses that were determined to have a disparity in the County’s award of contracts where CCNA certification was required. When feasible, the meeting should be held fourteen days before the solicitation is published. The informational meeting should provide a forum for discussing the solicitation and selection process.

**d. Apply Bid Discount to Goods and Services Prime Contracts**

The County should apply a bid discount for groups with statistically significant disparity on goods and services prime contracts. The bid discount would reduce the bidder’s price for evaluation purposes. A bid discount should be given during the evaluation process to goods and services prime contractors who are members of the statistically significant underutilized groups. The value of the bid discount will be determined by the County. The bid discount would apply to awards that are based on lowest bid or where review pricing is part of the qualifications. Offsetting this disadvantage could help mitigate the disparity in this industry. The groups with statistically significant disparity that would be eligible for bid discount are listed in Table 12.12.

**Commented [FML47]:** Again, narrowly tailoring the size of such bid discount remedies may be problematic given the lack of study evidence regarding the magnitude of cost disadvantages experienced by M/WBE firms.

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<sup>470</sup> FLA. STAT. TIT. XIX, § 287.055 (2014).



**Table 12.12: Groups Eligible for Goods and Services Bid Discounts**

Ethnicity/Gender	Goods and Services Contracts
African Americans	<i>Disparity</i>
Caucasian Females	<i>Disparity</i>

**4. Implement Subcontract Remedies**

The County should implement subcontract remedies for ethnic and gender groups that have statistically significant disparity. Subcontract remedies include subcontract goals, goal attainment at bid opening, a commercially useful function requirement, and a quantified good faith effort provision.

**a. Set Subcontract M/WBE Goals**

Race and gender-conscious subcontracting goals should be established for construction and professional services prime contracts. The subcontracting goals should apply to the ethnic and gender groups with a statistically significant disparity.

**i. Establish Subcontract Goals on Construction Contracts**

African Americans and Hispanic Americans had a statistically significant disparity in the prime contractors’ award of construction subcontracts. The subcontract goal should be set on all construction prime contracts and apply to the ethnic groups that had a statistically significant disparity. To meet the narrowly tailored standard, the MBE construction subcontract goal should be based on the availability levels for each ethnic group that was underutilized at a statistically significant level. Table 12.13 depicts the MBE construction subcontractor availability documented in the Study.

**Table 12.13: MBE Construction Subcontractor Availability**

Ethnicity/Gender	Construction
African Americans	11.15%
Hispanic Americans	11.61%

A separate WBE subcontract goal should be set on all construction prime contracts. Caucasian females were underutilized on the County’s construction subcontracts, though not at a statistically significant level. While race-conscious goals are limited to minority groups with statistically significant disparity pursuant to the narrowly tailored standard required by *Croson*, gender-conscious goals are not. Since *Croson* did not review the application of WBE goals, gender is

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subject to the intermediate standard of review, which only requires a finding of underutilization that does not need to be statistically significant. The County should implement a WBE subcontract goal based on the group’s availability. Table 12.14 below depicts the WBE subcontractor availability documented in the Study.

**Table 12.14: WBE Construction Subcontractor Availability**

Ethnicity/Gender	Construction
Caucasian Females	14.40%

**ii. Establish Subcontract Goals on Professional Services Contracts**

African Americans had a statistically significant disparity on the prime contractors’ award of professional services subcontracts. A MBE subcontract goal should be set on professional services prime contracts for African American subcontractors. The MBE subcontract goal should be limited to the ethnic group that had a statistically significant disparity. To meet the narrowly tailored standard, the MBE professional services subcontract goal should be based on the availability level for the ethnic group determined to be underutilized at a statistically significant level. Table 12.15 depicts the MBE professional services subcontractor availability documented in the Study.

**Table 12.15: MBE Professional Services Subcontractor Availability**

Ethnicity/Gender	Professional Services
African Americans	10.62%

A WBE subcontract goal should be set on professional services contracts since Caucasian females were underutilized on the County’s professional services subcontracts, though not at a statistically significant level. The County should implement a WBE subcontract goal based on the WBE availability level. Table 12.16 depicts the WBE subcontractor availability documented in the Study.

