State of New Jersey

Construction Services Disparity Study 2000 - 2002

Submitted to:
The Disparity Study Commission

Submitted by:
Mason Tillman Associates, Ltd.

October 2005

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ASSOCIATES, LTD

ACKNOWLEDGMENT

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

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

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

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

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

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

State of New Jersey

Construction Services Disparity Study 2000 - 2002

EXECUTIVE SUMMARY

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EXECUTIVE SUMMARY

I. STUDY OVERVIEW

A. Purpose

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

B. Legal Requirements

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

C. Study Management

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

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

D. Industries

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

E. Contract Thresholds

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

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

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

Table 2: Contract Thresholds for State Colleges and Universities

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

F. Key Findings

1. State Agencies, Authorities, and Commissions

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

2. State Colleges and Universities

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

G. Key Recommendations

1. Race and Gender-Neutral Recommendations

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

2. Race and Gender-Conscious Recommendations

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

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

II. DISPARITY STUDY PURPOSE AND SCOPE

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

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

- *Construction Services* included new construction and renovations, except routine building maintenance. All residential and non-residential building construction; heavy construction, such as streets, roads, and bridges; and special trade construction, such as fencing, HVAC, paving, and electrical were included.

- *Construction-related Services* included design services, such as architectural, engineering, and construction management services, that are performed as part of a construction project.

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

III. LEGAL BACKGROUND

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

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

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

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

[2] 115 S.Ct. 2097 (1995).

V. CONTRACT DATA SOURCES

A. State Agencies, Authorities, and Commissions

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

- Purchase Bureau's Management Acquisition Control System Enhanced (MACS-E)
- Division of Property Management and Construction's Project Management Information System (DPMC)

- Office of Management and Budget's New Jersey Comprehensive Financial System (NJCFS)

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

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

Authorities:
- New Jersey Building Authority
- New Jersey Public Broadcasting

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

- **Department of Military and Veterans Affairs** provided all of their construction and construction-related contract records. Small contracts for construction repairs were obtained from MACS-E.

- **Department of Transportation** provided all of the construction and construction-related contracts related to the transportation industry. Records for all other construction and construction-related contracts were provided by Treasury's Division of Property Management and Construction (DPMC).

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

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

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

Authorities:
- Casino Reinvestment Development Authority
- New Jersey Economic Development Authority[3]/Schools Construction Corporation
- New Jersey Highway Authority/New Jersey Turnpike Authority
- Garden State Parkway
- South Jersey Transportation Authority
- New Jersey Sports and Exposition Authority
- New Jersey Water Supply Authority
- New Jersey Transit Corporation
- New Jersey Housing and Mortgage Finance Authority

B. State Colleges and Universities

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

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

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

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

Colleges and Universities

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

VI. STUDY METHODOLOGY AND STRUCTURE

A. Methodology

The review of *Croson* and related case law provided the legal framework for conducting a disparity study. A legal review is the **first step** in a disparity study. Case law sets the standards for the methodology employed in a disparity study. **Step two** is to collect utilization records and determine the extent to which an agency has used minority, woman-owned, and other businesses to secure its needed services and commodities. Utilization records are also used to determine the geographical area in which companies that have received agency contracts are located. Identification of the agency market area is **step three**. Once the market area is defined, the **fourth step**, the availability analysis**,** identifies businesses willing and able to provide a service or commodity needed by the agency. In the **fifth step**, the utilization and availability analyses are used to determine whether there is disparity or statistically significant underutilization according to industry type. In **step six**, anecdotal analysis, the contemporary experiences of business owners in the agency's market

Disparity Study:
Critical Components

1. **Legal Framework**
2. **Utilization Analysis**
3. **Market Area Analysis**
4. **Availability Analysis**
5. **Disparity Analysis**
6. **Anecdotal Analysis**
7. **Race Neutral Assessment**
8. **Recommendations**

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

B. Study Chapters

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

Volume 1: New Jersey Construction Services Disparity Study

- *Chapter 1*: Legal Analysis presents legal cases applicable to business affirmative action programs and the methodology based on those cases required for the Disparity Study
- *Chapter 2*: Anecdotal Analysis presents the business community's opinions about whether barriers exist in their contracting, or attempts to contract with the State

- *Chapter 3*: Pre-Qualification Analysis describes the pre-qualification requirement set forth by New Jersey Statute § 52:35-2 and the regulations and procedures established by State Agencies and Authorities in compliance with the Statute

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

- Chapter 1: Prime Contractor Utilization Analysis presents the distribution of prime contracts by industry, ethnicity, and gender

- Chapter 2: Subcontractor Utilization Analysis presents the distribution of subcontracts by industry, ethnicity, and gender

- Chapter 3: Market Area Analysis presents the legal basis for geographical market area determination and defines the State's market area

- Chapter 4: Availability Analysis presents the distribution of available businesses in the State's market area

- Chapter 5: Prime Contractor Disparity Analysis presents prime contractor utilization, compared to prime contractor availability, by industry, ethnicity and gender, and whether the comparison is statistically significant

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

- Chapter 7: Disparity Study Recommendations presents best management practices

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

- Chapter 1: Prime Contractor Utilization Analysis presents the distribution of prime contracts by industry, ethnicity, and gender

- *Chapter 2*: Subcontractor Utilization Analysis presents the distribution of subcontracts by industry, ethnicity, and gender

- *Chapter 3:* Market Area Analysis presents the legal basis for geographical market area determination and defines the State's market area

- *Chapter 4*: Availability Analysis presents the distribution of available businesses in the State's market area

- *Chapter 5*: Prime Contractor Disparity Analysis presents prime contractor utilization, compared to prime contractor availability, by industry, ethnicity and gender, and whether the comparison is statistically significant

- *Chapter 6*: Subcontractor Disparity Analysis presents subcontractor utilization, compared to subcontractor availability, by industry, ethnicity and gender, and whether the comparison is statistically significant

- *Chapter 7*: Disparity Study Recommendations presents best management practices

VII. NOTABLE FINDINGS

A. Introduction

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

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

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

B. Disparity Findings

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

Informal Contracts

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

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

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

Formal Contracts

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

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

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5 When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level, or a level of absolute certainty, can never be obtained in statistics. A 95 percent confidence level is considered by the courts to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within 95 percent confidence level.

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

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

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

Subcontracts

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

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

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

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

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

Table 4: Disparity Findings: State Colleges and Universities

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

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

C. Disparity Ratios

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

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

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

- When the ethnic/gender group in question has low availability. For example if availability is 2 percent and utilization is 1 percent, the disparity ratio is a low 0.5, but the difference of only 1 percent is not substantial.

- When the total number of contracts is low. In that case, the presence of disparity may be statistically significant, while the degree of disparity may be a result of random occurrences that play a major role in small samples.

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

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

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

Table 6: Disparity Ratios: State Colleges and Universities

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

D. Anecdotal Findings

In *Croson*, the United States Supreme Court specified the use of anecdotal testimony as a means to determine whether remedial race and gender-conscious relief may be justified in a particular market area.[6] The Court stated that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proofs, lend support to a [local entity's] determination that broader remedial relief [be] justified."[7]

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

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

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6 *Croson*, 488 U.S. at 509.

7 *Id.*

- Agency managers were perceived to have questionable bid and contracting related practices

- Many business owners hoped the State will show leadership and a renewed commitment to implementing its M/WBE Program

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

VIII. RECOMMENDATIONS

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

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

IX. RACE AND GENDER-CONSCIOUS RECOMMENDATIONS

A. Prime Contractor Remedies

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

- Provide incentive credits to statistically underutilized groups on construction-related contracts
- Establish a weighted criterion for the utilization of groups with a disparity in the evaluation of construction-related services statements of qualifications and proposals

- Provide bid discounts to construction bids submitted by the groups with identified disparity

- Provide joint venture incentive credits among the statistically significant underutilized groups

- Establish a Sheltered Market program for all informal contracts to limit competition between firms from the statistically underutilized groups and other firms of comparable capacity

- Document for all contracts the Good Faith Effort of State staff to solicit quotes from statistically significant underutilized groups

B. Subcontractor Remedies

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

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

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

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

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

Table 8: Construction Subcontractor Availability-State Colleges and Universities

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

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

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

- Contract-specific M/WBE subcontracting goals can be established on all construction contracts for racial groups with an identified disparity

- Weighted Good Faith Effort criteria that define and quantify the minimum behavior required to demonstrate an attempt to meet the subcontracting goal should be developed

C. Disadvantaged Business Enterprise Programs

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

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

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

X. RACE AND GENDER-NEUTRAL RECOMMENDATIONS

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

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

- Unbundle large procurement into smaller contracts where feasible to maximize small business participation

- Eliminate pre-qualification standards in all but large and complex projects to provide otherwise capable firms the opportunity to compete for State contracts

- Directly award construction support services contracts, which are normally included within the general contract, as a means to award small contracts

- Evaluate bonding and insurance requirements to ensure that smaller contracts do not carry a disproportionately high level of coverage

- Phase bonding requirements to increase a small firm's access to credit and promote business growth

- Phase retainage requirements to reduce the cash flow burden experienced by small construction subcontractors

- Post quarterly project forecasts on the Internet to provide firms with adequate notice and lead time

- Consider Reducing SBE size standards to enable M/WBEs to compete with similarly situated businesses
- Allow certified M/WBEs to register their interest as subcontractors for State projects via the Internet

- Require prime contractors to list all subcontractors with their bids and proposals to ensure compliance with State standards

- Debrief unsuccessful bidders and proposers to help businesses learn about their areas of strength and weakness and how to create a more successful bid or proposal

- Establish uniform bid and proposal protest procedures to minimize the time and resources needed by all parties to respond to a protest

- Develop an expedited payment program to remove a major barrier to small business participation in public contracting by improving cash flow and to provide additional incentives for businesses to compete for State contracts by establishing the State as a preferred public sector client

- Provide for partial payment of invoices to enable small businesses that contract with the State to maintain a positive cash flow while providing goods or services to the State

- Assess the contract dispute resolution process to ensure it does not unduly disadvantage or burden M/WBEs

- Avoid overly complex or restrictive specifications to minimize the degree of expertise and resources needed to prepare bids

- Develop subcontractor substitution standards so that subcontractors are not removed from a project without due process

- Post prime contractor payments to the internet to allow subcontractors to monitor the progress of their project and to track when the prime contractor receives payment

- Conduct routine post-award contract compliance to ensure that M/WBE goals are met throughout the duration of a contract

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

XI. ADMINISTRATIVE RECOMMENDATIONS

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

A. Organizational Recommendations

- Establish a centralized M/WBE office with adequate staff to assume responsibility for the design, implementation, and operation of the business equity programs

- Provide formal recognition to State staff who comply with program requirements to utilize M/WBEs on informal contract solicitations

- Develop a Statewide M/WBE Program Manual to streamline the contract compliance process and provide one source that is applicable to all State contracting

- Conduct outreach and implement marketing strategies to attract more bidders and proposers and inform them of new requirements

B. Data Management Recommendations

- Track all subcontract bidders electronically on a Statewide basis

- Consistently track all subcontractor payments to ensure appropriate contract compliance and to identify problematic areas in contract compliance and project management

- Code contracts by industry classification in the New Jersey Comprehensive Financial System (NJCFS) to faciliate compliance reporting and aid in producing utilization reports

- Consolidate all payment tracking into the NJCFS to streamline payment monitoring and financial reporting

XII. CONCLUSION

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

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

Volume 1

State of New Jersey

Construction Services Disparity Study 2000 - 2002

LEGAL, ANECDOTAL, AND PRE-QUALIFICATION ANALYSES

Submitted to:
The Disparity Study Commission

Submitted by:
Mason Tillman Associates, Ltd.

October 2005

MASON TILLMAN
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LEGAL ANALYSIS

I. INTRODUCTION

This section discusses the state of the law applicable to affirmative action programs in the area of public contracting. Two United States Supreme Court decisions, *City of Richmond v. J.A. Croson Co.*[1] *(Croson)* and *Adarand v. Pena*[2] *(Adarand)*, raised the standard by which federal courts shall review such programs. In those decisions, the Court announced that the constitutionality of affirmative action programs that employ racial classifications would be subject to "strict scrutiny." An understanding of *Croson*, which applies to state and local governments, is necessary in developing sound Minority-Owned Business Enterprise (MBE) and Woman-Owned Business Enterprise (WBE) programs. Broad notions of equity or general allegations of historical and societal discrimination against minorities are insufficient to meet the requirements of the Equal Protection clause of the Constitution. Instead, governments may adopt race-conscious programs only as a remedy for identified discrimination,[3] and the remedy must impose a minimal burden upon unprotected classes.

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

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

2 *Adarand Constructors, Inc. v. Federico Pena*, 115 S.Ct. 2097 (1995).

3 In 1985, The New Jersey Legislature enacted a 15 percent M/WBE goals program for casinos licensees. When challenged after the Croson decision, the casinos attempted to rely on the State's 1983 disparity study. However, because that study did not specifically examine contracting by the casinos, the U.S. District Court held that there was no factual basis to support an M/WBE goal program for the casinos. *Ass'n for Fairness in Business, Inc. v. N.J. Casino Control Commission*, 82 F.Supp.2d 353 (2000).

A caveat is appropriate here. The review under strict scrutiny is fact-specific. Nevertheless, three post-*Croson* Federal Court of Appeals opinions do provide guidelines for the evidence that should be adduced if race-conscious remedies are put in place. The Third, Eleventh, and Tenth Circuits assessed the disparity studies in question on the merits instead of disposing of the cases on procedural issues.[4]

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

II. STANDARDS OF REVIEW

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

A. Race-Conscious Programs

In *Croson*, the United States Supreme Court affirmed that pursuant to the 14th Amendment, the proper standard of review for state and local race-based programs is strict scrutiny.[5] Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.[6] The Court recognized that a state or local entity may take action, in the form of an MBE Program, to rectify the effects of *identified, systemic racial discrimination* within its jurisdiction.[7] Justice O'Connor, speaking for the majority, articulated various methods of demonstrating discrimination and set forth guidelines for

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

5 *Croson*, 488 U.S. at 493-95.

6 *Id.* at 493.

7 *Croson*, 488 U.S. at 509.

crafting MBE programs so that they are "narrowly tailored" to address systemic racial discrimination.[8] The specific evidentiary requirements are detailed in Section IV.

B. Woman-Owned Business Enterprise Programs

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

Notwithstanding the Supreme Court's failure thus far to rule on a WBE program, the consensus among the Circuit Courts of Appeals is that these programs are subject only to intermediate scrutiny, rather than the more exacting strict scrutiny to which race-conscious programs are subject.[9] Intermediate review requires the governmental entity to demonstrate an "important governmental objective" and a method for achieving this objective which bears a fair and substantial relation to the goal.[10] The Court has also expressed the test as requiring an "exceedingly persuasive justification" for classifications based on gender.[11]

The 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 which are disproportionately burdened.[12]

The Third Circuit, in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia* (*Philadelphia*), ruled in 1993 that the standard of review that governs WBE

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

9 *See e.g., Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *Philadelphia*, 91 F.3d 586 (3d Cir. 1996); *Engineering Contractors Association of South Florida Inc., et al. v. Metropolitan Dade County et al.*, 122 F.3d 895 (11th Cir. 1997). *Concrete Works II*, 321 F.3d at 959, is in accord.

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

11 *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). *See also Michigan Road Builders Ass'n., Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987).

12 *Id.* at 728.

programs is different than the standard imposed upon MBE programs.[13] The Third Circuit held that whereas MBE programs must be "narrowly tailored" to a "compelling state interest," WBE programs must be "substantially related" to "important governmental objectives."[14] An MBE program would only survive constitutional scrutiny by demonstrating a pattern and practice of systemic racial exclusion or discrimination in which a state or local government was an active or passive participant.[15]

The Ninth Circuit in *Associated General Contractors of California v. City and County of San Francisco* (*AGCC I*) held that classifications based on gender require an "exceedingly persuasive justification."[16] The justification is valid only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification, and the classification does not reflect or reinforce archaic and stereotyped notions of the roles and abilities of women.[17]

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

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13 *Philadelphia*, 6 F.3d at 1000-01.

14 *Id.* at 1009.

15 *Id.* at 1002.

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

17 *Id.* at 940.

18 *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1579-1580 (11th Cir. 1994).

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

20 *United States v. Virginia*, 116 S.Ct. 2264 (1996).

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

cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective."[22]

The *Dade County* appellate court noted that, at the time, by articulating the "probative evidence" standard, the Third Circuit in *Philadelphia* was the only federal appellate court that explicitly attempted to clarify the evidentiary requirement applicable to gender-conscious programs.[23] It went on to interpret that standard to mean that "evidence offered in support of a gender preference must not only be 'probative' [but] must also be 'sufficient.'"[24] It also reiterated two principal guidelines of intermediate scrutiny evidentiary analysis: (1) under this test, a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself;[25] and (2) the intermediate scrutiny evidentiary review is not to be directed toward mandating that gender-conscious affirmative action is used only as a "last resort"[26] but instead ensuring that the affirmative action is "a product of analysis rather than a stereotyped reaction based on habit."[27] This determination turns on whether there is evidence of past discrimination in the economic sphere at which the affirmative action program is directed.[28] The court also stated that "a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[29]

C. Local Business Enterprise

The Ninth Circuit Court of Appeals applied the rational basis standard when evaluating LBE programs, holding that a local entity may give a preference to local businesses to address the economic disadvantages those businesses face in doing business within the city or county.[30] In *AGCC I*, a pre-*Croson* case, the City and County of San Francisco conducted a detailed study of the economic disadvantages faced by San Francisco-based businesses versus businesses located outside the City and County boundaries. The study

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22 *Dade County*, 122 F.3d at 908.

23 *Id.* at 909.

24 *Id.*

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

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

27 *Id.* (citing *Philadelphia*, 6 F3d at 1010 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 582-583 (1990)).

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

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

30 *AGCC I*, 813 F.2d at 943.

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

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 that ". . . the city may rationally allocate its own funds to ameliorate disadvantages suffered by local business, particularly where the city itself creates some of the disadvantages."[31]

Federal constitutional issues do not end the inquiry, however. State statutes may impose their own restrictions.

D. Disadvantaged Business Enterprise Programs

In response to the United States Supreme Court's decision in *Adarand*, which applied the strict scrutiny standard to federal programs, the U. S. Department of Transportation (USDOT) revised provisions of its DBE rules. Effective March 1999, the USDOT replaced 49 CFR part 23 of its DBE Program rules, with 49 CFR part 26. The goal of promulgating the new rule was to modify the DBE program so that it would be consistent with the "narrow tailoring" requirement of *Adarand*. The new provisions apply only to the airport, transit, and highway financial assistance programs of the USDOT. See Appendix A for the main components of the Rules.

III. BURDEN OF PROOF

The procedural protocol established by *Croson* imposes an initial burden of proof upon the government to demonstrate that the challenged MBE program is supported by a strong factual predicate, i.e., documented evidence of past discrimination. Notwithstanding this requirement, the plaintiff bears the ultimate burden of proof to persuade the court that the MBE program is unconstitutional. The plaintiff may challenge a government's factual predicate on any of the following grounds:[32]

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

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[31] *Id.* at 943.

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

- controverting data exists.

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

A. Strong Basis in Evidence

Croson requires defendant jurisdictions to produce a "strong basis in evidence" that the objective of the challenged MBE program is to rectify the effects of discrimination.[34] The issue of whether or not the government has produced a strong basis in evidence is a question of law.[35] Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.[36]

The adequacy of the government's evidence is "evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction]."[37] The onus is upon the jurisdiction to provide a factual predicate which is sufficient in scope and precision to demonstrate that contemporaneous discrimination necessitated the adoption of the MBE program.[38] The various factors which must be considered in developing and demonstrating a strong factual predicate in support of MBE programs are discussed in Section IV.

B. Ultimate Burden of Proof

The party challenging an MBE program will bear the ultimate burden of proof throughout the course of the litigation–despite the government's obligation to produce a strong factual predicate to support its program.[39] The plaintiff must persuade the court that the program is constitutionally flawed by challenging the government's factual predicate for the program or by demonstrating that the program is overly broad.

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33 *Croson*, 488 U.S. 469.

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

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

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

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

38 In *Geod Corp. v. State of New Jersey, et al.*, the expert retained by the Plaintiff was known to advance a theory known as a stock and flow analysis, which it offered in other cases as the proper analysis to justify a race-conscious goals program. Plaintiff's expert argued, in other cases, that the stock and flow analysis shifted the burden of the proof to the State. However, decisions such as *Concrete Works II* and *Philadelphia* rejected such an allocation to a defendant jurisdiction. Indeed, a stock and flow analysis would be tantamount to requiring a proper disparity study to examine utilization on a case-by-case basis.

39 *Id.* (citing *Wygant*, 476 U.S. at 277-278).

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)*.[40] She stated that following the production of the factual predicate supporting the program:

> [I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." [41]

In *Philadelphia*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether facts constitute a "strong basis" in evidence.[42] That court wrote that the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered.[43] 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.[44]

The situation differs if the plaintiff's theory is that an agency's conclusions as to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, once the agency comes forward with evidence of facts alleged to justify its conclusions, the plaintiff has the burden of persuading the court that those facts are not accurate. However, the ultimate issue of whether a strong basis in evidence exists is an issue of law, and the burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue.[45]

Concrete Works II made clear that plaintiff's burden is an evidentiary one; it cannot be discharged simply by argument. The court cited its opinion in *Adarand Constructors Inc. v. Slater*, 228 F.3d 1147 (2000): "[g]eneral criticism of disparity studies, as opposed to

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

41 *Id.*

42 *Philadelphia*, 91 F.3d at 597.

43 *Id.*

44 *Id.*

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

particular evidence undermining the reliability of the particular disparity study is of little persuasive value."[46]

The Supreme Court's disposition of plaintiff's petition for *certiorari* strongly supports the conclusion that plaintiff has the burden of proof. Supreme Court review of appellate decisions is discretionary, in that four justices have to agree, so normally little can be inferred from its denial. However, *Concrete Works* is not the typical instance. Justice Scalia concurred in *Croson* that strict scrutiny was required of race-conscious contracting programs. However, his antagonism there, and over the years, to the use of race is clear. Justice Scalia's view is that governmental remedies should be limited to provable individual victims. That view is at the base of his written dissent, on which only Chief Justice Rehnquist joined, to the Court's November 17, 2003 decision not to grant *certiorari* in *Concrete Works.*[47]

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

IV. CROSON EVIDENTIARY FRAMEWORK

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

A. Active or Passive Participation

Croson requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program. However, the local entity

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

47 *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado*, 321 F.3d 950 (10th Cir. 2003), *petition for cert. denied*, (U.S. Nov. 17, 2003) (No. 02-1673) ("*Concrete Works II*").

need not be an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court's strict scrutiny review.[48]

An entity will be considered an "active" participant if the evidence shows that it has created barriers that actively exclude MBEs from its contracting opportunities. In addition to examining the government's contracting record and process, MBEs who have contracted or attempted to contract with that entity can be interviewed to relay their experiences in pursuing contracting opportunities with that entity.[49]

An entity will be considered to be a "passive" participant in private sector discriminatory practices if it has infused tax dollars into that discriminatory industry.[50] The *Croson* Court emphasized a government's ability to passively participate in private sector discrimination with monetary involvement, stating, "[I]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice."[51]

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. In *Concrete Works I*, the Tenth Circuit considered a purely private sector definition of passive discrimination. Since no government funds were involved in the contracts analyzed in the case, the court questioned whether purely private sector discrimination is likely to be a fruitful line of inquiry.[52] On remand, the district court rejected the three disparity studies offered to support the continuation of Denver's M/WBE program because each focused on purely private sector discrimination. Indeed, Denver's focus on purely private sector discrimination may account for what seemed to be a shift by the court away from the standard *Croson* queries of: (1) whether there was a firm basis in the entity's contracting process to conclude that discrimination existed; (2) whether race-neutral remedies would resolve what was found;

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48 *Croson*, 488 U.S. at 509.

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

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

51 *Croson*, 488 U.S. at 492.

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

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

1) whether there was pervasive discrimination throughout the Denver Metropolitan Statistical Area (MSA)
2) were all designated groups equally affected
3) was such discrimination intentional
4) would Denver's use of such firms constitute "passive participation"
5) would the proposed remedy change industry practices
6) was the burden of compliance–which was on white male prime contractors in an intensely competitive, low profit margin business–a fair one.[53]

The court concluded that the City of Denver had not documented a firm basis of identified discrimination derived from the statistics submitted.[54]

However, the Tenth Circuit on appeal of that decision completely rejected the district court's analysis. The district court's queries required Denver to *prove* the existence of discrimination. Moreover, the Tenth Circuit explicitly held that "passive" participation included private sector discrimination in the marketplace. The court, relying on *Shaw v. Hunt*,[55] a post-*Croson* Supreme Court decision, wrote as follows:

> The *Shaw* Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id*. at 910. The City can satisfy this condition by identifying the discrimination "public or private, with some specificity." *Id*. (quoting *Croson*, 488 U.S. at 504 (*emphasis* added)). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." *Id*.[56]

The Tenth Circuit therefore held that the City was correct in its attempt to show that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against M/WBE subcontractors in other private portions of their

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

54 *Id.* at 61.

55 517 U.S. at 519.

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

business."[57] The court emphasized that its reading of *Croson*[58] and its own precedents supported that conclusion. Also, the court pointed out that the plaintiff, which had the burden of proof, failed to introduce controverting evidence and merely *argued* that the private sector was out of bounds and that Denver's data was flawed.[59]

The courts found that the disparities in MBE private sector participation, demonstrated with rate of business formation and lack of access to credit which effected MBEs' ability to expand in order to perform larger contracts, gave Denver a firm basis to conclude that there was actionable private sector discrimination. For technical legal reasons,[60] however, the court did not examine whether the consequent public sector remedy – i.e., one involving a goal requirement on the City of Denver's contracts – was "narrowly tailored." The court took this position despite the plaintiff's contention that the remedy was inseparable from the findings and that the court should have addressed the issue of whether the program was narrowly tailored.

Ten months later, in *Builders Association of Greater Chicago v. City of Chicago*,[61] the question of whether a public sector remedy is "narrowly tailored" when it is based on purely private sector discrimination was at issue. The district court reviewed the remedies derived from private sector practices with a more stringent scrutiny. It found that there was discrimination against minorities in the Chicago construction industry. However, it did not find the City of Chicago's subcontracting goal an appropriate remedy because it was not "narrowly tailored" to address the documented private discrimination due to lack of access to credit for MBEs. The court also criticized the remedy because it was a "rigid numerical quota," and there was no individualized review of MBE beneficiaries, citing Justice O'Connor opinion in *Gratz v. Bollinger*.[62]

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57 Slip opinion, pg. 20.

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

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

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

61 298 F.Supp2d 725 (N.D.Ill. 2003).

62 123 S.Ct, 2411, 2431 (2003). *Croson* requires a showing that there was a strong basis for concluding that there was *discrimination* before a race-conscious remedy can be used in government contracting. In the University of Michigan cases that considered race-conscious admissions programs, a key element in the decisions is the Court acceptance of *diversity* as a constitutionally sufficient ground; it did not require a showing of past *discrimination* against minority applicants. If it had, the basis for a program would have disappeared. Discrimination is the historic concern of the 14th Amendment, while promoting diversity is of recent origin. The Court may have been disposed therefore to apply a more rigorous review of legislation based on diversity. The 14th Amendment's prohibitions are directed against "state action." The private sector behavior of businesses that contract with state and local governments is a conceptual step away from what it does in its public sector transactions. That distinction may lead courts to apply the *Gratz* approach of more searching scrutiny to remedial plans based on private sector contracting.

The question of whether evidence of private sector practices also arose in *Builders Ass'n of Greater Chicago v. County of Cook*.[63] In this case the Seventh Circuit cited *Associated General Contractors of Ohio v. Drabik*[64] in throwing out a 1988 County ordinance under which at least 30 percent of the value of prime contracts were to go to minority subcontractors and at least 10 percent to woman-owned businesses. Appellants argued that evidence of purely private sector discrimination justified a public sector program. However, the court pointed out that the program remedying discrimination in the private sector would necessarily address only private sector participation. In order to justify the public sector remedy, the County would have had to demonstrate that it had been at least a passive participant in the discrimination by showing that it had infused tax dollars into the discriminatory private industry.

B. Systemic Discriminatory Exclusion

Croson clearly established that an entity enacting a business affirmative action program must demonstrate identified, systemic discriminatory exclusion on the basis of race or any other illegitimate criteria (arguably gender).[65] Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.[66] Using appropriate evidence of the entity's active or passive participation in the discrimination, as discussed above, the showing of discriminatory exclusion must cover each racial group to whom a remedy would apply.[67] Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

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63 256 F.3d 642 (7th Cir. 2001).

64 214 F.3d 730 (6th Cir. 2000).

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

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

66 *Id*. at 509.

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

Croson enumerates several ways an entity may establish the requisite factual predicate. First, a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by an entity or by the entity's prime contractors, may support an inference of discriminatory exclusion.[68] In other words, when the relevant statistical pool is used, a showing of gross statistical disparity alone "may constitute prima facie proof of a pattern or practice of discrimination."[69]

The *Croson* Court made clear that both prime and subcontracting data was relevant. The Court observed that "[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures."[70] Subcontracting data is also an important means by which to assess suggested future remedial actions. Since the decision makers are different for the awarding of prime and subcontracts, the remedies for discrimination identified at a prime versus subcontractor level might also be different.

Second, "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[71] Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.[72] Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

In *Coral Construction*, the Ninth Circuit Court of Appeals further elaborated upon the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.[73] 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.[74]

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68 *Id.* at 509.

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

70 *Croson*, 488 U.S. at 502-03.

71 *Id.* at 509.

72 *Id.*

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

74 *Id.*

Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.[75] Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring "the cold numbers convincingly to life."[76]

1. Geographic Market

Croson did not speak directly to how the geographic market is to be determined. In *Coral Construction*, the Court of Appeals held that "an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction."[77] Conversely, in *Concrete Works I*, the Tenth Circuit Court of Appeals specifically approved the Denver MSA as the appropriate market area since 80 percent of the construction contracts were let there.[78]

Read together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. Since *Croson* and its progeny did not provide a bright line rule for local market area, that determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.[79] Extra-jurisdictional evidence may be permitted, where doing so is reasonably related to where the jurisdiction contracts.[80]

2. Current Versus Historical Evidence

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

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75 *Id.*

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

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

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

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

80 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.

On the one hand, *Croson* requires that an MBE program be "narrowly tailored" to remedy current evidence of discrimination.[81] Thus, goals must be set according to the evidence of disparity found. For example, if there is a current disparity between the percentage of an entity's utilization of Hispanic construction contractors and the availability of Hispanic construction contractors in that entity's marketplace, then that entity can set a goal to bridge that disparity.

It is not mandatory to examine a long history of an entity's utilization to assess current evidence of discrimination. In fact, *Croson* indicates that it may be legally fatal to justify an M/WBE program based upon outdated evidence.[82] Therefore, the most recent two or three years of an entity's utilization data would suffice to determine whether a statistical disparity exists between current M/WBE utilization and availability.[83]

Pre-program data regarding an entity's utilization of M/WBEs prior to enacting the M/WBE program may be relevant to assessing the need for the agency to keep such a program intact. A 1992 opinion by Judge Henderson of the U.S. District Court for the Northern District of California, *RGW Construction v. San Francisco Bay Area Rapid Transit District* (*BART*),[84] set forth the possible significance of statistical data during an entity's "pre-program" years. Judge Henderson opined that statistics that provide data on a period when no M/WBE goals were operative are often the most relevant data in evaluating the need for remedial action by an entity. Indeed, "to the extent that the most recent data reflect the impact of operative DBE goals, then such data are not necessarily a reliable basis for concluding that remedial action is no longer warranted."[85] Judge Henderson noted that this is particularly so given the fact that M/WBEs report that they are seldom or never used by a majority prime contractor without M/WBE goals. That this may be the case suggests a possibly fruitful line of inquiry: an examination of whether different programmatic approaches in the same market area led to different outcomes in M/WBE participation. The Tenth Circuit came to the same conclusion in *Concrete Works II*. It is permissible for a study to examine programs where there were no goals.

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

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81 *See Croson*, 488 U.S. at 509-10.

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

83 *See AGCC II*, 950 F.2d 1401 at 1414 (consultant study looked at City's MBE utilization over a one year period).

84 *See* November 25, 1992, Order by Judge Thelton Henderson (on file with Mason Tillman Associates).

85 *Id.*

relevant market. Still, the court agreed with the district court that it was not enough to speculate on what MBE utilization would have been in the absence of the program."[86]

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

3. Statistical Evidence

To determine whether statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the "disparity index," which consists of the percentage of minority (or women) contractor participation in local contracts divided by the percentage of minority (or women) contractor availability or composition in the population of available firms in the local market area.[87] Disparity indexes have been found highly probative evidence of discrimination where they ensure that the "relevant statistical pool" of minority (or women) contractors is being considered.

The Third Circuit Court of Appeals, in *Philadelphia*, ruled that the "relevant statistical pool" includes those businesses that not only exist in the marketplace, but that are qualified and interested in performing the public agency's work. In that case, the Third Circuit rejected a statistical disparity finding where the pool of minority businesses used in comparing utilization to availability were those that were merely licensed to operate in the City of Philadelphia. Merely being licensed to do business with the City does not indicate either a willingness or capability to do work for the City. As such, the Court concluded this particular statistical disparity did not satisfy *Croson*.[88]

Statistical evidence demonstrating a disparity between the utilization and availability of M/WBEs can be shown in more than one way. First, the number of M/WBEs utilized by an entity can be compared to the number of available M/WBEs. This is a strict *Croson* "disparity" formula. A significant statistical disparity between the number of MBEs that an entity utilizes in a given product/service category and the number of available MBEs in

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86 *Dade County*, 122 F.3d at 912.

87 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).

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

the relevant market area specializing in the specified product/service category would give rise to an inference of discriminatory exclusion.

Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between the award of contracts by an entity in the relevant locality/market area to available majority contractors and the award of contracts to M/WBEs. Thus, in *AGCC II*, an independent consultant's study compared the number of available MBE prime contractors in the construction industry in San Francisco with the amount of contract dollars awarded to San Francisco-based MBEs over a one-year period. The study found that available MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-minority counterparts.[89]

Whether a disparity index supports an inference that there is discrimination in the market turns not only on what is being compared, but also on whether any disparity is statistically significant. In *Croson*, Justice O'Connor opined, "[w]here the gross statistical disparities can be shown, they alone, in a proper case, may constitute a *prima facie* proof of a pattern or practice of discrimination."[90] However, the Court has not assessed nor attempted to cast bright lines for determining if a disparity index is sufficient to support an inference of discrimination. Rather, the analysis of the disparity index and the finding of its significance are judged on a case-by-case basis.[91]

Following the dictates of *Croson*, courts may carefully examine whether there is data that shows that M/WBEs are ready, willing, and able to perform.[92] *Concrete Works I* made the same point: capacity–i.e., whether the firm is "able" to perform–is a ripe issue when a disparity study is examined on the merits:

> [Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the market place overstates "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority 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

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

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

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

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

> underutilization than does data that takes into consideration the size of MBEs and WBEs.[93]

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

The Sixth Circuit Court of Appeals, in *Drabik*, concluded that for statistical evidence to meet the legal standard of *Croson*, it must consider the issue of capacity.[94] The State's factual predicate study based its statistical evidence on the percentage of M/WBE businesses in the population. The statistical evidence did not take into account the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.[95] The court reasoned as follows:

> Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. If MBEs comprise 10% of the total number of contracting firms in the State, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.[96]

Further, *Drabik* also pointed out that the State not only relied upon the *wrong type of statistical data* but that the data was more than twenty years old. The appellate opinions in *Philadelphia*[97] and *Dade County*,[98] regarding disparity studies involving public sector contracting, are particularly instructive in defining availability.

First, in *Philadelphia*, the earlier of the two decisions, contractors' associations challenged a city ordinance which created set-asides for minority subcontractors on city public works

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

94 *See Drabik*, 214 F.3d 730. The Court reviewed Ohio's 1980, pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass'n v. Keip*, 1983 U.S. App. LEXIS 24185 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

95 *Id.*

96 *Id.* at 736.

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

98 *Dade County*, 943 F.Supp. 1546.

contracts. Summary judgment was granted for the contractors.[99] 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.[100]

The Third Circuit reviewed the evidence of discrimination in prime contracting and stated that whether it is strong enough to infer discrimination is a "close call" which the court "chose not to make."[101] It was unnecessary to make this determination because the court found that even if there was a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.

When the court looked at subcontracting, it found that a firm basis in evidence did not exist. The only subcontracting evidence presented was a review of a random 25 to 30 percent of project engineer logs on projects over $30,000. The consultant reviewer determined that no MBEs were used during the study period based upon the consultant's recollection regarding whether the owners of the utilized firms were MBEs. The court found this evidence insufficient as a basis for finding that prime contractors in the market were discriminating against subcontractors.[102]

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that "[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE;" and it was a "reasonable choice" under the circumstances to use a list of certified contractors as a source for available firms.[103] Although theoretically it may have been possible to adopt a more refined approach, the court found that using the list of certified contractors was a rational approach to identifying qualified firms.

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

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99 *Philadelphia*, 91 F.3d 586.

100 *Id*.

101 *Id.* at 605.

102 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.

103 *Philadelphia*, 91 F.3d at 603.

may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work."[104]

In addition, the court found that a program certifying MBEs for federal construction projects was a satisfactory measure of capability of MBE firms.[105] In order to qualify for certification, the federal certification program required firms to detail their bonding capacity, size of prior contracts, number of employees, financial integrity, and equipment owned. According to the court, "the process by which the firms were certified [suggests that] those firms were both qualified and willing to participate in public work projects."[106] 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.[107] Therefore, the court was somewhat flexible in evaluating the appropriate method of determining the availability of MBE firms in the statistical analysis of a disparity.

In *Dade County*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program, because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs was taken into account.[108] 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.[109] In addition, a comprehensive count of bidders is dependent on the adequacy of the agencies' record keeping.[110]

The appellate court in *Dade County* did not determine whether the County presented sufficient evidence to justify the M/WBE program. It merely ascertained that the lower court was not clearly erroneous in concluding that the County lacked a strong basis in

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104 *Id*

105 *Id.*

106 *Id.*

107 *Id.*

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

109 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).

110 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).

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

C. Anecdotal Evidence

In *Croson*, Justice O'Connor opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[111] Anecdotal evidence should be gathered to determine if minority contractors are systematically being excluded from contracting opportunities in the relevant market area. As will be discussed below, anecdotal evidence will not suffice standing alone to establish the requisite predicate for a race conscious program. Its great value lies in pointing to remedies that are "narrowly tailored," the second prong of a *Croson* study.

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

- M/WBEs denied contracts despite being the low bidders – *Philadelphia*[112]
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs – *Cone Corporation v. Hillsborough County*[113]
- M/WBEs' inability to obtain contracts for private sector work – *Coral Construction*[114]
- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties – *AGCC* [115]
- Attempts to circumvent M/WBE project goals – *Concrete Works I*[116]

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

112 *Philadelphia*, 6 F.3d at 1002.

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

114 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 Construction*, 941 F.2d 910 at 933 (WBE's affidavit indicated that less than 7 percent of the firm's business came from private contracts and that most of its business resulted from gender-based set-asides).

115 *AGCC II*, 950 F.2d at 1415.

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

- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on an entity's contracts – *AGCC*[117]

Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies, such as outreach to the M/WBE community. Set-asides are at the other end of the spectrum. Race-neutral measures, by definition, are accessible to all segments of the business community regardless of race. They are not intrusive, and in fact, require no evidence of discrimination before implementation. Conversely, race-conscious measures, such as set-asides, fall at the other end of the spectrum and require a larger amount of evidence.[118]

Courts must assess the extent to which relief measures disrupt settled "rights and expectations" when determining the appropriate corrective measures.[119] Presumably, courts would look more favorably upon anecdotal evidence, which supports a less intrusive program than a more intrusive one. For example, if anecdotal accounts related experiences of discrimination in obtaining bonds, they may be sufficient evidence to support a bonding program that assists M/WBEs. However, these accounts would not be evidence of a statistical availability that would justify a racially limited program such as a set-aside.

As noted above, in *Croson*, the Supreme Court found that Richmond's MBE program was unconstitutional because the City lacked proof that race-conscious remedies were justified. However, the Court opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[120]

In part, it was the absence of such evidence that proved lethal to the program. The Supreme Court stated that "[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."[121]

This was not the situation confronting the Ninth Circuit in *Coral Construction.* There, the 700-plus page appellate record contained the affidavits of "at least 57 minority or women

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117 *AGCC II*, 950 F.2d at 1415.

118 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.]").

119 *Wygant*, 476 U.S. at 283.

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

121 *Id.* at 480.

contractors, each of whom complains in varying degree of specificity about discrimination within the local construction industry. These affidavits certainly suggest that ongoing discrimination may be occurring in much of the King County business community."[122]

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."[123] After noting the Supreme Court's reliance on statistical data in Title VII employment discrimination cases and cautioning that statistical data must be carefully used, the Court elaborated on its mistrust of pure anecdotal evidence:

> Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices.[124]

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."[125]

Two other circuit courts also suggested that anecdotal evidence might be dispositive, while rejecting it in the specific case before them. For example, in *Contractors Ass'n*, the Third Circuit Court of Appeals noted that the Philadelphia City Council had "received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination," which the district court had "discounted" because it deemed this evidence to be "impermissible" for consideration under *Croson*.[126] The circuit court disapproved of the district court's actions because in its view the court's rejection of this evidence betrayed the court's role in disposing of a motion for summary judgment.[127] "Yet," the circuit court stated:

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

123 *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).

124 *Id.* at 919.

125 *Id.*

126 *Philadelphia*, 6 F.3d at 1002.

127 *Id.* at 1003.

> given *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, we do not believe this amount of anecdotal evidence is sufficient to satisfy strict scrutiny [quoting *Coral*, supra]. Although anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.[128]

The D.C. Circuit Court echoed the Ninth Circuit's acknowledgment of the rare case in which anecdotal evidence is singularly potent in *O'Donnell Construction v. District of Columbia*.[129] The court found that in the face of conflicting statistical evidence, the anecdotal evidence there was not sufficient:

> It is true that in addition to statistical information, the Committee received testimony from several witnesses attesting to problems they faced as minority contractors. Much of the testimony related to bonding requirements and other structural impediments any firm would have to overcome, no matter what the race of its owners. The more specific testimony about discrimination by white firms could not in itself support an industry-wide remedy [quoting *Coral*]. Anecdotal evidence is most useful as a supplement to strong statistical evidence–which the Council did not produce in this case.[130]

The Eleventh Circuit is also in accord. In applying the "clearly erroneous" standard to its review of the district court's decision in *Dade County*, it commented that "[t]he picture painted by the anecdotal evidence is not a good one."[131] However, it held that this was not the "exceptional case" where, unreinforced by statistics, the anecdotal evidence was enough.[132]

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

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128 *Id.*

129 963 F.2d at 427 (D.C. Cir.1992).

130 *Id.*

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

132 *Id.* at 926.

practices have on market conditions."[133] 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*.[134] There, the court approved a "vast number of individual accounts of discrimination" which included numerous reports of MBEs denied contracts despite being the low bidder; MBEs told they were not qualified although they were later found qualified when evaluated by outside parties; MBEs refused work even after they were awarded the contracts as low bidder; and MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal, the City points to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the city's procurement processes; an "old boy's network" still exists; and racial discrimination is still prevalent within the San Francisco construction industry.[135] 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. The cases suggest that, to be optimally persuasive, anecdotal evidence must satisfy six particular requirements.[136] These requirements are that the accounts:

- are gathered from minority contractors, preferably those that are "qualified"[137]
- concern specific, verifiable instances of discrimination[138]
- involve the actions of governmental officials[139]
- involve events within the relevant jurisdiction's market area[140]

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

134 *AGCC II*, 950 F.2d 1401.

135 *Id.* at 1415.

136 *Philadelphia*, 6 F.3d at 1003. The anecdotal evidence must be "dominant or pervasive."

137 *Philadelphia*, 91 F.3d at 603.

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

139 *Croson*, 488 U.S. at 509.

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

- discuss the harm that the improper conduct has inflicted on the businesses in question[141] and

- collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic[142]

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

Philadelphia makes clear that 14 anecdotal accounts will not suffice.[143] While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type called for above, were insufficient to justify the program in *Coral Construction*. The number of anecdotal accounts relied upon by the district court in approving Denver's M/WBE program in *Concrete Works I* is unclear, but by one count the number might have exceeded 139.[144] It is, of course, a matter of speculation as to how many of these accounts were indispensable to the court's approval of the Denver M/WBE program.

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

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141 *O'Donnell*, 963 F.2d at 427.

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

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

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

V. CONSIDERATION OF RACE-NEUTRAL OPTIONS

A remedial program must address the source of the disadvantage faced by minority or woman-owned businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.[145]

On the other hand, an M/WBE program cannot stand if the sole barrier to minority or woman-owned business participation is a barrier which is faced by all new businesses, regardless of ownership.[146] 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.[147] In other words, if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

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

> The Supreme Court has recently explained that although 'narrow tailoring does not require exhaustion of every conceivable race-neutral alternative' it 'does require serious, good faith consideration of workable race-neutral alternatives that will achieve ... diversity[.]' *Grutter*, 123 S.Ct, at 2344, 2345. The County has failed to show the necessity for the relief it has chosen, and the efficacy of alternative remedies has not been sufficiently explored.[148]

If the barriers appear race-related but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found. If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, M/WBEs also face race discrimination in the awarding of contracts, then a race-conscious program will stand, so long as it also includes race-neutral measures to address the capital and bonding barriers.[149]

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145 *AGCC II*, 950 F.2d at 1404.

146 *Croson*, 488 U.S. at 508.

147 *Id.* at 507.

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

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

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.[150] Instead, an entity must make a serious, good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing low MBE utilization, it is imperative to examine barriers to MBE participation that go beyond "small business problems." The impact on the distribution of contracts of programs that have been implemented to improve MBE utilization should also be measured.

VI. LOCAL IMPACT OF CROSON

During the study period, there were significant changes in New Jersey State contracting. Until 2003, the State of New Jersey had a race-conscious set-aside program.

The "Set-Aside Act," N.J.S.A. 52:32-17, effective October 1, 1984, was established for Small Businesses, Female Businesses, and Minority Businesses. The Act established a program requiring State Agencies with contracting authority to award not less than 15 percent of State contracts to eligible small businesses, 7 percent to eligible minority businesses, and 3 percent to eligible female businesses.

The Act's provisions were amended by the Consent Decree in *Geod Corp. v. State of New Jersey, et al*, dated July 10, 2003. The Consent Decree permanently enjoined the State from enforcing the Set-Aside Act as it related to setting aside contracts for bidding by minority and women-owned firms (M/WBEs), or requiring or permitting the State to establish M/WBE contract goals or targets for the award of State dollars.

Implementing regulations, effective September 2003, created bidding set-asides for only small businesses and eliminated from the Act all references to minority and women-owned businesses, N.J.A.C. 12A: 10-1.2 *et seq.*, and N.J.A.C. 17: 13-1.2 *et seq.* The new regulations also encompassed a subcontracting target program, which laid out procedures to be used by a State agency wanting to establish and administer a subcontracting target program, as it deems appropriate, in lieu of or as a supplement to the set-aside program. *See* N.J.A.C. 12A 10-4.2. Based, in part, on the total dollar amount of a project and the subcontracting opportunities on the project, State agencies were given authority to determine whether or not a specific contract is eligible for the subcontracting target program. After a contract is determined to be eligible for the target program, in order to be deemed responsive, contractors submitting bids must then meet the small business subcontracting targets or prove that a good faith effort was made to do so.

Governor McGreevey's Executive Order #71 dated October 2, 2003, stated "it is reasonable to anticipate that under the new regulations the number of small businesses eligible under

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

the Set-Aside Act will increase because many of the firms formerly certified as minority and women owned businesses qualify and may now register as small businesses." To accommodate for the anticipated increased number of small businesses eligible to participate in the set-aside program, the Executive Order changed the minimum percentage of State contracting dollars awarded from 15 percent in the Set-Aside Act, to a minimum of 25 percent.[151]

A disparity study should examine New Jersey's MBE utilization post-*Geod*, when the State's race-conscious program was suspended. If there are findings of statistically significant underutilization of minority businesses, such facts point to the conclusion that race-neutral approaches do not suffice and that there is a need for race-conscious remedies.

VII. CONCLUSION

The decision of the U.S. Supreme Court in the *Croson* case changed the legal landscape for business affirmative action programs and altered the authority of local governments to institute remedial race-conscious public contracting programs. This chapter has examined what *Croson* and its progeny require of a disparity study if it is to serve as legal justification for a race (and gender)-conscious affirmative action program in New Jersey. Great care must be exercised in determining whether discrimination has been "identified." If it has, race- neutral remedies have to be considered, and any race-conscious remedy must be "narrowly tailored."

VIII. LIST OF CASES

Cases

Adarand Constructors, Inc. v. Federico Pena, 115 S.Ct. 2097 (1995).

Associated General Contractors of America v. City of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996).

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

[151] The N.J. Commerce and Economic Growth Commission's Office of Business Services, and the N.J. Department of Treasury's Division of Purchase and Property, in a statement of the economic impact of the Consent Decree in *Geod* stated: "[t]he economic impact on minority and female businesses whose set-asides for state goods and services contracts are being eliminated, will be limited to independently owned and operated businesses in the State that have no more than 100 full-time employees, and gross revenues that do not exceed $12 million." Otherwise, the regulations "will continue to enhance the competitiveness and diversity of small businesses in both goods and services and construction contracts thus resulting in a positive economic impact."

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

Associated General Contractors of California v. San Francisco Unified School District, 616 F.2d 1381 (9th Cir. 1980).

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Gratz v. Bollinger, 123 S.Ct, 2411 (2003).

Harrison & Burrowes Bridge Constructors, Inc. v. Mario M. Cuomo, 981 F.2d 50 (2nd Cir. 1992).

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Hazelwood School District v. United States, 433 U.S. 299 (1977).

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

High-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal.4th 537 (2000).

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

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League of United Latin American Citizens v. Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976).

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Statutes

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

Appendix A

The main components of the new U.S. Department of Transportation rules are as follows:

1. Meeting Overall Goals

Section 26.51 requires that the "maximum feasible portion" of the overall DBE goal be met through the use of race/gender-neutral mechanisms. To the extent that these means are insufficient to meet overall goals, recipients may use race/gender-conscious mechanisms, such as contract goals. However, contract goals are not required on every USDOT-assisted contract, regardless of whether they were needed to meet overall goals.

If during the year it becomes apparent that the goals will be exceeded, the recipient is to reduce or eliminate the use of goals. Similarly, if it is determined that a goal will not be met, an agency should modify the use of race and gender-neutral and race and gender-conscious measures in order to meet its overall goals.

Set-asides may not be used for DBEs on USDOT contracts subject to part 23 except, "in limited and extreme circumstances when no other method could be reasonably expected to address egregious instances of discrimination."

2. Good Faith Efforts

The new regulation emphasizes that when recipients use contract goals, they must award the contract to a bidder that makes good faith efforts to meet the goal. The contract award cannot be denied if the firm has not attained the goal, but has documented good faith efforts to do so. Recipients must provide administrative reconsideration to a bidder who is denied a contract on the basis of a failure to make good faith efforts.

3. DBE Diversification

Section 26.33 is an effort to diversify the types of work in which DBEs participate, as well as to reduce perceived unfair competitive pressure on non-DBE firms attempting to work in certain fields. This provision requires that if agencies determine there is an over-concentration of DBEs in a certain type of work, they must take appropriate measures to address the issue. Remedies may include incentives, technical assistance, business development programs, and other appropriate measures.

4. Alternative Programs

Section 26.15 allows recipients to obtain a waiver of the provisions of the DBE program requirements if they demonstrate that there are "special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that establish this part."

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ANECDOTAL ANALYSIS

I. INTRODUCTION

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

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

A. Anecdotal Evidence of Active and Passive Participation

Croson authorizes anecdotal inquiries along two lines. The first approach, which investigates active participation, delves into "official" or formal acts of exclusion that are undertaken by representatives of the local government entity. The purpose of this examination is to determine whether the entity has committed acts designed to bar minority and women business owners from opportunities to contract with the jurisdiction.

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1 *Croson*, 488 U.S. at 509.

The second line of inquiry examines not the direct actions of civil servants, but the government's "passive" support of a private system of prime contractors and other entities that use their power and influence to bar minority and woman-owned businesses from benefitting from opportunities originating with the government. This "passive" support includes tolerance of exclusionary conditions that occur in the market area where the government infuses its funds. Under *Croson*, "passive" governmental exclusion results when: 1. Government officials knowingly use public monies to contract with private-sector companies that discriminate against minority and women business owners; or 2. Government officials knowingly fail to take positive steps to prevent discrimination by contractors who receive public funds.[2]

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

This chapter presents anecdotal accounts excerpted from interviews, public testimonies, and written testimonies of New Jersey's M/WBEs and small business enterprises in 2004. The anecdotes provide evidence of both direct and indirect barriers leveled by public agency officials and the business community.

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2 *Croson*, 488 U.S. at 491-93, 509.

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

4 488 U.S. at 509.

B. Anecdotal Methodology

In this study, the method of gathering anecdotal testimony was the oral history interview, in addition to public testimony recorded from four public hearings held throughout the State, and written testimony presented to the Disparity Study Commission. All testimony received from New Jersey's M/WBEs and small business enterprises were considered.

Oral history is defined by the *American Heritage Dictionary* as "historical information obtained in tape-recorded interviews with individuals having firsthand knowledge." This type of in-depth interview has been determined by Mason Tillman Associates to be superior to other forms of gathering anecdotal evidence—the mail or telephone survey, or public hearing testimony—because it affords the researcher a greater opportunity to assess not only the effects of public and private business practices on minority, female, and small businesses but also the means by which those practices occur. It also affords the business owner interviewees a protected setting in which their anonymity can be preserved.

By allowing interviewees to describe in detail and in their own words the barriers they have experienced in conducting business, information can be collected as to how barriers occur, who creates them, and how they affect the development of M/WBEs and small businesses. Thus, the information obtained not only sheds light on the State's previous M/WBE program and its current Small Business Program, but offers vital insights on future program needs and changes.

The interviewees were solicited using the list of available businesses compiled for the Disparity Study. Interviewees were pre-screened to determine whether they operated within the defined market area and were willing to commit to the interview process. A set of screener questions were used to determine if the interviewee had information to share that was specifically related to the State's contracting and procurement practices and to private sector business practices in the market area.

For the in-depth interviews, an extensive set of questions was used to probe all aspects of business development, from start-up to growth issues and to both public and private sector experiences. The in-depth interviews lasted one hour, on average.

Once completed, the interviews and four public hearing testimonies were transcribed and analyzed for patterns and practices, which are assumed to constitute barriers to an open business environment in the State's market area. From this analysis of the transcripts and the written testimony, the anecdotal report was completed. The anecdotal report describes general market conditions, business institutional barriers, prime contractor barriers, and the range of experiences of interviewees in attempting to do business in the State's market generally and with the State specifically.

C. Anecdotal In-Depth Interviewee Profile

Table 2.01 presents a profile of the business owners interviewed using the in-depth interview for this Disparity Study.

Table 2.01 Anecdotal In-Depth Interviewee Profile

Ethnicity	Number
African American	26
Asian American	2
Hispanic American	13
Native American	0
Caucasian	31
Total	72
Gender	**Number**
Male	27
Female	45
Total	72
Industry	**Number**
Construction[5]	46
Construction-Related Professional Services[6]	26
Total	72

During the time-frame for this Study, New Jersey's Set-Aside Act was fully in force. The Act permitted the State to set-aside contracts for bidding by minority and women-owned businesses. As a result of the settlement of Geod v. State of New Jersey, et al., the State's Set-Aside Program for M/WBEs was not in effect after July 11, 2003. While the in-depth interviews were conducted in 2004, the interviewees were asked to distinguish between the two periods. Thus, the following anecdotes pertain to the contracting environment in New Jersey when the State's M/WBE set-aside requirements were still in effect. There will be

5 This industry includes construction, maintenance, trucking, landscaping, and painting businesses.

6 Construction-related professional services include architectural, engineering, environmental, and construction management businesses.

a supplement to this report that will contain the State's M/WBEs and SBEs public contracting experiences after the suspension of the M/WBE set-aside requirement.

II. BUSINESS BARRIERS

A. Barriers Based on Race

Some of the interviewees described instances where they were treated differently or subjected to racial slurs while working on either public or private contracts. This type of stereotyping and prejudgment in the public and private sectors can prevent minority business owners from gaining access to business opportunities. Examples are provided of private and public sector experiences.

An Asian American male construction contractor reported that a State inspector made a racial slur to one of his employees. He also stated that they did not report it fearing repercussions:

> An inspector . . . made a racial slur to one of my employees. I did not report [it] to any[one]. The government has enough rules in place to monitor us and to protect minorities. But it is the people who have to change. I don't know when that is going to happen. Sometimes we don't stand up to what is happening [because] we are scared [of] the consequences. He was the inspector . . . and he was always nasty. My employee asked him for an inspection. He said, 'Maybe you can check it out and let me know.' At that point he made some kind of racial slur. [We] wanted to make a complaint in writing [but] my employee said, 'I'm all right, just let it go. We don't want to rock the boat.'

A Caucasian female owner of a construction-related firm for the past 18 years described two separate incidents when she encountered negative comments regarding women and minority-owned businesses:

> [I attended] a presentation where prime contractors [were encouraged] to [subcontract with] women and minority-owned businesses. An engineer who was vice president of a major engineering firm was on the panel. He [commented] that if it wasn't required of them, they would not hire women or minority-owned businesses. I [don't know if] he realized what a strong statement he was making. I think [it was] out of ignorance.
>
> [Also at the meeting], I heard a complaint about Black subcontractors. It was said that they didn't deserve to be assisted by the minority participation goal contract. [This statement was made] at a public seminar with a lot of

> people standing around. It made me feel very uncomfortable. It was a professional society [meeting].

A Hispanic American male owner of a construction firm reported that he was told by a colleague that he was not aware of any qualified Hispanic American companies in his field:

> It is frustrating but . . . I was told that they didn't know that there were qualified Hispanics doing [this] work. I have been told on several occasions that it is unusual to see minorities in this field.

This Hispanic American female owner of a construction-related company reported that many public agency managers believe that minority firms are only capable of working as subconsultants:

> [Most] public agencies allow us to work as subconsultants but not as a prime consultants because we are a minority firm. [They believe] we need to be monitored and we cannot do work on our own. A lot of engineering companies have been around for a long time, they are well established and these [agencies] go to the same companies over and over again.

A Hispanic American male owner of a construction-related firm reported that his race has impacted his firm both positively and negatively. He also mentioned that derogatory racial remarks have been made in his presence:

> I think [my race has been] a positive impact [on my company because] there are programs that has helped our business. [And a] negative [impact as well] because [some] people [characterize my firm as] a minority business and [assume] that we are not as good as a [majority owned] business. [For example], looking at me and hearing me speak you would not know that I am a minority. I am in a unique situation and I have been with prime consultants or other majority owners that have made racial comments about African American and Latino firms.

A Hispanic American female owner of a construction-related company has also had racial slurs made in her presence:

> The reason I do not [personally experience racism] is because I do not have the physical features of a minority [person]. My mother is Hispanic and my father is Irish, and I favor my father. People really can't tell by looking at me that I actually have a Hispanic heritage. So, I have heard [racially derogatory] conversations in front of me with people [not] knowing that I also was a minority.

This same business owner believes that M/WBEs experience difficulties in obtaining contracting opportunities because of misconceptions regarding the capabilities of these businesses:

> I think that there is a perception that the reason [a company is listed in a] M/WBE [directory] is because they can't compete with people who aren't. I think this is a perception that has nothing to do with the truth. But, sometimes perceptions are stronger than the truth. And, I think there is a general perception that [businesses] that are on M/WBE lists are not as competitive . . . their prices are off, or the quality [of their work] is not as good.

This African American male owner of a construction firm reported an incident where he believes he was treated differently because he was a minority business owner:

> I was working with [a large bank] where I was performing as a labor source for a larger dealership. The only communication I had with the supervisors and the managers from that bank was over the phone. I had to meet with one of the managers in Newark, and when I walked in the door he seemed shocked to find out that I was the owner. We did the [work], but I found out that afternoon that [one of their managers] went to my men, who are Caucasians . . . and said, 'How can you work for this guy?' After that day there was absolutely nothing that my company could do right for them. I had been doing work behind the scenes for a good year or so, and they never had a problem with any of my work. I was a guy behind the scenes making sure everything was getting taken care of. [Now] all of a sudden, there was nothing we could do right. And it wasn't because my crew happened to be people of color, it was because the owner of the company happened to be a person of color.

An African American female owner of a construction firm believes that she had been treated unfairly by manufacturers because of their bias concerning minority business owners:

> Even before checking our credit [a manufacturer for the materials that we buy] said, 'Oh you are a minority business [owner], you will to have to pay up front or provide [a certain] amount [of money] down.' They claimed that they had prior experience with a minority vendor that had not paid them. I have absolutely no idea whether it is true or not but that is what they [told us].

This Asian American male owner of a construction-related firm believes that minority businesses are generally regarded in a negative manner:

> I think there is a perception that minority companies are incapable of doing certain types of jobs. [Specifically], minority companies do not have the structure, resources, capital, or backing to [perform] some assignments. There are some people who think of [minority businesses] as very viable but others think we are not legitimate or capable companies.

An African American male owner of a construction company for more than two decades reported on comments he heard at a State-sponsored hearing for minority contractors:

> We were at a State Senate hearing for minority contractors in [Salem, New Jersey]. [Some] of the White contractors . . . in the room [were] talking about how they cut out black contractors. In fact, there was a big article in the *Jersey Journal* concerning this . . . story. [It mentioned] how they cut us out of the pie. [It was concerning] school construction [projects]. To be honest with you, it's just outright racism. They give the work to the White guy and give the crumbs to the Black guy. That is the way it has been. These guys [will] bring [in] their nephews, sons, daughters, or whatever. They would rather have a white dog than a Black man. Just cold-blooded racism.

An African American male construction contractor believes that minority companies are still viewed as inferior businesses; however, he hopes to dispel those myths:

> If I feel that I am being treated unfairly, I address it immediately. Some of the other companies that are minority companies don't have the resources or the right people to make their voices heard in the right areas. So it becomes more difficult for them to get to a level where they can do business. There are a lot of preconceived notions about minority companies not being able to do the job, not being able to meet their payroll and doing inferior work. I wanted to dispel all those myths and be an example of what a minority company could be and what we could do.

This African American male owner of a construction business stated that his company lost customers after he purchased it from a Caucasian colleague:

> [A project that I worked on as a subcontractor was] doing extremely well, during the time period when the [prime contractor] was a [majority-owned company]. When they needed a subcontractor . . . they called us and we went and [performed] the work. After six or seven months the owner filed for bankruptcy and we were on our own. [When] the customers we

> [acquired] through the [previous] owner found out that the business was ours they fired us.

An African American female owner of a construction-related firm reported that her employees are often treated differently because they work for a minority-owned business:

> A few years ago one of my Caucasian employees told me that, 'we are not being treated well on this project.' And he told me, 'I think it is because you are a minority firm.' Now, he did not quit or anything. He was just making a statement. This guy is a really good guy [and] he did great work. The client loved him. So it wasn't because they did not like him or anything like that. And he's still my employee.

This same business owner described an incident where she believes she may have been unfairly treated because of her race:

> [Several years ago] I went to [an electric company] in the southern part of New Jersey to market quality assurance services because my background was in [business area deleted]. There are very few women in nuclear power and even fewer Black women. In the meeting, some of the men were looking down at the table [or] didn't look at me at all when I was talking. They just sat quietly. I left my information and when I was leaving the room . . . something was dropped in the trash can. [It] seemed heavy enough to be the information that I had left. It sounded like a binder or a report [being put] in the trash can.

A representative from a Caucasian-owned construction firm reported that he witnessed union workers making racist remarks regarding minorities. He also spoke about the different treatment he believes minorities endure while picketing on job sites:

> A lot of [tradesmen from] the union hall did not want to work for a woman [or] an African-American. I have heard union people say, 'I'm not going to work for that Black contractor. No Black is going to supervise me.' I am White and very ashamed of this. It [also] happens to people from India entering the contracting industry. There are Indian engineers, [but] a lot of people won't work for them. I would describe that as blatant racism. It is being perpetuated and it's allowed to flourish.
>
> [On one] private job my people who were Hispanic [American] and Jamaican [were] . . . called 'niggers' and 'spics' when they crossed the picket line. Forget about the common words that are [typically] used, like 'scab' and 'union busters,' the 'nigger' word and the 'spic' word was used quite openly. Now, if the same type of demonstration happened in my town, picketing a supermarket or something like that and the majority of the

> people happened to be Black or Hispanic, and I yelled derogatory remarks like that, I would have been arrested or some kind of authority would have come down and got me for some sort of racism. Yet, this is prevalent on construction [work sites], and nothing is ever done about it.

This same business owner further described racial slurs he heard at a trade seminar:

> I have been in the trades all my life and . . . I hear people at trade seminars and so forth talking openly. I have heard [Caucasian] American tradespeople at bars [making comments]. They did not know who I was because sometimes I dress like a tradesperson, wearing a hard hat, safety glasses, and maybe a plaid flannel shirt. [After] they have had a few drinks and I do not think it's the alcohol talking [but] the alcohol bringing out [their] true feelings, they say, 'you will never catch me being supervised by no nigger.' It is that open. . . . [Or] 'I am not going to have no wetback tell me what to do.' This is a common [sentiment].

A Caucasian male co-owner of a construction company believes that the State's testing procedures for licensed lead removal contractors is discriminatory because the test is only written in English:

> The State of New Jersey refuses to set up a testing program for Spanish-speaking [workers]. We went to the State Board of Health and the Division of Commerce to ask why only English-speaking workers can do this work. That's discrimination. They said they have to learn English before they can do lead removal work which is ridiculous. Unfortunately, [native English speakers] are not doing the work. We don't have any in our group and we haven't for the last 15 years. My crews are either Polish or Portuguese. [Most of them] speak just enough [English] to be able to get the license. The [State] should allow an interpreter into the room to help these guys. It's just a matter of knowing what to do. They should not have to know the laws, the years the laws were [enacted], and what each law is about. They just [need] to know how to do the work safely.

B. Barriers Based on Gender

Female business owners describe instances where they believe their gender negatively affected their ability to work on State contracts. A Caucasian female owner of a construction company believes that men are given more opportunities than female business owners. She described a situation where she was treated differently than her male counterpart:

> Most of my colleagues are men and [they] get bigger breaks than women. They are accepted more in the construction industry. I don't think I have the

> [same] equality that men have. [One] year I had great difficulty with my bonding and I was dealing with a company called [name withheld]. They were supplying most of my jobs for that year, so I couldn't diversify my materials by using four or five different suppliers. So I bought everything from [name withheld] that year. At the end of the year I owed them $200,000. I had to hit my credit line for this money to make sure I paid them back, because they were going after the bonding company.
>
> [However], at the same time this happened to me, the same thing happened to another roofer. A man who had been in business for five years less than me. He owed more money than I owed to [company name withheld]. He told them that he couldn't pay, but that he would pay them as soon as he could. From what I hear the guy is still operating with the same creditors and having a better year, paying [his creditors] back. I paid my people back too. But he had all the breaks. Right off the bat, he was given all the credit that he needed. Where I had to fight for it with everyone. So I think it's a man thing.

A Caucasian male co-owner of a construction firm believes women are still discriminated against in the construction industry:

> My wife runs our office. There's no reason women can't [run a business], but I think there is a lot of prejudice from the males in the construction business and it helps them [continue to] get work. I think [M/WBE programs] are valuable [because those programs] force . . . big general contractors to [work with] women business enterprises.

A Caucasian female owner of a construction-related firm believes that she had a hard time obtaining work because she was female:

> I think a lot of firms did not want to work with women in the engineering field. They didn't trust that I could do a good job. . . . [So], I found it hard to break into the engineering field. It took many years to get where we are now. [I] knocked on doors until I got a chance to [work].

A female owner of a construction-related firm for almost 20 years reported that a male prime contractor refused to pay her because he believed that women should not earn as much money as their male counterparts:

> I was working as a subcontractor [on a State project] and when it came time to get pa[id], the [prime contractor told] me 'no woman [should] make that kind of money.' [We] are in court now and have been for about a year, and I still haven't seen a nickel of that money. For a woman in [this industry] not much [has changed]. I still only know one other woman engineer that

> owns a business. My sister was working at one of the companies I had worked at when she was in school trying to be an engineer, and they made it so difficult for her that she changed careers. They convinced her that she couldn't cut it as an engineer. If she was a man, their whole approach to her would have been different. I talked with people from that company, and they laughed at how they chased her out. Here, 20 years later they are laughing about how they chased her out, and that's a crime.
>
> [Sexism] is still out there, and the bankers are the worst. There is no reason why I should be [experiencing] all of the trouble I'm having with my bank. It's only because I'm female. I can guarantee you if it was my husband calling [the banks], he would not have [had as many] problems. I have a new banker now and I was in a meeting with him, and he said that I am inefficient in managing my money. They are giving me such a hard time and I just don't understand it. I'm convinced that it's nothing but discriminatory behavior.

A Hispanic American female construction contractor believes that her gender has impeded her from gaining access to networking meetings concerning upcoming public contracting opportunities:

> It is harder for me to . . . get a job than it is for a man. It's harder for me to [be a part of] meetings than it would be for a man. I put in bids for a lot of Camden jobs and I have not yet received [any] phone calls.

A Caucasian female construction contractor reported that most women are not taken seriously by their male counterparts in the construction industry:

> Not all men, [but] many men in the construction industry think women . . . are a joke or don't know what they are doing. [They] refuse to talk to [me] or [sit] down [and meet with] me. I have to start from negative 10 to get back to zero before I am even on a level playing field with some of these contractors.

This female owner of a construction-related firm reported that she is occasionally subjected to jokes and derogatory comments about women and minority business owners:

> My field is White-male dominated, and I frequently go to meetings where ninety-nine percent of the people there are White males. Occasionally, there are jokes or they will make remarks about the participation of women and minority-owned businesses.

Another female owner of a construction-related company described in detail the various types of sexual discrimination and harassment she has encountered in the engineering industry:

> I am a petite woman and I get inappropriate comments about what I wear or my hair. It is difficult to walk into a meeting as a professional to do a job when somebody right off the bat [comments on] what I am wearing or makes a sexual comment that everyone thinks is funny. As a woman walking into a boardroom full of men, the majority of men behave themselves. There is always that one or two in a group that have to bring up something inappropriate. I work with a lot of Indian [American] engineers, and an Indian manager for [agency name withheld] made a comment that 'I must not see my children because of this business.' It really was none of his business. His comment meant that he didn't approve of me working because I must not see my children. In his culture women stay home. I get a lot of Indian professionals not approving of women in the workplace or in professional positions. The amount of sexual harassment that I deal with is not worth it. I am stuck with this guy for three years because of my [contract with agency name withheld]. I would love to walk away from that contract because he treats us like crap, but the money is our steady stream and we need it or else we will go under.

C. Barriers Created by the Trade Unions

On July 25, 2002, Assembly Bill No.1926 and Senate Bill No. S-1044 was signed into law (N.J.S.A. 52:38:1) which authorized the use of project labor agreements (PLAs) on certain public works construction projects in New Jersey. According to Assembly Bill 1926 and Senate Bill No. S-1044, a public entity is authorized to include project labor agreements in public work projects if the entity determines that the agreement will promote labor stability and advance the interests of the public entity in cost, efficiency, quality, skilled labor force, safety, and timeliness (N.J.S.A. 52:38:3).

Additionally, the law allows contractors and subcontractors to retain a percentage of their current workforce on projects that require project labor agreements (N.J.S.A. 52:38:4). However, the interpretation of this portion of the law has seemed to cause considerable confusion among the interviewees.

Most of the interviewees expressed their discontent with project labor agreements; specifically noting that the law restricts competitive bidding and favors union contractors. Some believe that it will eventually exclude non-union contractors from working on construction projects in the State of New Jersey.

A Caucasian male representative of a woman-owned construction company reported on what he feels are unfair contradictions concerning project labor agreements and non-union contractors:

> The State of New Jersey [requires] a $300 registration fee for the right to work on public works projects. [Now] the Governor instituted project labor agreements preventing non-union contractors from working on [public works projects]. However, if a non-union contractor [is awarded a contract], he has to hire union [workers] but his employees are not permitted to work on the job. Also, a union contractor can hire a non-union contractor, [but] a non-union contractor has to hire a union employee. [This] does not make sense to me.

A Caucasian male owner of a construction company believes that it is unfair that big union contractors are allowed to utilize non-union subcontractors when bidding on State projects:

> The big union contractors that bid with the State are using a lot of non-union subcontractors. This impacts us considerably because we cannot compete on a union level with a non-union subcontractor. A non-union subcontractor does not have to pay time and a half on Saturdays and double time on Sundays. They do not have [the burden of] a whole crew at a high wage. They can use kids to work or guys off the street. In our area there are a lot of illegal immigrants at the train station. You can go there and pick them up for work. As a non-union contractor, I can't do that. I have to use union personnel only on my projects. They pay these [non-union subcontractors] cash, $5.00 or $10.00 an hour. This really has impacted our business. There is a prevailing wage stipulation which is basically the union wage. But it is badly abused. People are submitting certified payrolls that are either falsified, or if they work 12 hours the certified payroll only shows eight [hours].

A Hispanic American male owner of a construction firm reported on what he believes were discriminatory practices by the unions in the State of New Jersey:

> Since I was a young man, I could not be a union member because the union did not accept people like me. And I can say without any [doubt] that when the Salem Nuclear Power Plants were being built, I was the only one rejected from entering the union. You had to be a union member to work there. [Recently, I was scheduled to work] at the school district in Gloucester, New Jersey, along with several people who were non-union contractors but were from Gloucester City. [However], we all got pushed off the job because the contractor who had the contract had to use union labor or give up the contract.

An African American male owner of a construction firm explained why he is against project labor agreements:

> Up until the implementation of project labor agreements in New Jersey, I really did not know what it was like to be discriminated against. As a contractor, I feel that [the agreement] was the most discriminatory thing that the State has ever done. Most . . . minority or women-owned businesses are going to be unable to participate in school projects that are in excess of $5 million unless they sign a project labor agreement. If they enter into these agreements, they [may not be able] to bring in their people.

According to this Caucasian construction contractor, the State only accepts bids for foundation pile driving from union contractors. The business owner reported on how this practice has negatively impacted his company:

> We have been excluded from doing foundation pile driving work with regard to any new school construction in the State of New Jersey. Now those jobs must be union. New Jersey was a right-to-work state. Now our rights as non-union contractors have been taken away from us. We are not allowed to work on these jobs. Any government job over $5 million must be union. So, when a bid has foundation pile work as part of a $5 million job, we are not allowed to do [the work] as a subcontractor. [Previously], our work consisted of approximately 90 to 95 percent of foundation pile driving for schools in this area. We also did a lot of pile driving work for municipalities when they were [renovating] municipal buildings or public works buildings.
>
> Recently, we were shut out of the bidding [process] for a City building in New Jersey. That went out for bid last week, and we could not bid the pile driving. All of the non-union contractors that we have spoken with are quite upset and concerned about having their rights taken away.

This Caucasian owner of a construction firm reported that the firm will be negatively affected if the Governor's proposal to limit school construction projects to union contractors is implemented:

> We are non-union and we specialize in school [construction projects]. We have already been affected by the [governor's proposal]. If he follows through with [requiring] that school [projects] be [performed by] union [contractors], we will be out of business [because] that is our main work. Union-only [jobs] will cut me out right away. I will have no opportunity to even bid. It's supposed to be a system where everybody has a chance to bid. That's why it's low bid, not union only. We are qualified with the State. We have to go through the same qualifications [as union contractors], but we can't bid because we are not union. That is pretty unfair.

A Caucasian owner of a construction firm also reported on the kind of impact the firm will suffer regarding the Governor's proposal:

> If [the Governor's proposal passes], it will take away 70 percent of my work. That will mean that my twenty employees will have to go union, or I will have to close my shop. It is very serious. I have been in business over thirty years, and I have never had a bond called. My employees have been with me from five to thirty years. But, if this happens and we have to go union, we are going to be in trouble. To be elected, [the Governor received] money from the unions.

An African American male construction business owner reported that the State's project labor agreements have negatively impacted minority firms because they do not have good relationships with the unions:

> I think that we were getting a bunch of lip service, and I have said this to the Governor. Basically, any job over $5 million within the State of New Jersey falls under the auspices of a labor agreement. The project labor agreements do not [require that] the project be [performed by a] union [contractor], but the unions are the only ones that qualify for the labor agreements. Historically, unions have not been minority friendly. So it's sort of a slap in the face. [Now] we are [conducting] a diversity study. They should have done the diversity study prior to implementing these labor agreements. My personal feeling is that the Governor is doing this diversity study as a way to get his opponents off his back. But, I think the [Governor] has already made a statement loud and clear where he stands with this.

An African American male owner of a construction company for 20 years believes that some prime contractors use their affiliations with the unions to deny minority contractors subcontracting work:

> We were recommended to do subcontracting work on a new middle school in Jersey City. I contacted the prime contractor and he contacted the subcontractor, which was [company name withheld]. I talked to [company name withheld] and the first thing he [asked] me was, 'Are you union?' I told him no. I told him that [should not matter] because we pay union wage to scale so we should be able to work on the job. He informed me that he would not [work with me because] he had a contract with the unions [where he promised only to] use union labor. I know for a fact that as long as you pay union wages a contractor can give you a subcontract. That is just one example of what they use to keep us out of mainstream projects.

An African American male construction business owner reported that the unions create problems for his company:

> [Some labor unions] can create a lot of problems by not sending the proper personnel or they [send] us the bottom-of-the-barrel workers, which are those who have not worked in months. [They will] give [us] inferior workers, [who] take more time to [complete the project] which costs us more money. There is not a [State] requirement to use [union personnel]. But if we do not use them on government jobs, [the unions] harasses [us] and make it very difficult to do business and to work on State projects.

A Caucasian female owner of a construction company reported that some prime contractors will ask for quotes requiring prevailing wages in order to make sure union workers are used on the job:

> [Some prime contractors will ask for] a quote that [requires] prevailing wages. Basically, they really want union men on the job. On a school [project] last summer we were lucky because we sent union men to work on the project. For us, [meeting the] prevailing wage [means using] our union men. Prevailing wages are very high as far as a hourly rate. So, it is the equivalent of our union men. [When] we showed up at the school [job site] there were union officials [there] asking to card our guys. And not just our guys [but] all the [workers]. I [felt] that was pretty [gutsy] because I thought school [projects] were prevailing wage, not union.

A Caucasian male owner of a construction company for 40 years reported that even though his work force is 40 percent minority, he is unable to use these workers on State and Federal jobs because of prevailing wage requirements:

> Forty percent of our employees are minorities. Our work force [includes] Blacks, Hispanics, and [Asians]. [But] we cannot do the prevailing wage work with [our employees] because there is no [classification] in the prevailing wage statute for a 'helper' or 'on-the-job trainee.' Since our work force [includes] people who are not in an approved apprenticeship program, they cannot work on a federal or State job unless they get paid a full mechanic's salary. I do have a few employees that are mechanics, but most of them are in the process of training. So, if I put them on a State job I have to pay them a full mechanic's wage. It does not make economic sense to put someone on a job and pay him a full mechanic's wage, when he is a helper or has a training status. We lose money.

This same Caucasian male business owner believes that unions use prevailing wage requirements to discriminate against minority workers because most apprenticeship programs are controlled by unions:

> The crux of the real problem is that minorities are shut out in this State because of the classification of workers in the prevailing wage statute. There is no helper or on-the-job training classification. But, when you look at the apprenticeship programs, they are all controlled by unions. And when you look to the union for minority [workers], they have very few. Less than five percent of the apprenticeship [programs] in all the building trades in New Jersey have minorities. The only trade that has more than five percent is the laborer's affiliation. The other trades such as electrical, carpentry, mechanical, and plumbing have a less than five percent minority [participation]. So State or Federal contract work is [comprised of] union people, using Caucasian [workers]. We chose not to do prevailing [wage] state work. We choose not to because if we can't [use] our work force freely the way we want to, then we can't do [that type of work]. There are too many restrictions with the State. The prevailing wage [requirements] are not written to create fair wages but are used as [tools] to discriminate. That's the only reason it is on the books. They want to discriminate, and this law allows them to discriminate. If you search the records on prevailing wage, you will learn that when Congress passed the law in 1932, it was passed for one reason: to exclude Blacks from working on jobs. And it still prevails that way. Many people don't understand the prevailing wage law, and they have been hoodwinked to believe that this law is [meant] to create a liveable wage. That is the premise that most people [believe, but] it's only there to discriminate.

This same business owner has been subjected to audits because his firm has been repeatedly reported to the Labor Department for supposedly not paying the prevailing wage:

> When we walk onto a job with minority [workers], it is [assumed] that we are not paying them the prevailing wage. So the Labor Department is often called [and a complaint is filed]. The next day, there will be a man from the Department of Labor on the job questioning my people as to whether they are being paid the prevailing wage. Then immediately after that, they want to see our payroll records and [subject us to] audits. There have been cases where they audited [my company] and found that I owed $100 or something because of a minor discrepancy in the way the books were done. For the smallest mathematical error, we are still in violation. The people that I send on [these jobs] are mechanics. They are minority mechanics. I do not send trainees on a prevailing wage job, because I would have to pay them the full wage.