**Table 12.16: WBE Professional Services Subcontractor Availability**

Ethnicity/Gender	Professional Services
Caucasian Females	20.92%



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**b. Require Subcontract Goal Attainment at Bid Opening**

The prime contractor should be required to meet the M/WBE subcontract goals at the time of bid opening or document a good faith effort to do so. Bidders who fail to meet either goal and wish to be considered for an award must document that a good faith effort was made to meet the goal(s). If the good faith effort documentation is not submitted with the bid or the submittal is not approved, the County should move to the next lowest bidder. The next lowest bidder's response to the goal requirement should be reviewed until a responsive bidder is identified. If no bidder is found to be responsive, the contract should be cancelled and re-advertised.

**c. Implement a Commercially Useful Function Requirement**

The listed subcontractors must perform a commercially useful function. The responsibility for determining if a listed M/WBE can perform a commercially useful function is the sole responsibility of the prime contractor. The commercially useful function of each listed subcontractor should be verified by the County at the time of bid opening. If the commercially useful function requirement is not approved, the County should move to the next lowest bidder. The next lowest bidder's response should be reviewed until a responsive bidder has only listed subcontractor(s) that perform commercially useful functions. If no bidder is found to be responsive, the contract should be cancelled and re-advertised. The commercially useful function requirement should apply to all procurement activity, including change orders, substitutions, and task orders. A business that performs a commercially useful function minimally does the following:

- Executes a distinct element of the work of the contract.
- Carries out its obligation by actually performing, managing, or supervising the work involved and, in the case of a supplier, warehousing its materials, supplies, and equipment.
- Performs work that is normal business practice for its industry, service, and function.
- Completes the work identified at the time of bid opening, and does not further subcontract a portion of the work that is greater than that expected to be subcontracted by normal industry standards.

**d. Quantify Good Faith Efforts Criteria**

A waiver provision should be put in place for contractors who fail to meet the contract goal with a certified M/WBE that performs a commercially useful function. Bidders who fail to meet the goal and wish to be considered for an award must document that a good faith effort was made to meet the goal. Bidders should submit documentation of good faith efforts to contract with or to purchase significant material supplies from eligible M/WBEs within 48 hours of the bid opening. If a contractor or bidder fails to meet specified goals in the bid documents, the County should determine if the contractor has complied with all requirements of the solicitation documents and made the required good faith effort.

While the County currently provides guidelines for reasonable actions made in good faith effort regarding the SBE goals, the County should enhance its good faith effort policy by assigning a

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value to each good faith effort element to further improve the attainment of its M/WBE subcontracting goal. Good faith effort elements should be quantified to determine whether a prime contractor has provided sufficient evidence of a good faith effort to meet the M/WBE subcontract goals. The maximum score should be 100 points. To be considered a responsive bidder, the prime contractor must demonstrate a bona fide good faith effort that is sufficient to achieve a minimum score of 80% of the required points. The following are examples of good faith elements and recommended point assignments:

**i. Advertising (5 points)**

Opportunities for M/WBEs should be advertised to certified M/WBEs in three digital media outlets during the two weeks prior to the bid opening, except when advertisement in print media is required by statute. A subcontracting opportunity should be published online in general circulation media, minority-focused media, trade association publications, or trade-related publications at least twice, unless the solicitation waives this requirement. The advertisement should include the project name, the name of the bidder, areas of work available for subcontracting, contact person's name and telephone number, information on the availability of plans and specifications, date the subcontractor's written bid is due to the prime contractor, and assistance available to subcontractors in obtaining bonds, financing, and insurance.

**ii. Outreach to Identify M/WBEs (15 points)**

Prime contractors should communicate with M/WBEs through personal, frequent, and persistent contact by promptly returning telephone calls, facsimiles, and emails. Correspondence logs should list the names of the businesses, the representatives contacted, and dates of the contact. Copies of correspondence with the businesses contacted, including the responses received, should be provided. Documentation should also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission. At least three businesses should be contacted.

**iii. Attending the Pre-bid Meeting (5 points)**

Attendance at the scheduled pre-bid meetings should be mandatory to comply with the good faith effort requirement. The prime contractor's name on the pre-bid meeting sign-in sheet should serve as documentation.