Another Caucasian male construction business owner for the past 16 years believes that unions use the prevailing wage requirements to ensure that union workers are being utilized on State projects:

> Generally speaking, unions use a strong arm approach. I can't bid on a union project because if the other trades on that job are union and I bring in my non-union guys, they will shut the job down. I choose not to be affiliated with them, so I just don't do that type of work. The prevailing wage [requirements] cost the State and its taxpayers far too much money. They [implemented the prevailing wages] to appease union bosses. Then they flip it around and say that the State is guaranteed quality workmanship by hiring union [workers]. I have heard stories about [unions] strong-arming non-union [workers] because the State does not require union workers, you just have to pay the prevailing wage. But the [unions] come in and try to steal away workers and try to get them to sign up with them.

This same business owner explained why he believes the prevailing wage requirement makes it difficult for him to be the lowest bidder:

> The prevailing wage for a painter is probably $33 an hour, plus benefits. So I usually figure my costs at about $44 an hour. [When] you add in insurance and [all the] overhead it brings it up to the $50 an hour range. So when I price a job and I use that rate, there is no way I can win because someone else is going to be pricing [the project] at a standard rate knowing that they will probably be able to get away with not paying the prevailing wage.

A Caucasian male construction business owner believes that unions are allowed an advantage in the bidding process:

> This is the problem and it happens every day in the State of New Jersey. I bid [on] a project and they reject the bid for whatever reason. Now, the union knows exactly what it has to spend to get its contractor underneath our bid. In the past five years we have lost $20 million worth of projects in the State of New Jersey to this practice. And it's an unfair practice and should not be permissible. I went to the Attorney General's office and met with two investigators [who] told me they would look into the matter. It then got assigned to an Assistant Attorney General and [eventually] was squashed. In Atlantic County, we had three bids rejected [because they] said we were over the established budget for the electrical portion of work. [They] rebid the project and awarded the contract to a union contractor [who] was still $400,000 over the budget. But they rejected our responsive bid by saying that [we were over budget]. It's is an extremely unfair process and it is practiced throughout the State of New Jersey.

This same business owner reported on another practice he believes the union utilizes to unfairly win State projects:

> I [also] believe it's collusion, meaning that [when] I bid on the job against three union contractors, the school district is basically in bed with the unions. So [they] take my bid, reject [it], and rebid the project. The union then comes up with $100,000 to give to the other union contractors. And whichever one of those contractors [are the lowest] . . . gets the $100,000 and then deducts [that amount] from their bid and I'm out. No one is giving us $100,000. To me that's bid rigging. And it's not fair to pay the prevailing wage rate and then ask your people to give you a dollar back to put into a fund. In essence, they are really not paying the prevailing wage rate. But the New Jersey Department of Labor is in bed with the unions. We get audited on every job. Every job we do in the State, the New Jersey Labor Department comes down and audits my records. Mainly, because the union says we're not paying the rate. And not one time have they found any discrepancies in our payroll. But it's the process that they use to make things difficult. I can't take $100,000 out of my bid to win a project without going bankrupt. I tighten up as tight as I can and resubmit the bid. The union knows how much money they can spend [by] that time to be the successful low bidder. It's a clear-cut issue that it is collusion. The union is gradually putting as many of their members in the school district on the school boards to vote these things in. They voted for the project labor agreements. They make decisions in the union contractors' best interests. The bottom line is simple, either my company goes union and abides by their laws, or they are going to put me out of business. That is their goal, no compromise.

In addition, this same business owner also believes that project labor agreements exclude non-union contractors from working on State projects:

> Any municipality or school district is allowed to put a project labor agreement in their bidding document. [This] excludes non-union contractors who are qualified by the New Jersey Schools Construction Corporation. It restricts them from bidding unless they use union labor. This is a totally unfair process. I'm qualified to bid for the work but I can't bid because I choose not to use union labor. It increases the cost of the project to the taxpayer. And, it definitely restricts fair competitive bidding. I am a small business enterprise and to me that is discrimination [against small businesses].

This Caucasian male representative of a construction company reported on the effect of project labor agreements on his company as well as minority firms:

> [Previously], the minority contractors had to pay the prevailing wage, because that was required. But they were able to pay that and pay into the benefit portion. They paid their own people [and] the benefit portion was not paid to a union hall. So, they were more flexible in their pricing. And they knew how their people worked, so they knew they could get a good day's worth of work. They [also] knew how to bid and consequently their pricing was much lower. We had to go to the union hall to get people [whose] work ethic was not as good. They threw a lot of people on the job and added [workers] that were not necessary. They bidded much higher and our pricing increased to absorb [their higher prices]. In turn we passed the pricing onto the State.
>
> [Now] if I put a minority contractor on the job and he or she is non-union, I might have pickets on the job. They might target that minority contractor and start picketing him and try to force that contractor into a union agreement. In fact, I know of several minority contractors that were practically forced out of business. [Or] the only reason they were able to stay in business was that they signed a union contract to get [workers] from the union hall. But that means they had to lay off the minority people that they had working for them. When they signed the union agreement and [received] people [from] the trade world, the trade world didn't particularly like them, because they were non-union to start. So, they were never given the best people. In fact, they would give them the worst people out of the hall. So these poor minority contractors, not only were [they] saddled with higher costs per hour, but they had to pay union benefits and were also saddled with people who weren't working efficiently.

Finally, this same Caucasian male business representative described an incident where he believes his company was unfairly reported to the Labor Department by a union contractor:

> A union contractor did not win [a State project] and we did, but we were doing work in 'his territory.' He didn't like that so he came to visit our job site to talk with us. He wanted to know how many people were on the job and who was doing what. He talked with one of our supervisors in a hard hat area. He came onto a hard hat site wearing a suit and tie. Basically, he wasn't even in compliance with OSHA. But OSHA was called on us and they came out and filed a report that there was imminent danger . . . on a job site. So, [when the union contractor] came to the job site and talked with [our workers], . . . within a day or so OSHA was called. The investigation proved to be unfounded, because there was no imminent danger.

III. BARRIERS CREATED BY THE STATE

A. Barriers Created by Public Agency Managers

Public agency managers are charged with the responsibility of managing programs to aid minority and women business owners in building and maintaining their businesses. Many business owners believe that most of these managers have succeeded in their efforts to increase the participation of minority and woman businesses on public contracts. However, they believe that the practices of some Agency managers have created barriers for minority and women-owned businesses.

A Hispanic American female owner of a construction company in business for almost 20 years described her frustration in working with one of the State's project management consultants. According to this business owner, the management firm had a high turnover of project managers:

> The gentleman that was the original [manager] on the project lasted about three months. Then about four or five different people took over my project. They each had to start from scratch and over time they started finding problems with requisitions that I had submitted. So they had to go back and revise what the first [manager] did. They were changing [managers] constantly. Two weeks ago, I was again promised that my requisition had gone out. So, I [submitted] a letter to the State of New Jersey asking them for assistance. I'm not even going to bother with [management company name withheld] any longer. I'm going to [submit] a formal complaint to the EDA.

This Caucasian female owner of a construction company believes that the State could do a better job managing their projects. She believes that the State's management consultants are not fully aware of what the needs of the projects are:

> [The State should] hire more in-house [managers] to oversee their [projects]. The [State] is a giant, bumbling machine that is too cumbersome. The State could do a much better job. The State knows what it needs, the [management consultants] do not. The [consultants] are all out making names for themselves.

An African American male construction business owner believes his company was treated differently than other firms on a school construction project:

> Every school project had issues [supplying] doors because of the push to get the schools [completed] by September. So, everyone was trying to get

> doors. There are a select number of door manufacturers and [they all] were late [meeting their shipping deadlines]. We were berated in meetings [and threatened] with the [assessment] of liquidated damages. We did whatever we had to, [such as] pay overnight shipping to get the doors in [quicker]. We had a construction management team that consisted of a majority firm and a minority firm. And typically the majority firm was heading this particular issue and we were the prime [contractors] on the job. And they were basically berating my people about the delays in the doors when everybody was [experiencing the same] delays.

This same business owner also believes that some project management consultants scrutinized his firm and other minority firms to meet unrealistic deadlines imposed by certain State agencies:

> I found that a lot of the project management firms have been holding myself and other minority firms under high scrutiny. I think this happens because some of the projects have unrealistic completion dates, and they are playing the 'cover their tail' game in order to maintain the schedules. I think the project managers are not operating in good faith when negotiating changes that realistically should be considered as a change of scope.

An African American male owner of a construction company complained to the State Department of Transportation regarding the misbehavior of one of his project managers:

> [Some managers] try to make it difficult for us to do our work. [They] really don't want us to complete it. A manager with the [New Jersey State Department of Transportation] made it difficult for [my workers]. Every time he came out [to the site] he told them they had not done anything. When I [went to] check on them I [found] that they did [complete some tasks]. But he always made it difficult for me. I complained to his boss, and they took him off [the project]. I have not seen him again.

B. Agencies Failure to Monitor its Projects

A governmental entity must provide the resources and staff to effectively monitor its projects. This supervision should span the entire process from pre-bid activities, bidding, selection, award, to the contract compliance process.

A Caucasian male co-owner of a construction company reported that some contractors prefer to work on State projects that are managed by agency managers instead of consultants, because they are not as strict when monitoring their projects:

> We are inspected by New Jersey DOT personnel or by consultants. If you get a consultant they are tough. They will follow the specifications to the

> ‘T.’ But if you get a DOT employee inspector, things are totally different. They have a tendency to let things slide, and they do not pay much attention [to the State’s projects]. They are hourly wage people, and they don’t really care. [Many business owners] look for jobs that are DOT-inspected and avoid the ones that have consultants for that reason. For example, there should be three coats of paint applied to a [building structure]. I [know of] a [State] project that was being [performed by another contractor] 15 minutes from my shop. When I [would go] by in the morning they were sandblasting the [building]. When I came back [later that day] they were finished and the guys were gone. They applied one [coat]. That [contractor] could do the work cheaper because they can get away with poor quality work. The [State] needs to police their jobs better.

This same Caucasian male business owner also believes that DOT inspectors and management consultants do not verify the accuracy of the certified payroll reports submitted by prime contractors:

> They should also check with employees and find out what they are actually being paid. Anyone can make up a certified payroll and turn it in as gospel. I don’t think the consultants or the resident engineers are checking how many hours an employee is actually working. I never had [State inspectors come] on my job [site].

A Hispanic American owner of a construction firm stated that while he worked on two State projects, the prime contractors made excessive change orders and mistakes, but the State’s managers failed to intervene:

> I have worked on [two jobs] for engineering firms from New York and from Pennsylvania. Neither [company] has a residence in the State of New Jersey or pay taxes to the State of New Jersey. There were excessive change orders and mistakes made on both projects. The end result is that the taxpayers will pay for it. Yet neither one of these engineering firms are being held liable for it. They don't pay taxes in the State, and they did not do the job right, what do they care. They are getting a check whether or not they do the job right. I have [attended] meetings to discuss [these issues]. I threatened to go to the newspapers two or three times. This policy has got to change. These engineers are getting away with murder in our industry.

This Hispanic American female owner of a construction-related firm also believes that the State does not adequately monitor its prime contractors:

> I don’t think the [State] does any monitoring, and the firms do whatever . . . they want.

An African American male construction contractor also believes that stricter monitoring standards should be implemented by the State:

> [There should be] mandatory adherence to the [business enterprise] goals that are initially set. [There is] no accountability.

IV. BARRIERS CREATED BY THE CONTRACTOR COMMUNITY

A. Difficulty Breaking into the Contracting Network

Both new and established minority and woman business owners report difficulties breaking into the contracting network. Even though some business owners have been in operation for more than 20 years, they are still excluded from job opportunities because they are not included in the social and business networks with those in positions of power in their respective fields. In particular, many interviewees reported on their inability to obtain contracting opportunities on the State's school construction projects.

An African American male construction contractor spoke of the difficulty small businesses have in trying to obtain work on school construction projects in the State of New Jersey:

> We didn't seek a lot of work with the State [but] sought some [work for] school construction projects in 2003. The State has always been a hard entity to crack. They seem to always have the same players over and over again. [As for the State's] affirmative action [requirements] there was never any substantial [work] for minorities to go after. [The] bottom line is [we received] the crumbs off of the table. They had horse-and-pony shows, which included opportunity meetings to learn how to get work within the school systems. But, there were three or four contractors in the City of Camden who were getting all the work. It seemed like it was on a rotating basis. One guy would get the first job, the second guy would get the next job, the third guy the next job, and then they'd start all over again. Also, a lot of the [pre]qualifications [that are required to] get into the game are excluding and precluding a lot of minority firms.

This Caucasian female owner of a construction firm also expressed her frustration in trying to obtain school construction work in New Jersey:

> [My colleagues] have the same frustration. [We] tried to learn how to become eligible for work [within the State]. For example, we have been told that there is $9 billion in school construction work that is happening

> throughout the State. That is a humongous number. We are definitely qualified to do that work, but how do you become eligible to learn [about] the projects? I [have] gone to the seminars where they throw you packets of information that got [me] more confused. So who is being awarded this $9 billion [worth of] school work? We are educated people who have the credentials and the qualifications, and we [still] do not know how to get a little piece of the pie.

This Hispanic American female owner of a construction-related firm also expressed her frustration in trying to obtain work on some of the State's school construction projects:

> I have had discussions with major public agencies in the New Jersey/New York area where I said, 'You have [school construction] projects that we have proposed on as a prime consultant. You have seen our work as a subconsultant and you know we do great work. But you won't let us [work as] prime [consultants on your] projects. How come?' [They responded], 'We have a comfort level with the big guys.' But, as a smaller firm we can do the job better, faster, and cheaper. There seems to be a glass ceiling for subconsultants. They want to throw us crumbs. They [say they] want to help our business grow but then they leave us hanging out to dry. How many more times do we have to go through this dog and pony show? And it's not cheap to put together a technical proposal and a presentation for each of these schools that they are promising [contracting opportunities]. We are always a bridesmaid, never the bride. I know a lot of firms have dropped out of the program because they're not willing to deal with this anymore.

This same business owner described a situation where her company's score was changed on a proposal for what she believes were political reasons:

> It seems like you actually need a politician behind you to put a bug in the ear [of the right person]. Because it seems like the big guys get all the work, [and] they seem to support the politicians [that] are handling the real big contracts. We had an interesting situation occur with us [regarding] the Schools' Construction Program. We were up for a job where everyone said, 'You are going to get this job.' We put together a superior proposal and presentation. We managed to get a conference, but we did not get the job [because] they changed [our] scores. Someone called a politician and said, 'We want this job.' I have a memo that [substantiates] this. I don't know how we got a copy of it. But it is a very damaging memo that says, 'Please change this score and award the contract to this other firm.'

This African American male owner of a construction-related business reported that he has never received any public sector work, even though he has tried since 1993:

> [I believed that] there [would be] opportunities for minority firms to do business with public and project entities, [mainly], because there were not a lot of [minority businesses] in my industry. I felt this could be a niche that I could fill. But in reality I found there were very few opportunities. Most of the companies wanted to just work with the same people they had been working with all along. And I [believe] that they [are] just doing this study to satisfy whatever criteria they need to show that they made a good faith effort. As a matter of fact, I have never [received] any [work] from the public sector and this has been since 1993.

This Caucasian male owner of a construction-related firm explained why he no longer seeks work for the State's school construction projects:

> But, as far as I'm concerned, the program for school construction is badly run, and they are not encouraging small contractors or construction managers to work for them. They have no incentives. [I have] attended three or four meetings regarding school construction [projects] where they have stated that they encourage participation by minority and small business, [but] it is all lip service. If you are a small contractor, you don't have a large net worth. They told me that I should restructure the way I ran my business so that I could accommodate them and come back and reapply. I chose not to go through another seven months of submitting information to pre-qualify with them. I have not gone back. I am doing work for county and municipal agencies.

An African American male construction contractor reported that he was denied access to a networking meeting concerning school construction projects in the State:

> The [New Jersey] networks are really close knit. [There are] a lot of political issues to deal with. I paid my membership to the New Jersey Schools Construction Agency. But when I [went to one of their meetings] I could not even get inside. In fact, [I could not get] my money back [when they did not allow me] to attend. They told me that I couldn't get in. I showed them my receipt, but they did not have my name on the register. I believe it was due to the size of my company. The organization [is comprised of] national [businesses] that come into the State of New Jersey and take advantage of their programs. I guess we were not big enough to be a winning kind of firm. I believe [we were excluded] because the State of New Jersey does not mandate nor adhere to any policies. They change them or they water them down.

An African American male owner of a construction-related firm reported that his networking efforts did not make it any easier for him to break into the contracting industry:

> I started going to meetings that were hosted by [senator name withheld] every Saturday for [minority businesses] to meet big name [prime contractors]. None of those meetings never [resulted] in minorities [receiving] consulting, architectural, or engineering [projects]. We were referred to as the blue collar workers— bricklayers, sheet rock men, and metal guys. The State of New Jersey only has one African-American architect, whose name is [company name withheld], and he is [located in] Princeton, New Jersey. I went to [another] meeting for small and minority contractors where [agency managers] come and glorify themselves by shaking hands and meeting [business owners]. [They asked for] my resume. I never heard from any of them including the New Jersey School [Board], Newark School Board, or the Transit Authority. I wrote nice letters [but] I never got anything.

An African American male construction contractor reported that he had to work exclusively in the private sector because he never received any work from the State:

> I was never able to acquire any State work. Even [after] going through the M/WBE [program], it just never happened. [It was] too time-consuming and I had to live. So I went into the private industry to find work. At the time the [State] was proposing to rebuild a lot of schools. The larger contractors were obviously getting the contracts [over] the small contractors. I think the jobs were taken before we even had an opportunity to bid on them.

An African American female owner of a construction firm for the past 13 years also believes that very few minority and small business owners are given the opportunity to work on construction projects in the State of New Jersey:

> If you go on the construction job sites, you can look around and see right in front of your face how many of those jobs went to small and minority-owned firms. It's a tragedy in a way because of all the school construction [work] coming up with the EDA. My point is that New Jersey has not really [invested] into assisting small businesses so that when they go on a project they have a level playing field. Doing business with the State of New Jersey has not been a good experience for me. For the last seven years I got most of my work through other States. I have worked on the Phillies baseball stadium, the Eagles' stadium, and the Eagles' training facilities. I [have received] offers in Chicago to work on Soldier Field and for Northwestern University.

An African American male owner of a construction company for the past 20 years believes that the same few contractors are utilized on jobs valued at $5 million or more:

> Everything in [New] Jersey is very cliquish. Like the unions, everything is tightly controlled here. On the [contracts] for $5 million or more, only three prime [contractors] are called to bid on those jobs. And in terms of licensed electrical subcontractors, there may be two that get called all the time.

An African American male owner of a construction-related firm for the past fourteen years reported that he is often told that a team has already been formed when he contacts prime contractors for work:

> I have been in business for 14 years. When I call these big firms before the proposal is due, they say that they already have a team. They have people that they have been using for years. It is not because we can't do the job. They won't give us the opportunity to be on their team and . . . there is not much that you can do about that.

A Hispanic American male owner of a construction company believes that the construction industry basically consists of older established companies:

> The [construction industry] is made up of . . . second and third generation [business owners]. It's basically old money and old business. [For] someone new to come in and try to break into the industry is not easy to do.

This Hispanic American male construction contractor reported that his company is located in Camden, and the majority of his employees also live in Camden. However, most of the construction projects are awarded to businesses located out of the City:

> I am a contractor [who] lives in Camden. [Approximately] 97 percent of my 38 employees are [also] from Camden. [But], I cannot compete for [work in Camden] with big contractors [who are not] from the City.

This Caucasian female construction business owner believes that some general contractors are given preferences in order to win awards from State agencies:

> I believe that in this industry project managers or construction managers are being paid off. I also believe that [some] contractors [are utilized more because] the [agency managers] know their performance, they are comfortable with them, and they know how to bid the [State] projects. I also believe that [these contractors] are told what to [bid] after all the other bids [have been submitted]. This has been my experience in this industry for many years.

This African American owner of a construction-related firm described the difficulties she encountered trying to obtain work from the State's various surveying departments:

> As a minority company, trying to talk to technical people [in various surveying departments] was impossible. We knew of majority-[owned] companies that had talked to the same people we needed to talk to, but no one would talk to us. Finally, we [received] one contract, and they acted like [since] we got one contract [we should] leave them alone.

An African American owner of a construction business reported that his efforts in seeking subcontracting opportunities from some of the State's prime contractors were not fruitful:

> The jobs that [were advertised] were too big for [my company]. I tried to get in touch with the major contractors who [were awarded] the contract. [But], they would not give [me any] information. So, therefore, I tried to get in the union, and when I went there and they stalled me for about 45 minutes. And I said, 'Hey, we have an appointment.' The guy said, 'No, you can't get in the union like that.' So, . . . I just left it alone.

An African American owner of a construction-related firm believes that the State's no-bid contracts provide prime contractors with opportunities to prevent small business owners from breaking into the contracting network:

> I think the State's procurement process is flawed [because] of their no-bid contracts. The contracts that don't go out for bid go to firms that are politically connected. There are too many openings for abuse with the no-bid aspect of [bidding]. People have biases [and] small businesses owned by people of color [are] not taken seriously. [But] it is okay for us to be the janitor. . . .

An African American owner of a construction company believes that the major construction projects will continue to go to the larger established firms, while the small business owners are relegated to small subcontract work:

> [It is the] nature of the beast. We are survivors and we will always get a tail end piece of [work], but we will [never] get a major portion of anything. These large [firms] like [names withheld] have been here for years, and they already have the equipment [to do the work]. Everything is in place and they are not going anywhere. We are not going to knock them out of the box. So we'll get a tail end piece of something. If it's road work [up for bid], we will get a small section of a side street, and they will get the highways and building construction.

This African American male owner of a construction company also believes that there is an inner circle of contractors that are receiving the majority of the construction work in New Jersey:

> I have been to [many] construction exchange [meetings]. [They were beneficial] because the actual contractor would be there. But, [I kept encountering] the same situation, where I met different contractors and I would give them my card and [company brochures]. But if the [prime contractor] did not have to meet a certain [goal they] would not necessarily want to call someone that they really did not know. That is just the way the system is. [Construction companies are] being built off of 'my father's father's business,' and that's basically the way each company passes the torch. It will stay [within] a small circle and not open up to other [businesses] if the State doesn't find a way to try to include [businesses] into that circle.

A Caucasian male owner of a construction-related firm believes that the State has shown favoritism in utilizing large firms which makes it difficult for smaller firms to break into the contracting network:

> Big firms and out-of-state firms are getting all the work, and the small firms are not getting [their fair share]. [I have been told] that the [State] has [instituted] a ranking and lottery system so that one firm could not get too much work. [But] it remains to be seen. They are not using the talent base that is down at [my] level, and there is plenty of it. We do not find out about upcoming projects so that we can joint venture with other firms and pool our resources. Smaller [firms] are better because the State gets to work with the principal of the firm. [When the State works with] a large firm, they get assigned to a project manager.

An African American owner of a construction-related company believes that minority contractors are at a disadvantage because they do not have the money to be a part of the contracting networks:

> My experience as it relates to doing business with New Jersey . . . is that the minority contractors as well as small contractors are at a big disadvantage because we do not have the money to play the ball game. Nobody wants to say it, but that is what it is. It is pay to play. The White small businesses have one thing going for them—big uncles and cousins that will call them back as subcontractors. So, they get taken care of.

This African American female owner of a construction company believes that success in the construction industry depends upon involvement with networks:

> The most successful firms understand that construction is a relationship-based business. The networks may not be the evil empire, but generally, White males have made the money in the past and they are comfortable with each other.

This Asian American owner of a construction-related firm believes that diversity in the contracting pool encourages new ideas and therefore is beneficial for the State:

> In the real world diversity helps to bridge a diverse approach to diverse ideas. Giving contracts to the same [contractors] will not [produce] new ideas. You do not want to eat the same cooking every day, [or] wear the same clothes every day, so the [State] should not give the jobs to the same companies. Give opportunities to different companies.

B. Good Old Boy's Network

Several interviewees described the "good old boy's network" as a major factor in hindering their businesses from obtaining contracting opportunities. An African American female owner of a construction-related firm reported on the attempts she made trying to penetrate the old boy's network:

> In my industry the old boy's network is very strong. It [is] almost impossible to penetrate. I don't even try anymore. I am not going to bang my head against a concrete wall to [try and] penetrate that network. We had a strategic marketing meeting to [discuss] what we were going to do last year. We [decided] to focus on taking [prospective clients] out to lunch . . . and of course I was the one to take them out to lunch. I just found that trying to get lunch meetings with White men was basically impossible. I don't know whether it was because I was a woman or a black woman. [It] was just impossible.

This African American male construction contractor explained why believes the good old boy's network will continue to survive:

> Majority-[owned firms preferring] not to [utilize minority-owned businesses] goes back to the old boy's network. They are not going to include minority firms in the process if they don't have to.

A Caucasian male co-owner of a construction-related firm believes that certain companies are used repeatedly despite their poor performance because of the good old boy's network:

> There is the good old boy standard that runs rampant in my field. [We] did everything [right] and someone else could do everything wrong, and for some reason [we] are the one that is not chosen for the project. Or someone can do something wrong and [we] can do everything right, but that vendor is still on the site working. I move a lot of radioactive waste out of New Jersey. I subcontracted with [another firm] and they could not perform and I was called in to pick up the pieces. But that company is still working, taking task orders away from me. If somebody can't perform, why [do they] drag them along? That's the good old boy system.

A Caucasian female owner of a construction- related firm for 14 years believes that the good old boy's network prevents women and minorities from receiving their fair share of contracting opportunities:

> I think it is more difficult for women and minorities to break into the [contracting community] because of the 'old boy's network.' If they have a choice they will give the work to their friend who is another White male.

An African American male owner of a construction-related firm believes that the good old boy's network still excludes some business owners from obtaining public contracting opportunities:

> Well, it is a 'who do you know' network. And if you are not part of that network then you [can] be excluded.

Finally, this Caucasian female construction contractor believes that the good old boy's network exists within the Newark Housing Authority:

> The Housing Authority [is a] good old [boy's] club that is very difficult to get in. Many of my . . . business associates have [encountered] different hurdles in dealing with the Housing Authority. I have bidded on many of their jobs and found it impossible [to obtain work]. I have also gone to pre-bid meetings and . . . wasted my time. When the bid goes through, it takes months [for them] to get back to me. It's usually me following up with them, not them following up with me. There's no general feedback on whether [my bid] was too high, too low, or if I was the fourth highest bidder. They don't share any of that information.

C. Prime Contractors Avoiding Program Requirements

Most business enterprise programs require prime contractors to demonstrate good faith efforts if they are unable to meet the particular requirements for subcontracting with M/WBEs. Many M/WBEs reported that prime contractors have purposely used tactics to circumvent the requirements. For example, some prime contractors will seek to obtain M/WBE business names and certification numbers without intending to use them on their projects.

A Caucasian female construction contractor was contacted by a corporation informing her that a prime contractor was fraudulently listing her as one of his subcontractors:

> I spoke to a woman [name withheld] from [company name withheld] who is [responsible] for trying to get minorities to work with [her employer]. [She discovered] that a [prime contractor] had been using my [name and number]. She questioned me about thousands and thousands of dollars that he claimed to have paid me. But he never did. [However], there is nothing I can do about it.

This African American male owner of a construction company described a situation where a prime contractor used his name to secure a bid without any intention of utilizing his services:

> They were building a jail in Thorton, New Jersey. A few of the [prime] contractors who bid on it had to put down the names of minority contractors. [A gentleman from] the company that [won] the bid never called me back. So, I called his office one day, and asked him, why he used me [on his bid documents] if he knew he was not interested? He gave me the name of someone who was on the job site, that was supposed to be in charge of [their contract requirement]. When I called him, he was always busy. I think they used minority company names to finalize their bid. Once they get the job, they do not come looking for you. You [can] just forget it [because] they will not call you back. They give you the impression they are going to hire you, [but] it never happens.

A Caucasian male owner of a 40-year-old construction firm explained how some prime contractors use subcontractors' bid information with no intent of utilizing their services:

> [Company name withheld] used our paperwork, and I had no idea that they did the job without us. They used our paperwork [to get the job] and did the work on their own. [I also found out] they were using my paperwork at other [agencies] where I actually was bidding to other general contractors. I had my lawyer write them a letter to cease using my paperwork. When

> you submit a bid to a [prime] contractor they [obtain] all of the paperwork [that is required] to submit a bid. So, the [agency] knows that the [prime contractor is] using a pre-qualified plumber. The [prime contractor] has my pre-qualification papers, bonding limits, license numbers, and State registration. I have to submit [these documents] with my bid [to the prime contractor]. Once the [prime contractor] gets [this information] they [keep] it [for future use].

This same business owner described another situation where a prime contractor used his bidding information to obtain a contract without his knowledge:

> [Another prime contractor] substituted me because he found a lower price after the [contract was awarded]. And two years later I am still fighting this in the court [system]. I have spent $35,000 in attorneys' fees so far, and I may not get back anything. [But] this is [based] on principle. I have talked to other contractors who said, 'why bother, it costs too much and nothing is going to happen.' There is a 50/50 chance I will get back 10 percent of my bid, which would be my lost profits. [This] is slightly [higher] than my attorney fees. We generally submit [our bid to the prime contractor] a day before the bid opening so that they can have all their paperwork in order for them to submit their bid. There is usually 8 or 10 general contractors bidding. I submit my paperwork to all of them and then it's up in the air. I don't know anything unless they call me back to ask questions about my paperwork. I have had 'friendly' contractors tell me that my price was right. Then later on in the day or the next day, other plumbing subcontractors revise their bids lower than mine [because] the general contractor told a friend what bids other contractors are sending in. [This] is very common. I'm privileged because I'm a major subcontractor. Once my name is listed on their bids, I'm supposed to be used or I can take them to court. A [small] subcontractor are generally the non-licensed contractors—window workers, cement block workers. [Those subcontractors] are not listed on the bid, and they do not [find out] until it's too late. They can bid their prices for a month after the bid opening. I don't know how they [stay in] business.

This Hispanic American male construction contractor believes that most prime contractors contact his company solely because it is a minority business:

> I honestly think the only reason why [prime contractors] have used me . . . is [because] I am a minority contractor licensed and registered with the State. Other than that, I do not think they would be [contacting] us.

This African American male owner of a construction company reported that a prime contractor pressured him to reduce his bid because the prime contractor could go elsewhere to meet his DBE goal requirement:

> The bidding process was pretty good, but we had to take a very short profit margin. The prime contractor [insisted on reducing my scope of work] because I was a DBE and they had to meet that goal. They would have gone somewhere else if I had not come down on my price.

This Caucasian male owner of a construction-related firm also believes that larger firms use smaller companies to meet M/WBE goals with no real intent on working with the company:

> You cannot make any money working as a subcontractor for one of these big companies. [These] big companies will use your name as an SBE or an MBE then turn around and do the work themselves.

An African American male owner of a construction company reported that some prime contractors solicit bids from his firm to negotiate with other subcontractors:

> We [have] given [our] bids [to prime contractors] just to have them give our numbers to someone else.

An African American male construction contractor also reported that some prime contractors solicit bids with no intention of utilizing his firm:

> There were no [projects] that I could [qualify] for as a general contractor. [So], when it came to subcontracting, the general contractor would solicit bids just to say that they solicited [from minority business owners]. [But], we were not given an opportunity to [work on] the job. They would say, 'We sent out the [bids] and none of them responded.' But [what] they do not say is, 'We sent out the [bids], and we only gave them two days to [respond].' I actually spoke with two prime contractors [who told] me that they were just sending out the [bid notification] as a formality, and they weren't really anticipating using any minority contractors. They had to do that to cover their rear ends.

An African American male owner of a construction company reported that he is frequently contracted by prime contractors seeking bids on projects that never yield any work for his firm:

> They will get us to bid [on] a project so they can say they [have] a minority bid, but we don't hear from them again. This happens quite frequently. It happened to me and other minority [business owners] that I fellowship with.

> We all go through the same mess. They need our name and number so they can say, 'We got so and so.' [They are] just going through the motions. [They used our bid] as a subcontractor on a project at the Newark Airport. We put a lot of effort into [preparing our bid], and we did not hear from them. They did not call to say we didn't get the job or our bid was too high.

A Hispanic American male owner of a construction company reported that his company routinely calls prime contractors asking to be placed on their bidder's lists. However, they have not responded as expected:

> I call [prime contractors] asking to be put on their bidding list. They send us an application, and we [complete] it and then send it back to them. That's how they put us on their bidding list. But a lot of the [prime contractors] do not call [us]. We are not getting calls like I thought we would.

A Caucasian female owner of a construction firm believes that sometimes bids are designed to allow prime contractors to avoid M/WBE requirements:

> States and municipalities used to take each individual [prime] contractor and subcontractor's bid separately [to] see what the overall price would be. The general contractor would bid and include everything. That's how they used to take bids. Now that it is no longer required, and a lot of municipalities and States only take lump sum bids from general contractors. When we [tried] to obtain bid information direct from general contractors [it usually does] not [include the] entire bid information. A general contractor sent out a request for bid to us. And when we called and [informed them] that we were interested in [submitting] a bid, they sent us a cut down version of the prints. It was [just] the electrical portion. It was not a complete set of prints. The State has given the general contractors the power and we are underneath them. It's difficult to bid for a job if you don't have all the information. There is just no two-ways about it. If we do not get all the information, we [can not submit] an accurate bid.

According to this Caucasian female owner of a construction-related firm, she typically has negative experiences when working with prime contractors:

> Many times we are asked to [work] with a company because it is trying to meet small business, women, or minority business goals. Then one of two things happens. They win the job and we never hear from them again. Or we do the work for them, submit our bills to them, and they are slow to pay. We are at their mercy.

This Hispanic American female owner of a construction-related company also believes that M/WBE subcontractors are routinely mistreated by prime contractors with no redress:

> A major problem for me is the glass ceiling. There is just so far a small firm can go before it is cut off from getting any further. The biggest issue for me is the abuse of the subconsultants by prime consultants. There seems to be no recourse for subconsultants. There needs to be a compliance manager from the agencies that are awarding the work. We are not a female-owned business, we are a minority-owned business. I am sure [abuse] happens all the time between the prime [contractor] and the subcontractor. We are put on a team because we are M/WBEs, [but] we are treated worse [than] non-M/WBEs.

A Hispanic American female owner of a construction-related firm believes that most prime contractors purposefully subcontract the smallest portion of work to M/WBE firms:

> The State leaves it up to the [prime] contractor to decide which trade he's going to [subcontract out]. So, even though [the prime contractor] has to subcontract out mechanical, electrical, or plumbing work, they typically [subcontract] the smallest percentage of that work to M/WBE firms.

This same business owner stated that when she worked for a major construction-related firm in New Jersey, the company never made any effort to subcontract with women or minority-owned businesses:

> I worked for a privately owned major design firm in the State of New Jersey. At that time, we did not use minority or women-owned businesses as subconsultants. We never looked for a minority-owned or woman-owned firm to [perform geotechnical] testing. I met a [minority] gentleman at the disparity meeting who provides geotechnical services. And we never tried to use any of the people on those M/WBE lists to [subcontract] with our firm. [We worked] for the New Jersey Economic Development Association, NJEDA.

This African American male owner of a construction company reported that some minority business owners will fraudulently assist prime contractors to avoid M/WBE requirements:

> Some Black businesses have entered into agreements with White-[owned] firms who have received multi-million dollar contracts. The [minority company] does not do the work, but they get paid a $10,000 fee for not showing up. Then the majority prime contractor hires his friend or someone else who's not a minority [to do the work]. [If an] investigation] [ensues] regarding the allegation the [minority firm will] deny the allegation and say they were working.

A Caucasian female owner of a construction company believes that most subcontractors do not complain about the treatment they receive from prime contractors because they fear retaliation:

> A lot of the prime contractors who consistently call me are [seeking] help to meet whatever percentage goal [is required on their contract]. I have worked in this company since 1978, and we have created a policy to not look back but to keep going forward. You can't take it personally when a company chooses another subcontractor over you, even when you know that they have used your figures. There is no redress. If you give them hell, you are likely never to work for them again.

This same business owner believes that prime contractors use the policies set forth by the State to shop bids submitted by subcontractors:

> When contracts are awarded the [prime contractor] has seven days to supply the names of their subcontractors that will be participating on the project. This allows the prime contractors seven days to shop for [bids]. It is frustrating when you put in all the time and the energy to supply a good bid and then they want you to eat into your projects and cut your own throat. I am tired of cutting my own throat. I think it is about high time that prime contractors become accountable for the names that they submit [on their] bids.

V. DIFFICULTIES IN THE BID PROCESS THROUGH THE LIFE OF A CONTRACT

A. Difficulties with the State's Pre-qualification Process

The State of New Jersey requires its bidders to meet pre-qualification standards to bid on architecture, engineering, and construction contracts. The criteria and requirements for these qualifications vary for each industry and State agency. Therefore, contractors must comply with different pre-qualification standards for the different State agencies. Many of the interviewees expressed extreme discontent in trying to navigate the State's pre-qualification processes.

A Caucasian female owner of a construction company reported that it took her firm six months to get pre-qualified with the Office of Government Integrity. However, once her pre-qualification was approved, the rules had changed making her pre-qualification status void:

> It [took] six months to get pre-qualified through the Office of Government Integrity. By the time I got to the pre-qualification meetings, the rules had changed again. As a result, I was disqualified for most of the bids where I [previously attended] pre-qualification meetings.

This Caucasian female owner of a construction company described the State's pre-qualification process as confusing and time-consuming:

> [It is] confusing; [I have] sat for three to five hours [at outreach meetings where] they hand you paperwork and say you need to get pre-approved and then [direct you to] web sites. I am an educated woman and it just seems like a huge undertaking. I don't have the luxury of time to fill out more paperwork. It has gotten so confusing that I'm not even sure what is the proper path. All of our energies are spent on procuring more work. And to fill out these stacks of paperwork and [to] not even know if it's the appropriate paperwork is really cumbersome. I am interested in learning [what] bids are available for school [construction projects]. It would be advantageous for me to learn this information, but no one seems to understand how I could obtain this information.
>
> When I call Trenton, it's like a bad joke. I am put on hold and then I am told that this is not my department and they put me on hold [again] and then I am [sent] to someone else. I could go through 12 numbers before I find someone who is willing to answer my questions. No one seems to be motivated down there, it's like everybody hates their jobs, it's unbelievable. It's very discouraging to try to work for the State. It just seems very bureaucratic. We have been in the SAVI database where you pay a certain amount of money a year. We have never ever once gotten a phone call from anybody saying that we saw your name in the Savvy II database. I would like to know who utilizes this database. [We have been] in that database since 1999.

A Caucasian male owner of a construction-related firm also described the State's pre-qualification process as time-consuming and laborious:

> First of all, it was difficult to get [through] the approval process. It was very time-consuming and laborious. It took almost a year. [We bid on] half a dozen jobs, but those projects were not going to firms in our ranking, which happened to be $10,000,000 [or less]. The larger firms with unlimited rankings were getting short listed, or firms with rankings of $25,000,000 or more. This [happened with] 6 or 7 projects that were advertised in the $10,000,000 ranking.

Another Caucasian male owner of a construction-related firm also believes that firms with high or unlimited ranking are being awarded projects valued well below their rankings:

> We bid three jobs and [never got] short-listed. The jobs that we [bid on] went to firms with $25 million or unlimited rankings. I did some research [and learned] that at least 6 or 7 [bids] for $7 million projects went to very large, unlimited ranking firms.

An African American female owner of a construction-related firm described her frustration with the State's pre-qualification process:

> The D.P.M.C. qualifies [businesses] based on their past experience. And that process is very lengthy and tedious. [It could] take six months to a year. So, by the time you meet the capacity [requirements], where you can bid as a prime contractor, the programs are over [or the criteria has changed].

A Caucasian male representative of a woman-owned construction company explained tactics his firm has employed in trying to circumvent the pre-qualification process. However, these measures have not always been cost efficient for his company or the State:

> There have been jobs where I have worked for the State, and I had to solicit someone else to put my bid forward. And this doubled my cost to the State. But, since we cannot get a certifiable classification, we can't openly compete.

An African American male owner of a construction company reported of two separate pre-qualification processes he had to endure to work on public work projects in the State of New Jersey:

> [Businesses] have to register to work for municipalities and public works. Now, the S.E.C. [requires] D.P.M.C. pre-qualification, which is needed to work on school [projects]. But I thought that when I obtained my public works contractor registration, that was enough to work in the school systems. But now everyone is finding out in South New Jersey that we [need] this [other] pre-qualification.

This male representative of a Caucasian-owned, construction-related firm reported on his frustration at obtaining the necessary pre-qualification requirements, only to have the project awarded to an out-of-State company:

> Going through all the work to be [pre-qualified] with the State, only to have someone from out of State come in and be awarded the subcontract, is a little discouraging.

A Caucasian male owner of a construction firm described how the State's pre-qualification process and its lowest qualified bidder requirement are in conflict for small business owners:

> The [State's pre-qualification process] has not been effective, at least from our company's perspective, and we [have been in business for] 21 years. [The State's] policies and regulations have prohibited us from being successful. The first problem is that the State . . . wants the lowest qualified bidder. However, the State also says [that] in order to become pre-qualified your [company's] balance sheet [must] be at a certain minimum requirements. It's impossible to build up your balance sheet if you are cutting your price to get the work, and there is no retained earnings. It's basic accounting and it just doesn't work. You can't retain an earning because you have to be the cheapest guy.