**iv. Providing Timely Written Notification (20 points)**

Prime contractors should be required to solicit, in writing, subcontract bids and material quotes from relevant M/WBEs at least two weeks prior to the bid opening. Relevant businesses are those that could feasibly provide the goods or services required to satisfy the terms specified in the County's solicitation. When soliciting bids, quotes, and proposals, the prime contractor should provide the project name, the bidder's name, subcontract items, primary contact person's name and phone number, information on the availability of plans and specifications, and the date on which the subcontractor's written bid should be submitted to the prime contractor. Written notification should include verification of the transmission date, the recipient's name, and the



company name. Documentation should also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission.

**v. Contact Follow-up (15 points)**

Prime contractors should be required to promptly return telephone calls, facsimiles, and emails after the initial solicitation. The follow-up should consist of a telephone call, facsimile, or email during normal business hours at least two weeks prior to the bid opening. The prime contractor should maintain correspondence logs that list the subcontractors who were contacted, including the results of that contact. The list should also include the names of the eligible businesses and contact persons, as well as telephone numbers, dates of contact, and notes regarding the outcome of said contact. The record should also identify the scope of work for which each was asked to provide a bid.

**vi. Identifying Items of Work (15 points)**

Subcontracts should be broken down into discrete items or packages that M/WBEs may find economically feasible to perform. The documentation should include a list with descriptions of the specific items of work solicited from eligible businesses, as well as notices and advertisements targeting M/WBE subcontractors.

**vii. Negotiating in Good Faith (15 points)**

Prime contractors should negotiate fairly with interested M/WBEs even if selection of the M/WBE would increase costs or the contractor could self-perform the work. Prime contractors may not unjustifiably reject bids, quotes, or proposals prepared by eligible businesses based on the subcontractor's standing within its industry, or on membership in a specific group, organization, association, and/or political or social affiliation. A written statement with names, addresses, and telephone numbers of subcontractors contacted and the negotiated price and services should be submitted. This list should include dates of the negotiations and the results and document the bids received from businesses that could provide a commercially useful function.

**viii. Offer Assistance in Securing Financing, Insurance, or Competitive Supplier Pricing (10 points)**

Prime contractors should provide M/WBEs with technical assistance regarding plans, specifications, and requirements of the contract in a timely manner to facilitate responses to solicitations. Prime contractors may not deny a subcontract solely because a certified M/WBE cannot obtain a bond and should make efforts to assist interested businesses in obtaining financing, bonds, and insurance required by the County, as well as provide competitive pricing. The prime contractor should provide a written description of the type of assistance offered, the company name, contact person and telephone number, and the name of the person who provided the assistance, as well as that of the supplier that offered competitive pricing.



## 5. Staff the M/WBE Department

The Office of Small Business Assistance staff should be augmented to ensure that the M/WBE Department staff have the requisite skills, knowledge, and ability to meet the objectives and responsibilities of the M/WBE Program. Routine staff training should be conducted to ensure that all personnel are knowledgeable about M/WBE Program requirements and capable of supporting the M/WBE Program and its policies and objectives. The M/WBE Department should minimally have the following two positions:

### a. Staff Descriptions

**M/W/SBE Data Analyst:** compiles, verifies, and reports data measuring the County's compliance with contract goals and monitoring requirements. The Data Analyst manages the data management system to ensure that it can generate the reports required to measure compliance with the M/WBE and SBE Program requirements. In addition, the Data Analyst manages all solicitations received from the user departments and develops comprehensive outreach strategies to meet the M/WBE and SBE goals using digital media vehicles. The Data Analyst must demonstrate proficiency in Microsoft Office Suite; knowledge of databases, design, data collection, and manipulation; and the ability to work with businesses with diverse interests and backgrounds.

**M/WBE Contract Compliance Specialist:** monitors M/WBE contract compliance and M/WBE contractor and subcontractor on site participation, investigates complaints, ensures contracts are properly and legally executed, and creates a profile of each contractor by preparing site visit reports. The Contract Compliance Specialist must demonstrate knowledge of procurement processes, the ability to work with public officials and the general public, and the ability to work with businesses with diverse interests and backgrounds.

## 6. Implement a Training Program for Certification Staff

A training program should be designed to provide continuing education for certification analysts to ensure that certification standards are uniformly applied in a consistent manner. Certification standards and their application are key elements for the credibility and integrity of an M/WBE Program. Formal and regular professional training can ensure analysts are consistent in the decisions made in the application review process. Training can equip analysts to detect fraudulent activity, which is ever changing and often elusive. There are various methods for training, including the use of internal expertise on a peer-to-peer basis.

## 7. Expand the Small Business Advisory Committee to Serve as Advisors for the M/WBE Program

The County Small Business Advisory Committee's function should be expanded to include responsibility for reviewing the relevant documentation concerning the attainment of the M/WBE goals. The Small Business Advisory Committee membership should be augmented to include certified M/WBEs and trade and business organization executives.



## 8. Enforce the Tracking and Verification Policy

The County's Schedule 1, Schedule 2, Schedule 3 and Schedule 4 forms should track both SBE and M/WBE subcontractor participation.<sup>471</sup> Prime contractors are required to report their subcontractor participation on each contract at the time of award, with the Schedule 1 and 2 forms, and with each invoice with the Schedule 3 and 4 forms. This requirement should be enforced.

The forms should be modified to capture all subcontractors, including M/WBEs and non-M/WBEs. The County's prime contractors should be contractually required to submit the Schedule 3 and 4 forms on a monthly basis. The form should document all subcontractor payments made year-to-date, the dollar value of the payments, and the percentage completed on each subcontract. This information should be tracked for all subcontractors, including M/WBEs and non-M/WBEs. Tracking all subcontractors will enable the County to determine the percentage of the total subcontract dollars spent with all subcontractors.

## 9. Implement a Subcontractor Payment Verification Provision

The County should implement an online subcontractor payment verification program that allows subcontractors to notify the County in real time the status of the invoice payments received from their prime contractor. Prime contractors should be required to submit verification of subcontractor payments on the County's website. The electronic verification of payments made to subcontractors should include information on both M/WBE and non-M/WBE subcontractors. The prime contractor's compliance with the payment verification program should be mandatory. In addition, the prime contractor should be required to include subcontractors' invoices as part of its regular billing to the County. Each subcontractor listed as paid for the previous billing cycle should be contacted electronically by the County to verify that the payment was received. This verification procedure would eliminate reliance on self-reporting by the prime contractors.

Any discrepancy in the payment reported by the prime contractor and subcontractors should be resolved before additional prime contractor payments are made. The payment verification requirements should be published on the County's website, and in solicitation and contract documents.

## 10. Conduct Routine Post-Award Contract Compliance Monitoring

The County should enhance the SBE Program's monitoring standards to track SBE utilization and uniformly apply these standards to track M/WBE utilization. Consistent contract compliance monitoring could minimize the hardships experienced by subcontractors due to unauthorized substitutions. The County's substitution standards should be enforced throughout the life of the contract to ensure that the listed M/WBE subcontractors are not removed or otherwise substituted without authorization.

<sup>471</sup> The Schedule 1 "List of Proposed SBE-M/WBE Participation" form, and the Schedule 2 "Letter of Intent to Perform as an SBE-M/WBE" form is submitted with the bid or proposal. Schedule 3 "SBE-MWBE Activity" form was submitted with the prime contractor's payment request. Schedule 4 "SBE-M/WBE Payment Certification" was completed by the prime contractor and submitted to the County to verify actual payments made to SBE subcontractors.



Contract compliance monitoring methods should also include strategies to verify actual subcontractor participation on County contracts. The County should perform job site visits to verify actual subcontractor participation on construction contracts as currently provided for in the SBE program.

### **11. Report M/WBE Utilization**

The County should prepare an M/WBE Utilization Compliance Review that documents M/WBE utilization data by department. The Review should be presented to the Board of County Commissioners at quarterly intervals and published on the County's website.<sup>472</sup> The purpose of the Review is to measure the effectiveness of the M/WBE Program by analyzing the County departments' prime contract and subcontract awards by ethnicity, gender, and industry. The Review should also document the attainment of construction and professional services subcontract goals. Award of prime contracts to M/WBEs should be reported with separate accounting of the award of Job Order Contracts, Single Trade Annual Contracts, Master Agreements, and CCNA design contracts. The information should be reported for each department by ethnicity, gender, and award amounts.

The Review should document year-to-date payments, original award, and modifications to the original award. Prime contract change orders and amendments should be separately reported by department and industry. Contract-specific waivers to the subcontract goal at bid opening, substitutions, or failure to meet the subcontract goal during the term of the contract should also be published in the Review.