A Caucasian male co-owner of a construction firm believes that some contractors have found ways to circumvent the State's pre-qualification process:

> . . . The [State's] pre-qualification [requirement] concerning their bidding process [is not adequately monitored]. There's been a number of contractors that have gone out of business and claimed bankruptcy because they failed [at] doing the job. They come back in six months with a new company [name] and the same people. One contractor has done this four times. They are from Tonkin Springs, Florida. There is a half a dozen contractors from there who have done this across the country, and they are doing it in New Jersey. [They are receiving] 75 percent of the bridge contracts. These are not small contracts. These are $3 million to $4 million contracts. They have an unlimited time frame to do the work, which is not the way the bid [requirements] are written. [Typically], you have 100 days to do the job and must start the job within 25 days of notice [to proceed]. The State is working it so these guys can get the notice to proceed when they're ready to go to work. Then they stretch the contract out so that they can do one contract after another.

This same contractor further elaborated:

> Then these businesses go bankrupt and in six months [there are new] pre-qualified companies with $10 million to $15 million bonding capacities. It took us 15 years to get up to $6 million bonding capacity. We have got a perfect track record from the day we started because we take smaller projects and we are very conscientious about [our work]. And [when] these guys come in . . . someone looks the other way. That's the problem. We went to the DOT. I think there were six legitimate contractors upset about this. And the DOT basically said, 'Too bad. Go away.' We had a meeting

> with the head of the DOT, the head of the labor board, and six contractors. And we all spoke our minds [asking], 'Why aren't these guys being monitored?' They are looking the other way, it's rampant in the State. It's so blatantly obvious.

This African American female owner of a construction firm explained why she believes the State's pre-qualification process is not favorable for small business owners:

> We have to submit our classification through the State, [which includes] all of our financials that we have done within the [last] three months. They take your highest numbers and [determine how much] work you can do for the Division of Building and Construction for the State of New Jersey. If your budget is $100,000 they [limit the amount of] work [that you can do to], no more than $100,000. This is totally one-sided because my [firm] has done contracts with the State up to $1.4 million. My supplier has [also served as] my bank and supplies my [company with] equipment and materials for my projects. Once I get paid, I pay [my supplier]. [We] have completed these contracts very successfully. [But], I will never grow because I am [limited to the amount of work I can receive] based on my financials. From my experience, this process is not working for small businesses.

A Caucasian male construction-related firm described his frustration at trying to pre-qualify his firm to work with the State's Schools Construction Corporation:

> At the end of 2002 we tried to pre-qualify with the Schools Construction Corporation. It took about seven or eight months and multiple calls [providing] quotes before they finally responded and scheduled a series of meetings. At that point, we were turned down for work because the Chief Financial Officer [believed we were] not financially capable of undertaking work as a prime contractor for the State's school construction [projects]. They suggested that we work as a subcontractor for one of the other companies. But that wasn't available because we had to have a pre-qualification with the Schools Construction [Corporation] in order to work as a subcontractor. Their bottom line was although we had about $40 million worth of construction work on the books, and today we probably have twice or three times that amount, they found that [we were] unqualified. I think if they were serious about [utilizing] smaller companies, they would [have considered the fact] that we paid our bills on time and had a good credit rating. But we did not have the net worth that they were requiring of companies to do work for the State.

An African American male construction contractor also disagrees with the State' pre-qualification process. He believes that the rating system does not adequately determine the capacity of work that small business owners can perform:

> They gave us a rating [which limits] how much work we can do at one time. [But] that doesn't necessarily mean that we are not capable of handling some additional work.

A Hispanic American male owner of a construction-related firm believes that the State's quality-based selection system makes it difficult for small and minority businesses to compete with larger, more established businesses:

> We [work as] prime [contractors], but the bulk of the work we have done [for the State] has been as a subcontractor. It is hard to get prime [contracts] with the State agencies. I think it is because of the way procurement is selected. There is a rating system. Engineering and surveying services are procured under what is called a quality-based selection [process]. [This] means that [selection] is based on qualifications and past experience [but] not necessarily on the lowest bid. As a firm that has not been in business as long as the other prime [contractors], we are at a disadvantage.
>
> [The State's] quality-based selection [process] should be based on the experience of the [employees] in the company who are going to do the work rather than the name [of the company]. I think that larger firms have an advantage [under the current system]. In fact, a lot of the work being done in larger companies are with people who have less experience [than some of the smaller companies]. I have 29 years of experience, and I get involved in my projects. Our clients benefit from that experience. Sometimes I compete against larger firms whose project managers [may have] five years experience.

This same business owner provided an example as to how he believes the quality-based selection process favors majority-owned firms:

> I have a lot of employees in my firm who have worked on bridge inspection contracts. Yet when we try to [bid on] a bridge inspection contract with the Department of Transportation, they use criteria [that] is [based on the firm's] bridge inspection [experience]. That will give us a very low rating for the firm, but our staff has a lot of experience. The rating [system] is set up to favor firms that have been in business longer doing that kind of work. It doesn't give new firms and most minority firms an opportunity to break in as a new prime consultant. The rating system favors existing firms. If [a company] has done ten projects over the last two years, it will obviously get a higher score than a firm that has not [performed] any projects over the past

> two years. So essentially, it is the same firms getting work over and over again.

This African American female construction contractor believes the State of New Jersey should consolidate its pre-qualification process within its varied agencies:

> [Some of the pre-qualification processes] that are [required] to work in the State of New Jersey include: authorization to do business, registration certificate, certificate of good standing, classification with DPMC, classification with the New Jersey Economic Development Authority, registration in the DOL Public Works Contractor Registration Act, etc. They are time consuming and overwhelming. Any new business owner trying to come into the State of New Jersey will be mind-boggled by all of the paperwork that is required. There should be a one-stop shopping [spot].

A Caucasian female owner of a construction firm spoke about a promise made by the State decades ago to make uniform the pre-qualification process within the State agencies. However, since this has not occurred, this business owner must seek pre-qualification from four different State agencies:

> We have dealt with every State agency I think there is possible to deal with. Around 1989 we were told that there would be one form that would encompass all four entities in the State, including the New Jersey Department of Transportation, New Jersey Transit, New Jersey Building and Construction, and New Jersey Commerce. [This uniform form has not come into fruition], and the whole month of February is taken up by writing all these different agencies to get pre-qualified.

Finally, this African American male owner of a construction-related firm believes that the State's pre-qualification process should also be consolidated into one procedure:

> Consolidate all the State requirements for public works contracting under a one-stop management system. Presently, a contractor must deal with the Department of Labor, Department of Commerce, Department of Treasury, and New Jersey Schools Construction Corporation separately in order to participate in school construction and public works projects.

B. Difficulty Obtaining Bid Information

One of the most common barriers for M/WBEs attempting to contract with government agencies is the difficulty in obtaining bid information. Despite using appropriate contacts to obtain bid notices, many New Jersey minority and women business owners complained about not securing timely information about upcoming contract opportunities. Many

interviewees expressed disappointment that they were unable to obtain bid notices despite the various efforts made to acquire the information from various State agencies.

This Hispanic American male owner of a construction company reported that he subscribes to a costly reporting service to learn about upcoming contracting opportunities with the State:

> The Dodge Reports [inform] you on what jobs are [coming] out. They [cover] municipal, government, and school [projects]. Their [listings] are up to date; however, they are an independent businesses [which] costs a couple thousand dollars a year. [It] provides me with upcoming job opportunities. [If I did not subscribe to Dodge], I don't how I [would hear about upcoming opportunities]. I was making phone calls to general contractors and asking them to put me on their bidding list. [But] Dodge gives you an idea [on] who the general contractors are that are bidding on certain projects.

A Hispanic American female construction contractor also reported that her company does not routinely receive upcoming contracting opportunities from the State:

> I think we should get more notices of the jobs that are out there. We should receive notices on bids that we can bid on. We hear [about contracting opportunities] from [colleagues] on the street. [The State does] not have a very good system if they have one. A lot of money [can] be made in the City of Camden. I know one [person] that's [getting all the work] because he's getting all the information. That's not fair to me. He does framing, drywall, roofing, and siding. He is a general contractor.

This Hispanic American male construction contractor also reported that even though his company is registered with the State, he still is having difficulty receiving bid notices:

> I am registered with the State and they should be sending [us] notification [about contracting opportunities]. [I try to find out] who is going to be the general contractor so I can try to be a subcontractor.

This Caucasian female construction contractor also has experienced difficulties trying to obtain bid notices from the State:

> I was unable to get bids in my trade. [Notices] were being sent to me on [projects] that were not for my specific trade. They would send me stuff that was way out of my league or had to do with heavy construction rather than interiors, which is what I do. I've spoken to several people at the New Jersey Schools Construction Corporation and [informed] them of my situation, and they encouraged me to keep trying.

This minority male construction contractor described the difficulties he encountered when trying to get his questions answered prior to the bid due date:

> My experience with getting answers to questions through the bid process has been very problematic. When we were doing work as D.P.M.C. contractors, the State had seven days to answer questions before the bid opening. On our first job with the S.C.C. they answered our questions three days before the bid opening. [This] did not give us a chance to review the bid content [to make] drawing changes and specification changes. In one case [there were] twenty different drawing changes. [I had to] take them and distribute them to all of my subcontractors for bidding. The chances of mistakes being made were one hundred percent, because there was not enough time for me to review the documents . . . or even question some of the changes being made.

A Caucasian female owner of a construction company reported that even though her firm is registered with the State, she has not received any bid information within the last year and a half:

> We are classified with the State of New Jersey, which is a requirement in order to get work from the State. After we were classified, we would occasionally receive some bid information from the State through the mail. Most of the bid information that we now [receive] is through a construction newspaper [called] *PCN News*. The [State] used to send [bid information] in the mail when they had something that was within our classification. But I haven't seen [a bid notice] in a year and a half [to] two years now.

A Hispanic American male owner of a construction firm believes that the State's web site which lists bid information should be updated to make it user-friendly:

> Advertising bid information on the computer is a good [practice]. But a lot of [bid information is disseminated by] word-of-mouth. Until we were computer literate, it was quite difficult for us to get [bid] information. The information is available if you have the time. It's not easy for the layman to grasp. I don't find it user friendly. I personally find it somewhat difficult to get the [bid] information from their web site.

An African American male owner of a construction-related firm reported that he never receives bids for architectural engineering projects:

> We don't get bids to do architectural engineering [projects]. I went to the School Board and they told me that, '. . . we already got our architects.' They don't send out work for architects and engineers.

A Caucasian male owner of a construction-related firm reported that his company is registered with the Department of Treasury, but he has never received any bid notices from that agency:

> The only way we find out about projects [is when] we search for work. Although we are a registered construction management company with the Department of Treasury, we are never contacted for work. As a small firm, we do not have the wherewithal to have someone spend an exorbitant amount of time researching projects that are available. Although we try to use the Internet, it is not user friendly for a small firm. If the State is serious about having small and medium-sized firms procure supplies, engineering, and construction management services, they should have a better process of getting that information to the smaller firms. A dedicated Internet site that has [upcoming contracting opportunities should be made] available. The Port Authority actually does a much better job of [disseminating information]. Once you are registered with them, [they send] correspondence advising of available projects.

This same business owner also reported that the Department of Treasury did not inform his company that it was not selected as a prime consultant after it submitted its bid:

> There were problems getting information from the selection committee for the [Department of] Treasury. They asked us for information [regarding] one particular project. The only reason we found out that the project had been awarded [to another company] was because we heard on the street that someone else was already working on that project.

This Asian American male owner of a construction-related firm reported on the various efforts he employs in trying to obtain bid information from the Department of Transportation:

> We are a professional services company. [Our] data gathering process [involves] going out and finding projects that are coming up . . . so we can make teaming arrangements. It is always difficult to get [bidding] information from the different [State] agencies. Although the New Jersey Department of Transportation has orderly projections on their web site, they are not accurate. So we try to network within the department and find out what projects are coming out and within what time frame. We try to get detailed information about a project before it is advertised. [However], we had difficulty trying to get that information. So, we started knocking on their door, and we were able to get some information. I still don't think we are able to get as much [information] as other companies. I visited the department to introduce [my company] to [their] project managers and department heads to learn what projects are coming out of their department.

> Having detailed information about [upcoming] projects prior to it being advertised [allows us] to get all of our leg work done. Not having that information is really a disadvantage.

This African American male owner of a construction business reported that he has never received bid notices from the State of New Jersey, despite the fact that he has been in business for 14 years and has worked on several municipal projects within the State:

> I have been in business since 1995, and I never [received bid notices from the State]. I was doing [work for various] municipalities [so] they knew me.

An African American male construction contractor reported that he does not receive bid information, even though his company is MBE-certified:

> I am a certified MBE company, and I thought that automatically placed me on the bidder's list. It makes no sense for [one] not to be included if you are certified.

An African American male owner of a construction company reported that his company has never received any bid information from the State:

> I have not [received] any outreach from the State. Some projects are listed in the *Star Ledger*. I've looked into some of the work that they had, but basically the bid process is something that you have to seek. That is just the way the whole process works. The problem with most of the bids in the *Star Ledger* is that they are usually quite large. I am a small company, and I only have three dump trucks for site work. However, I have worked with the City of Newark because they make known their [upcoming contracting] opportunities. I [believe] it is the State's fault that they don't put [this information] out there like the City of Newark.

An African American female owner of a construction company for the past 13 years reported that it is time-consuming for small business owners to search the different State agencies' web sites for upcoming contracting opportunities:

> The [State] has different web sites that what one must click onto [depending on what] you are looking for. There are so many [web sites] that if you don't have a person [dedicated to researching bids] you will never get through some of that stuff. It is not all that friendly right now.

A Hispanic American female owner of a construction-related firm believes that some State agencies are not fairly listing all available businesses on their web sites:

> We [received] a call from a consultant saying, 'We tried to find you on the SCC web site.' They have a directory of every architectural and engineering firm that is pre-qualified with the Schools Construction Program. You have to be qualified before you can bid or do any work for the SCC. The [SCC] has this beautiful directory that's available online. I [looked on their web site] and [after] a few hours I could not [find my business]. I went back [on later] and we were [listed]. So I think they rig it. They block people out of the computer for a while. So they can pretty much control who comes up. How could we be off the web site for a couple of hours and then back on?

However, this Caucasian male owner of a construction-related company since 1961 reported that he has not encountered major problems obtaining bid information from the various State agencies:

> We did not have any problems getting bid information relative to RFP's that were put out by [State] agencies for [upcoming] projects. The New Jersey DOT probably has by far the best announcements relative to their web site. The New Jersey Turnpike and the Highway Authority also have pretty good advertisements through their web sites for upcoming projects. [However], the New Jersey Transit has the worst web site I have ever seen. It contains almost no information. But New Jersey Transit does advertise through the *Star Ledger* and other State newspapers about their upcoming [projects].

C. Other Difficulties with the Bid Process

Business owners reported other difficulties with the State's bid process. For example, this African American female owner of a construction-related firm described her difficulties in trying to determine the correct location of a pre-bid conference:

> I went to a pre-bid conference for health and safety work involving a train line with New Jersey Transit. [Once I] got there, [I learned that] everyone [of color] in the meeting did not [initially have the correct meeting location]. They set up the pre-bid conference where you had to call [ahead] and schedule to be there. [But] when I called, they never returned my calls and I thought maybe it was just me. But when I got to the site where we were supposed to meet, there were two or three other [business owners], all minority companies, waiting because they did not know where to go. We finally found [out that the pre-bid conference] was at the maintenance yard at Maplewood. They had two mandatory site visits and a mandatory bidders conference. If you missed any of those [meetings], you could not bid. [When] they went around the room [for] introduc[tions], I said, 'Oh, and by

> the way, we have our M/ WBE [certification].' [The facilitator] stopped the tape and said, 'This is not your opportunity to market.'

A Caucasian female owner of a construction-related firm believes the State's bid dissemination system is flawed:

> Basically, it seems like you fulfill this quota, and everyone's name is put into a hat and every once in a while your name pops up. It's very indeterminate and very discriminatory. We will be a perfect match for a project, and a company that is a terrible match for a project will get asked to bid. It's very frustrating when we think of all of the work that we could do with the State if we got the opportunity. I think that their [bidding] system is flawed. I think it's a problem for the prime [contractors] as well as the subcontractors. For instance, they [sent] us [a bid to] design a sewage treatment plant for a large hospital, rather than a project more suited to our capabilities like designing a small parking lot. We never receive those [bids].

A Hispanic American female owner of a construction firm for 18 years maintains that the State's rating system for submitting bids is unfair. According to this business woman, the rating system has prevented her from bidding on projects that she believes her company had the capacity to perform:

> [I have] difficulties with the State of New Jersey's rating [system which determines] the financial [solvency for businesses]. They do one [review] per year and based on that rating, that's the aggregate amount that [a company will] be able to bid on a project. You cannot bid on anything that goes over that [amount]. And that caused a problem [for us] because we fell behind starting in the year 2000 through 2002. [Work] was slow for us, and we did not have a lot of work coming in. Due to our financial statement, our ratings were lowered. [We] spoke to other contractors [who] faced the same problems. We wanted the opportunity to go after as much work [that was] out there, but our ratings limited us.

This same business owner reported her frustrations to a State representative explaining how the rating system adversely affects small businesses:

> In 2002, I called [State] Representative, [name withheld], who was the person in charge of reviewing the paperwork [to determine pre-bid ratings]. I [also] sent a letter with my [financial] package explaining [my concerns regarding the rating system and] that [all we wanted was an] opportunity [to work with the State]. Our rating wasn't great, but it wasn't bad. [Our financial revenues] were over $1,000,000 when our ratings were drastically lowered. I asked for the opportunity to [raise] my [rating] back to what I had

> and [maintained] for a couple of years. But [he] explained that unless I was able to prove [that I had more] income, [he] could not revise it [nor give] me [my previous ratings]. The reason I could not show any more [revenues] was because I had very limited [work from] the private sector. I have one or two private customers and the rest [of my work] is solely depended upon bidding and obtaining work from the State. However, I didn't have anything to show because I wasn't able to [bid] on [State] jobs that were being offered at the time [because of my low rating].

Finally, this Caucasian female owner of a construction firm believes the State's requirement that all bidders attend a mandatory pre-bid conference can be a barrier for small businesses:

> I really don't think the State of New Jersey should require mandatory pre-bid meetings. I am a small contractor and sometimes I don't have the available [staff] to go to these pre-bid meetings. A pre-bid meeting is for the [dissemination of] general information about the project, and I don't think it should be mandatory. It should be subject to the bidder's discretion as to whether or not she wants to go to the meeting. If you are not there, you absolutely are not allowed to bid. [Once] we were late about a minute and a half, and we . . . were not allowed to bid. So, the cost of the plans and specifications and the [staff] to go to the pre-bid meeting was all on me.

D. Inadequate Lead Time

Inadequate lead time was another reason given by minority and women business owners as a barrier in receiving work with government agencies. Some agencies and prime contractors often send out notices at the last minute, preventing prospective bidders from submitting a competitive bid or proposal.

This African American male owner of a construction-related firm believes that the State provides inadequate lead time that prevents certain firms from having sufficient time to prepare a successful bid:

> [Proposals] are given to us [with little] time to submit [a response]. [When] you have to make your submission to the State [within such] a short time period, [it is assumed] that they do not want you to work on the job. [So], we always [receive] it at the last minute.

A Caucasian female owner of a construction firm reported that adequate lead time is not normally provided when bidding on most State projects:

> We are not getting [enough lead] time. Sometimes there is not enough time, and I have to tell them 'no we can't bid it.' [We] get a couple of days [so] there is no way. I [need] two to three weeks at a minimum [to prepare] a

> decent [proposal]. Once I receive the bid notice . . . I have to wait for the plans, so three to four weeks is probably a better time frame. We get that much time less than 25 percent of the time.

This Caucasian female construction contractor also believes the State does not provide enough lead time to prepare a bid:

> [The State] sends me notifications, [but] by the time I [receive] them the bid [due date] has already passed or the due date for the pre-bid meeting has passed. I definitely need a couple of weeks to get a proper bid together. The State requires everything from certificates to notarized [documents]. It is simply a very long process. I was able to do it, but unless one person worked the whole time to [put the package together] it could not get done.

This African American male construction contractor believes that the State's bid noticing system is outdated, and adequate lead time is not given to respond to their bids:

> [The State's] Internet [site] is outdated. When [projects] are posted, it's too late to bid on the project. And as far as access to obtaining blueprints [is concerned], it's really not user-friendly. It's very discouraging dealing with the State of New Jersey. [When I] followed up, [I learned that] a lot of the projects have been canceled, put on hold, or the scope of work has been totally changed.

An African American male construction contractor reported that the State does not send out bid notices in a timely manner. Oftentimes, he does not find out about upcoming contracting opportunities until after the bid due date:

> [They should] disseminate information on a timely basis to minority business firms. The disheartening thing is that we find out about [bids] after the fact. [Also, the State] needs to consider increasing the amount of work that [companies] can bid on.

A Caucasian male owner of a construction-related firm reported that his company was asked to respond to a RFP by the Department of Treasury in only 10 days:

> We have [submitted] proposals with the State Police through the Department of Treasury, and they wanted responses to their RFP within 10 days, which is really not enough time. They asked us to respond to a bid for a communications proposal. As a small firm, we do not have the wherewithal to pull a lot of people together like a big firm to dedicate to preparing responses.

This African American male owner of a construction company reported that typically he is given one week to respond to a bid:

> No, I do not have enough lead time. [Generally, we are given] a week [to respond to a bid]. [We need] at least two or three weeks. How are we going to put something together when we have other bids we are trying to complete [in that short time period]?

An African American owner of a construction company for 20 years reported that sometimes he is given just a few days to a week to prepare a bid package:

> [It] seems like by the time we get the bid, we have a couple of days or maybe a week to look through the whole manuscript and specifications to [submit a bid]. [This is] just not enough time.

This African American male construction contractor also reported that he has received bid notification which only allowed a week to respond:

> We have received the bid notification less than a week before the bids were due. Which meant we had to obtain blueprints within a week and submit our bid, which is almost impossible in the construction industry. We are contacted by general contractors soliciting subcontracting numbers to fulfill their minority requirements. But a lot of times they sent us bid notification two days before the bid was due.

E. Bid Shopping

Bid shopping is generally understood to be the process in which a prime contractor solicits bids and provides bid information to other bidders. The process is also used by prime contractors who want their preferred bidder to have the lowest price.

This African American female owner of a construction-related firm believes that some prime contractors shop bids to avoid subcontracting with minority business owners:

> [There have been] complaints about subcontractors giving bids to prime [contractors] and their bid is shopped around until they get a lower [bid] from a White firm. And then they [claim] they didn't use a particular minority business because their bid was too high.

However, this Caucasian female owner of a construction firm believes that some bids are designed to allow prime contractors to shop the bids they receive from subcontractors:

> [Prime contractors] will play our numbers after the bid has gone through. They play [our numbers] with other subcontractors against the price that we

> originally gave them. It happens every time now. They are not supposed to be allowed to do it. For example, there's a project that we did down the street. And the way the bid was written . . . they were able to name three subcontractors for the electrical [work]. So after everybody gave [their] numbers the [prime contractors] listed their three subcontractors on the bid. They [used] all three subcontractors and played their numbers against each other after the [prime contractors] were awarded the contract. [They said] if you lower your number, we will give [you the contract]. So we ended up taking money off of our original price, and they kept that money because they already had a contract with [the State] that included [our original bid] in it.

This same business owner reported that this same prime contractor tried to shop her bid on another occasion:

> There was another [incident involving] the same general contractor. I called to find out how many subcontractors they were allowed to name. Apparently, they were only allowed to name one. So we told them they had to [choose another] subcontractor if they did not like our original price. They couldn't use the other [subcontractor because] we were already named. We just told them, 'You have to use the other [subcontractor] because we can't lower our price.' They called back and said, 'We looked at it again, and we'll leave it like it is.' The general contractor in both of these incidents was [company name withheld], and they are [located] in Philadelphia.

This Caucasian female owner of a construction company also believes that some State agencies' bid requirements allow prime contractors to shop bids:

> [When] the DOT issues a contract to a prime [contractor], that prime [contractor] has seven days to give them a list of their subcontractors. [So], they have seven days to shop the numbers. I have had many calls [asking], 'Can you do better?'

F. Denied Despite Having the Lowest Bid

Of those interviewed, some business owners have been denied contract awards, despite being the lowest bidder on a project. A Caucasian male co-owner of a construction-related firm reported that he was the lowest bidder, but his bid was rejected by the State because of the size and financial status of his company:

> I recall one time when the other company just had [more employees] to handle the project, even though [the project] did not require a lot of people. I was the low bidder on [the project] but lost the project. [The decision] was based on my size and my financial situation at the time.

This Asian American male construction contractor also reported that his low bid was rejected due to the size of his firm:

> We were the lowest bidder in 2001 with the town of Waynesboro, but they [did not] give us the contract. I think they thought we were too small. We did everything according to their rules, and they still [did not award us the contract].

A Caucasian female owner of a construction firm recounted an incident where her bid was denied even though she was the lowest bidder:

> We [submitted a] bid on the Lakeside Middle School [project]. The State attached a value to the job [of] $1.5 million to $1.7 million. Our bid was around $1 million. There was a bid that was $130,000 more than [our bid]. They threw our bid out because they said we did not have three [previous] jobs that [amounted to] 80 percent of a $1.8 million [project]. I don't know where they came up with this formula, but that's what they said. I wrote to the director of the SCC, [name withheld]. [Name withheld] wrote me back and said, 'Sorry for whatever criteria they used, [but] too bad.' And they gave the job to the second bidder and spent another $130,000.

This same contractor consulted an attorney regarding the above situation:

> I went to an attorney, and [he] looked up the school bidding law [in New Jersey] and contacted the [State] and said, 'Hey, I think you've got a problem here.' They said that they had special rules, and there is a gray area so [their decision was] discretionary on their part. We actually filed a lawsuit. [We met in] Trenton with my attorney, the attorney for the State, and someone from the SCC. They gave me this spiel about this is a learning curve and they were really sorry and they are [going to] . . . [close the loophole]. [But] it was a moot point because they had already given the job to the other guy, and he had started on [the project]. I spent a lot of money on that attorney. I felt like I paid for his education.

This Caucasian female construction contractor believes that many government agencies re-bid projects to try and get a lower price:

> It's a constant issue, and not only with our company. It's a situation [where] entities collect the bids and then they re-bid them to try to get a lower price. [By now], everyone has put their cards on the table. [These] municipalities, state governments, and counties are the ones that [put out] bids then reject all the bids and then re-bid it.

Another Caucasian female owner of a construction firm reported that her bid was the lowest bid, but the contract was awarded to the third lowest bidder:

> I was the lowest bidder [for a project] in a school township called Hamilton Township. And the school board of Hamilton Township left the entire bid process up to the architect that was handling the job. They opened the bids and announced that I was the lowest bidder on the job. Later I found out that the only [person who] reviewed the bids was the architect, and that was the general practice for that school district. He told me they were going to award the bid to me and we [also] discussed [additional work].
>
> I called to find out when they were going to award the job, and the [architect] was out ill. [But] no one called me back from the architectural firm. I called the school board and got the runaround until finally I got the secretary of the Board of Education on the phone. [I was] told that I was not the lowest bidder. I said, 'I definitely was the lowest bidder.' And she said, 'Well, all I know is the job was awarded to the third bidder, which was [name withheld] and the second bidder was [name withheld].' There is nothing anyone can do if you are not there at the bid opening in person to make them go through every single paper. I lost the job to the third bidder not the second bidder.

G. Problems with Certification Procedures

During the July 1, 2000 to June 30, 2002 study period, the State certified M/WBEs as part of the New Jersey Set-Aside program. The State's Set-Aside Program sets forth the standards for demonstrating eligibility. The State's certification process determines the eligibility of businesses as either minority or women business enterprises. In July 2003, the M/WBE component of the Set-Aside program was suspended, therefore it became solely a Small Business Set-Aside program. However, many business owners reported having difficulties with the State's former M/WBE certification process and with its current small business certification procedures.

This Caucasian male representative of a woman-owned, construction-related firm reported that it took almost two years to get his certification application approved by the New Jersey Commerce. Unfortunately, the program was no longer in effect once his application was approved:

> We did all of the requisite work in order to [certify] our firm. We were advised by Rutgers University in preparation for our presentation to the New Jersey Commerce . . . [but] all of our submissions were rejected. It took an additional year and a half. Last September, we finally completed the applications. [But] at that time we were told that [our] application was no

> longer valid because . . the minority and women business enterprise status [was no longer available].

An Asian American male construction contractor believes that the State's certification process was too long and tedious:

> I tried [for] two years to get certified. It is a very tedious procedure. I don't know why there are so many regulations. The State of New York welcomed us with open arms, and we have done a lot of work in New York. The [State of New Jersey] needs to relax their review procedures. If you miss the window [to submit the certification application], you have to wait until the next year. For [general] contractors that can be tough, so just imagine the minority contractor's plight. First of all, for minorities it's not easy to be in business or to fund the business in addition to the other problems with this kind of paperwork.

A Caucasian female construction contractor believes that the certification process for all of the State agencies should be streamlined so that one application can be used for all State certification processes:

> We have every [business enterprise] certification that is out there. I went to a meeting last week with [name withheld] from the governor's office, and she reaffirmed that it's really important . . . to [have] all these certificates in the event that something comes up. But, the State has made it very difficult. Most of the [State] agencies want the same information. [But], if you get certified for one, it doesn't [apply] to another [agency]. So we have to [certify] again and pay another fee. For a small business to get on the map, you have to shell out a thousand dollars just in administration fees between filling out these reports and pre-qualification [requirements]. And to date, it has not shown [to] be worth it. [Also], I think the paperwork [could be] a lot less difficult as far as the certifications are concerned. They should make all the standards [for all agencies the same] across the board so all the information [can be] shared.

This Hispanic American male owner of a construction-related services firm also believes the State should implement a uniform certification application for all of its agencies:

> The [State] should have a uniform system for businesses to get [certified]. For instance, we have to submit certifications to half a dozen agencies, which require slightly different forms. If the [State had] a uniform form, that would be a big benefit.

An Asian American male owner of a construction-related firm also suggests that each State agency honor certifications from other State agencies:

> We are certified with the Department of Transportation, the Economic and Growth Commission, the NJ Transit, and Port Authority. The application itself is not a problem, [but] having to submit [an application] with every agency over and over again [can be burdensome]. I would like [the application process] to be unified. [So], if you are certified with one agency or department, other agencies would honor the certification.

An African American owner of a construction firm found the State's certification process difficult and complicated:

> My concern being a small minority business owner [was in] filling out all the [certification] paperwork, . . . it was quite a struggle. Even though the Internet had [some] information, it still did not break down the [process]. It was very complicated. I thank God for my accountant and my lawyers who steered me in the right direction.

A Caucasian female owner of a construction company reported that she encountered difficulties trying to prove that she controlled and managed her business:

> The first time I applied for [certification with the State] I was rejected. I had to go to Trenton to fight it. My husband and I made an appointment to appeal [their decision]. By the time we left [the meeting], they were convinced that I was in fact running our company. But prior to that, they were going to reject [our application]. If I did not fight, I would not have been certified. However, I haven't seen any advantages since I've been certified. I was told recently that they were going to do away with the program. And I thought well, it costs me a $100 to renew it every other year, and it's done me absolutely no good. I include it in my bid [response package], and that doesn't do any good either. As a woman-owned business, it hasn't helped me at all.

An African American female construction contractor stated that she was unable to get certified as an M/WBE because her company did not have enough work history:

> The [prime] contractors would not [work with us] until I was certified. [But the State requires that business owners] have a job history before they can be certified. I had worked 17 years for another construction company. And when that construction company left the State of New Jersey, I felt it was an advantageous [time] to start my own business. But I didn't know that [we] had to have a working history in order to be certified as a MBE or M/WBE.

> When I got my [denial] back from the State of New Jersey, that was the reason [given].

This Caucasian female owner of a construction-related firm reported that she has allowed her M/WBE certifications to lapse with the State because she felt uncomfortable submitting some of the required financial documents:

> There is a lot of information that has to be filled out in order to be certified as a WBE. The reason for this is so that people who claim that they are WBEs are [bone fide] WBEs. I know that in the past men have promoted a woman and claimed her as a partner when she really wasn't. [But] when it came time for recertification, I didn't have time to put all the [required] materials together. A few years ago they [started requiring] financial statements. I didn't particularly care to have [my financial information] on file in various State agencies. So, all of my WBE [certifications] have lapsed.

An African American male owner of a construction company also believes that the costs involved in submitting the required financial documents in order to be certified by the State is a burden on small business owners.

> [The certification process] is very involved. [My accountant] had to go through my taxes and expenses over a [certain period of] years and [draft] a financial report. That took time and money. And he gave me a big break on the price.

This African American female owner of a construction firm provides another example of how the State's financial requirements impact small business owners:

> Minority contractors [must] provide personal confidential statements in order to be certified. It limits the amount of assets a minority can have, [which] include pensions, retirement funds, and IRAs. This criteria is not put on women-owned businesses. I am 51 and my husband is 55, so if we are putting money away for retirement then we are going to be out of luck. Secondly, the retirement money is counted as 100 percent [income], but if we took money out of our IRA or any pension fund before we retire, it [would be subject to] substantial penalties. Yet [the income] is calculated at what it is worth today.

This African American male construction contractor reported that the State's certification process was excessive and has not proven to be valuable to his company:

> I gave them the paperwork, and that's how we were able to get certified. It was excessive and not worth the paper it was written on.

A Caucasian male owner of a construction company also reported that his certification was not beneficial to his company:

> At one point we had a [small business certification]. I found that to be a waste of time. We received zero contracts. [It] was a joke. And we incurred tremendous costs to get that [certification from the] DOT.

This African American woman owner of a construction firm was also not pleased with the State's certification process:

> The overwhelming complications to get registered and certified is really a pain in the neck. Everybody complains about the process.

Alternatively, this Caucasian male co-owner of a construction firm believes that the State's certification process should be rigorous to ensure that the businesses applying for certification are bone fide:

> I think [the certification process] is excessive but it has to be. Because anyone could say, 'Oh, my wife owns the business,' and get into the program when they should not be. For example, my wife co-owns our business. I work in the field, she works in the office. There's no question she operates the business. But, I think there are a lot of subcontractors whose wives are housewives and not even involved. [This] would be very common if [the process] was not difficult. The [State] thoroughly checked us out.

This Hispanic American male construction contractor reported that the State's certification process was not excessive and quite speedy:

> [The State's certification process] was not excessive. It was a lot faster than I thought [it would be].

Finally, a Caucasian male owner of a construction-related firm completed his SBE certification application in only 15 minutes:

> The [SBE certification applications was the] easiest [process] compared to any [other] forms we had to fill out. We [completed it] in 15 minutes.

H. Reduction in Scope of Work

The preparation of any bid or proposal requires manpower hours that can be significant, depending on the size of the project. A company preparing a bid or proposal must tap into its cash reserve to pay for the labor expended for a submittal, yet this labor does not generate cash flow for the company. These costs and risks, although faced by all companies

that bid on projects, can have a significant impact on small businesses and M/WBEs with limited financial resources.

A Hispanic American male owner of a construction company described the loss to small businesses when the scope of work is reduced after an award of the contract:

> I submitted a bid in 2002 to the West Stafford Township in southern New Jersey. The contract was for 6,000 tons of asphalt material and stone material. I bid it based on a certain tonnage, and they wound up taking about 200 tons. I called the engineer and he said, 'Yes, the job had been reduced in scope.' The contract was to supply and deliver materials for a year, and it never materialized. I lost money [because] I had to post the bond for the total amount of the job, [which was] for the 6,000 tons. I never recouped the money that I put up for the bond.

A Caucasian female owner of a construction company believes that most prime contractors reduce the scope of work on their subcontracts so that they can complete the work in-house:

> On one [project], the prime contractor submitted his pricing structure and listed our subcontract. They came back and told us that [certain] portions of our work were no longer required. Basically, because the contractor did the work himself. In most cases they do the work themselves to save money. [We have learned] to just suck it up and move on.

This Caucasian female owner of a construction-related firm reported that her work did not materialize because the prime contractor opted to perform the work in-house:

> I remember a few instances where we were on a team and they [did not abide by] the DBE/MWBE requirement. The margins were for subcontractors but they decided to do the work themselves.

A Hispanic American male owner of a construction company reported that a prime contractor asked him to write a letter to the State explaining why he was not qualified to perform his work pursuant to his subcontract:

> We were told by [company name withheld] that we were named as a subcontractor. They wanted to utilize us as installers, and they communicated this to NJSCC but we were not utilized. We found out that NJSCC requested [company name withheld] to [submit] a letter from us stating that we were not qualified to install the windows. They had already installed the [windows]. Ironically, we had just finished installing the same type of windows for a $350,000 project that we were working on. And we conveyed to the [NJSCC] that we were not going to send them such a letter because we had extensive experience with all types of windows. I kept

> calling the NJSCC to find out if any action was taken. I was not able to find out if, in fact, there was any action taken. Obviously, the [prime contractor] installed it themselves and thought they could get away with it.

A Hispanic American female owner of a construction-related firm reported that her scope of work was reduced by a prime contractor after the award of the contract. She reported this situation to officials at a State agency because during the bidding process the prime contractor met their M/WBE requirements by subcontracting with her firm:

> We were asked to be part of a team [because of our] M/WBE status. When they were awarded the bid, our work was reduced about 15 percent, making it not worth our while to continue on the project. They basically used us as window dressing to get the bid and then proceeded to cut us out. The standard response from the EDA was that we do not get involved in the sanctity of the contract between the prime [contractor] and the subcontractor.

A Caucasian female owner of a construction-related firm also had her subcontract canceled after the prime contractor was awarded the contract:

> I was supposed to do two major tasks on a very large project for the New Jersey Highway Authority. I believe that my qualifications to perform the work contributed to the prime contractor getting awarded the contract. When we were awarded the subcontract, one of the major tasks we were supposed to do was taken away from us. The prime contractor said they were going to do it themselves. I spoke to the prime contractor and they said this is the way it's going to be. I assume they were hoping to make more profit on the job by doing [the work in house]. As it turned out, they used their inexperienced [workers] that they recently hired and they did the work incorrectly. They ended up having to do the work all over again. I felt taken advantage of [because] his [initial] intention was to [perform the work in-house].

An African American male owner of a construction-related firm reported that oftentimes his subcontract work is reduced after the prime contractor finalizes its contract with the State:

> Sometimes the prime [contractor] will put [us] on a project and [inform] us of the work that we will be doing. Then, at the end of the day we do not get the same amount [of money] that they put on the contract because they only paid us for what we were used for. In most cases they say we are getting 10 percent of the work and then once it is completed we only get 2 or 3 percent. They keep most of the jobs for themselves.

When this same business owner was asked if he reported this, he responded in the negative explaining that:

> The prime [contractor] is responsible for the job, and they control the job. We don't have a contract with the State, we have a subcontract with the prime.

This Asian American male owner of a construction-related firm reported that the scope of work on his on-call contracts is frequently reduced:

> [Reduction in scope of work] happens frequently on on-call contracts or term agreements. [For example], we have a three year term agreement [where] we are used for three years on an as-needed basis. We had 2 or 3 contracts where we were the subcontractor on call. [During] the 3 years [on one of our term agreements] we never received a single assignment, and I know the prime [contractor] received assignments. [The term agreements] were with the DOT and NJ Transit.

An African American male owner of a construction-related company reported that his firm lost money on a project that it completed because its scope of work was continually reduced:

> We put in three to five different bids on the JFK School [project] in Patterson, and the [prime] contractor [kept] reducing the scope of work. The job got reduced so much that [the project resulted in] a negative profit margin, and we lost money on that job.

Finally, a Hispanic American male owner of a construction-related firm explained that even though his firm had successfully grown from just himself to 90 employees, his success has caused him to lose work:

> We are a firm that has grown and has been successful. I can honestly say that over the past 15 years we started with just me and now we have 90 people working for us. We have been very successful in our industry. As we grow, [businesses] that we have worked for in the past [now] see us as a competitor. Recently, we were [part of] a project that was in Sussex County. [It was] with the NJ Transportation Preparation Planning Agency, [which receives] federal dollars. We were a subconsultant to [company name withheld], which is a large engineering firm. After they were awarded the project they found out that we were awarded another project where we [competed against] them in Bergen County. My understanding is that they were upset that we had gotten this project and therefore removed us from the team.

I. Supplier Problems

Small, women, and minority business owners encounter problems obtaining merchandise or supplier agreements that would enable them to bid successfully on new business or to fulfill existing contractual obligations with clients.