The fourth-quarter Review should also assess year-to-date program activities. It should include the M/WBE Oversight Committee's comments and an M/WBE Program evaluation for the calendar year. The County's exemplary practices and achievements should be noted in each fourth quarter Review.

### **12. Create an M/WBE Directory**

The County should maintain a directory of certified M/WBEs with business address, telephone number, website, and specialty, as well as contact person's name, address, telephone number, and email address. The list must be updated upon certification, revocation or denial. The list should be posted on the Palm Beach County Office of Small Business Assistance website in a searchable and downloadable format.

### **13. Conduct Targeted Outreach to M/WBEs**

When soliciting bids, proposals, and statements of qualifications, the County should adhere to the following affirmative steps in conducting targeted outreach to M/WBEs:

<sup>472</sup> Palm Beach County, FL, PPM CW-O-043 (January 1, 2011). Please note that the OSBA currently prepares semi-annual performance reports on the level of SBE and M/WBE participation achieved on completed contracts in County contracting, and presents an annual utilization report to the Board of County Commissioners.



- Ensure that the gender and ethnic groups with statistically significant underutilization are solicited to respond to solicitations.
- Request lists of potential prime contractors from the M/WBE Department when soliciting response to solicitations.
- Perform community outreach to M/WBEs before the solicitation is released to notify them of the upcoming opportunity.
- When economically and technically feasible, encourage the formation of joint ventures, partnerships, and other similar arrangements among the ethnic and gender groups with a statistically significant underutilization.

## V. Race and Gender-Neutral Remedies

The race and gender-neutral recommendations are offered to enhance the procurement process and remove program barriers that minority, women, and small businesses encountered when attempting to do business with the County. These recommendations do not require findings of statistically significant disparity to be implemented. However, they would support the M/WBE Program and increase the likelihood of the County and its prime contractors to do business with M/WBEs. Implementation of the race and gender-neutral remedies would also increase transparency in the procurement process.

### A. Pre-Award Procedures

#### 1. Implement County-wide Management Training

The Policies and Procedures Manual should be updated to include the recommendations that are presented herein. The revised procurement procedures should be uniformly applied throughout the procurement process to remove implicit and explicit bias in the award of County contracts. Annual County-wide management training is necessary to implement these recommendations. The training program should address the practices colored by implicit and explicit bias that has contributed to the statistically significant underutilization of M/WBEs documented in the Study.

All staff with procurement responsibility—including the selection of the procurement method, the formulation of the solicitation, the evaluation of the submittals, and the award of the contract—should be knowledgeable about the County’s procurement procedures. County staff should be trained to recognize the practices that affect the attainment of the M/WBE Program objectives. Training will standardize County procurement processes, ensure that procurement procedures are applied uniformly by all departments, and ensure that all employees are equipped to identify and manage implicit bias inherent in the County’s contracting practices.

#### 2. Enhance Contract Solicitation Process

When soliciting bids, proposals, and statements of qualifications for construction and professional services contracts, departments should be required to adhere to the following affirmative steps:

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- Ensure that the gender and ethnic groups that were found to have a disparity are solicited for construction and professional services prime contracts.
- Request lists of potential proposers from the M/WBE Program.
- Conduct outreach to the identified M/WBEs before the request for proposals is released to notify them of upcoming opportunities.
- Email the notice of opportunities to the listed potential proposers.
- When economically and technically feasible, encourage the formation of joint ventures, partnerships, and other similar arrangements among the ethnic and gender groups with a disparity.
- Maintain an email log of all M/WBEs solicited for professional services contracts.
- Post the professional services solicitations on the County’s website on a regular basis and on the same day(s) each month.

**3. Revise Informal Bid Process for Construction and Professional Services Contracts**

For informal construction and professional services solicitations, County departments should be required to obtain at least one quote from the M/WBEs that were found to have a statistically significant disparity. The award should also be reported to the Board of County Commissioners with an explanation for the decision to award to a non-M/WBE.

**4. Evaluate Use of Multi-Year Contracts**

The Job Order Contract (JOC) Program, the Single Trade Annual Contract Program, and the master agreements are procurement methods used by the County to award construction and professional services contracts. Using these methods, the County bundles multiple construction and professional services contracts into a few large solicitations with multi-year renewal options. The County should reduce the use of large, multi-year contracts to provide more prime contracting opportunities for M/WBEs and small businesses. Several recommendations are presented to unbundle these multi-year contracts.