For example, this African American male owner of a construction firm reported that some manufacturers refused to utilize his firm because of their negative perception of firms owned by minorities:

> I have had [problems] when manufacturers felt they really did not need to [utilize] my firm as a supplier for their products. New Jersey [awarded] big contracts for purchasing floor coverings, [such as] carpeting and things of that sort. I was told by a particular manufacturer that the State did not have a true diversity program. They felt it was too much of a risk to align themselves with my company. So they did not [use] me as a dealer [nor did they] give me pricing [so that] I could bid on State contracts. Until the end users make it known that they are looking to diversify their vendor base beyond lip service, the manufacturers will sidetrack the issue. I think the perception is that minority-owned firms really won't last very long. [I believe] that their perception is that companies that are headed by people of color are unprepared and cannot get the financing necessary to grow their business.

A Caucasian female owner of a construction company reported that she was treated differently by a supplier because she is female:

> I have had more trouble with suppliers [because I] am female. For the [first] two years that I was in business I did not have [one supplier] walk through my front door. There was one salesman that took a chance on us, and when I had to apply for credit from companies that I had known for years, I [received] very few breaks. The first time I was late on a payment, I was nailed. All the other bigger roofing companies were getting breaks when it came to finance charges and things like that. [But] they were hitting me with finance charges. Some materials are only sold by [certain] suppliers. So if I can't get those materials, I can't bid the job specifying that [supplier's] material.

This same business owner further elaborated why she believes her supplier treated her unfairly:

> I do not have a good rapport with [company name withheld]. I wasn't able to pay them because we were shut down for the winter. And they still wanted their money in the winter. They knew what kind of contract it was

> when they sold me the material. But when it was time to pay, they wanted their money. So they started charging finance charges, and I refused to pay the finance charges because I was aware that most of the roofing companies that they were dealing with were not paying finance charges. So I kind of pleaded discrimination to them, they denied it, and said everybody pays finance charges. [This supplier] has a lot of different materials that I need. And when I didn't deal with them anymore, it was very hard to get the materials that they had. I still deal with them when I need [their products, but] I buy it with cash.

VI. FINANCIAL BARRIERS

A. Difficulty Obtaining Financing

According to many interviewees, their limited access to capital inhibits their growth potential. A Caucasian female owner of a construction-related firm reported on how some banks misrepresent low loan rates to attract small business owners:

> No one will give you money unless you have money. We tried to get a loan and finally were approved for a loan. I had to prove that I had contracts over and above the loan amount. I paid a [high] interest [rate] and had to [maintain a certain amount in] the account [to keep it] open. I had to go through so much . . . to get the money.
>
> Once my business [started earning income] . . . [name withheld] of New Jersey Transportation, said [name of bank withheld] was offering this wonderful loan for disadvantaged businesses. They were supposed to have great rates so I [applied] for the bank's floating loan and closed out [my other account] so I could get this great rate. [However], it was the same . . . rate! All they wanted to do was bring in more customers and pretend like [they had] a great rate. If they really want to help disadvantaged businesses, then give us a great rate.

Another Caucasian female owner of a construction-related company discusses the problems she encountered trying to obtain loans from banks. She found that the programs specially designed for small business and/or women business owners were not that beneficial:

> In a consulting business like [mine] often there is a long turn around time between [performing the work] and when you can [submit] your invoice. Within a year I may get sufficient income to run the business, but it is very uneven on a month-to- month basis. There was a bank in New York that was advertising small loans for women-owned businesses, but it was only

> for New York businesses. [Another] bank had a special program for women-owned businesses, but you had to be in business three years before they would consider you. So, by the time we got to the three year point my credit was in shreds. I had to get by as best I could, but it certainly inhibited me from hiring staff that I needed at the time. I still have not been able to get credit because my credit history is not good because I wasn't making enough money to pay myself. My personal bills were late and my credit history is a mess. There is no way I can [now] get credit. I have an American Express card but that is the only card that I have. All I needed was a revolving account of $10,000 or $15,000 dollars, and I would have been fine.

This African American female owner of a construction-related firm reported that her company received a considerable line of credit, but the declining economy drastically affected her firm:

> In April of 2000 [I received] a $750 thousand line of credit, and I paid some bills from that line of credit. After 9/11 and the recession, Governor McGreevey stopped the flow of contracts because the State wanted to review all of its transportation contracts. We were really hit hard, and even though I had received a line of credit from my bank, my revenues drastically went down and I was left to finance my company myself. A lot of the other firms were not paying on time, which affected my credit. My line of credit did not get renewed. Eventually, I could not pay down on what I had borrowed against. So they stopped the line [of credit] because I was not able to pay down on it. I had no capital whatsoever. So I started looking around for another bank, but because my revenues were down other banks refused to work with me. I went to every bank [including, bank names withheld]. [Other] minority firms are having the same problems. I know this because we [have] called each other and talked about it.

This Hispanic American male owner of a construction-related firm also discussed the disadvantages of some loan programs for small business owners:

> It is more difficult as a minority in the banking and the financing arena. It seems it is easier for majority-owned firms to find capital and finance their growth, whereas minority businesses tend to be pigeon holed into a particular program that, in my opinion, has higher fees and higher costs. The underlying assumption is that minority businesses are not going to be successful and may be a higher risk. If you approach [a financing institution] and do not mention that you are a minority and just mention your 15 years of experience, you tend to have a [better] opportunity to get a loan. For example, if I approached a bank and [gave them] my financials [without] mentioning that I am a minority, they would [mention] all sorts of programs

> [I could apply for]. As soon as I mention I am a minority, they put me into the EDA program. I found out that this program had a lot of paperwork and up front fees. Banks funnel you into a particular program that may be more expensive because it is guaranteed by a State agency, [and these programs require] more paperwork and more background checks. Personally, I have avoided those types of loans because I found that they are more expensive.

An African American male construction contractor who has been in business for 10 years also described the difficulties he encountered in trying to obtain financing for his company:

> I have never been able to obtain any line of credit or anything from the State. I had to deal with banks directly. I could never seem to make headway dealing with the State. I had to collateralize my real estate and other assets. We have been doing $3 million a year in sales since 1999. This year we are [expecting to earn] $6 million in sales. [But], I had to give up four houses for a $150,000 loan. The EDA claims they assist minorities or businesses in general, but I have never [heard of one business owner] who has been successful [with this agency]. Our profit margins could have been greater, but because of lack of finances, I had to subcontract a higher percentage of work. It's almost a Catch 22. I could have higher net profits if I had the funding.

This Asian American male construction contractor also believes that 9/11 and issues surrounding the general economy have made it very difficult for businesses to obtain credit:

> We have been in business for 10 years, and we still cannot increase our credit lines. I [offered] to put [my] house up as collateral. Still, they came back and said my house value was not high enough. [Because of] the [national] security situation, Enron, and 9/11, bonding has become very tight. I would say since September 2001 through the present, it's been very tough.

A Caucasian male owner of a construction-related firm believes that most financial institutions will only lend money to larger, established businesses:

> The only way a [financial institution] will loan money [to a small business owner] is based on their balance sheet. So if your company has a strong balance sheet, owns a lot of equipment, and has a lot of net worth, they will [provide you with a loan]. A small company does not have a lot of net worth, or equipment, or own real estate. There is not a method for a small professional business to [obtain a loan].

This African American male owner of a construction business believes that some financial institutions have denied him access to loans because of his race:

> I find that most financial institutions automatically assume that because I am a person of color, that I am not prepared to [provide] what they [require]. I have [utilized the services] of certified CPAs, attorneys, and [other professionals] to make sure that all my paperwork was correct. But it just seemed like I kept getting the run around. I did get financing from one bank, and it was [because] the banker's father [works] in construction so she understood my industry. And that was for a small amount [of only] $25,000. I applied at various branches of [bank name withheld]. I met with branch managers who took forever to give me an answer, and the answer always ended up being in the negative. They felt that I did not have enough receivables coming in. Another time they told me that my credit was questionable. I [also] went to the SBA and applied for 8a certification and financial assistance. I filled out a lot of paper[work]. But I never [received] any real follow up, so after awhile I just stopped applying and I just made it with what I had. It has completely hindered my ability to grow because [working] in construction you need cash flow for materials and labor. So I was basically [limited] to very small jobs or [providing] labor for larger companies.

An African American male owner of a construction company believes that most banking institutions are still biased toward minority business owners:

> Banks are still banks [and they are still] doing what they always have done. They look at us [as minority businesses], and we are still faced with the same issues we were faced with before 1961. [Such as], who we are and our abilities. We are scrutinized more than anyone else. State and federal laws have not [protected us]. It is up to the person at the bank and how he feels.

This African American male owner of a construction-related firm reported that he had difficulties trying to secure operating expenses for his firm:

> We [approached several] banks, and [we were told] that they could not finance us because our workload [was too] low or we did not have enough credit for them to extend the amount we were [requesting]. We were looking for operating expenses to meet our payroll needs. Engineering consulting services [require engineers] to get the job, but we [also] need jobs in order to [get engineers]. So you have to maintain a certain quality of staff to go after proposals. We could not go after the jobs we wanted because we could not maintain the staff that we needed [to prepare a responsive proposal]. [For] a small firm to [receive] $100,000 they need so much collateral, [such as a] car or house, but larger firms do not have to do that.

This Caucasian male owner of a construction-related firm believes that most banks deny loans based on the assets of the borrower:

> One of the biggest challenges for a small firm [is] that banks want you to obligate your house [for a business loan]. So they are basically giving you a home equity loan. I would say it has nothing to do with my ethnicity, but it has something to do with the size of my [firm]. It is a numbers game. The bank obviously wants to be able to collect on their loan, and an old joke amongst business people is, banks are only interested in lending money to people who don't need it.

This Caucasian male representative of a construction firm in business for 30 years reported on comments he heard minority and women business owners lament about with their difficulties in getting financing:

> I have heard minority and women contractors [complain that] they do not have a large cash flow, and it costs them money to do work with the State and county agencies [mainly], because they have to borrow money to keep their cash flow. So the money that they borrow, plus the interest, actually costs them more money to do work with state and county governments.

However, this African American female owner of a construction firm reported on a positive relationship she has developed with her bank since the inception of her business:

> We have been with the same brick and mortar bank since we began our business. The bank has changed its name several times and is about to change it again. They have always been receptive to giving us a line of credit to meet our needs. They recently renewed our line of credit without even contacting us. They just said, 'Oh your line of credit has been renewed for another two years.'

B. Difficulty in Obtaining Bonding

Many of the interviewees reported that their inability to secure adequate bonding has prevented them from bidding on State projects. This problem is compounded when M/WBEs are given higher bond rates than similar majority-owned businesses.

This African American male construction contractor reported that he was given higher bonding rates than other businesses that were not as financially strong as his company:

> I went to college with guys that had businesses similar to mine that were [located] in the South Jersey area [but] were not as financially strong as [my company]. But, when I talked to them about their bonding rates and banking terms, they were getting better terms than us. I switched bonding companies

> because we were using the same bonding company, and these guys were getting better rates than me, [even though] my financials were stronger. When I threatened to go to another bonding company, they suddenly wanted to change [my] rates, rather than [their] being proactive and saying, you guys have been strong over the last three or four years [so] we are going to reduce your rate.

When this same business owner was asked why he believed he was treated differently than his colleagues in South Jersey, he responded:

> [It was because] of the hue of my skin. It took seven or eight years to get to the point where we probably should have been after three or four [years]. It got to the point where they could [no longer] deny us because [our financial situation] was so strong.

A Caucasian male owner of a construction-related firm reported that his company does not bid on projects that require bonding because of the difficulties he has experienced in trying to obtain it:

> [Obtaining] bonding for environmental work is very difficult, and 9/11 always seems to be [used] as an excuse. No one is willing to [issue] performance or payment bonds unless you have money in the bank to cover the bond. I have gone to bonding companies for a $300,000 [bond], and they say, 'give us $300,000 and we'll bond you.' So essentially they want me to finance my own bond. And that's the only kind of bonding that I am able to secure. So, any job that requires bonding I do not go after it.

A Caucasian female owner of a construction company believes that many insurance companies are leaving the State of New Jersey, and the remaining companies are making it difficult for small businesses to receive bonding:

> In the State of New Jersey the insurance companies are in control because so many companies are leaving the State. And I [believe] the Insurance Commission is controlled by the insurance companies. No one wants to rock the boat because they are afraid the insurance companies are going to leave. Consequently, it's making it hard [to obtain] bonding. I can no [longer] bid on [projects] in the State of New Jersey that I usually bid on such as schools [projects]. Once you lose your bonding, you can't bid on school [projects]. Eventually, I did get a company in Pennsylvania to bond me, but they are not allowed to do too much work in the State of New Jersey.

This Hispanic American male construction contractor in business for 15 years reported that he works primarily as a subcontractor because he has difficulty in getting bonding:

> I had to become a subcontractor . . . because the major contractor is the one who has the bonding. Everything boils down to money and income.

A Caucasian female construction contractor believes it is especially difficult for small business owners to obtain a bond:

> A small business has a very little profit margin, especially in the beginning. I found it very difficult to obtain a line of credit for my business. I put up my house for collateral, but they [required] several years of profit, to [qualify for] a bond. If you are a small business and do not have much profit they refuse to bond you. I got bonded last year for a small amount.]But], I could not get a bond for over $300,000.

This Hispanic American male construction contractor reported that his limited bonding capacity negatively affects the number of bids on which he is able to bid:

> A small company's bonding capacity is very small, and the contracts out there are few and far apart. I often see jobs from the State, [but] I cannot bid on them because of the [bond] amount. If they would divide them into different trades, I may be able to have a shot. [Also], more [businesses] may be able to bid on those jobs because of the lower bond requirements.

An African American female owner of a construction-related firm for 13 years described the devastating impact on her firm when her bonding company canceled her bond:

> We were located in Ashbury Park, and we didn't realize that [our bonding] company was owned by a political power broker. We tried to get our bond limit raised so that we could compete for contracts in Ashbury Park. Within a day of us submitting a request to our agent to have our bonding level increased, we were canceled. We had collateralized the bond with a hundred percent cash, and they held onto that cash for over six months. [Therefore], we could not secure another bond. So we ended up subcontracting with a company that we are currently working with. We have seen our revenues erode, and things are definitely worse. Some battles you can't fight because the [other] person has deeper pockets than you. We did not go to the Department of Banking and Insurance because we didn't want any sort of [retaliation]. And when I questioned them about the non-renewal, they sent the cancellation notice that just had 'other' checked. They had a [list] of reasons [for] why a bond could be canceled, such as increased risk or lack of payment. Well, none of those applied to us. After I pressed them [for a specific reason for the cancellation], they said that they were getting out of

> the small bond business. As a result, I went from $230,000 in revenues down to $49,000, I lost most of my staff, and I am now doing work as a subcontractor.

An African American owner of a construction-related company believes that bond requirements are impractical for small minority businesses:

> I think bonding [companies] ask for too much from minority companies. First of all, you [need] a pretty high net worth, and [they also] want to attach your personal assets to the bond if something goes wrong. And with [construction] jobs this happens a lot of times. The cost of the bond for minority companies is not the one-and-a-half percent to one-and-three quarters percent of the face value of the bond. [But] it escalates to three-and-a-half percent of the bond cost. That can put some companies out of business before they start.

An African American female owner of a construction-related firm believes that her race factored into the difficulty she had with increasing her bonding capacity:

> I can't see my company moving forward until I get the financing that I need. Luckily, I ran into the right financial institution, but that only happened within the last two weeks. We [had] bonding, but trying to get more bonding was ridiculous. Trying to increase our bonding limit past $1 million was like asking to be shot in to space [via] the space shuttle. I'm the last one that would play the race card, but in that instance I think race definitely had [something] to do with it.

An African American male owner of a construction company also believes it is difficult for minority businesses to obtain a bond. He suggested that the State implement a program designed to assist small business owners with bond requirements:

> It is so hard to get a bond in [New Jersey]. They want to see a track record, especially for a performance bond. But, how do you establish a track record if [you cannot qualify for] a bond? We just had a Senate hearing concerning this issue [with] myself and 20 other contractors. We [suggested] that the State bond smaller contractors. The State could pick up the cost of the bond. There are [methods] that the State [can use] to remedy a situation if the contractor steps out of line or does not complete a job. The [State] has more leverage than private bonding companies.

This African American male construction contractor expressed the same sentiments as the previous business owner:

> It is difficult to get a bond for jobs when you do not have a track record. And the only way you [can] get a track record is to [be given] an opportunity to get a job.

This Caucasian male owner of a construction company described how his company was able to finally secure bonding:

> I worked at building up my balance sheet for three years, and I eventually got bonding. I built up [my balance sheet] by winning prime contracts.

C. Late Payments by Prime Contractors

Limited access to capital is compounded when the State's prime contractors pay their subcontractors in an untimely manner. Many minorities, women, and small business enterprises reported a lag time between when prime contractors received payment from a public agency and when the prime contractor paid its subcontractors.

A Caucasian female owner of a construction-related firm reported that her firm has waited over a year for payment from a prime contractor:

> It has taken me over a year to get paid by a prime contractor on a transportation project. [Sometimes prime contractors will] use us on their team to win the job and then never give us the work. Or they use us and then pay us in a very slow [manner]. It sort of turns off small businesses such as mine from even teaming on those types of jobs, because they are either wasting our time or holding up our pay. We have payroll and insurance to meet. The [prime contractor] submits the bill when they want and then pays us when they get paid. We have no recourse.

A Caucasian male construction contractor in business for four decades reported on the difficulties his company has encountered in trying to receive payments from general contractors. In some instances he reported that several general contractors never paid for his services:

> Getting paid from a general contractor is usually a battle. Generally, not [all general contractors] are late, but 50 percent of the general contractors pay late. I would consider late to be more than a week or two after they have been paid by either the State or the school board. There is really nothing you can do other than write letters. The real problem comes [when it is time to receive] the last payment, which in some cases never [happens]. I have never been paid by [company names withheld].

This same business owner explained that prime contractors usually pay him two months after they receive their check from the State:

> What [normally] happens is [the general contractor] gets a lump sum, then they put the check in the bank and pay the [subcontractor] two months later. [This happens] 50 percent of the time, and it [forces] me to go out and take a loan for that amount [to meet my operating expenses]. When my suppliers bill me monthly, I have to pay them [even though] I am waiting to get a check from the general contractor.

A Hispanic American female construction contractor reported that her company had to wait over eight months after a project was completed to receive payment:

> We completed a [project] for the Schools Construction Corporation, and the management company was very bad with the paperwork. I submitted all my close-out documents twice, and they misplaced them. I had to redo everything. [Approximately] 8 months after the job was completed, they still owed me my retainage.

A Caucasian female owner of a construction company believes that subcontractors generally have to wait 30 to 60 days for payment, unless a public agency requires the prime contractor to submit payment sooner:

> [Payment] depends on whether there is a law [requiring] prime contractors to pay their subcontractors within ten days after they receive their money. [Usually] it can take 30 to 60 days before we see a dime. When we are putting out mega dollars on a job, [this can] hurt.

Another Caucasian female owner of a construction company reported that she generally waits 45 to 60 days before she calls her prime contractor for payment because of the terms in most subcontracts:

> When it comes to general contractors, some pay fairly easy. And then there are others that you have to beat up and call all the time. You have to call them weekly just in order to get [paid] within a certain time frame. The biggest problem is the way contracts are structured so that we don't get paid until they get paid. And they get a lead-time after they get their money before they have to pay us. So basically [I have to wait] 45 to 60 days before I can even call. Now in the meantime, I have to pay everybody and my payroll, of course, is weekly. There have been more than enough occasions where my husband and I have driven around to pickup checks, in order to make payroll. And that's the one big problem.

This same business owner reported on an incident where she had to deduct $24,000 from her invoice in order to receive payment from a prime contractor:

> We had a situation earlier where a general contractor for a small project didn't pay us for months and months. We are not a big contractor, so it was a lot of money to us. In order to get paid we ended up writing off $24,000 and accepting a lower amount. [The prime contractor] had taken money that the [client] had paid him and paid [his] other bills instead of us.

A Hispanic American female owner of a construction-related company described a situation in which a prime contractor used dishonorable tactics to pay her firm less than what was contracted:

> We [experienced] a bad situation when we were consultants on a health and safety [project] for the school district. The [prime contractor] was paid, but they never paid us. It has been over 180 days, and they owe us $350,000. This could put any firm out of business. Apparently, the usual practice [of this prime contractor] is not to pay until the firm starts to bring legal action, and then they come back to the subcontractor and pay 80 cents on the dollar. The prime [contractor would] make an extra 20 percent. We decided not to go the legal route. We took out a municipal lien on the school district, and when we did this, the [prime contractor got] angry with us and we've since had trouble getting work through them. We are still trying to overcome this.

This Caucasian female owner of a construction firm believes that the State should implement procedures requiring prime contractors to pay their subcontractors within a certain amount of time:

> I think the State should enforce . . . procedures . . . to [ensure] that subcontractors are paid in a timely fashion. The State has wiped their hands of this responsibility. [Also], the subcontractor [should] be able to go to the State for assistance when the prime contractor is not paying as it should.

A Caucasian female construction contractor reported that as a subcontractor she is routinely paid late by general contractors:

> [Late payments by prime contractors] happens all the time. I never got paid directly from the State, only through general contractors. I can do a job and go months [before] I am given a purchase order on the job. It's difficult to say the least. I am dealing with a problem with [company name withheld] over [a project] that was completed last October. I am still waiting for payment. I believe this is the norm in this industry. Unfortunately, the general contractor can hold the money from a subcontractors, and if you [don't] play their game, they will do you in.

A Caucasian female owner of a construction-related firm reported that she normally waits five to six months before receiving payment from prime contractors:

> As a subcontractor we do not get paid until five to six months after we submit our invoice. That is a long time for a business to float their payroll. That is why [I am] still [working from] my home. If we were paid in a timely manner, I could afford to rent or lease [office space]. It is standard practice [not to receive] payment until the prime [contractor] gets paid. Now, if the prime [contractor] screws up their invoice and it gets kicked back, we are [further delayed].

An African American male construction contractor believes that late payments by prime contractors can force small business owners out of business:

> A lot of these general contractors will break smaller firms. The next thing you know they are out of business. If you are working as a subcontractor for one of the majority-[owned] firms, sometimes they may string you out . . . 100 plus days [before payment]. If you have four to six guys on a job working at prevailing wages, that number becomes pretty substantial. [This has] affected my business because [I had to use up] my line of credit and put handcuffs on other opportunities that I might have been able to take advantage of.

This same business owner further explained the effects on small businesses that are trying to cover operating expenses when faced with financial restraints caused by prime contractors:

> [Small business owners] do not have the resources, access to capital, or relationships with banks to [obtain credit for] an extended payroll. They look at us more as a burden as opposed to trying to assist us. So a lot of times, small firms get caught in a situation where they have to make payments or feed the family. They make bad business decisions by taking a job at the general contractor's [price] as opposed to the real number they know is [required] to do the job. They hope to [make up the difference] down the road, but that never happens. So, they get caught in a continual spiral downward.

This African American male owner of a construction company reported that a prime contractor filed for bankruptcy before paying the balance owed to him on a State construction project:

> On a New Jersey Transit job[site] our [prime contractor claimed] we gave them the wrong price. We document everything that we do. I said, 'No, we didn't we documented the prices that we gave you.' I said, 'Look, I have to

> get my money.' He did not want to pay me. It was for $100,000, but I got paid everything except $20,000. We wrote letters and then this contractor [went] bankrupt. The contractor was [name withheld]. He was working on the Hudson Light Rail [project]. I had to kick and scream to get my money. I had to pick up my checks [because] they would not mail them [to me] on time.

An African American male owner of a construction-related firm described his frustration when he tried to receive payment from prime contractors.

> Small firms cannot afford to wait 90 to120 days to be paid. [This] makes life difficult for us. We don't know when the prime contractor [receives his check]. [On one particular project], each time we called they said, 'We have not been paid.' [We could not determine] if they had been paid or not. We do not have direct contact with the agency that pays the [prime contractor]. We cannot call the [agency] and ask if they have paid a certain company [because] they will say they can't discuss that with us.

This African American male owner of a construction-related firm offered discounts to prime contractors in an effort to encourage prompt payments:

> In order to get paid [in a timely manner] we took a 10 percent reduction. The contractor was waiting on payment from the SCC, but we wanted to get paid in a timely manner so we signed a waiver for reduction of 10 percent [of our costs].

An African American male owner of a construction company reported that he waited six months to receive payment from a prime contractor on a housing authority project:

> I believe it was last year . . . and the [prime contractor] was always 30 days late. When the time came for the final payment on this housing authority [project], it [took] six months before I [received] payment.

This African American female owner of a construction-related firm sought help from the State regarding late payments from a prime contractor. However, the prime contractor retaliated:

> We were being paid late, and we basically could not wait 60 days [for payment]. It got to be unbearable a couple of times when we were paid very late. [We] started getting behind [with our bills], it was awful. I went to the [prime contractor] and said, 'We can't continue being paid late.' [This] created a bad situation because [we were] working with them on other projects and [payments from this contractor] was sporadic over a period of two years. I finally went to the State and they got involved.

A Caucasian male owner of a construction-related business for more than four decades reported that it typically takes three to six months before he is paid by prime contractors:

> When we bill our [prime contractors], we found that they would hold onto our invoice for two to three months before they would [submit] our invoice to the State. Rather than sending it immediately or within 10 to 15 days [after receipt of payment from the State]. So, typically it takes three to six months to get paid. [This] creates cash flow problems [because] I have to go to the bank and borrow from my line of credit to pay my payroll, mortgage, computer equipment, utilities, etc.

However, this Caucasian male owner of a construction-related firm reported that he has not had any issues with late payments by prime contractors:

> Prime [contractors] are very good about paying me when they get paid. I submit my invoices, and they are turned around in a pretty decent [time frame]. I have no real complaints there.

D. Late Payment by Public Agencies

Even though the State's procurement regulations specify the methods and timing of payments to its contractors, many minority and woman-owned businesses reported receiving late payments from the State.

A Hispanic American male owner of a construction company reported that the State owes him $80,000 for a project that is over 14 months old:

> There is a job, [but] I won't give the name; however, the job is over fourteen months old. Our warranty on the project expired two weeks ago. The State still hasn't paid me over $80,000 that they owe due to engineering issues. Not mechanical issues [relating to what] I did, [but] due to engineering issues. The State of New Jersey owes me money, but they have issues on the job with the engineer. And since I'm the prime [contractor] on the job, [I do not get paid] until the issues are resolved with the engineer. But yet I completed the project in accordance with the plans and specifications that were handed to me that I bidded on.

This Caucasian male owner of a construction-related firm reported that his company has waited up to nine months to receive payment from the Department of Transportation:

> There have been cases where we have waited six [to] nine months to get paid because someone [did] not process the paperwork correctly or [they did] not tell us there was an error [with our] paperwork. In the past they have taken a long time to [pay us] our money. I often think that government

> agencies do not [realize] what it is like to be a business person in the State of New Jersey. They are not business friendly. They do not realize that when they don't pay a bill in a [timely manner] it affects the company's bottom line, and it affects their ability to hire people [and] to be profitable. If they had their paychecks held up for a week or a month, they would understand.

A Caucasian male representative of a woman-owned business reported that his construction-related company has never received payment from the Camden Redevelopment Agency:

> For whatever reason, there was conflict with the State. . . . and we were never paid for the balance of our work, which amounted to approximately $150,000.

Another Caucasian male representative of a woman-owned construction company reported on the hardships of small businesses when payments are late:

> I think the payment schedules are extremely discriminatory for subcontractors. Most small contractors cannot afford to foot the bill for payroll, particularly at project labor agreement rates.

This minority male construction contractor reported that he waited 60 days for payments from a State agency which caused a hardship on his subcontractors:

> The biggest hurdle we have right now is with the S.C.C. and the way payments are made to us contractors and [subsequently] to our subcontractors. Right now we have been [receiving] payments [after] sixty days.

A Hispanic American female construction contractor in business for almost two decades reported that her company submitted a voluminous amount of paperwork four times to one of the State's management consultants before receiving payment for its services:

> The biggest problem we had was with one of the [State's] management [consultants] located in Jersey City. Their name is [company name withheld]. The projects were for three schools in Jersey City. We completed our electrical upgrades and data communication systems work over a year ago. And to date, I am still waiting for payment on a portion of my last invoice, which is not even the retainage or the close-out [amount]. I [submitted] my [documentation and invoice] four times. [At the request of the State's management consultant], I submitted [documentation] three times to the manufacturer of the generator [that we supplied to the State]. The [manufacturer] told me that they would not send any more documentation. I would have to pay for it if I wanted another set of the

> documents. I'm talking about boxes full of stuff, not just a couple of sheets, [such as] binders with pictures and disks with the pictures of the whole job for each school. And for each requisition we were instructed to provide about 12 to 24 pictures of [the job].

This Caucasian female owner of a construction company reported on the impact that minority subcontractors face when she receives late payments from the State:

> The payments have been excruciatingly slow. Knock on wood, we are not starving so we muddle through it. I tried to use a minority contractor called [name withheld] to haul trash for me. People like that cannot afford to wait six months to get paid. If I [could], I'd dole them out money. If owed [him] $10,000 and I had $3,000, I would give it to him. But at some point, they don't have the means to hang out there.

A Caucasian male co-owner of a construction company also explained how late payments from the State affects subcontractors:

> At the State level, if an invoice lags on someone's desk, it prolongs payment [to subcontractors]. Being a subcontractor to a big general contractor, we're small potatoes. Our barking all the time doesn't seem to help.

This Caucasian male owner of a construction-related firm waited four months for payment from some State agencies. However, he also reported that it can be detrimental for small business owners to complain about late payments:

> We sent our invoices in four or five times. [Our] payments were delayed for four months. And for a small firm, your cash flow is your life blood. So that's very painful. We [complained] directly to the person responsible for it, at the director level. We even went to the mayor's level or to a county executive depending on [the job]. Sometimes it becomes self-defeating because if someone [learns] that you are complaining about them, they will make sure that the invoice is lost again or it goes to the bottom of the pile. So it doesn't always help to complain.

An African American male construction contractor reported that 90 days is the average wait time for payment on the State's school construction projects:

> A lot of the [current] school construction projects are [usually] 90 days [late in submitting] payments. The average firm waits 90 to 100 days for [payment]. [It must be] the bureaucracy within the State. I have no idea why it takes 90 days to [process] an invoice. But on average that is what it has been taking.

A Caucasian male owner of a 21-year-old construction company described his frustration in trying to obtain timely payments from the State:

> I [have] complained [to the State, but] they do not care. They [have] regulations for the different branches of the State [government]. [One agency will say], 'We don't have to follow the laws of another agency [because] we are not the Department of Transportation, we are the Turnpike and we do things differently here.' It's still taxpayer dollars. Why do I have to wait four months to be paid for [work] that we have done correctly [in accordance] to the plans, specifications, and contract? I am sick of this because I have had to [deal with] this for many years.

This Caucasian male owner of a construction-related firm explained how his company is affected when the State pays its prime contractors late:

> [As a subcontractor], I am down the food chain, so it clearly is a problem when I am invoicing through a contractor and [that] contractor is being paid late by the State. Contracting jobs typically [pay] 90 plus days [after submittal of the invoice]. We had to borrow money to cover our receivables on contracting jobs. Generally, [I expect] State DOT jobs regardless of the contractor, to be at least a 90 day payout.

A Caucasian male owner of a construction company explained that sometimes he does not bid on State projects because of late payments:

> They hold all the cards, and it is usually very difficult to get paid from a school [project]. So the larger school [projects] I have stayed away from. The difficulty in payment is usually caused by paperwork bureaucracy that is required to get [invoices] signed and approved. It usually stretches out for months, so I tend to avoid some of that work.

An African American male owner of a construction company reported that late payments are the major reasons he does not pursue State contracts:

> I do not have six months to wait or to invest in a project before I see any [profits]. And that's why I shy away from State contracts.

Finally, this Caucasian female construction contractor reported that the State is very prompt when paying their prime contractors:

> The [State's] contracts stipulate when payments are supposed to be [submitted]. The State is very good at paying on time, as well as the municipalities.

VII. PUBLIC VS. PRIVATE

Some interviewees compared the business environment in the public and private sector.

A Hispanic American male owner of a construction firm believes that the public sector provides more opportunities for minority businesses than the private sector because of government mandates:

> In the private sector, it is difficult for us to achieve the same number of contracts that we have [received in the public sector]. Our overall revenues would decrease. In the private sector there are a lot of relationships that have been developed over the years. It's a very close knit sector, and [there are] relationships that have been solidified. So it is hard to get your foot in the door. For example, we have recently [worked] with companies in the [public sector] that we did not have a [prior business] relationship with. They looked us up on the NJSCC web site. They were looking for subcontractors to meet the minority criteria that the government mandates. I have been told countless times, 'Hey we saw you on the NJSCC web site.'

A Caucasian female owner of a construction-related professional services firm reported that the experience she has acquired working on public sector projects has helped her firm obtain more work in the private sector:

> I have a number of private sector projects. But the experience I [have gained working] on public sector projects [has] certainly been an asset in [getting more] work in the private sector.

This Hispanic male construction contractor believes that the work he has received in the public sector has been instrumental in having his business grow:

> [A public] contract I [acquired] in 2003 was [responsible for making] it my best year in business. If we did not have that contract, it would have been just another year. [Last year] was the best year [for my] business because of that contract.

This Hispanic American male owner of a construction-related firm reported that his company has been very successful in the private sector, but his company has also grown from business enterprise programs in the public sector:

> The private sector is [comprised primarily of] builders and developers. There are no set-asides, minority goals, or restrictions [on company size] in order to get work. We have been very successful in the private side because we have a competitive price. However, in the public sector, both the New

> Jersey Transit DOT and the Port Authority have proactive programs. We have [received] work from them [which] has also grown [our business] quite a bit.

A Caucasian male owner of a construction-related firm prefers working on public projects because payments are guaranteed:

> I [would] rather work for the public sector because you are guaranteed payment. Private clients may . . . be more contentious.

An African American female owner of a construction-related firm reported that she has experienced difficulty trying to obtain work in the public sector:

> It is difficult to obtain contracts in the public sector. Just this year I approached the New Jersey Development Council. I gave them literature [pertaining to my company], and they basically said, 'We have firms that we have worked with for years and we are very happy with them.'

This African American male construction contractor explained why he prefers working in the private sector:

> In the private sector I am treated with respect, based on my track record. I have provided quality products in the past. And [since] construction is not an exact science, if there are some errors or omissions on the specifications it's resolved in a more amenable [manner]. [We] work together as a team in the private sector, as opposed to the State where it becomes an adversarial relationship from day one.

This Caucasian male owner of a construction-related firm prefers the private sector because there are no set-asides for minority contractors:

> In the private sector there are no set-asides. It [depends on] your reputation. We have [experienced] tremendous competition from minorities [seeking public] contracts. In the private sector we don't experience that because they are not forced to set-aside work for minorities. So in [the public sector] the playing field is not even for us, because minority consultants take the work.

However, this Asian American male owner of a construction-related firm believes that it is difficult to penetrate networking relationships in the private sector:

> It is difficult to break into the private [sector]. I [believe] old relationships play a big [role]. [When] developers work with firms for a long period of time, they know each other on a personal level, and they stick to those they

> know. So, it is an extremely difficult process to break their relationship [or networks].

A Caucasian male owner of a construction firm reported that working in the private sector has financially hurt his business:

> The private sector is about making . . . relationships. When . . . we work on private projects, [sometimes] we usually end up getting hurt financially because they do not pay us.

According to this African American male owner of a construction company, working in the private sector has been more beneficial than working in the public sector:

> I do a lot of work for [company name withheld]; they are a big company. I remember the day I called [them for work]. They faxed me some information and I faxed it back. Right now I am [working on] five of their stores. So, it turned out to be a good relationship because they gave me a chance. Someone called me back, talked to me, and gave me a chance. [There was] no run around.

This Caucasian male owner of a construction company described what he believes are the pros and cons of the private and public sectors:

> When you compare private sector work to public sector work, there are both pros and cons. The private sector [allows] you to negotiate a contract [regarding the] terms of conditions and pricing. In the public sector you don't have the ability to negotiate. They set the contract on their terms and conditions. However, the [positive side] to the public sector is [that even though] the State may not pay in a timely [manner] there is a sense of security [in] knowing [that] eventually you will get paid. In the private sector there is a risk that the [company] may go bankrupt.

VIII. COMMENTS ABOUT THE STATE'S BUSINESS ENTERPRISE PROGRAMS

During the time-frame for this Study, New Jersey's set-aside act was in force. The interviewees expressed a range of attitudes and opinions about the State's M/WBE program. Even though most agreed that improvements needed to be made, many minority business owners described the State's M/WBE program as valuable and instrumental in sustaining their businesses and having them grow.

This Caucasian male co-owner of a construction company believes that the M/WBE program is needed because the construction industry is still male-dominated:

> I think the [State's M/WBE program] is valuable because the construction [industry] is a male-oriented business.

A Caucasian female owner of a construction firm reported that her WBE certificate has been instrumental in obtaining public contract work:

> For the first couple of years my WBE certificate was basically a piece of paper that I had gone through a lot of trouble to get. Recently, it has [become valuable]. Now all of a sudden my [WBE] certificate has become very important. There is another project that we will be awarded through a general contractor because of that certificate. So yes, now it's helping.

A Caucasian female owner of a construction-related firm stated that her company has benefitted tremendously because of the State's M/WBE program:

> [Because of the State's M/WBE program], we have been on teams for very large transportation projects. [They were] large dollar projects that we could not have done otherwise. The [M/WBE] goals are very important [in that they] allow women and minority companies just starting out to be successful.

This Caucasian female owner of a construction firm stated that the State's M/WBE program has also been beneficial in her business growing:

> I would say [the M/WBE program] has helped us to grow. It has its good points and its bad points.

This Caucasian female owner of a construction-related firm credits the State's M/WBE program for the growth of her business, as well as other small companies:

> [The State's M/WBE program] is valuable because it gives start-up businesses a chance to [obtain] contracts. [It also helps small businesses] become associated with [larger] firms that might . . . use them when there is no minority business enterprise [goal]. It was valuable to me and valuable to others who are just getting started.

However, this African American male owner of a construction firm explained why the State's M/WBE program has not been beneficial to his business:

> I went to a few meetings where the same people with different clothes on said the same thing. It is suppose to help minority businesses, but I don't

> see where it has helped. They give you a lot of data, booklets, and stuff like that, but basically I just want to know where are the jobs. Who got the major contracts so I can approach them.

This African American owner of a construction firm described his frustration in attending business outreach meetings:

> As a subcontractor, this whole [public contracting] process has been so discouraging that I decided not go to the [community outreach business meeting]. Why continue to participate in something that is just a facade?

This African American owner of a construction-related firm believes there are loopholes that allow prime contractors to avoid actually utilizing minority and women contractors:

> There are a lot of loopholes with the State contracts. [Prime contractors] can overlook [minority and women business owners] and not allow us to participate, especially under the new legislation.

IX. POSITIVE STATEMENTS

Although interviewees were solicited for speaking about barriers they experienced with the State of New Jersey, many business owners shared their sentiments regarding the positive experiences and relationships they developed with managers and staff at several State agencies.

A Caucasian female construction contractor reported that her company has had a positive relationship with the New Jersey Division of Building and Construction:

> [We have worked with] the New Jersey Division of Building and Construction. They are very professional, they solicit [bids], and their projects are awarded to the lowest bidder.

A Caucasian female owner of a construction-related firm gave kudos to the New Jersey Transportation Department for its efforts to ensure that subcontractors are paid:

> I have done work with most of the State's agencies. The New Jersey Transit is the most [successful] in monitoring women and minority [businesses]. They even make sure that we get paid. They require that [subcontractors] send invoices to the [general] contractor and directly to them. No other agency that I have worked with had a [monitoring system] like that.

This African American male owner of a construction-related firm explained how the New Jersey Transit successfully monitors payments to subcontractors:

> I have had a good experience, and most people have had a good experiences with the NJ Transit. They do a very good job enforcing minority goals and making sure that subcontractors are paid on their jobs. We worked as a subcontractor on one or two contracts, and we were able to go after jobs as a prime [contractor]. When you [work] as a subcontractor on the job with the NJ Transit, every month they send out a letter to the prime [contractor requiring] them to fill out [paperwork] on how much money was paid to the subcontractor. So the [prime contractors] have to keep records on a month-to-month basis on their billing and payments. The subcontractor gets the same form to submit to the NJ Transit, and they [compare] it with how much money has been given to the prime [contractor], which is very good.

This Asian American male owner of a construction-related firm also gave high marks to New Jersey Transit and other agencies for their efforts in assisting minority businesses in obtaining public contracts:

> One of the first agencies who promoted and catered to minorities was the New Jersey Transit and Port Authority of New Jersey and New York. I think the Department of Transportation had a small contract set-aside for minority and women-owned businesses. That was very valuable, and that gave us exposure on a broad spectrum of a projects.

This African American female owner of a construction-related firm gave her opinion on which State agency she believes has the most effective M/WBE program:

> As far as M/WBE [programs go], I would say that NJ Transit is the best, followed by the NJ Department of Transportation.

A Hispanic American male owner of a construction-related company spoke about the positive relationships he has forged with working with State agencies:

> I [believe] the programs the State had for minorities and women opened up the door [to business owners like myself]. [Working with] DOT and NJ Transit has been a very positive experience. I have been able to form relationships as a prime consultant with [managers at] some of the [State's] agencies. They treat me as an equal, regardless of my race or background.

An African American male owner of a construction business reported that he has a positive relationship with the Housing Authority in Camden:

> [It is] positive here in Camden. I get a lot of work with the Housing Authority.

X. RECOMMENDATIONS

The interviewees listed a number of ways the State could improve its programs, which included: making changes to its bid submittal requirements and breaking up larger contracts into smaller ones. Their recommendations are relevant to one or more of the State's programs and have been offered throughout this chapter.

A Caucasian male construction contractor recommended that the State require separate bid openings for each trade:

> The [State] should change the law back [to] when separate bid openings for each trade [were required]. [They changed it] because the general contractors wanted it changed. It basically made the price higher so architects, engineers, [or project mangers] could make more money. It is supposed to make the job easier for the school board, but I do not think it does. I used to be able to send my prices straight to the Board of Education, and they would [buy at] that price. Now, I [have] to submit my price to a general contractor, and he adds a few percentage [points] on top of [my price] because there is no sense in him doing more paperwork for nothing.

A Caucasian female owner of a construction-related firm suggested the State set stricter guidelines regarding their M/WBE goals. She also recommended that the State verify that all M/WBE goals are met before releasing final payments to its prime contractors:

> My suggestion to the State would be to enforce the set-aside goals that they have. I have spoken to other small, women, and minority businesses about this issue and it's common. Instead of giving guidelines as to what they want companies to do, [the State] should enforce the guidelines. If they require a 25 percent small business [participation], then make sure that happens. I would [also] require [prime contractors] to demonstrate that they have met their small business goals before release of their final payment.

A Caucasian female construction contractor recommends breaking large contracts into smaller projects to increase the participation of M/WBEs on State contracts:

> It would help if the State had construction jobs [that were] under $3 million. Most small businesses can't bid on [projects over that amount] because they are not qualified. [They should] have smaller [projects] to bid on. Bids under $3 million [would allow] small contractors to [compete].

This African American construction contractor also believes that the State's practice of bundling contracts makes it difficult for minority firms to qualify for many projects:

> The State bundles [contracts] by taking four projects valued at $5 million and making them a $20 million [project]. We cannot bid on them, so we can't get our foot in the door.

This African American male owner of a construction firm recommends that the State post jobs valued at $2,500 on their Internet site, so small businesses can have access to those opportunities:

> The State of New Jersey has a lot of contracts that are valued at $2,500 or less. I think those [contracts] should be on the Internet where people can have access to them.

This African American male owner of a construction company believes that the State should break up large contracts into smaller projects:

> The contracts [should be] broken down [instead of having one] big package that goes to one contractor. [And] that [contractor] gets a $10 million contract and then subcontracts out to smaller [firms]. If the [projects are broken] into smaller portions, then more minorities can get involved.

Another African American male owner of a construction-related company also suggests the State break up large contracts into smaller projects so that minorities and women can compete with larger majority-owned firms:

> Asians, Blacks, and women are essentially asking for opportunities, and those opportunities should come from our tax base. If we are taxpayers and residents of this State, then give us opportunities. It should not be so [difficult] to find jobs. [The State should] package [jobs] at a size where we can compete. I don't mind competing head to head with [company names withheld], the large top ten companies. When I compete head-to-head for [projects outside of the] Abbot school districts, I win 50 percent of the time because our people and paperwork are the same. If [there are smaller] projects that our company could go after, I [would] not mind

> competing head-to-head with these folks. But they have got to give us an opportunity [by] packaging bids [smaller] so that the jobs are fair and equal. If the Newark school district has a new school that has to be built and it's a $30 million [project], it should [be broken down so that] we can bid on it as a construction manager. Don't simply give it to one company [who already has] $400 million or $500 million worth of school projects. If we are going to grow, give us the ability to grow by starting us with $10 million to $20 million projects to manage and let us grow from that.

This African American male owner of a construction firm suggests the State employ stricter monitoring of their contracts to ensure that minority and women subcontractors are actually performing the work:

> If the [State] wants to improve contracting opportunities for minorities and women, they should send their staff to monitor their contracts to make sure that minority and women contractors are doing the work.

This African American male owner of a construction-related professional services firm suggested the following penalties be subjected to prime contractors who pay late:

> Regulations that deal with prompt payment were significantly strengthened when they were amended to expose prime contractors to monetary penalties when failing to pay subcontractors and vendors within ten calendar days of having been paid. However, also requiring prime contractors to submit subcontractor vouchers for completed work in the payment cycle, which they received, can further strengthen this provision. Additionally, the State should conduct exit interviews with minority and women contractors who participate in public work contracts to learn how to improve the subcontracting experience.

A Hispanic American female owner of a construction-related professional services firm also recommends that State agencies implement processes that verify subcontractor payments once the agency's prime contractor has been paid:

> I think there needs to be more enforcement by public agencies to monitor contracts and to make sure that subconsultants are paid on time. [When] prime consultants get paid, the subconsultant should be paid as well. [They should also] make sure the subconsultants get what they were promised in the proposal when the [contract] was [negotiated].

Finally, a Hispanic American female owner of a construction-related professional services firm suggests that the State compile a directory of M/WBEs for prime contractors seeking subcontractors:

> When I was working in the corporate world as a prime contractor responsible for [contracting] with subconsultants, there was no forum or directory for us to be able to contact any SBE, WBE, or MBE contractors. We had to do extensive research to try to find these people.

XI. SUMMARY

An overwhelming majority of the interviewees expressed concerns regarding two salient issues. The first major concern of the interviewees was the enactment of the State's project labor agreements. Most of the interviewees, which included women, minority, and small business owners, were against the required project labor agreements. The interviewees believe the project labor agreements are structured in a fashion that favors union contractors. Many business owners are fearful that the project labor agreements will eventually exclude non-union contractors from projects that require such agreements. Additionally, there was widespread confusion among the interviewees regarding the application of the project labor agreements. Specifically, the business owners were unclear on what percentage of their work force can be used on projects with project labor agreements versus what percentage must be union personnel.

The State's pre-qualification process was the second major concern of the interviewees. Since various State agencies have pre-qualification procedures for their particular department, most of the business owners reported on the hardships they face in trying to meet the pre-qualification requirements for each agency. Some interviewees reported that the process to become pre-qualified is so lengthy that, in some instances, the pre-qualification procedures had changed before they could complete the process.

Finally, it should also be noted that numerous positive comments were made praising State employees for their helpfulness and hard work. Table 2.02 lists a summary of findings concerning current barriers against various ethnic and/or gender groups.

Table 2.02 Summary of Findings Concerning Current Barriers against Ethnic/Gender Groups

Type of Evidence	African Americans	Asian Americans	Hispanic Americans	East Indian	Caucasian Females
BUSINESS BARRIERS					
Barriers Based on Race	U	U	U	U	
Barriers Based on Gender			U		U
Barriers Created by the Trade Unions	U		U		
BARRIERS CREATED BY THE STATE					
Barriers Created by Public Agency Managers	U		U		U
Agencies Failure to Monitor its Projects	U		U		U
BARRIERS CREATED BY THE CONTRACTOR COMMUNITY					
Difficulty Breaking Into Contracting Network	U	U	U	U	U
Good Old Boy's Network	U		U		U
Primes Avoiding Program Requirements	U		U		U

Table 2.02 Summary of Findings Concerning Current Barriers against Ethnic/Gender Groups

Type of Evidence	African Americans	Asian Americans	Hispanic Americans	East Indian	Caucasian Females
DIFFICULTIES IN BID PROCESS THROUGH THE LIFE OF A CONTRACT					
Difficulties with the State's Pre-qualification Process	U		U		U
Difficulty Obtaining Bid Information	U		U	U	U
Other Difficulties with Bid Process	U		U		U
Inadequate Lead Time	U				U
Bid Shopping	U				U
Denied Despite Low Bid		U			U
Problems with the Certification Procedures	U	U	U		U
Reduction in Scope of Work	U		U	U	U
Supplier Problems	U				U

Table 2.02 Summary of Findings Concerning Current Barriers against Ethnic/Gender Groups

Type of Evidence	African Americans	Asian Americans	Hispanic Americans	East Indian	Caucasian Females
FINANCIAL BARRIERS					
Difficulty Obtaining Financing	U	U	U		U
Difficulty Obtaining Bonding	U		U		U
Late Payment by Prime Contractors	U		U		U
Late Payment by Public Agency	U		U	U	U

3

PRE-QUALIFICATION ANALYSIS

I. INTRODUCTION

New Jersey Statutes §52:35-1 et seq. require the pre-qualification of bidders on public works contracts. New Jersey State Agencies, Authorities, and Commissions are authorized under New Jersey Statute §52:35-11 to establish reasonable regulations that set forth their pre-qualification rules for compliance with this pre-qualification law. Bidders on contracts with State Colleges and Universities, which are autonomous, quasi-public entities, are exempt from the pre-qualification requirements.

This chapter will provide a description of the pre-qualification requirement set forth by New Jersey Statute §52:35-2. The regulations and procedures established by New Jersey State Agencies and Authorities in compliance with the Statute will be reviewed.

II. POLICY, REGULATIONS, AND PROCEDURES

A. Pre-Qualification Policy

The New Jersey State legislature enacted Bidder Classification Statutes in 1931 under New Jersey Statutes §52:35-1 et seq. New Jersey Statute §52:35-2 sets forth the rule that State officials must require all persons proposing to submit bids on public work, to be furnished for or on behalf of the State, to also submit a statement for classification. The statement must fully disclose the prospective bidders' financial ability, adequacy of plant and equipment, organization and prior experience, and such other pertinent and material facts as may seem desirable to be pre-qualified. New Jersey Statute §27:7-35 et seq. establishes the pre-qualification requirements for the Department of Transportation's construction projects. The requirements set forth by New Jersey Statute §27:7-35 mirror those of New Jersey §52:35-1. New Jersey Statute §52:35-3 requires State officials to classify all prospective bidders as to the character and amount of public work on which they shall be qualified to submit a bid. New Jersey Statute §52:35-8 states that "no person shall be

qualified to bid on any contract, who shall not have submitted a statement required by New Jersey Statute §52:35-2 within a period of 24 months preceding the date of opening of bids for such contract."

Public work is defined under New Jersey Statute §52:33-1 as any public building, public highway, bridge, or other public betterment, work, or improvement of a permanent nature, constructed, reconstructed, repaired, or improved wholly at the expense of the public. This definition has been applied by State officials to construction and construction-related architectural and engineering contracts.

New Jersey Statute §52:35-2 authorizes State Officials, Departments, Boards, Commissions, and Committees or other branches of the State government to promulgate regulations to implement the policy. However, there is no requirement to establish rules in order to comply with the statute. Regulations were codified by the New Jersey Turnpike Authority, the Department of Transportation, the Department of the Treasury, the New Jersey Transit Corporation, and the New Jersey Sports and Exposition Authority. These Agencies and Authorities have also established their own procedures for pre-qualifying bidders.

B. Pre-Qualification Regulations

1. Current New Jersey Administrative Codes

The New Jersey Turnpike Authority, the Department of Transportation, the Department of the Treasury, the New Jersey Transit Corporation, and the New Jersey Sports and Exposition Authority have codified pre-qualification regulations in New Jersey's Administrative Code §19:9 et seq., §16:44 et seq., §17:19 et seq., §16:72 et seq., and §19:20 et seq., respectively. The pre-qualification standards set forth in these regulations were enacted in response to the statutory requirement for the solicitation through a questionnaire, from all businesses proposing to submit a bid on public work, a demonstration of financial ability, adequacy of plant and equipment, organization, and prior experience. The five regulations do not establish the same contract threshold for pre-qualification, the type of businesses which must pre-qualify to perform public works contracts, the eligibility standards for determining pre-qualification status, and the time period when a business must pre-qualify. However, the Department of the Treasury defines the terms organization, experience, and performance on its web site. The specific regulations promulgated by the New Jersey Turnpike Authority, the Department of Transportation, the Department of the Treasury, the New Jersey Transit Corporation, and the New Jersey Sports and Exposition Authority are detailed below.

a. New Jersey Turnpike Authority

The New Jersey Turnpike Authority codified the rules governing its pre-qualification process on December 3, 1963. Title 19, Chapter 9 of New Jersey's Administrative Code (N.J.A.C. §19:9-2.7 and N.J.A.C. §19:9-2.12) set forth the Authority's rules regarding pre-

qualification for construction and construction-related bidders. A pre-qualification application must be submitted annually or at least 21 days prior to the bid opening of a specific contract.

Prospective construction-related bidders are pre-qualified based on the type of project for which they are allowed to bid. A business must have a current professional services pre-qualification form on file with the Authority at the time of the advertisement of the expression of interest solicitation. A current pre-qualification form is one which has been with the Authority for no more than 24 months. Table 3.01 illustrates the information that must be provided by prospective bidders under the New Jersey Turnpike Authority's regulations.

Table 3.01 New Jersey Turnpike Authority's Regulations

Information required by §52:35-2	Organization	Financial Ability	Prior Experience	Adequacy of Plant and Equipment	Other Pertinent Facts
Construction contractors	Adequacy of officers and key personnel	Satisfactory financial condition	Recent satisfactory completion of work similar to the classification being sought and experience on a contract valued at 60 percent of the maximum classification rating being sought	Adequate facilities, including plant and equipment	Qualifying statement and no proceedings reflecting on the moral integrity of the bidder
Construction-related contractors	Adequacy of officers and key personnel	No requirement	Current and past projects undertaken by the business and nature of services provided on each project	Not Applicable	For project-specific consultants, the information required may be modified to reflect the needs of the Authority

The questionnaire formulated by the New Jersey Turnpike Authority follows the standards set forth in the regulation. However, the regulation does not seek information from the prospective bidder on financial ability, one of the four key areas which the pre-qualification process is expected to assess, pursuant to New Jersey Statute §52:35-2.

Prospective construction bidders are pre-qualified by trade and the amount of work on which they are entitled to bid. At the discretion of the Authority, a bid submitted by a pre-qualified bidder may exceed its size classification by 10 percent.

b. Department of Transportation

The Department of Transportation codified the rules governing its pre-qualification process on September 1, 1969. The rules were codified under Title 16, Chapter 44 of New Jersey's Administrative Code. N.J.A.C. §16:44-1.2 sets forth pre-qualification requirements for construction and construction-related contractors proposing to bid on public works for the Department. A bidder must be pre-qualified on the bid opening date. Table 3.02 illustrates the information that must be provided by prospective bidders under the Department of Transportation's regulations.

Table 3.02. Department of Transportation's Regulations

Information required by §52:35-2	Organization	Financial Ability	Prior Experience	Adequacy of Plant and Equipment	Other Pertinent Facts
Construction contractors	Adequacy of officers and key personnel	Consolidated financial statement	Length and nature of contractor's prior experience and work record statement	Construction equipment owned	Adoption of an Affirmative Action Program, and stockholder information, in addition to suspension of license, debarment, or prior disqualification of the business
Construction-related contractors	Adequacy of officers and key personnel	Consolidated financial statement	Length and nature of contractor's prior experience and work record statement	Not Applicable	Adoption of an Affirmative Action Program, and stockholder information, in addition to suspension of license, debarment, or prior disqualification of the business

The questionnaire formulated by the Department of Transportation follows the standards set forth in the regulation and seeks information from the prospective bidder on the four key areas which the pre-qualification process is expected to assess, pursuant to New Jersey Statute §52:35-2.

The Department of Transportation has also promulgated regulations for rating prospective bidders by the amount of work on which they can bid. The calculation is based on a business' aggregate rating and project rating. The aggregate rating is derived from a business' working capital, the net book value of its equipment, unsecured lines of credit,

and its average past performance rating. If a contractor has never been classified by the Department or if a contractor has not received a performance rating from the Department within the previous four years, past work experience and experience of officers and key personnel are evaluated through the analysis of work experience, verification letters and/or personal contacts. New businesses with limited and/or no work history, are evaluated using detailed individual experience profiles.

c. Department of the Treasury

The Department of the Treasury codified the rules governing its pre-qualification process on July 31, 1970. The rules were codified under Title 17, Chapter 19 of New Jersey's Administrative Code. N.J.A.C. §17:19-2.1 sets forth pre-qualification requirements for construction contractors wishing to bid on public works projects. N.J.A.C. §17:19-5.4 sets forth the pre-qualification requirements for contractors wishing to be selected for construction-related contracts. To bid, a contractor must be pre-qualified on the bid opening date. The regulations require construction and construction-related prime contractors, as well as construction subcontractors, wishing to bid on contracts for the Department of the Treasury to submit a pre-qualification application. Table 3.03 illustrates the information that the prospective bidder is expected to submit in accordance with the Department of the Treasury's regulations.

Table 3.03 Department of the Treasury's Regulations

Information required by §52:35-2	Organization	Financial Ability	Prior Experience	Adequacy of Plant and Equipment	Other Pertinent Facts
Construction contractors and Construction subcontractors	Adequacy of officers and key personnel	Financial statement	Prior staff experience, past performance, and past project experience	No requirement	Bonding capacity, adoption of an Affirmative Action Program, and stockholder information
Construction-related contractors	Adequacy of officers and key personnel	Financial history	Type and value of past project work, licensed and technical staff	Not Applicable	At least one principal in active private practice, with full financial responsibility for two years preceding pre-qualification

The questionnaire formulated by the Department of the Treasury follows the standards set forth in the regulation. However the regulation does not seek information on adequacy of plant and equipment one of the four key areas which the pre-qualification process is expected to assess, pursuant New Jersey Statute §52:35-2. The Department of the

Treasury's Division of Property Management and Construction (DPMC) handles the pre-qualification process.

The Department of the Treasury has also promulgated regulations for rating prospective bidders by the amount of work on which they can bid. The calculation of a business' aggregate rating is one factor that determines the maximum size of the contract for which a pre-qualified firm can bid. The aggregate rating is derived from a number of factors, including information collected through the questionnaire. The business' average performance rating, which is the performance multiplier in determining the aggregate rating, is derived from a State performance evaluation or information received by DPMC during the review of project references. The average performance rating is crucial; a prospective bidder's application for pre-qualification can be rejected if the average performance rating is too low.

The regulations include a process for requesting an administrative hearing before the DPMC on matters related to the classification and pre-qualification of a prospective bidder. Evaluation of the business' classification can be reviewed by DPMC under the provisions in the rules.

d. New Jersey Transit Corporation

The New Jersey Transit Corporation codified the rules governing its pre-qualification process on January 7, 1991. The rules were codified under Title 16, Chapter 72 of New Jersey's Administrative Code. N.J.A.C. §16:72-1.4 sets forth pre-qualification requirements for construction and construction-related contractors wishing to be classified as responsible so that they can bid on the Authority's contracts. A bidder must be pre-qualified on the bid opening date. Table 3.04 illustrates the information that must be provided by prospective bidders under the New Jersey Transit Corporation's regulations.

Table 3.04 New Jersey Transit Corporation's Regulations

Information required by §52:35-2	Organization	Financial Ability	Prior Experience	Adequacy of Plant and Equipment	Other Pertinent Facts
Construction contractors	Necessary organization, experience, operational controls, and technical skills	Adequate financial resources	Satisfactory record of performance	Necessary production, construction, and technical equipment	Satisfactory record or reputation of integrity
Construction-related contractors	Necessary organization, experience, operational controls, and technical skills	Adequate financial resources	Satisfactory record of performance	Not Applicable	Satisfactory record or reputation of integrity

The questionnaire formulated by the New Jersey Transit Corporation follows the standards set forth in the regulation and seeks information from the prospective bidder on the four key areas which the pre-qualification process is expected to assess, pursuant to New Jersey Statute §52:35-2.

e. New Jersey Sports and Exposition Authority

The New Jersey Sports and Exposition Authority codified its pre-qualification rules on August 2, 1999. The rules were codified under Title 19, Chapter 20 of New Jersey's Administrative Code. N.J.A.C. §19:20-2.3 requires contractors wishing to be selected for construction-related contracts to be pre-qualified. The pre-qualification requirement is limited to construction-related contracts in excess of $25,000. A bidder must be pre-qualified within two years prior to the date on which the Authority advertises the solicitation. Table 3.05 illustrates the information that must be provided by prospective bidders under the New Jersey Sports and Exposition regulations.

Table 3.05 New Jersey Sports and Exposition Authority's Regulations

Information required by §52:35-2	Organization	Financial ability	Prior Experience	Adequacy of Plant and Equipment	Other Pertinent Facts
Construction-related contractors	Qualifications of the firm and designated project team	No requirement	Experience, past performance, and capability of the firm in respect to any special technologies, techniques, and expertise the project requires	Not applicable	Any other criteria specified by the Authority

The New Jersey Sports and Exposition Authority has developed a two tiered process for the pre-qualification of its bidders. First, bidders are required to submit a questionnaire. The questionnaire requires the submission of basic information, such as the business' location, type of organization, names of officers, professional services for which the business is licensed, a list of references, and certification. At the time of bid, the bidder must submit additional information that is specific to the project, pursuant to the regulation. The regulation does not solicit information on financial ability, one of the four key areas which the pre-qualification process is expected to assess, pursuant to New Jersey Statute §52:35-2.

2. Criteria Governing Award of Public Work

In order to bid on a public works contract, New Jersey Statute §52:35-3 requires State officials to classify prospective bidders as to the character and amount of public work on which they may submit bids. As noted above, the five regulations promulgated since 1969 have standards for pre-qualifying businesses by their character. However, not all of the regulations include a standard to address the amount of work criteria. The two regulations that do stipulate standards vary significantly in the criteria used to determine the classification.

a. Amount of Public Work Criteria

State officials are authorized under New Jersey Statute §52:35-3 to establish a rating system by which bidders may be classified as to the amount of the contract they can bid. Out of the five State Agencies and Authorities that have codified pre-qualification regulations, only the Department of the Treasury and the Department of Transportation have codified regulations that specifically outline the criteria to classify businesses by the amount of public work that a bidder can perform. Both determine the classification by using an aggregate rating. An aggregate rating is the dollar value limit of all contracts, private and public, which a firm may perform at a given time.

The steps that must be followed are specific, but the way the variables are to be evaluated is not accounted in the code. The Department of the Treasury calculates a business' aggregate rating by evaluating its working capital, performance rating, bonding capacity, and prevailing wage violations. The Department of Transportation calculates the aggregate rating using a business' working capital, its net book value of equipment, unsecured lines of credit, and past performance rating. Both the Department of the Treasury and the Department of Transportation utilize a performance rating as a multiplier in determining a business' aggregate rating.

b. Comparison of Information Required by Pre-Qualification Regulations

Table 3.06 provides a side-by-side comparison of the type of information that a bidder must submit in order to pre-qualify under the regulations. The first column describes the information that should be required of bidders wishing to pre-qualify to bid for public works contracts, as set forth in New Jersey Statute Annotated §52:35-2. The differences in terminology used to describe the information to be provided by the bidders and the specific documentation required illustrates the lack of uniformity in each of the five regulations used to pre-qualify prospective bidders to be selected for the State's public works contracts.

Table 3.06 Information Required on the Pre-Qualification Regulations for Construction Contractors

Information Required under N.J.S.A.§52:35.2	New Jersey Turnpike Authority	Department of Transportation	Department of the Treasury	New Jersey Transit Corporation
1. Organization	1. Adequacy of officers and key personnel	1. Adequacy of officers and key personnel	1. Adequacy of officers and key personnel	1. Necessary organization, experience, operational controls, and technical skills
2. Financial Ability	2. Satisfactory financial condition	2. Consolidated financial statement	2. Financial statement	2. Adequate financial resources
3. Prior Experience	3. Recent satisfactory completion of work similar to the classification being sought and experience on a contract valued at 60 percent of the maximum classification rating being sought	3. Length and nature of contractor's prior experience and work record statement	3. Prior staff experience, past performance, and past project experience	3. Satisfactory record of performance
4. Adequacy of Plant and Equipment	4. Adequate facilities, including plant and equipment	4. Construction equipment owned	4. No requirement	4. Necessary production, construction, and technical equipment
5. Other pertinent facts	5. Qualifying statement and no proceedings reflecting on the moral integrity of the bidder	5. Adoption of an Affirmative Action Program, stockholder information, in addition to suspension of license, debarment, or prior disqualification of the business	5. Bonding capacity, adoption of an Affirmative Action Program, and stockholder information	5. Satisfactory record or reputation of integrity

Table 3.07 Information Required on the Pre-Qualification Regulations for Construction-Related Contractors

Information Required under N.J.S.A.§52:35.2	New Jersey Turnpike Authority-Construction-Related	Department of Transportation	Department of the Treasury-Construction-Related	New Jersey Transit Corporation	New Jersey Sports and Exposition Authority
1. Organization	1. Adequacy of officers and key personnel	1. Adequacy of officers and key personnel	1. Management of firm	1. Necessary organization, experience, operational controls, and technical skills	1. Qualifications of the firm and designated project team
2. Financial Ability	2. No requirement	2. Consolidated financial statement	2. Financial history	2. Adequate financial resources	2. No requirement
3. Prior Experience	3. Current and past projects undertaken by the business and nature of services provided on each project	3. Length and nature of contractor's prior experience and work record statement	3. Type and value of past project work, licensed and technical staff	3. Satisfactory record of performance	3. Experience, past performance, and capability of the firm in respect to any special technologies, techniques, and expertise the project requires
4. Adequacy of Plant and Equipment	4. Not applicable	4. Not applicable	4. Not applicable	4. Not applicable	4. Not Applicable
5. Other pertinent facts	5. For project-specific consultants, the information required may be modified to reflect the needs of the Authority	5. Adoption of an Affirmative Action Program, stockholder information, in addition to suspension of license, debarment, or prior disqualification of the business	5. At least one principal in active private practice, with full financial responsibility for the two years preceding pre-qualification	5. Satisfactory record or reputation of integrity	5. Any other criteria specified by the Authority

C. Pre-Qualification Procedures

The New Jersey Schools Construction Corporation has not codified rules governing pre-qualification, however, in compliance with the New Jersey Statute §52:35-2, it has instituted a pre-qualification process for bidders wishing to bid on its construction and construction-related contracts. In fact, there were two different procedures for pre-qualification during the two-year study period, July 1, 2000 and June 30, 2002. During the first part of the study period, bidders for construction-related projects were required to submit a pre-qualification questionnaire to the New Jersey Schools Construction Corporation. For construction contracts, the New Jersey Schools Construction Corporation used the Department of the Treasury's pre-qualification process.

In 2002, the New Jersey Schools Construction Corporation modified its procedure to utilize the Department of the Treasury's process for the pre-qualification of construction and construction-related prime contractors and construction-related subcontractors. After the Department of the Treasury approves the pre-qualification of a contractor, the New Jersey Schools Construction Corporation sends the application to the office of Government Integrity to conduct a background check.. The New Jersey Schools Construction Corporation retains the authority to reverse the Department of the Treasury's pre-qualification determination. Construction and construction-related prime contractors must be pre-qualified at the time of bid opening. Table 3.08 illustrates the information that must be provided by prospective bidders under the Department of the Treasury's regulations.

Table 3.08 Department of the Treasury's Regulations

Information required by §52:35-2	Organization	Financial Ability	Prior Experience	Adequacy of Plant and Equipment	Other Pertinent Facts
Construction contractors and Construction subcontractors	Organization	Financial statement	Prior staff experience, past performance, and past project experience	No requirement	Bonding capacity, adoption of an Affirmative Action Program, and stockholder information
Construction-related contractors	Management of firm	Financial history	Type and value of past project work, licensed and technical staff	No requirement	At least one principal in active private practice, with full financial responsibility for the two years preceding pre-qualification

The New Jersey Schools Construction Corporation uses the Department of the Treasury to classify prospective contractors on the amount of work they can bid.

D. Interagency Cooperation

Six State Agencies and Authorities comply with New Jersey Statute §52:35-2 by having the Department of the Treasury or the Department of Transportation handle their pre-qualification process. The five State Agencies and Authorities that require their contractors to pre-qualify with the Department of the Treasury are the Department of Military and Veterans Affairs, Department of Environmental Protection, Department of Health and Senior Services, Department of Human Services, and the Department of Law and Public Safety. The South Jersey Transportation Authority requires bidders to pre-qualify with the Department of Transportation.

III. AGENCIES, AUTHORITIES, AND COMMISSIONS REPORTING NO PRE-QUALIFICATION REQUIREMENTS

Although State Statute §52:35-2 requires all State Agencies, Authorities, and Commissions to pre-qualify prospective bidders for their public works contracts, 7 agencies reported in a survey conducted in May of 2004 that they did not require pre-qualification. The 7 agencies are the Casino Reinvestment Development Authority, New Jersey Water Supply Authority, New Jersey Housing and Mortgage Finance Authority, New Jersey Meadowlands Commission, North Jersey District Water Supply Commission, Passaic Valley Sewage Commission, and the Pinelands Commission.

IV. AWARD OF CONTRACTS TO NON-PRE-QUALIFIED FIRMS

The statistical evidence indicates that between July 1, 2000 and June 30, 2002, State Agencies, Authorities, and Commissions awarded public works contracts to construction and construction-related prime contractors and construction-related subcontractors which were not pre-qualified. This suggests that pre-qualification has not been a requirement uniformly applied in the award of public works contracts. It is notable that some of these contracts may have been awarded under emergency contracting procedures. Award of an emergency contract which is exempt from the competitive bidders process should not preclude the use of the pre-qualification list. Since the agencies were not interviewed there may have been some unforseen conditions that necessitated the utilization of non pre-qualified firms.

V. CONCLUSION

These findings illustrate that pre-qualification standards are not uniformly interpreted in the award of contracts by State Agencies and Authorities. The pre-qualification requirement does not seem to be a uniform standard in the determination of whether or not a contractor is qualified to submit a bid. Moreover, an assumption can be made that there are qualified businesses that have not submitted a bid because of the state statute mandating the pre-qualification requirement for all prospective bidders on public works contracts.

Volume 2

State of New Jersey

Construction Services Disparity Study 2000 - 2002

STATE AGENCIES, AUTHORITIES, AND COMMISSIONS

Submitted to:
The Disparity Study Commission

Submitted by:
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STATE AGENCIES, AUTHORITIES, AND COMMISSIONS PRIME CONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

As set forth in *Croson* and its progeny, a disparity study must document minority contracting in the jurisdiction under review. The first step in a disparity analysis is the statistical review of prime contracts. The objective of this statistical analysis is to determine the level of minority and woman-owned business enterprise (M/WBE) prime contractor utilization compared to non-M/WBE prime contractor utilization on contracts awarded between July 1, 2000 and June 30, 2002. The definition of prime contractors for the Study is all firms to which the State Agencies, Authorities, and Commissions awarded contracts during the study period.

The prime utilization analysis included construction and construction-related contracts awarded by State Agencies, Authorities, and Commissions. Only those agencies, authorities, and commissions that awarded construction and construction-related contracts to for-profit businesses were included in the Study. State Colleges and Universities were analyzed separately from the State Agencies, Authorities, and Commissions. These findings are reported in Volume 3, Chapter 1: Prime Contractor Utilization Analysis.

Construction services included new construction and renovations, except routine building maintenance. All residential and non-residential building construction; heavy construction, such as streets, roads, and bridges; and special trade construction, such as fencing, HVAC, paving, and electrical were included.

Construction-related contracts included design services, such as architectural, engineering, and construction management services, that are performed as part of a construction project.

This chapter will discuss the State Agencies, Authorities, and Commissions' utilization of prime contractors in the two industries.

II. STATE AGENCIES, AUTHORITIES, AND COMMISSIONS PRIME CONTRACT DATA SOURCES

Data Sources

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

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

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

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

Authorities:
- New Jersey Building Authority
- New Jersey Public Broadcasting

Prime contracts for two departments were only obtained in part from the centralized sources. Listed below are the Agencies for which part of the data were obtained through

the centralized sources and the balance of the information was provided by the particular Agency.

- **Department of Military and Veterans Affairs** provided all of their construction and construction-related contract records. Small contracts for construction repairs were obtained from MACS-E.

- **Department of Transportation** provided all of the construction and construction-related contracts related to the transportation industry. Records for all other construction and construction-related contracts were provided by Treasury's DPMC.

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

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

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

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

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

The following data were used as additional sources of information to assess the comprehensiveness of the data the Agencies provided:

- Treasury's Division of Contract Compliance

Treasury's Division of Contract Compliance provided a list of construction contracts awarded by State Agencies, Authorities, and Commissions for which the prime contractor had filed EEO forms. The database also included the names of subcontractors on some of the contracts. This information was cross-referenced with the data provided by the Agencies to insure accuracy and completeness of the data included in the Study. All discrepancies found between the sources of data were resolved with State Agency, Authority, and Commission staff.

- Department of Labor (DOL) business registration database

DOL provided a database listing contractors that had registered since the beginning of the study period. This database was used as a source of addresses and contact information for prime and subcontractors.

III. STATE AGENCIES, AUTHORITIES, AND COMMISSIONS PRIME CONTRACTOR UTILIZATION THRESHOLDS

State Agencies, Authorities, and Commissions prime contracts within each industry classification were grouped into three size categories. One category included all the contract records without regard to size of the award. The other two categories were defined by the industry's informal and formal procurement standards. Informal contracts were small purchases that had a maximum size threshold and did not require advertising. Although many agencies had different formal and informal levels, the size categories chosen for the analysis reflect the policies governing procurement of most State Agencies, Authorities, and Commissions. Table 1.01 details the informal thresholds by industry.

Formal contracts were advertised solicitations above the informal threshold. Formal contracts have no maximum size threshold. However, the analysis of formal contracts was capped at $500,000 for both industries because there was demonstrated capacity within the pool of willing M/WBEs to perform contracts at this level.

Table 1.01 Prime Contract Thresholds

State Agencies, Authorities, and Commissions	Informal
Construction	$41,100 and under
Construction-Related	$25,000 and under

Prime contract awards have been grouped, by amount, into these three categories and are presented in the tables and charts that follow. The three categories of contracts are all contracts, contracts under $500,000, and contracts under $41,100 for construction or contracts under $25,000 for construction-related. The number of contracts and dollar amounts are presented within each of the three categories.

IV. STATE AGENCIES, AUTHORITIES, AND COMMISSIONS PRIME CONTRACTOR UTILIZATION

As depicted in Table 1.02 below, the State Agencies, Authorities, and Commissions issued 3,812 construction and construction-related prime contracts during the July 1, 2000 to June 30, 2002 study period. These included 2,885 for construction contracts and 927 for construction-related contracts.

Also, during the study period, the State Agencies, Authorities, and Commissions expended $2,337,654,468 for construction and construction-related contracts with $1,979,628,693 for construction contracts and $358,025,775 for construction-related contracts.

Table 1.02 Total Construction and Construction-Related Prime Contracts and Dollars Expended between July 1, 2000 and June 30, 2002

State Agencies, Authorities, and Commissions	Total Number of Contracts	Total Dollars Expended
Construction	2,885	$1,979,628,693
Construction-Related	927	$358,025,775
Total	3,812	$2,337,654,468

A. All State Agencies, Authorities, and Commissions Prime Contracts by Industry

1. Construction Prime Contractor Utilization: All Contracts

Table 1.03 summarizes all contract dollars expended by the State Agencies, Authorities, and Commissions on construction prime contracts. Minority Business Enterprises received 7.04 percent of the construction prime contract dollars; Women Business Enterprises received 6.98 percent; and Caucasian Male Business Enterprises received 85.98 percent.

African American Businesses received 7 or 0.24 percent of the construction contracts during the study period, representing $943,313 or 0.05 percent of the contract dollars.

Asian American Businesses received 19 or 0.66 percent of the construction contracts during the study period, representing $28,647,097 or 1.45 percent of the contract dollars.

Hispanic American Businesses received 84 or 2.91 percent of the construction contracts during the study period, representing $108,888,559 or 5.5 percent of the contract dollars.

Native American Businesses received 1 or 0.03 percent of the construction contracts during the study period, representing $851,908 or 0.04 percent of the contract dollars.

Minority Business Enterprises received 111 or 3.85 percent of the construction contracts during the study period, representing $139,330,877 or 7.04 percent of the contract dollars.

Women Business Enterprises received 210 or 7.28 percent of the construction contracts during the study period, representing $138,219,026 or 6.98 percent of the contract dollars.

Minority and Women Business Enterprises received 321 or 11.13 percent of the construction contracts during the study period, representing $277,549,903 or 14.02 percent of the contract dollars.

Caucasian Male Business Enterprises received 2,564 or 88.87 percent of the construction contracts during the study period, representing $1,702,078,789 or 85.98 percent of the contract dollars.

Table 1.03 Construction Prime Contractor Utilization: All Contracts, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	7	0.24%	$943,313	0.05%
Asian Americans	19	0.66%	$28,647,097	1.45%
Hispanic Americans	84	2.91%	$108,888,559	5.50%
Native Americans	1	0.03%	$851,908	0.04%
Caucasian Females	210	7.28%	$138,219,026	6.98%
Caucasian Males	2,564	88.87%	$1,702,078,789	85.98%
TOTAL	2,885	100.00%	$1,979,628,693	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	7	0.24%	$943,313	0.05%
Asian American Females	2	0.07%	$49,410	0.00%
Asian American Males	17	0.59%	$28,597,687	1.44%
Hispanic American Females	47	1.63%	$9,607,894	0.49%
Hispanic American Males	37	1.28%	$99,280,666	5.02%
Native American Females	0	0.00%	$0	0.00%
Native American Males	1	0.03%	$851,908	0.04%
Caucasian Females	210	7.28%	$138,219,026	6.98%
Caucasian Males	2,564	88.87%	$1,702,078,789	85.98%
TOTAL	2,885	100.00%	$1,979,628,693	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	49	1.70%	$9,657,304	0.49%
Minority Males	62	2.15%	$129,673,574	6.55%
Caucasian Females	210	7.28%	$138,219,026	6.98%
Caucasian Males	2,564	88.87%	$1,702,078,789	85.98%
TOTAL	2,885	100.00%	$1,979,628,693	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	111	3.85%	$139,330,877	7.04%
Women Business Enterprises	210	7.28%	$138,219,026	6.98%
Minority and Women Business Enterprises	**321**	**11.13%**	**$277,549,903**	**14.02%**
Caucasian Male Business Enterprises	2,564	88.87%	$1,702,078,789	85.98%
TOTAL	2,885	100.00%	$1,979,628,693	100.00%

2. Construction-Related Prime Contractor Utilization: All Contracts

Table 1.04 summarizes all contract dollars expended by the State Agencies, Authorities, and Commissions on construction-related prime contracts. Minority Business Enterprises received 9.94 percent of the construction-related prime contract dollars; Women Business Enterprises received 1.17 percent; and Caucasian Male Business Enterprises received 88.9 percent.

African American Businesses received 13 or 1.4 percent of the construction-related contracts during the study period, representing $5,678,515 or 1.59 percent of the contract dollars.

Asian American Businesses received 30 or 3.24 percent of the construction-related contracts during the study period, representing $21,626,212 or 6.04 percent of the contract dollars.

Hispanic American Businesses received 12 or 1.29 percent of the construction-related contracts during the study period, representing $5,249,673 or 1.47 percent of the contract dollars.

Native American Businesses received 21 or 2.27% of the construction-related contracts during the study period, representing $3,021,624 or 0.84 percent of the contract dollars.

Minority Business Enterprises received 76 or 8.20 percent of the construction-related contracts during the study period, representing $35,576,024 or 9.94 percent of the contract dollars.

Women Business Enterprises received 36 or 3.88 percent of the construction-related contracts during the study period, representing $4,178,736 or 1.17 percent of the contract dollars.

Minority and Women Business Enterprises received 112 or 12.08 percent of the construction-related contracts during the study period, representing $39,754,761 or 11.1 percent of the contract dollars.

Caucasian Males Business Enterprises received 815 or 87.92 percent of the construction-related contracts during the study period, representing $318,271,014 or 88.9 percent of the contract dollars.

Table 1.04 Construction-Related Prime Contractor Utilization: All Contracts, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	13	1.40%	$5,678,515	1.59%
Asian Americans	30	3.24%	$21,626,212	6.04%
Hispanic Americans	12	1.29%	$5,249,673	1.47%
Native Americans	21	2.27%	$3,021,624	0.84%
Caucasian Females	36	3.88%	$4,178,736	1.17%
Caucasian Males	815	87.92%	$318,271,014	88.90%
TOTAL	927	100.00%	$358,025,775	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	13	1.40%	$5,678,515	1.59%
Asian American Females	7	0.76%	$2,106,809	0.59%
Asian American Males	23	2.48%	$19,519,402	5.45%
Hispanic American Females	1	0.11%	$11,150	0.00%
Hispanic American Males	11	1.19%	$5,238,523	1.46%
Native American Females	0	0.00%	$0	0.00%
Native American Males	21	2.27%	$3,021,624	0.84%
Caucasian Females	36	3.88%	$4,178,736	1.17%
Caucasian Males	815	87.92%	$318,271,014	88.90%
TOTAL	927	100.00%	$358,025,775	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	8	0.86%	$2,117,959	0.59%
Minority Males	68	7.34%	$33,458,065	9.35%
Caucasian Females	36	3.88%	$4,178,736	1.17%
Caucasian Males	815	87.92%	$318,271,014	88.90%
TOTAL	927	100.00%	$358,025,775	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	76	8.20%	$35,576,024	9.94%
Women Business Enterprises	36	3.88%	$4,178,736	1.17%
Minority and Women Business Enterprises	**112**	**12.08%**	**$39,754,761**	**11.10%**
Caucasian Male Business Enterprises	815	87.92%	$318,271,014	88.90%
TOTAL	927	100.00%	$358,025,775	100.00%

B. All State Agencies, Authorities, and Commissions Prime Contracts under $500,000, by Industry

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

Table 1.05 summarizes all contract dollars expended by the State Agencies, Authorities, and Commissions on construction prime contracts under $500,000. Minority Business Enterprises received 8.81 percent of the prime contract dollars; Women Business Enterprises received 11.65 percent; and Caucasian Male Business Enterprises received 79.53 percent.