**a. Reevaluate the Administration of Job Order Contracts**

The County should reevaluate its use of JOC contracts, defined as competitively bid, firm fixed-price indefinite quantity contracts for general contractors with four one-year renewal options.<sup>473</sup> The Facilities Development & Operations Department is authorized to award up to five JOC contracts annually, each with four one-year renewal options. Each contract is valued at a maximum of \$2.5 million. In response to the JOC solicitation, contractors must submit bids with three



<sup>473</sup> JOC contracts are typically awarded for “repair, alteration, modernization, maintenance, or rehabilitation.” (Construction Contract Programs Memorandum)

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“adjustment factors” to be considered responsive. Adjustment factors are considered when evaluating the solicitation responses.<sup>474</sup>

Work orders are issued by the County to a JOC contractor to solicit services for small projects. On receipt of a work order from the County, the JOC contractor prepares a response by multiplying the appropriate adjustment factor by the quantity and the unit price in the Construction Cost Catalog. The JOC contractor may self-perform all or a portion of a work order or use the work order to solicit the services of another contractor. Work orders typically awarded under the JOC are for facility repair, alteration, modernization, maintenance, and rehabilitation.<sup>475</sup> The County bond requirement is waived for contracts performed under the JOC until the cumulative work by the contractor exceeds \$200,000; thereafter, a bond is required.

A consultant is hired to prepare the Construction Cost Catalog and provide other procurement and project administration services on behalf of the County. The County issued 432 JOC work orders during the study period that were awarded to nine contractors. Table 12.17 illustrates that five contractors received over 86% of the JOC work orders and 88% of the dollars awarded.

**Table 12.17: JOC Program Highly Utilized Prime Contractors**

Vendor	Total Award Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
5 Vendors Received	\$20,754,291	88.20%	374	86.57%
4 Vendors Received	\$2,777,323	11.80%	58	13.43%
<b>9 Vendors Received</b>	<b>\$23,531,614</b>	<b>100.00%</b>	<b>432</b>	<b>100.00%</b>

The majority of the JOC work orders that the County issued were small. As illustrated in Table 12.18, 86% of the JOC contracts were valued at less than \$100,000, and 58% were valued at less than \$25,000.

**Table 12.18: JOC Program Prime Contracts Awarded by Size**

Size	Total	
	Frequency	Percent
\$0 - \$4,999	83	19.21%
\$5,000 - \$24,999	166	38.43%
\$25,000 - \$49,999	67	15.51%
\$50,000 - \$99,999	56	12.96%
\$100,000 - \$249,999	38	8.80%
\$250,000 - \$499,999	18	4.17%
\$500,000 - \$999,999	4	0.93%
\$1,000,000 - \$2,999,999	0	0.00%
\$3,000,000 and greater	0	0.00%
<b>Total</b>	<b>432</b>	<b>100.00%</b>

<sup>474</sup> PBC/FDO Construction Procurement Programs Memo. Palm Beach County (2015).

<sup>475</sup> PBC/FDO Construction Procurement Programs Memo. Palm Beach County (2015).

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The County should increase the number of contractors selected in the JOC program and ensure the selection is fair, transparent, and reflects the pool of available M/WBEs. The award of work orders to JOC contractors should be on a rotational basis. A rotational program for the award of work orders to JOC contractors should foster more equity in the process. The rotation program would also increase the opportunities for and build the capacity of small businesses by allowing a greater number of businesses to work as JOC contractors. No business in the rotation should be eligible to receive a second assignment until all other businesses on the list had been offered at least one assignment. The listed contractors would be ranked by the date and time that they were placed on the list. Additionally, the rotation program could require specialties on separate rotations based on NAICS code and/or industry categories, as needed. The renewal option in the JOC contract should be limited to a two-year renewal. The County should also publish the contractors selected for the JOC award on its website. Given the size of the work orders, JOC contractors should be solicited from the listed SBEs and M/WBEs.