African American Businesses received 6 or 0.25 percent of the construction contracts under $500,000 during the study period, representing $143,413 or 0.15 percent of the contract dollars.

Asian American Businesses received 14 or 0.57 percent of the construction contracts under $500,000 during the study period, representing $3,372,281 or 3.49 percent of the contract dollars.

Hispanic American Businesses received 65 or 2.66 percent of the construction contracts under $500,000 during the study period, representing $4,997,198 or 5.17 percent of the contract dollars.

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

Minority Business Enterprises received 85 or 3.48 percent of the construction contracts under $500,000 during the study period, representing $8,512,892 or 8.81 percent of the contract dollars.

Women Business Enterprises received 149 or 6.1 percent of the construction contracts under $500,000 during the study period, representing $11,257,122 or 11.65 percent of the contract dollars.

Minority and Women Business Enterprises received 234 or 9.59 percent of the construction contracts under $500,000 during the study period, representing $19,770,014 or 20.47 percent of the contract dollars.

Caucasian Male Business Enterprises received 2,207 or 90.41 percent of the construction contracts under $500,000 during the study period, representing $76,826,571 or 79.53 percent of the contract dollars.

Table 1.05 Construction Prime Contractor Utilization: Contracts under $500,000, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	6	0.25%	$143,413	0.15%
Asian Americans	14	0.57%	$3,372,281	3.49%
Hispanic Americans	65	2.66%	$4,997,198	5.17%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	149	6.10%	$11,257,122	11.65%
Caucasian Males	2,207	90.41%	$76,826,571	79.53%
TOTAL	2,441	100.00%	$96,596,585	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	6	0.25%	$143,413	0.15%
Asian American Females	2	0.08%	$49,410	0.05%
Asian American Males	12	0.49%	$3,322,871	3.44%
Hispanic American Females	43	1.76%	$2,199,134	2.28%
Hispanic American Males	22	0.90%	$2,798,064	2.90%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	149	6.10%	$11,257,122	11.65%
Caucasian Males	2,207	90.41%	$76,826,571	79.53%
TOTAL	2,441	100.00%	$96,596,585	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	45	1.84%	$2,248,544	2.33%
Minority Males	40	1.64%	$6,264,349	6.49%
Caucasian Females	149	6.10%	$11,257,122	11.65%
Caucasian Males	2,207	90.41%	$76,826,571	79.53%
TOTAL	2,441	100.00%	$96,596,585	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	85	3.48%	$8,512,892	8.81%
Women Business Enterprises	149	6.10%	$11,257,122	11.65%
Minority and Women Business Enterprises	**234**	**9.59%**	**$19,770,014**	**20.47%**
Caucasian Male Business Enterprises	2,207	90.41%	$76,826,571	79.53%
TOTAL	2,441	100.00%	$96,596,585	100.00%

2. Construction-Related Prime Contractor Utilization: Contracts under $500,000

Table 1.06 summarizes all contract dollars expended by the State Agencies, Authorities, and Commissions on construction-related prime contracts under $500,000. Minority Business Enterprises received 10.99 percent of the prime contract dollars; Women Business Enterprises received 4.39 percent; and Caucasian Male Business Enterprises received 84.62 percent.

African American Businesses received 9 or 1.19 percent of the construction-related contracts under $500,000 during the study period, representing $239,082 or 0.31 percent of the contract dollars.

Asian American Businesses received 17 or 2.25 percent of the construction-related contracts under $500,000 during the study period, representing $3,764,542 or 4.84 percent of the contract dollars.

Hispanic American Businesses received 9 or 1.19 percent of the construction-related contracts under $500,000 during the study period, representing $1,528,150 or 1.96 percent of the contract dollars.

Native American Businesses received 21 or 2.78 percent of the construction-related contracts under $500,000 during the study period, representing $3,021,624 or3.88 percent of the contract dollars.

Minority Business Enterprises received 56 or 7.42 percent of the construction-related contracts under $500,000 during the study period, representing $8,553,399 or 10.99 percent of the contract dollars.

Women Business Enterprises received 35 or 4.64 percent of the construction-related contracts under $500,000 during the study period, representing $3,417,424 or 4.39 percent of the contract dollars.

Minority and Women Business Enterprises received 91 or 12.05 percent of the construction-related contracts under $500,000 during the study period, representing $11,970,823 or 15.38 percent of the contract dollars.

Caucasian Male Business Enterprises received 664 or 87.95 percent of the construction-related contracts under $500,000 during the study period, representing $65,865,125 or 84.62 percent of the contract dollars.

Table 1.06 Construction-Related Prime Contractor Utilization: Contracts under $500,000, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	9	1.19%	$239,082	0.31%
Asian Americans	17	2.25%	$3,764,542	4.84%
Hispanic Americans	9	1.19%	$1,528,150	1.96%
Native Americans	21	2.78%	$3,021,624	3.88%
Caucasian Females	35	4.64%	$3,417,424	4.39%
Caucasian Males	664	87.95%	$65,865,125	84.62%
TOTAL	755	100.00%	$77,835,947	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	9	1.19%	$239,082	0.31%
Asian American Females	6	0.79%	$1,506,809	1.94%
Asian American Males	11	1.46%	$2,257,733	2.90%
Hispanic American Females	1	0.13%	$11,150	0.01%
Hispanic American Males	8	1.06%	$1,517,000	1.95%
Native American Females	0	0.00%	$0	0.00%
Native American Males	21	2.78%	$3,021,624	3.88%
Caucasian Females	35	4.64%	$3,417,424	4.39%
Caucasian Males	664	87.95%	$65,865,125	84.62%
TOTAL	755	100.00%	$77,835,947	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	7	0.93%	$1,517,959	1.95%
Minority Males	49	6.49%	$7,035,440	9.04%
Caucasian Females	35	4.64%	$3,417,424	4.39%
Caucasian Males	664	87.95%	$65,865,125	84.62%
TOTAL	755	100.00%	$77,835,947	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	56	7.42%	$8,553,399	10.99%
Women Business Enterprises	35	4.64%	$3,417,424	4.39%
Minority and Women Business Enterprises	**91**	**12.05%**	**$11,970,823**	**15.38%**
Caucasian Male Business Enterprises	664	87.95%	$65,865,125	84.62%
TOTAL	755	100.00%	$77,835,947	100.00%

C. All State Agencies, Authorities, and Commissions Prime Contracts under $41,100 or $25,000, by Industry

1. Construction Prime Contractor Utilization: Contracts Under $41,100

Table 1.07 summarizes all contract dollars expended by the State Agencies, Authorities, and Commissions on construction prime contracts under $41,100. Minority Business Enterprises received 3.01 percent of the prime contract dollars; Women Business Enterprises received 7.48 percent; and Caucasian Male Business Enterprises received 89.51 percent.

African American Businesses received 5 or 0.24 percent of the construction contracts under $41,100 during the study period, representing $80,613 or 0.5 percent of the contract dollars.

Asian American Businesses received 4 or 0.2 percent of the construction contracts under $41,100 during the study period, representing $56,106 or 0.35 percent of the contract dollars.

Hispanic American Businesses received 42 or 2.05 percent of the construction contracts under $41,100 during the study period, representing $348,228 or 2.16 percent of the contract dollars.

Native American Businesses received none of the construction contracts under $41,100 during the study period.

Minority Business Enterprises received 51 or 2.49 percent of the construction contracts under $41,100 during the study period, representing $484,947 or 3.01 percent of the contract dollars.

Women Business Enterprises received 100 or 4.88 percent of the construction contracts under $41,100 during the study period, representing $1,203,488 or 7.48 percent of the contract dollars.

Minority and Women Business Enterprises received 151 or 7.37 percent of the construction contracts under $41,100 during the study period, representing $1,688,435 or 10.49 percent of the contract dollars.

Caucasian Male Business Enterprises received 1,898 or 92.63 percent of the construction contracts under $41,100 during the study period, representing $14,403,373 or 89.51 percent of the contract dollars.

Table 1.07 Construction Prime Contractor Utilization: Contracts under $41,100, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	5	0.24%	$80,613	0.50%
Asian Americans	4	0.20%	$56,106	0.35%
Hispanic Americans	42	2.05%	$348,228	2.16%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	100	4.88%	$1,203,488	7.48%
Caucasian Males	1,898	92.63%	$14,403,373	89.51%
TOTAL	2,049	100.00%	$16,091,808	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	5	0.24%	$80,613	0.50%
Asian American Females	2	0.10%	$49,410	0.31%
Asian American Males	2	0.10%	$6,696	0.04%
Hispanic American Females	33	1.61%	$146,550	0.91%
Hispanic American Males	9	0.44%	$201,678	1.25%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	100	4.88%	$1,203,488	7.48%
Caucasian Males	1,898	92.63%	$14,403,373	89.51%
TOTAL	2,049	100.00%	$16,091,808	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	35	1.71%	$195,960	1.22%
Minority Males	16	0.78%	$288,987	1.80%
Caucasian Females	100	4.88%	$1,203,488	7.48%
Caucasian Males	1,898	92.63%	$14,403,373	89.51%
TOTAL	2,049	100.00%	$16,091,808	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	51	2.49%	$484,947	3.01%
Women Business Enterprises	100	4.88%	$1,203,488	7.48%
Minority and Women Business Enterprises	**151**	**7.37%**	**$1,688,435**	**10.49%**
Caucasian Male Business Enterprises	1,898	92.63%	$14,403,373	89.51%
TOTAL	2,049	100.00%	$16,091,808	100.00%

2. Construction-Related Prime Contractor Utilization: Contracts under $25,000

Table 1.08 summarizes all contract dollars expended by the State Agencies, Authorities, and Commissions on construction-related prime contracts under $25,000. Minority Business Enterprises received 2.65 percent of the prime contract dollars; Women Business Enterprises received 2.22 percent; and Caucasian Male Business Enterprises received 95.13 percent.

African American Businesses received 8 or 2.4 percent of the construction-related contracts under $25,000 during the study period, representing $13,701 or 0.49 percent of the contract dollars.

Asian American Businesses received none of the construction-related contracts under $25,000 during the study period.

Hispanic American Businesses received 1 or 0.3 percent of the construction-related contracts under $25,000 during the study period, representing $11,150 or 0.4 percent of the contract dollars.

Native American Businesses received 2 or 0.6 percent of the construction-related contracts under $25,000 during the study period, representing $50,000 or 1.77 percent of the contract dollars.

Minority Business Enterprises received 11 or 3.3 percent of the construction-related contracts under $25,000 during the study period, representing $74,851 or 2.65 percent of the contract dollars.

Women Business Enterprises received 12 or 3.6 percent of the construction-related contracts under $25,000 during the study period, representing $62,639 or 2.22 percent of the contract dollars.

Minority and Women Business Enterprises received 23 or 6.91 percent of the construction-related contracts under $25,000 during the study period, representing $137,490 or 4.87 percent of the contract dollars.

Caucasian Male Business Enterprises received 310 or 93.09 percent of the construction-related contracts under $25,000 during the study period, representing $2,683,132 or 95.13 percent of the contract dollars.

Table 1.08 Construction-Related Prime Contractor Utilization: Contracts under $25,000, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	8	2.40%	$13,701	0.49%
Asian Americans	0	0.00%	$0	0.00%
Hispanic Americans	1	0.30%	$11,150	0.40%
Native Americans	2	0.60%	$50,000	1.77%
Caucasian Females	12	3.60%	$62,639	2.22%
Caucasian Males	310	93.09%	$2,683,132	95.13%
TOTAL	333	100.00%	$2,820,622	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	8	2.40%	$13,701	0.49%
Asian American Females	0	0.00%	$0	0.00%
Asian American Males	0	0.00%	$0	0.00%
Hispanic American Females	1	0.30%	$11,150	0.40%
Hispanic American Males	0	0.00%	$0	0.00%
Native American Females	0	0.00%	$0	0.00%
Native American Males	2	0.60%	$50,000	1.77%
Caucasian Females	12	3.60%	$62,639	2.22%
Caucasian Males	310	93.09%	$2,683,132	95.13%
TOTAL	333	100.00%	$2,820,622	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	1	0.30%	$11,150	0.40%
Minority Males	10	3.00%	$63,701	2.26%
Caucasian Females	12	3.60%	$62,639	2.22%
Caucasian Males	310	93.09%	$2,683,132	95.13%
TOTAL	333	100.00%	$2,820,622	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	11	3.30%	$74,851	2.65%
Women Business Enterprises	12	3.60%	$62,639	2.22%
Minority and Women Business Enterprises	**23**	**6.91%**	**$137,490**	**4.87%**
Caucasian Male Business Enterprises	310	93.09%	$2,683,132	95.13%
TOTAL	333	100.00%	$2,820,622	100.00%

2

SUBCONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

The objective of the subcontractor utilization analysis of construction and construction-related services contracts is to determine the level of minority and woman-owned business enterprise (M/WBE) subcontractor utilization compared to non-M/WBE subcontractor utilization. The subcontractor utilization analysis presents the choices made by prime contractors in their selection of M/WBE and non-M/WBE subcontractors on State prime contracts.

The subcontractor utilization analysis includes construction and construction-related contracts awarded by State Agencies, Authorities, and Commissions between July 1, 2000 and June 30, 2002. State Colleges and Universities contracts were analyzed separately from the State Agencies, Authorities, and Commissions.

II. SUBCONTRACTOR UTILIZATION DATA SOURCES

The first step in compiling subcontractor data was the determination of the size of the prime contracts to be researched. The research identifying subcontractor utilization was limited to prime contracts $50,000 and greater. Once the threshold was defined, the State Agencies, Authorities, and Commissions were surveyed to determine if they had subcontractor records on file for prime contracts $50,000 and greater.

It was determined that there was no centralized source for the State Agencies, Authorities, and Commissions' construction and construction-related subcontracts. While none of the State Agencies, Authorities, and Commissions maintained comprehensive subcontractor records, several could provide subcontractor award records for some of their prime

contracts. In collecting the data needed for all subcontractors, a number of strategies were employed.

Nine State Agencies, Authorities, and Commissions have compiled available subcontracting data that could be provided in an electronic format. The nine State Agencies, Authorities, and Commissions which provided such records are listed below:

State Departments:
- Transportation

Authorities:
- Garden State Parkway
- New Jersey Economic Development Authority*/Schools Construction Corporation
- New Jersey Highway/Turnpike Authority
- New Jersey Sports & Exposition Authority
- South Jersey Transit Authority

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

Commissions:
- New Jersey Meadowlands Commission
- Passaic Valley Sewage Commission

After reviewing the electronic files provided, it was determined that additional research should be performed at one State Agency, Authority, and Commission. Hard copy records were copied on site at nine State Agencies, Authorities, and Commissions, and the relevant information was entered into an electronic file. State Agencies, Authorities, and Commissions where hard copy subcontractor records were reviewed are listed below:

State Departments:
- Treasury
- Military and Veterans Affairs

Authorities:
- Casino Reinvestment Development Authority
- New Jersey Highway/Turnpike Authority
- New Jersey Housing and Mortgage Finance Authority
- New Jersey Transit Corporation
- New Jersey Water Supply Authority

Commissions:

- North Jersey District Water Supply Commission
- Pinelands Commission

The Treasurer's Director of Contract Compliance maintained records of subcontractors, which had been submitted by prime contractors in response to the requirement to file Equal Employment Opportunity forms (AA 301/AA 302). There were only a limited number of these records which included the project award date, contract title, and subcontractors.

Subcontractor records were also collected from the Treasury's Department of Property Management and Construction (DPMC) and the School Construction Corporation's project management firms. The Treasury's DPMC manages construction contracts funded by various State Agencies, Authorities, and Commissions and is therefore the repository for project files which contained major subcontractor information. Several project management firms manage school construction contracts. Their files contain information on subcontractors engaged by the school construction prime contractors.

Once the electronic and hard copy subcontractor records were compiled, the prime contractors were surveyed to collect payment data for the identified subcontracts and secure information on any utilized subcontractors which had not been identified through documentary research.

Identified subcontractors were contacted to verify their subcontract dollars. As a result of this intensive effort to collect subcontracting data, a total of 3,864 subcontracts were identified in the two industries, construction and construction-related.

III. STATE AGENCIES, AUTHORITIES, AND COMMISSIONS SUBCONTRACTOR UTILIZATION ANALYSIS: ALL SUBCONTRACTS

As depicted in Table 2.01 below, the State Agencies, Authorities, and Commissions prime contractors issued 3,864 construction and construction-related subcontracts during the July 1, 2000 to June 30, 2002 study period. These included 2,770 for construction contracts and 1,094 for construction-related contracts.

Also, the State Agencies, Authorities, and Commissions prime contractors expended $555,475,122 construction and construction-related subcontract dollars during the study period, with $488,347,293 for construction contracts and $67,127,829 for construction-related contracts.

Table 2.01 Total Construction and Construction-Related Subcontracts and Dollars Expended between July 1, 2000 and June 30, 2002

State Agencies, Authorities, and Commissions	Total Number of Subcontracts	Total Dollars Expended
Construction	2,770	$488,347,293
Construction-Related	1,094	$67,127,829
Total	3,864	$555,475,122

State Agencies, Authorities, and Commissions Subcontractor Utilization

1. State Agencies, Authorities, and Commissions Construction Subcontract Utilization: All Subcontracts

Table 2.02 depicts construction subcontracts awarded by prime contractors. Minority business enterprises received 13.5 percent of the construction subcontract dollars; Women Business Enterprises received 20.18 percent; and Caucasian Male Business Enterprises received 66.31 percent.

African American Businesses received 79 or 2.85 percent of the construction subcontracts during the study period, representing $12,414,801 or 2.54 percent of the subcontract dollars.

Asian American Businesses received 41 or 1.48 percent of the construction subcontracts during the study period, representing $4,346,947 or 0.89 percent of the subcontract dollars.

Hispanic American Businesses received 244 or 8.81 percent of the construction subcontracts during the study period, representing $49,052,375 or 10.04 percent of the subcontract dollars.

Native American Businesses received 4 or 0.14 percent of the construction subcontracts during the study period, representing $121,500 or 0.02 percent of the subcontract dollars.

Minority Business Enterprises received 368 or 13.29 percent of the construction subcontracts during the study period, representing $65,935,623 or 13.5 percent of the subcontract dollars.

Women Business Enterprises received 531 or 19.17 percent of the construction subcontracts during the study period, representing $98,571,229 or 20.18 percent of the subcontract dollars.

Minority and Women Business Enterprises received 899 or 32.45 percent of the construction subcontracts during the study period, representing $164,506,852 or 33.69 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 1,871 or 67.55 percent of the construction subcontracts during the study period, representing $323,840,441 or 66.31 percent of the subcontract dollars.

Table 2.02 Construction Utilization: All Subcontracts, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	79	2.85%	$12,414,801	2.54%
Asian Americans	41	1.48%	$4,346,947	0.89%
Hispanic Americans	244	8.81%	$49,052,375	10.04%
Native Americans	4	0.14%	$121,500	0.02%
Caucasian Females	531	19.17%	$98,571,229	20.18%
Caucasian Males	1,871	67.55%	$323,840,441	66.31%
TOTAL	2,770	100.00%	$488,347,293	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	8	0.29%	$6,222,648	1.27%
African American Males	71	2.56%	$6,192,153	1.27%
Asian American Females	9	0.32%	$1,203,136	0.25%
Asian American Males	32	1.16%	$3,143,811	0.64%
Hispanic American Females	170	6.14%	$28,663,352	5.87%
Hispanic American Males	74	2.67%	$20,389,023	4.18%
Native American Females	0	0.00%	$0	0.00%
Native American Males	4	0.14%	$121,500	0.02%
Caucasian Females	531	19.17%	$98,571,229	20.18%
Caucasian Males	1,871	67.55%	$323,840,441	66.31%
TOTAL	2,770	100.00%	488,347,293	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	187	6.75%	$36,089,136	7.39%
Minority Males	181	6.53%	$29,846,487	6.11%
Caucasian Females	531	19.17%	$98,571,229	20.18%
Caucasian Males	1,871	67.55%	$323,840,441	66.31%
TOTAL	2,770	100.00%	$488,347,293	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	368	13.29%	$65,935,623	13.50%
Women Business Enterprises	531	19.17%	$98,571,229	20.18%
Minority and Women Business Enterprises	**899**	**32.45%**	**$164,506,852**	**33.69%**
Caucasian Male Business Enterprises	1,871	67.55%	$323,840,441	66.31%
TOTAL	2,770	100.00%	$488,347,293	100.00%

2. State Agencies, Authorities, and Commissions Construction-Related Subcontract Utilization: All Subcontracts

Table 2.03 depicts construction-related subcontracts awarded by prime contractors. Minority Business Enterprises received 20.72 percent of the construction-related subcontract dollars; Women Business Enterprises received 12.95 percent; and Caucasian Male Business Enterprises received 66.33 percent.

African American Businesses received 47 or 4.3 percent of the construction-related subcontracts during the study period, representing $2,018,104 or 3.01 percent of the subcontract dollars.

Asian American Businesses received 124 or 11.33 percent of the construction-related subcontracts during the study period, representing $7,560,708 or 11.26 percent of the subcontract dollars.

Hispanic American Businesses received 40 or 3.66 percent of the construction-related subcontracts during the study period, representing $4,328,829 or 6.45 percent of the subcontract dollars.

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

Minority Business Enterprises received 211 or 19.29 percent of the construction-related subcontracts during the study period, representing $13,907,641 or 20.72 percent of the subcontract dollars.

Women Business Enterprises received 160 or 14.63 percent of the construction-related subcontracts during the study period, representing $8,694,585 or 12.95 percent of the subcontract dollars.

Minority and Women Business Enterprises received 371 or 33.91 percent of the construction-related subcontracts during the study period, representing $22,602,226 or 33.67 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 723 or 66.09 percent of construction-related subcontract dollars during the study period, representing $44,525,603 or 66.33 percent of the subcontract dollars.

Table 2.03 Construction-Related Utilization: All Subcontracts, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	47	4.30%	$2,018,104	3.01%
Asian Americans	124	11.33%	$7,560,708	11.26%
Hispanic Americans	40	3.66%	$4,328,829	6.45%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	160	14.63%	$8,694,585	12.95%
Caucasian Males	723	66.09%	$44,525,603	66.33%
TOTAL	1,094	100.00%	$67,127,829	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	24	2.19%	$625,928	0.93%
African American Males	23	2.10%	$1,392,176	2.07%
Asian American Females	52	4.75%	$3,185,126	4.74%
Asian American Males	72	6.58%	$4,375,582	6.52%
Hispanic American Females	19	1.74%	$2,208,024	3.29%
Hispanic American Males	21	1.92%	$2,120,805	3.16%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	160	14.63%	$8,694,585	12.95%
Caucasian Males	723	66.09%	$44,525,603	66.33%
TOTAL	1,094	100.00%	67,127,829	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	95	8.68%	$6,019,078	8.97%
Minority Males	116	10.60%	$7,888,563	11.75%
Caucasian Females	160	14.63%	$8,694,585	12.95%
Caucasian Males	723	66.09%	$44,525,603	66.33%
TOTAL	1,094	100.00%	$67,127,829	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	211	19.29%	$13,907,641	20.72%
Women Business Enterprises	160	14.63%	$8,694,585	12.95%
Minority and Women Business Enterprises	**371**	**33.91%**	**$22,602,226**	**33.67%**
Caucasian Male Business Enterprises	723	66.09%	$44,525,603	66.33%
TOTAL	1,094	100.00%	$67,127,829	100.00%

3

MARKET AREA ANALYSIS

I. MARKET AREA DEFINITION

A. Legal Criteria for Geographic Market Area

The Supreme Court's decision in *Richmond v. Croson*[1] firmly established that programs which set aside a certain percentage of state and local contracts for minority and woman-owned firms must be supported by *evidence of past discrimination in the award of their contracts*.

Prior to the *Croson* decision, many agencies and jurisdictions implementing race-conscious programs had done so without developing a detailed public record to document discrimination in their award of contracts. Instead, they relied upon common knowledge and widely-recognized patterns of discrimination, both local and national.[2]

Croson established that a local government should not rely on society-wide discrimination as the basis for a race-based program, but should instead identify discrimination within its own jurisdiction.[3] In *Croson*, the Court found the City of Richmond's Minority Business Enterprise (MBE) construction program to be unconstitutional due to 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 the statistical comparison of business availability and business utilization. Therefore, the identification of the local market area

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

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

3 *Croson*, 488 U.S. at 497.

is particularly important as it establishes the parameters within which to conduct a disparity study.

B. Application of the Croson Standard

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

In analyzing the cases following *Croson,* a pattern emerges which provides us with additional guidance. The body of cases examining market area support a definition of market area that is reasonable.[7] In *Cone Corporation v. Hillsborough County*,[8] the Eleventh Circuit Court of Appeals considered a study in support of Florida's Hillsborough County MBE program, which used minority contractors located in the County as the measure of available firms. The program was found to be constitutional under the compelling governmental interest prong of strict scrutiny.

Hillsborough County's program was based on statistics indicating that specific discrimination existed in the construction contracts awarded by the County, not in the construction industry in general. Hillsborough County had extracted data from within its own jurisdictional boundaries and assessed the percentage of minority businesses available in Hillsborough County. The court stated that the study was properly conducted within the "local construction industry."[9]

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII),*[10] the Ninth Circuit Court of Appeals found the City and County of San Francisco's MBE

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4 *Croson*, 488 U.S. at 471.

5 *Id.* at 500.

6 *Id.* at 470.

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

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

9 *Id*. at 915.

10 *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

program to have the factual predicate necessary to survive strict scrutiny. The MBE program was supported by a study that assessed the number of available MBE contractors within the City and County of San Francisco. The court found it appropriate to use the City and County as the relevant market area within which to conduct a disparity study.[11]

In *Coral Construction v. King County*, the Ninth Circuit Court of Appeals held that, "a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program."[12] In support of its MBE program, Washington's King County offered studies compiled by other jurisdictions, including entities completely within the County or coterminous with the boundaries of the County, as well as a separate jurisdiction completely outside of the County. The plaintiffs contended that *Croson* required King County to compile its own data and cited *Croson* to prohibit data sharing.

The court found that data sharing could potentially lead to the improper use of societal discrimination data as the factual basis for a local MBE program and that innocent third parties could be unnecessarily burdened if an MBE program were based on outside data.

However, the court also found that the data from entities within the County and from coterminous jurisdictions to be relevant to discrimination in the County and posed no risk of unfairly burdening innocent third parties. As for data gathered by a neighboring county, the court concluded that this data could not be used to support King County's MBE program. The court noted, "It is vital that a race-conscious program align itself as closely to the scope of the problem legitimately sought to be rectified by the governmental entity. To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries."[13] However, the court did acknowledge that the "world of contracting does not conform itself neatly to jurisdictional boundaries."[14]

In other situations courts have approved a definition of market area that extends beyond a jurisdiction's boundaries. In *Concrete Works v. City and County of Denver*,[15] the court directly addressed the issue of whether extra-jurisdictional evidence of discrimination can be used to determine "local market area" for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA) to support its MBE program. Relying on *Croson*, plaintiffs argued that the extra jurisdictional evidence should not be considered. The court disagreed, finding

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11 *Id.* at 1415.

12 *Coral Construction v. King County*, 941 F.2d 910, 916 (9th Cir. 1991).

13 *Id.* at 917.

14 *Ibid.*

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

that *Croson*'s concern was that cities not use vaguely defined societal discrimination as the factual predicate for a disparity study. The court explained that evidence of discrimination should be specific so that race-conscious programs are designed to minimize burdens upon nonculpable third parties.

Critical to the court's acceptance of the Denver MSA as the relevant local market was the finding that more than 80 percent of construction and design contracts awarded by Denver were awarded to contractors within the MSA. Another consideration was that Denver's analysis was based on U.S. Census data, which was available for the Denver MSA, but not for the city itself. There was no undue burden placed on nonculpable parties, as Denver had conducted a majority of its construction contracts within the area defined as the local market. Citing *AGCCII*,[16] the court noted, "that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions that the city has taken in the past have visited racial discrimination on such individuals."[17]

Similarly, New York State conducted a disparity study in which the geographic market consisted of New York State and eight counties in northern New Jersey. The geographic market was defined as the area encompassing the location of businesses which received more than 90 percent of the dollar value of all contracts awarded by the agency.[18]

State and local governments must pay special attention to the geographical scope of their disparity studies. *Croson* determined that the statistical analysis should focus on the number of qualified minority individuals or qualified minority business owners in the government's marketplace.[19] The text of *Croson* itself suggests that the geographical boundaries of the government entity comprise an appropriate market area, and other courts have agreed with this finding. In addition, other cases have approved the use of a percentage of the dollars spent by an agency on contracting.

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

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16 *AGCCII*, 950 F.2d at 1401.

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

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

19 *Croson*, 488 U.S. at 501.

II. STUDY'S MARKET AREA

The clear implication of the market area cases is that in applying the test of reasonableness, one can limit the area to that of the jurisdiction if the facts support it. The following table depicts the overall number of construction and construction-related contracts and the dollar value of contracts awarded by the State Agencies, Authorities, and Commissions between July 1, 2000 and June 30, 2002. As depicted in the table, the State Agencies, Authorities, and Commissions awarded 3,812 prime contracts valued at $2,337,654,467. Of these contracts, 3,482 or 91.34 percent were awarded to New Jersey-based companies. The dollar value of those contracts was $2,009,162,186 or 85.95 percent of all dollars. For construction prime contracts, 2,628 or 91.09 percent were awarded to New Jersey-based companies. The dollar value of those contracts was $1,670,111,081 or 84.36 percent of the total construction dollars. Of the construction-related services prime contracts, 854 or 92.13 percent of the contracts were awarded to New Jersey-based companies. The dollar value of those contracts was $339,051,104 or 94.7 percent of the total construction-related dollars. Given that geographical distribution, the State of New Jersey is determined to be this study's geographical market area.

Table 3.01 State Agencies, Authorities, and Commissions Market Area: July 1, 2000 to June 30, 2002

Market Area	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Combined Types of Work				
Market Area: State of New Jersey	3,482	91.34%	$2,009,162,186	85.95%
Outside Market Area	330	8.66%	$328,492,282	14.05%
Total	3,812	100.00%	$2,337,654,467	100.00%
Construction				
Market Area: State of New Jersey	2,628	91.09%	$1,670,111,081	84.36%
Outside Market Area	257	8.91%	$309,517,611	15.64%
Total	2,885	100.00%	$1,979,628,693	100.00%
Construction-Related Services				
Market Area: State of New Jersey	854	92.13%	$339,051,104	94.70%
Outside Market Area	73	7.87%	$18,974,671	5.30%
Total	927	100.00%	$358,025,775	100.00%

4

AVAILABILITY ANALYSIS

I. INTRODUCTION

According to *Croson*, availability is defined as businesses in the jurisdiction's market area that are willing and able to provide goods or services the jurisdiction procures.[1] To determine availability, minority and woman-owned business enterprises (M/WBEs) and non-M/WBEs within the jurisdiction's market area that are willing and able to perform its contracts need to be enumerated. When considering sources for determining the number of willing and able M/WBEs and non-M/WBEs, the selection must be based on whether two significant aspects about the population in question can be gauged from the various sources. The source must indicate first the firm's interest in doing business with the local government, as implied by the term "willing," and second, the willing business' capacity to provide goods or services, as implied by the term "able."

The determination of availability must follow from the definition of an entity's market area. The market area analysis presented in Chapter 3 defined the State of New Jersey (State) as the market area for State Agencies, Authorities, and Commissions because the majority of businesses utilized are domiciled within the State's jurisdiction.

The minority, woman, and Caucasian male-owned businesses in the market area providing construction and construction-related services were compiled from State and other sources. Separate availability lists were compiled for prime contractors and subcontractors in those industries.

[1] *Croson*, 488 U.S. at 509.

II. SOURCES OF POTENTIALLY WILLING AND ABLE PRIME CONTRACTORS

A. Pre-Qualified Contractor Sources

The pre-qualified lists were a source of construction and construction-related businesses willing and able to do business with State Agencies, Authorities, and Commissions. New Jersey Statute § 52:35-2 requires all bidders on state public works contracts to be pre-qualified. A prospective bidder is required to submit a statement that fully discloses the financial ability, adequacy of plant and equipment, organization, and other pertinent information in order to pre-qualify. While State officials have the option of promulgating regulations deemed appropriate for controlling the qualifications of prospective bidders, all regulations must ensure that public works contracts are awarded to pre-qualified businesses, according to New Jersey law.

The only exception to the State's pre-qualification requirement applies to State Colleges and Universities. These institutions are exempt from the pre-qualification requirement because they are autonomous, quasi-public entities. However, a survey of 23 State Agencies, Authorities, and Commissions determined that 7 agencies did not require bidders to pre-qualify. The 7 agencies are the Casino Reinvestment Development Authority, New Jersey Water Supply Authority, New Jersey Housing and Mortgage Finance Authority, New Jersey Meadowlands Commission, North Jersey District Water Supply Commission, Passaic Valley Sewage Commission, and the Pinelands Commission.

It is evident from the prevailing practices that pre-qualification lists are just some of many sources used by State Agencies, Authorities, and Commissions to identify businesses with the capacity needed to perform their construction and construction-related contracts. Therefore, the pre-qualified lists are not the sole sources in determining the number of businesses available to perform the public works contracts under analysis in this Study. Other sources used by State Agencies, Authorities, and Commissions to identify businesses available to perform their contracts are listed in Table 4.01 below.

B. Other Prime Contractor Sources

M/WBEs and non-M/WBEs willing and able to do business with the State were identified from various sources. Businesses that demonstrated willingness to contract with the State were identified from State and other agency sources. The willingness of businesses identified from non-governmental sources had to be determined. Table 4.02 lists the sources used. These sources include government and private listings of M/WBEs and non-M/WBEs in the market area.

Table 4.01 Summary of Prime Contractor Availability Data Sources

Source of Record	Type of Information
State of New Jersey and Other Government Records	
State of New Jersey: State Agency, Authority, Commission, College, and University Vendors	M/WBEs and Non-M/WBEs
State of New Jersey: State Agency, Authority, Commission, College, and University Utilized Businesses	M/WBEs and Non-M/WBEs
State of New Jersey: State Agency, Authority, Commission, College, and University Unsuccessful Bidders	M/WBEs and Non-M/WBEs
State of New Jersey: State Agency, Authority, Commission, College, and University Pre-qualification Lists	M/WBEs and Non-M/WBEs
Government Agency Certification Lists	
Department of Commerce Certification List	M/WBEs and Non-M/WBEs
New Jersey Department of Transportation Certification List	M/WBEs and Non-M/WBEs
The Port Authority of New York and New Jersey Certification Database	M/WBEs
United States Small Business Administration PRO-Net Database	M/WBEs and Non-M/WBEs
Business Outreach Events	
State of New Jersey Public Hearings' Attendee Lists	M/WBEs and Non-M/WBEs
State of New Jersey Business Surveys	M/WBEs and Non-M/WBEs
Trade Association Membership Lists	
Associated General Contractors	M/WBEs and Non-M/WBEs
Atlantic Plumbing & Heating	M/WBEs and Non-M/WBEs
Better Business Bureau	M/WBEs and Non-M/WBEs
Builders League of South Jersey	M/WBEs and Non-M/WBEs
Building Construction Association of NJ	M/WBEs and Non-M/WBEs
Maple Shade Progress Business Association	M/WBEs and Non-M/WBEs
New Jersey Association of Women Business Owners	M/WBEs
South Jersey Mechanic Contractors Association	M/WBEs and Non-M/WBEs
Chamber of Commerce Membership and Business Directory Lists	
Asian Indian Chamber of Commerce	M/WBEs
Atlantic County Chamber of Commerce	M/WBEs and Non-M/WBEs

Table 4.01 Summary of Prime Contractor Availability Data Sources

Source of Record	Type of Information
Avalon Chamber of Commerce	M/WBEs and Non-M/WBEs
Bayshore New Jersey	M/WBEs and Non-M/WBEs
Bloomfield Chamber of Commerce	M/WBEs and Non-M/WBEs
Bridgeton Chamber of Commerce	M/WBEs and Non-M/WBEs
Brigantine Chamber of Commerce	M/WBEs and Non-M/WBEs
Cherry Hill Chamber of Commerce	M/WBEs and Non-M/WBEs
Chinese American Chamber of Commerce	M/WBEs
Cranford Chamber of Commerce	M/WBEs and Non-M/WBEs
Dennis Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Denville Chamber of Commerce	M/WBEs and Non-M/WBEs
East Brunswick Regional Chamber of Commerce	M/WBEs and Non-M/WBEs
Eastern Monmouth Chamber of Commerce	M/WBEs and Non-M/WBEs
Elmwood Park Chamber of Commerce	M/WBEs and Non-M/WBEs
Franklin Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Garfield Chamber of Commerce	M/WBEs and Non-M/WBEs
Glassboro Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Elizabeth Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Fort Lee Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Hammonton Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Mercer County Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Vineland Chamber of Commerce	M/WBEs and Non-M/WBEs
Highland Park Chamber of Commerce	M/WBEs and Non-M/WBEs
Hope Chamber of Commerce	M/WBEs and Non-M/WBEs
Howell Chamber of Commerce	M/WBEs and Non-M/WBEs
Hudson Chamber of Commerce	M/WBEs and Non-M/WBEs
Irvington Chamber of Commerce	M/WBEs and Non-M/WBEs
Jackson Chamber Member Directory	M/WBEs and Non-M/WBEs
Jefferson Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Lower Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Main Street Hammonton Businesses	M/WBEs and Non-M/WBEs
Matawan Aberdeen Chamber of Commerce	M/WBEs and Non-M/WBEs
Metropolitan Trenton African American Chamber of Commerce	M/WBEs
Metuchen Chamber of Commerce	M/WBEs and Non-M/WBEs
Middlesex County Regional Chamber of Commerce	M/WBEs and Non-M/WBEs
Millburn Chamber of Commerce	M/WBEs and Non-M/WBEs

Table 4.01 Summary of Prime Contractor Availability Data Sources

Source of Record	Type of Information
Montville Chamber of Commerce	M/WBEs and Non-M/WBEs
North Jersey Chamber of Commerce	M/WBEs and Non-M/WBEs
North Essex Chamber of Commerce	M/WBEs and Non-M/WBEs
Ocean Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Paramus Chamber of Commerce	M/WBEs and Non-M/WBEs
Paulsboro Chamber of Commerce	M/WBEs and Non-M/WBEs
Perth Amboy Chamber of Commerce	M/WBEs and Non-M/WBEs
Phillipsburg Chamber of Commerce	M/WBEs and Non-M/WBEs
Piscataway-Middlesex-South Plainfield Chamber of Commerce	M/WBEs and Non-M/WBEs
Point Pleasant Chamber of Commerce	M/WBEs and Non-M/WBEs
Pompton Lakes Chamber of Commerce	M/WBEs and Non-M/WBEs
Regional Business Partnership Directory	M/WBEs and Non-M/WBEs
Ridgewood Chamber of Commerce	M/WBEs and Non-M/WBEs
Ringwood Chamber of Commerce	M/WBEs and Non-M/WBEs
Salem County Chamber of Commerce	M/WBEs and Non-M/WBEs
Sea Isle City Chamber of Commerce	M/WBEs and Non-M/WBEs
Somerset County Business Partnership	M/WBEs and Non-M/WBEs
Southern New Jersey Chamber of Commerce	M/WBEs and Non-M/WBEs
Tom's River Ocean County Chamber of Commerce	M/WBEs and Non-M/WBEs
Westfield Area Chamber of Commerce	M/WBEs and Non-M/WBEs
Westfield Business Directory	M/WBEs and Non-M/WBEs

C. Determination of Willingness

The term "willingness" refers to a firm's indicated interest in doing government contracting. This term, as it has been used in *Croson* and its progeny, is addressed in detail in the Legal Analysis chapter in Volume 1. Companies secured through the State of New Jersey and other governmental agencies, listed in Table 4.02, have demonstrated their willingness to perform on public contracts. These businesses had either bid on State projects, sought government contracts, secured government certification, or responded to the outreach campaign conducted in conjunction with this Disparity Study and other State outreach programs. It is therefore presumed that companies that sought government contracts are willing to provide the goods and services needed by the State.