**b. Reevaluate the Use of Renewal Options on Single Trade Annual Contracts**

Single trade annual contracts are awarded to contractors that have been prequalified to provide services in a single trade specialty. The trades include electrical, heating, ventilation and air conditioning, flooring, demolition, asbestos abatement, handyman, and low voltage services.<sup>476</sup> The FDO prequalifies contractors for annual trade services contracts and selects up to five contractors from the prequalified list to award large and small specialty contracts.

The single trade annual contract awards are issued with four one-year renewal options. The award of single trade annual contracts is limited to contractors in the prequalified pool of businesses.<sup>477</sup> The contracts are to be awarded to the lowest responsive and responsible vendor within the pool.

The County should limit the renewal options to two-years for single trade contracts to create more prime contracting opportunities for SBEs and M/WBEs. For each single trade annual contract, the County should select no less than five contractors, and the pool of selected contractors should reflect the diversity of the available businesses. To achieve diversity in the prequalified pool, the single trade annual contracts should be widely advertised each year to ensure open competition. Solicitations should be distributed to SBEs and M/WBEs. And pre-bid meetings should be held to promote the County's commitment to selecting an ethnic and gender diverse pool of contractors.

Work orders should be awarded on a rotational basis to the prequalified businesses. No business in the rotation should be eligible to receive a second assignment until all other businesses on the prequalification list received at least one assignment.



<sup>476</sup> Construction Contract Programs Memorandum

<sup>477</sup> Single Trade Annual Contracts refer to contracts for Electrical, HVAC, Flooring, Demolition, Asbestos Abatement, Handyman, and Low Voltage. The client identified that these programs are not reflected in the governing Ordinance or Purchasing Manual, but have been used as benchmarks for the procurement process in practice.

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**c. Limit Use of Master Agreements**

The County procures construction and professional services contracts through master agreements. Master agreements are processed through the Purchasing Department as a Central Purchasing Master Agreement (CMA) or as a Contract Master Agreement (KMA).<sup>478</sup> A master agreement is an estimated usage and multi-year term contract. County departments are authorized to issue purchase orders and delivery orders against CMAs and KMAs without competition. Thus, master agreements effectively remove construction and professional services opportunities from the competitive process, because the purchase orders and delivery orders would otherwise be advertised.

The County should limit the use of master agreements to maximize competition in the procurement of construction and professional services contracts. Furthermore, the multi-year renewal options should be limited to two-years, thereby allowing more businesses to participate in this procurement method.

**B. Post-Award Procedures**

**1. Provide Debriefing Sessions for Unsuccessful Bidders**

Debriefing sessions should be available to all respondents to County solicitations. Any unsuccessful bidders that requests a debriefing should be granted a session.<sup>479</sup> Debriefing sessions for unsuccessful bidders should be provided by the project manager or the purchasing department. Additionally, solicitations should state that debriefing sessions are optional. The procedures for scheduling the debriefing session should be set forth in the solicitation and the bid award notice. Debriefing sessions can provide vital information to help small businesses prepare more competitive submittals.

**2. Develop a Subcontractor Prompt Payment Policy**

The County should implement an expedited subcontractor payment policy. Prime contractors should be required to pay their subcontractors within five days of receipt of their invoice payment. If the prime contractor disputes a subcontractor's invoice written notice should be provided to the subcontractor within three days of receipt of the invoice detailing the disputed amount. The undisputed amount should be paid within five days of receipt of the invoice. Any disputed balance should be paid within five days of the dispute being resolved.



<sup>478</sup> Commodity Based Documents by Document Code, provided by the County.

<sup>479</sup> Palm Beach County, FL, Ordinance 05-062 § 2-55 (2005). The County currently provides for protest procedures in the Palm Beach County Purchasing Code, and permits the Director of the Small Business Assistance authority over the protest process. This authority should be extended to overseeing debriefing sessions for unsuccessful bidders.

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### 3. Publish Prime Contractor Payments

Prime contractor payments should be posted on the County's website to allow subcontractors to track the County's payments of prime contractor's invoices. Payment data should be updated weekly or bi-weekly on the same day of the week. The reported prime contract payment information should be searchable by contract number, project name, and prime contractor name. This system will enable subcontractors and suppliers to track the disbursements to their prime contractors in real time and thereby eliminate the subcontractor's need to ask the County for the status of its prime contractor's invoice payment.

#### C. Data Management Enhancements

##### 1. Add Unique Project Number to the Advantage Financial System

The County tracks prime contract payments in the Advantage Financial System, which uses an Advantage number as a unique identifier for each contract. In addition, the County departments should input their unique project number for each prime contract into the Advantage Financial System. This will allow OSBA to easily extract data for compiling the SBE and M/WBE utilization reports. The prime contracts should also be coded by industry using North American Industry Classification System (NAICS), in addition to the National Institute of Governmental Purchasing (NIGP) code currently being utilized by the County.

##### 2. Establish an Electronic Subcontract Tracking System

The County should implement a cloud-based electronic subcontract management system to be fully integrated with the Advantage Financial System. A centralized management system is needed to capture complete subcontract data. Contract and payment information in the Advantage Financial System should be fully integrated with a cloud-based electronic subcontract tracking system.

The subcontract tracking system should minimally capture the unique prime contract Advantage number, the subcontract name, award amount and date, and payment amount and dates. The County should track comprehensive subcontracting activity from contract award through contract completion, including all change orders and amendments.

## VI. Website Enhancement Strategies

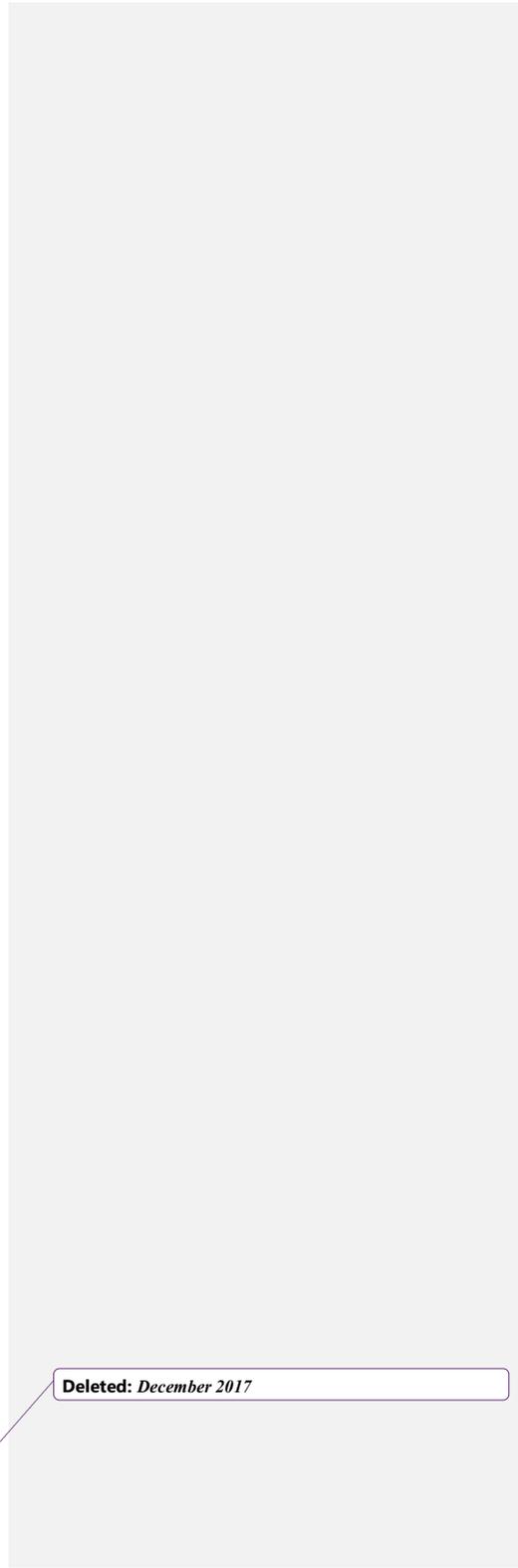
Recommendations presented in this section are intended to enhance the utility and functionality of the County's website for its business users.



**A. Content Enhancements**

**1. Enable Website Interaction**

The *PBC Business Opportunities* webpage should include a web interface that enables interactive communication between users and County staff. This feature would streamline the response process to local businesses' inquiries regarding solicitations.



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## 2. Publish Prime Contractor Utilization Reports

The County should publish the SBE and M/WBE Utilization Reports on its website quarterly. The reports should be published on a pre-determined day each quarter so that the business community is informed of the quarterly publishing date.