Companies from the non-governmental agency membership lists in Table 4.02 were not presumed to be willing, based on the *Croson* criteria. These companies were surveyed to determine their willingness to bid on State contracts. The businesses that indicated a

willingness when surveyed, were added to the database used to create a unique list of willing businesses in the State's market area. The surveyed businesses that indicated an interest in contracting with the State were combined with the businesses from the State and other government lists, certification lists, and outreach lists to compile this unique list of willing businesses.

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

Tables 4.03 through 4.05 represent the distribution of available prime contractors. The sources are ranked, with the highest ranking assigned to the contractors utilized by the State. Each company is *counted only once in the distribution.* For example, a utilized prime contractor is counted once in the prime contractor utilization source and is not counted a second time, even though the company may have been certified or identified as a bidder.

As noted in Table 4.02, 98.24 percent of the prime contractors available in the two industries combined were obtained from public agencies, certification lists, and business outreach events. Companies identified through the willingness survey represented 1.76 percent of the willing firms.

Table 4.02 Distribution of Prime Contractor Availability Data Sources: All Construction and Construction-Related

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor and Subcontractor Utilization	8.92%	19.25%	16.43%
Pre-Qualified Contractors	32.39%	66.86%	57.47%
Bidders Lists	0.31%	1.82%	1.41%
Certification Lists	54.36%	9.07%	21.41%
US SBA Pro-net	2.09%	0.64%	1.04%
Public Hearing Attendees	0.26%	0.57%	0.48%
Subtotal	**98.33%**	**98.20%**	**98.24%**
Willingness Survey	1.67%	1.80%	1.76%
Grand Total*	**100.00%**	**100.00%**	**100.00%**

*The percentages may not total 100 percent due to rounding

The distribution of available businesses by source was performed for each industry. As noted in Table 4.03, 98.18 percent of the construction prime contractors identified were derived from public agencies, certification lists, and business outreach sources. Companies identified through the willingness survey represented 1.82 percent of the willing firms.

Table 4.03 Distribution of Prime Contractor Availability Sources: Construction

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor and Subcontractor Utilization	9.93%	21.06%	18.06%
Pre-Qualified Contractor	32.50%	65.00%	56.27%
Bidders Lists	0.43%	2.39%	1.86%
Certification Lists	52.86%	8.74%	20.60%
US SBA Pro-net	2.14%	0.47%	0.92%
Public Hearing Attendees	0.21%	0.55%	0.46%
Subtotal	**98.07%**	**98.21%**	**98.18%**
Willingness Survey	1.93%	1.79%	1.82%
Grand Total*	**100.00%**	**100.00%**	**100.00%**

*The percentages may not total 100 percent due to rounding

Table 4.04 depicts the data sources for construction-related prime contractors. As noted, 98.54 percent of the prime contractors were obtained from public agencies, certification lists, and business outreach sources. Companies identified through the willingness survey represented 1.46 percent of the willing firms.

Table 4.04 Distribution of Prime Contractor Availability Sources: Construction-Related

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor and Subcontractor Utilization	8.07%	15.68%	13.40%
Pre-Qualified Contractor	35.46%	71.29%	60.55%
Bidders Lists	0%	0.14%	0.10%
Certification Lists	53.61%	9.50%	22.72%
US SBA Pro-net	1.68%	1.08%	1.26%
Public Hearing Attendees	0.34	0.58%	0.50%
Subtotal	**99.16%**	**98.27%**	**98.54%**
Willingness Survey	0.84%	1.73%	1.46%
Grand Total*	**100.00%**	**100.00%**	**100.00%**

*The percentages may not total 100 percent due to rounding

III. CAPACITY

The second component of the availability requirement set forth in *Croson* is a firm's capacity or ability to perform the contracts awarded by an agency.[2] However, capacity requirements are not delineated in *Croson*. In fact, a standard for capacity has only been addressed in a few subsequent cases. Each case where capacity has been considered has involved large, competitively bid, construction prime contracts. Therefore, in order to assess the capacity of willing market area firms to do business with the State, four approaches have been employed:

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

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

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

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

A. Size of Prime Contracts Analyzed

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

The State's construction and construction-related services contracts were analyzed to determine the capacity required to perform the contracts and the capacity demonstrated by prime contractors regarding ethnic and gender groups. The size distribution illustrates the fact that limited capacity is needed to perform the overwhelming majority of the State Agencies, Authorities, and Commissions' contracts.

1. Construction Prime Contracts, by Size

Table 4.05 depicts the State Agencies, Authorities, and Commissions' construction contracts awarded within dollar ranges. The percentage of contracts valued under $25,000 was 63.19 percent, the percentage of those under $100,000 was 75.39 percent, and the percentage of those under $500,000 was 84.61 percent. A P-value calculation was conducted to determine the probability that the findings comprise a pattern or a chance occurrence.

The P-value of <0.001 denotes a significant difference in the size of construction contract dollars across ethnic/gender groups.

2. Construction-Related Services Prime Contracts, by Size

Table 4.06 depicts the State Agencies, Authorities, and Commissions' construction-related contracts awarded within dollar ranges. The percentage of contracts valued under $25,000 was 35.49 percent, the percentage of those under $100,000 was 53.4 percent, and the percentage of those under $500,000 was 81.45 percent.

The P-value of <0.001 denotes a significant difference in the size of construction-related contract dollars across ethnic/gender groups.

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

Table 4.05 Construction Prime Contracts by Size: July 1, 2000 to June 30, 2002

Size	Caucasian				Minority					
	Females		Males		Females		Males		Total	
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
$1 - $24,999	78	37.14%	1,702	66.38%	31	63.27%	12	19.35%	1,823	63.19%
$25,000 - $49,999	23	10.95%	227	8.85%	4	8.16%	6	9.68%	260	9.01%
$50,000 - $99,999	12	5.71%	73	2.85%	3	6.12%	4	6.45%	92	3.19%
$100,000 - $249,999	21	10.00%	104	4.06%	3	6.12%	5	8.06%	133	4.61%
$250,000 - $499,999	15	7.14%	101	3.94%	4	8.16%	13	20.97%	133	4.61%
$500,000 - $999,999	17	8.10%	92	3.59%	1	2.04%	6	9.68%	116	4.02%
$1,000,000 - $2,999,999	34	16.19%	154	6.01%	3	6.12%	7	11.29%	198	6.86%
$3,000,000 and greater	10	4.76%	111	4.33%	0	0.00%	9	14.52%	130	4.51%
Total	210	100.00%	2,564	100.00%	49	100.00%	62	100.00%	2,885	100.00%

P-Value < 0.001

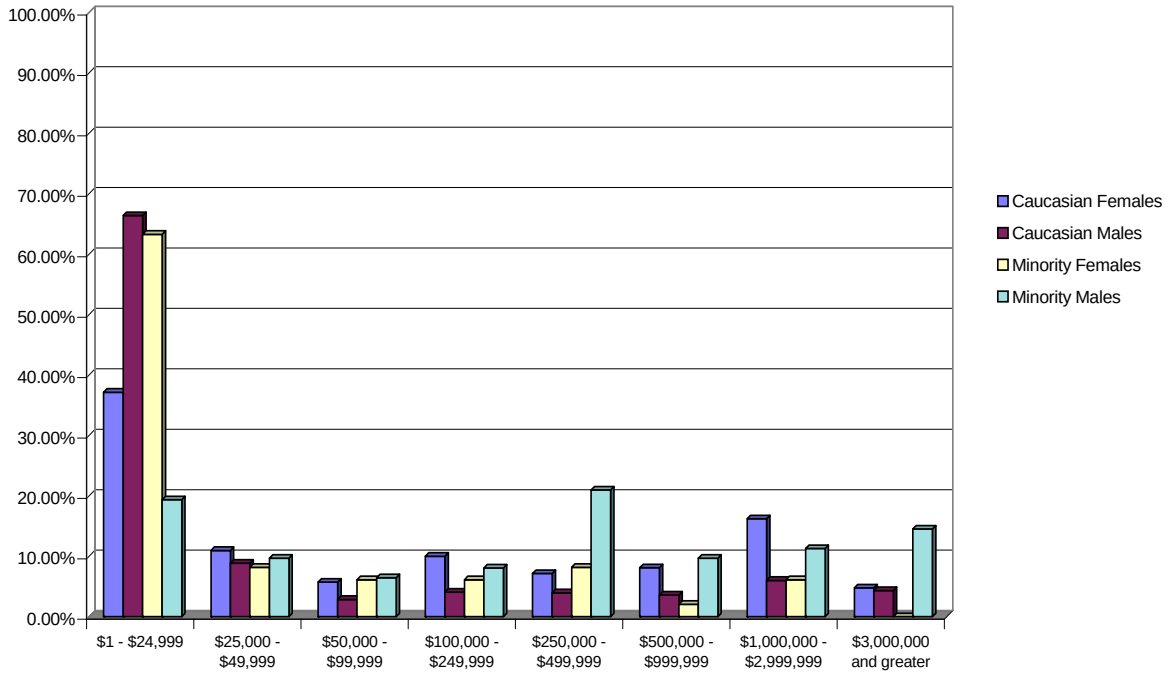
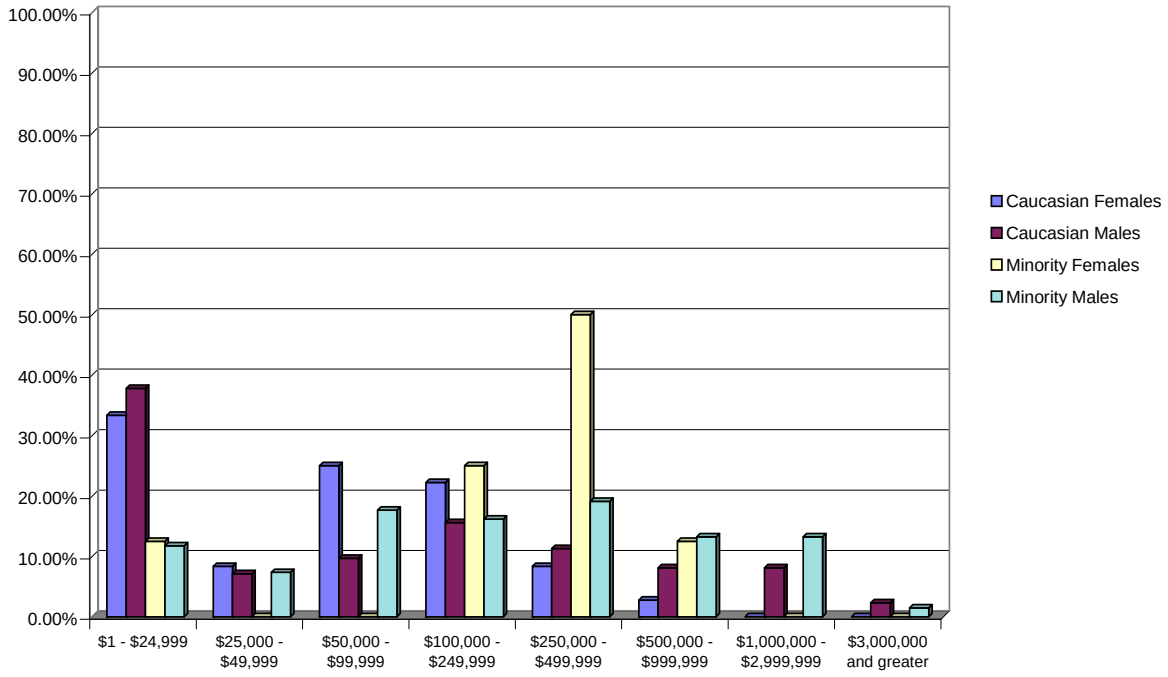


Table 4.06 Construction-Related Prime Contracts by Size: July 1, 2000 to June 30, 2002

Size	Caucasian				Minority					
	Females		Males		Females		Males		Total	
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
$1 - $24,999	12	33.33%	308	37.79%	1	12.50%	8	11.76%	329	35.49%
$25,000 - $49,999	3	8.33%	58	7.12%	0	0.00%	5	7.35%	66	7.12%
$50,000 - $99,999	9	25.00%	79	9.69%	0	0.00%	12	17.65%	100	10.79%
$100,000 - $249,999	8	22.22%	127	15.58%	2	25.00%	11	16.18%	148	15.97%
$250,000 - $499,999	3	8.33%	92	11.29%	4	50.00%	13	19.12%	112	12.08%
$500,000 - $999,999	1	2.78%	66	8.10%	1	12.50%	9	13.24%	77	8.31%
$1,000,000 - $2,999,999	0	0.00%	66	8.10%	0	0.00%	9	13.24%	75	8.09%
$3,000,000 and greater	0	0.00%	19	2.33%	0	0.00%	1	1.47%	20	2.16%
Total	36	100.00%	815	100.00%	8	100.00%	68	100.00%	927	100.00%

P-Value < 0.001



B. Largest M/WBE Prime Contract Awards, by Industry

An examination of all contracts awarded during the study period demonstrated that large competitively bid prime contracts were awarded to M/WBEs in construction and construction-related industries by State Agencies, Authorities, Commissions, and the State Colleges and Universities. The distribution of the largest M/WBE prime contracts awarded is depicted in Table 4.07 below. In construction, M/WBEs were awarded very large, competitively bid contracts. The utilization analysis shows that M/WBEs demonstrated the capacity to successfully compete for contracts as large as $34.4 million in construction and $3.1 million in construction-related services. WBEs were awarded contracts over $15 million in construction and more than $760,000 in construction-related services.

Table 4.07 The Largest M/WBE Prime Contract Awards, by Industry: State Agencies, Authorities, Commissions, and State Colleges and Universities

Ethnicity	Construction	Construction-Related
African Americans	$799,900	$2,827,742
Asian Americans	$10,634,531	$3,160,061
Hispanic Americans	$34,438,866	$2,346,208
Native Americans	$851,908	$365,503
Caucasian Females	$15,004,003	$761,313

IV. PRIME CONTRACTOR AVAILABILITY ANALYSIS

The contract size analysis in Tables 4.05 and 4.06 demonstrates that the capacity needed to perform on most of the State's Agencies, Authorities, and Commissions' contracts is limited. Furthermore, M/WBE firms in the State's market area do in fact have the capacity to bid on large contracts in each of the industries studied.

The prime contractor availability findings are summarized below.

A. Construction Prime Contractor Availability

The distribution of available construction prime contractors is summarized in Table 4.08.

African American Businesses account for 6.42 percent of the construction firms in the State's market area.

Asian American Businesses account for 3.05 percent of the construction firms in the State's market area.

Hispanic American Businesses account for 5.71 percent of the construction firms in the State's market area.

Native American Businesses account for 0.08 percent of the construction firms in the State's market area.

Minority Business Enterprises account for 15.26 percent of the construction firms in the State's market area.

Women Business Enterprises account for 11.6 percent of the construction firms in the State's market area.

***Minority and Women Business Enterprise*s** account for 26.86 percent of the construction firms in the State's market area.

Caucasian Male Business Enterprises account for 73.14 percent of the construction firms in the State's market area.

Table 4.08 Available Construction Prime Contractors

Ethnicity	Percent of Businesses
African Americans	6.42%
Asian Americans	3.05%
Hispanic Americans	5.71%
Native Americans	0.08%
Caucasian Females	11.60%
Caucasian Males	73.14%
TOTAL	100.00%
Ethnicity and Gender	**Percent of Businesses**
African American Females	0.90%
African American Males	5.52%
Asian American Females	0.57%
Asian American Males	2.48%
Hispanic American Females	1.35%
Hispanic American Males	4.36%
Native American Females	0.00%
Native American Males	0.08%
Caucasian Females	11.60%
Caucasian Males	73.14%
TOTAL	100.00%
Minority and Gender	**Percent of Businesses**
Minority Females	2.82%
Minority Males	12.44%
Caucasian Females	11.60%
Caucasian Males	73.14%
TOTAL	100.00%
Minority and Females	**Percent of Businesses**
Minority Business Enterprises	15.26%
Women Business Enterprises	11.60%
Minority and Women Business Enterprises	**26.86%**
Caucasian Male Business Enterprises	73.14%
TOTAL	100.00%

B. Construction-Related Prime Contractor Availability

The distribution of available construction-related prime contractors is summarized in Table 4.09.

African American Businesses account for 4.94 percent of the construction-related firms in the State's market area.

Asian American Businesses account for 7.93 percent of the construction-related firms in the State's market area.

Hispanic American Businesses account for 4.39 percent of the construction-related firms in the State's market area.

Native American Businesses account for 0.1 percent of the construction-related firms in the State's market area.

Minority Business Enterprises account for 17.36 percent of the construction-related firms in the State's market area.

Women Business Enterprises account for 12.42 percent of the construction-related firms in the State's market area.

Minority and Women Business Enterprises account for 29.78 percent of the construction-related firms in the State's market area.

Caucasian Male Business Enterprises account for 70.22 percent of the construction-related firms in State's market area.

Table 4.09 Available Construction-Related Prime Contractors

Ethnicity	Percent of Businesses
African Americans	4.94%
Asian Americans	7.93%
Hispanic Americans	4.39%
Native Americans	0.10%
Caucasian Females	12.42%
Caucasian Males	70.22%
TOTAL	100.00%
Ethnicity and Gender	**Percent of Businesses**
African American Females	1.15%
African American Males	3.79%
Asian American Females	1.35%
Asian American Males	6.58%
Hispanic American Females	1.15%
Hispanic American Males	3.24%
Native American Females	0.05%
Native American Males	0.05%
Caucasian Females	12.42%
Caucasian Males	70.22%
TOTAL	100.00%
Minority and Gender	**Percent of Businesses**
Minority Females	3.69%
Minority Males	13.67%
Caucasian Females	12.42%
Caucasian Males	70.22%
TOTAL	100.00%
Minority and Females	**Percent of Businesses**
Minority Business Enterprises	17.36%
Women Business Enterprises	12.42%
Minority and Women Business Enterprises	**29.78%**
Caucasian Male Business Enterpris	70.22%
TOTAL	100.00%

V. SOURCES OF POTENTIALLY WILLING AND ABLE SUBCONTRACTORS AND AVAILABILITY

A. Subcontractor Sources

All available State Agency, Authority, and Commission prime contractors were included in the subcontractor availability. Additional subcontractors were identified using sources in Table 4.10.

Table 4.10 Unique Subcontractor Availability Data Sources

Type of Record	Type of Information
• Subcontracting records provided by the State	• M/WBEs and non-M/WBEs
• Subcontractors identified by utilized prime contractors through the prime contractor survey	• M/WBEs and non-M/WBEs

B. Determination of Willingness and Capacity

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

The subcontractor availability findings are summarized below.

C. Construction Subcontractor Availability

The distribution of available construction subcontractors is summarized in Table 4.11.

African American Businesses account for 6.3 percent of the construction firms in the State's market area.

Asian American Businesses account for 4.34 percent of the construction firms in the State's market area.

Hispanic American Businesses account for 5.52 percent of the construction firms in the State's market area.

Native American Businesses account for 0.12 percent of the construction firms in the State's market area.

Minority Business Enterprises account for 16.28 percent of the construction firms in the State's market area.

Women Business Enterprises account for 12.67 percent of the construction firms in the State's market area.

Minority and Women Business Enterprises account for 28.94 percent of the construction firms in the State's market area.

Caucasian Male Business Enterprises account for 71.06 percent of the construction firms in the State's market area.

Table 4.11 Available Construction Subcontractors

Ethnicity	Percent of Businesses
African Americans	6.30%
Asian Americans	4.34%
Hispanic Americans	5.52%
Native Americans	0.12%
Caucasian Females	12.67%
Caucasian Males	71.06%
TOTAL	100.00%
Ethnicity and Gender	**Percent of Businesses**
African American Females	0.98%
African American Males	5.32%
Asian American Females	0.85%
Asian American Males	3.49%
Hispanic American Females	1.40%
Hispanic American Males	4.13%
Native American Females	0.00%
Native American Males	0.12%
Caucasian Females	12.67%
Caucasian Males	71.06%
TOTAL	100.00%
Minority and Gender	**Percent of Businesses**
Minority Females	3.22%
Minority Males	13.05%
Caucasian Females	12.67%
Caucasian Males	71.06%
TOTAL	100.00%
Minority and Females	**Percent of Businesses**
Minority Business Enterprises	16.28%
Women Business Enterprises	12.67%
Minority and Women Business Enterprises	**28.94%**
Caucasian Male Business Enterprises	71.06%
TOTAL	100.00%

D. Construction-Related Subcontractor Availability

The distribution of available construction-related prime contractors is summarized in Table 4.12.

African American Businesses account for 4.51 percent of the construction-related firms in the State's market area.

Asian American Businesses account for 7.11 percent of the construction-related firms in the State's market area.

Hispanic American Businesses account for 4.09 percent of the construction-related firms in the State's market area.

Native American Businesses account for 0.13 percent of the construction-related firms in the State's market area.

Minority Business Enterprises account for 15.84 percent of the construction-related firms in the State's market area.

Women Business Enterprises account for 12.27 percent of the construction-related firms in the State's market area.

Minority and Women Business Enterprises account for 28.11 percent of the construction-related firms in the State's market area.

Caucasian Male Business Enterprises account for 71.89 percent of the construction-related firms in State's market area.

Table 4.12 Available Construction-Related Subcontractors

Ethnicity	Percent of Businesses
African Americans	4.51%
Asian Americans	7.11%
Hispanic Americans	4.09%
Native Americans	0.13%
Caucasian Females	12.27%
Caucasian Males	71.89%
TOTAL	100.00%
Ethnicity and Gender	**Percent of Businesses**
African American Females	0.98%
African American Males	3.53%
Asian American Females	1.19%
Asian American Males	5.92%
Hispanic American Females	1.06%
Hispanic American Males	3.02%
Native American Females	0.09%
Native American Males	0.04%
Caucasian Females	12.27%
Caucasian Males	71.89%
TOTAL	100.00%
Minority and Gender	**Percent of Businesses**
Minority Females	3.32%
Minority Males	12.52%
Caucasian Females	12.27%
Caucasian Males	71.89%
TOTAL	100.00%
Minority and Females	**Percent of Businesses**
Minority Business Enterprises	15.84%
Women Business Enterprises	12.27%
Minority and Women Business Enterprises	**28.11%**
Caucasian Male Business Enterprises	71.89%
TOTAL	100.00%

5

PRIME CONTRACTOR DISPARITY ANALYSES

I. INTRODUCTION

The objective of the disparity analysis is to determine the level minority and woman-owned business enterprises (M/WBEs) were utilized on State Agencies, Authorities, and Commissions contracts. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) would be approximate to the proportion of available MBEs[1] and WBEs in the relevant market area. If the available M/WBE businesses are underutilized, a statistical test could determine the probability that the disparity is due to chance. If there is a low probability that the disparity is due to chance,[2] *Croson* states that an inference of discrimination can be made. This type of analysis is applied to M/WBEs by both ethnicity and gender.

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

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1 Availability is defined as willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 4.

2 When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by the courts to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within the 95 percent confidence level.

A disparity ratio less than 0.80 indicates a relevant degree of disparity. This disparity may be detected using a parametric analysis,[3] where the number of contracts is sufficiently large and the variation of the contract amount is not too large. When the variation in contract dollar amounts is high, a disparity may not be detectable. Under the condition when the variation in contract dollar amounts is high, a non-parametric analysis[4] would be employed to analyze the contracts ranked by dollar amount.

In order to assess whether the difference in contract values is attributable to chance, a P-value[5] is calculated. The P-value takes into account the number of contracts, amount of contract dollars, and variation in contract dollars. If the difference between the actual and expected number of contracts and total contract dollars has a P-value of less than 0.05, the difference is statistically significant.[6]

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

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

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3 Parametric analysis is a statistical examination based on the actual values of the variable. In this case, the parametric analysis consists of the actual dollar values of the contracts.

4 Non-parametric analysis is a method to make data more suitable for statistical testing by allowing one variable to be replaced with a new variable that maintains the essential characteristics of the original one. In this case, the contracts are ranked from the smallest to the largest. The dollar value of each contract is replaced with its rank order number.

5 P-value is a measure of statistical significance.

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

II. DISPARITY ANALYSES

Prime contractor disparity analysis was performed on construction and construction-related services contracts awarded by the State Agencies, Authorities, and Commissions between July 1, 2000 and June 30, 2002.

As demonstrated in Chapter 4: Availability Analysis, the majority of the State Agencies, Authorities, and Commissions contracts are small with 83.84 percent under $500,000 and 56.45 percent $25,000 and under. The fact that the majority of the State Agencies, Authorities, and Commissions contracts are small suggests that the capacity needed to perform most of the contracts awarded during the study period was minimal. Furthermore, there is evidence that the willing firms had the capacity to perform contracts in excess of $500,000. A threshold of $500,000 was set for the prime contract disparity analysis to ensure that willing firms had the capacity to perform contracts included in the analysis. The prime contract disparity findings in the industries under consideration are summarized in the sections below.

A. State Agencies, Authorities, and Commissions Disparity Analysis: Construction Prime Contracts, under $500,000

The disparity analysis of all construction prime contract dollars under $500,000 is depicted in Table 5.01 and Chart 5.01.

African American Businesses represent 6.42 percent of the available construction firms and received 0.15 percent of the construction prime contract dollars under $500,000. This underutilization is statistically significant.

Asian American Businesses represent 3.05 percent of the available construction firms and received 3.49 percent of the construction prime contract dollars under $500,000. This overutilization is not statistically significant.

Hispanic American Businesses represent 5.71 percent of the available construction firms and received 5.17 percent of the construction prime contract dollars under $500,000. This underutilization is not statistically significant.

Native American Businesses represent 0.08 percent of the available construction firms and received none of the construction prime contract dollars under $500,000. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 15.26 percent of the available construction firms and received 8.81 percent of the construction prime contract dollars under $500,000. This underutilization is statistically significant.

Women Business Enterprises represent 11.6 percent of the available construction firms and received 11.65 percent of the construction prime contract dollars under $500,000. This overutilization is not statistically significant.

Minority and Women Business Enterprises represent 26.86 percent of the available construction firms and received 20.47 percent of the construction prime contract dollars under $500,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 73.14 percent of the available construction firms and received 79.53 percent of the construction prime contract dollars under $500,000. This overutilization is statistically significant.

Table 5.01 State Agencies, Authorities, and Commissions Disparity Analysis: Construction Prime Contracts under $500,000, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$143,413	0.15%	6.42%	$6,200,581	-$6,057,168	0.02	< .05 *
Asian Americans	$3,372,281	3.49%	3.05%	$2,943,896	$428,385	1.15	**
Hispanic Americans	$4,997,198	5.17%	5.71%	$5,519,805	-$522,607	0.91	not significant
Native Americans	$0	0.00%	0.08%	$73,597	-$73,597	0.00	----
Caucasian Females	$11,257,122	11.65%	11.60%	$11,205,204	$51,918	1.00	**
Caucasian Males	$76,826,571	79.53%	73.14%	$70,653,502	$6,173,069	1.09	< .05 †
TOTAL	$96,596,585	100.00%	100.00%	$96,596,585			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	0.90%	$864,769	-$864,769	0.00	----
African American Males	$143,413	0.15%	5.52%	$5,335,811	-$5,192,398	0.03	< .05 *
Asian American Females	$49,410	0.05%	0.57%	$551,980	-$502,570	0.09	----
Asian American Males	$3,322,871	3.44%	2.48%	$2,391,915	$930,956	1.39	**
Hispanic American Females	$2,199,134	2.28%	1.35%	$1,306,354	$892,780	1.68	**
Hispanic American Males	$2,798,064	2.90%	4.36%	$4,213,451	-$1,415,387	0.66	< .05 *
Native American Females	$0	0.00%	0.00%	$0	$0	----	----
Native American Males	$0	0.00%	0.08%	$73,597	-$73,597	0.00	----
Caucasian Females	$11,257,122	11.65%	11.60%	$11,205,204	$51,918	1.00	**
Caucasian Males	$76,826,571	79.53%	73.14%	$70,653,502	$6,173,069	1.09	< .05 †
TOTAL	$96,596,585	100.00%	100.00%	$96,596,585			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$2,248,544	2.33%	2.82%	$2,723,104	-$474,560	0.83	not significant
Minority Males	$6,264,349	6.49%	12.44%	$12,014,775	-$5,750,427	0.52	< .05 *
Caucasian Females	$11,257,122	11.65%	11.60%	$11,205,204	$51,918	1.00	**
Caucasian Males	$76,826,571	79.53%	73.14%	$70,653,502	$6,173,069	1.09	< .05 †
TOTAL	$96,596,585	100.00%	100.00%	$96,596,585			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$8,512,892	8.81%	15.26%	$14,737,879	-$6,224,987	0.58	< .05 *
Women Business Enterprises	$11,257,122	11.65%	11.60%	$11,205,204	$51,918	1.00	**
Minority and Women Business Enterprises	**$19,770,014**	**20.47%**	**26.86%**	**$25,943,083**	**-$6,173,069**	**0.76**	**< .05 ***
Caucasian Male Business Enterprises	$76,826,571	79.53%	73.14%	$70,653,502	$6,173,069	1.09	< .05 †

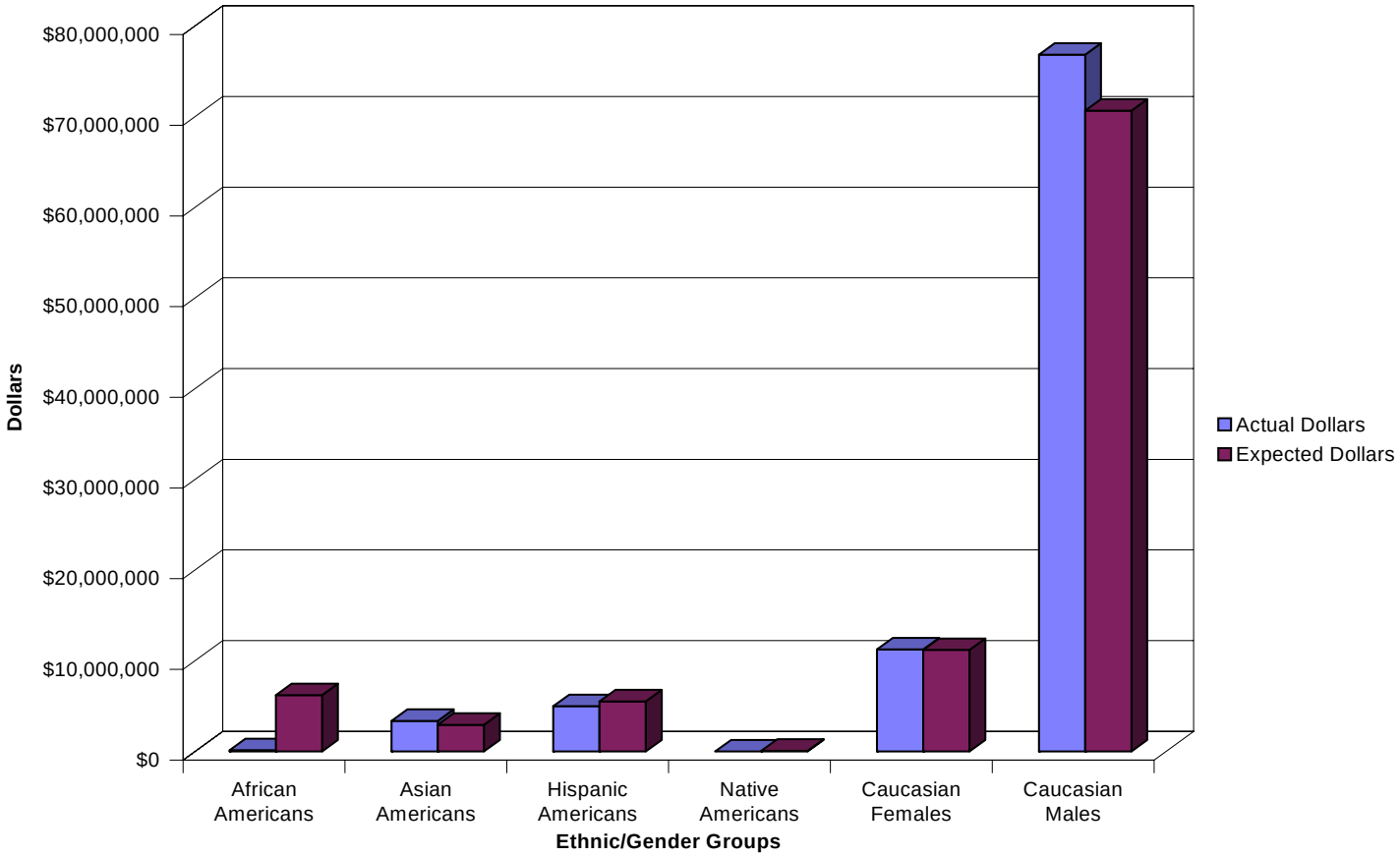
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 5.01 State Agencies, Authorities, and Commissions Disparity Analysis: Construction Prime Contracts under $500,000, July 1, 2000 to June 30, 2002



B. State Agencies, Authorities, and Commissions Disparity Analysis: Construction-Related Prime Contracts, under $500,000

The disparity analysis of all construction-related prime contract dollars under $500,000 is depicted in Table 5.02 and Chart 5.02.

African American Businesses represent 4.94 percent of the available construction-related firms and received 0.31 percent of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Asian American Businesses represent 7.93 percent of the available construction-related firms and received 4.84 percent of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Hispanic American Businesses represent 4.39 percent of the available construction-related firms and received 1.96 percent of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Native American Businesses represent 0.1 percent of the available construction-related firms and received 3.88 percent of the construction-related prime contract dollars under $500,000. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 17.36 percent of the available construction-related firms and received 10.99 percent of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Women Business Enterprises represent 12.42 percent of the available construction-related firms and received 4.39 percent of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Minority and Women Business Enterprises represent 29.78 percent of the available construction-related firms and received 15.38 percent of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 70.22 percent of the available construction-related firms and received 84.62 percent of the construction-related prime contract dollars under $500,000. This overutilization is statistically significant.

Table 5.02 State Agencies, Authorities, and Commissions Disparity Analysis: Construction-Related Prime Contracts under $500,000, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$239,082	0.31%	4.94%	$3,843,271	-$3,604,189	0.06	< .05 *
Asian Americans	$3,764,542	4.84%	7.93%	$6,172,526	-$2,407,985	0.61	< .05 *
Hispanic Americans	$1,528,150	1.96%	4.39%	$3,416,241	-$1,888,091	0.45	< .05 *
Native Americans	$3,021,624	3.88%	0.10%	$77,642	$2,943,983	38.92	**
Caucasian Females	$3,417,424	4.39%	12.42%	$9,666,409	-$6,248,986	0.35	< .05 *
Caucasian Males	$65,865,125	84.62%	70.22%	$54,659,857	$11,205,267	1.20	< .05 †
TOTAL	$77,835,947	100.00%	100.00%	$77,835,947			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	1.15%	$892,881	-$892,881	0.00	< .05 *
African American Males	$239,082	0.31%	3.79%	$2,950,390	-$2,711,308	0.08	< .05 *
Asian American Females	$1,506,809	1.94%	1.35%	$1,048,165	$458,644	1.44	**
Asian American Males	$2,257,733	2.90%	6.58%	$5,124,362	-$2,866,629	0.44	< .05 *
Hispanic American Females	$11,150	0.01%	1.15%	$892,881	-$881,731	0.01	< .05 *
Hispanic American Males	$1,517,000	1.95%	3.24%	$2,523,360	-$1,006,360	0.60	< .05 *
Native American Females	$0	0.00%	0.05%	$38,821	-$38,821	0.00	----
Native American Males	$3,021,624	3.88%	0.05%	$38,821	$2,982,804	77.83	**
Caucasian Females	$3,417,424	4.39%	12.42%	$9,666,409	-$6,248,986	0.35	< .05 *
Caucasian Males	$65,865,125	84.62%	70.22%	$54,659,857	$11,205,267	1.20	< .05 †
TOTAL	$77,835,947	100.00%	100.00%	$77,835,947			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$1,517,959	1.95%	3.69%	$2,872,748	-$1,354,789	0.53	< .05 *
Minority Males	$7,035,440	9.04%	13.67%	$10,636,932	-$3,601,493	0.66	< .05 *
Caucasian Females	$3,417,424	4.39%	12.42%	$9,666,409	-$6,248,986	0.35	< .05 *
Caucasian Males	$65,865,125	84.62%	70.22%	$54,659,857	$11,205,267	1.20	< .05 †
TOTAL	$77,835,947	100.00%	100.00%	$77,835,947			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$8,553,399	10.99%	17.36%	$13,509,681	-$4,956,282	0.63	< .05 *
Women Business Enterprises	$3,417,424	4.39%	12.42%	$9,666,409	-$6,248,986	0.35	< .05 *
Minority and Women Business Enterprises	**$11,970,823**	**15.38%**	**29.78%**	**$23,176,090**	**-$11,205,267**	**0.52**	**< .05 ***
Caucasian Male Business Enterprises	$65,865,125	84.62%	70.22%	$54,659,857	$11,205,267	1.20	< .05 †

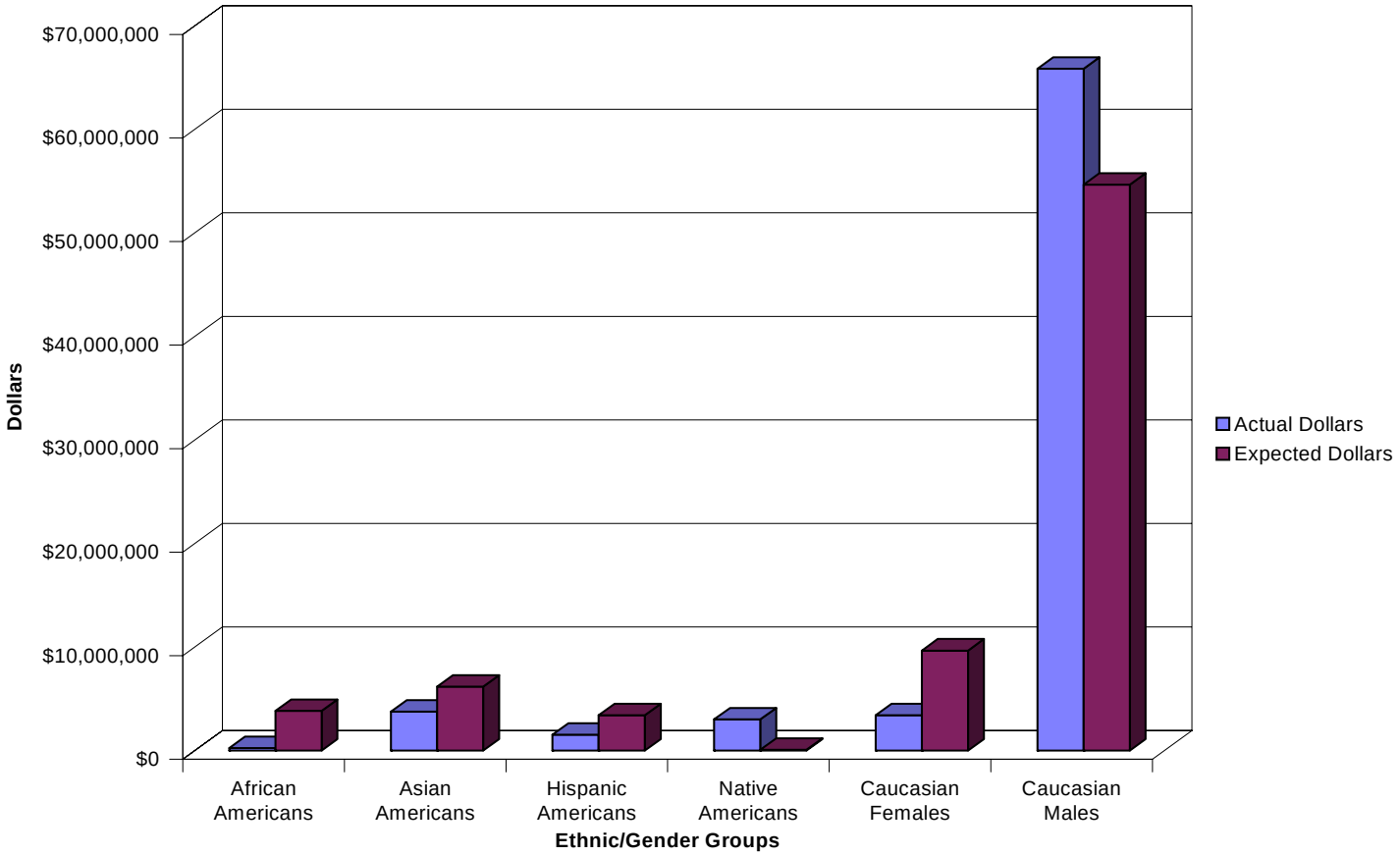
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 5.02 State Agencies, Authorities, and Commissions Disparity Analysis: Construction-Related Prime Contracts under $500,000, July 1, 2000 to June 30, 2002



C. State Agencies, Authorities, and Commissions Disparity Analysis: Construction Prime Contracts, under $41,100

The disparity analysis of construction prime contract dollars under $41,100 is depicted in Table 5.03 and Chart 5.03.

African American Businesses represent 6.42 percent of the available construction firms and received 0.5 percent of the construction prime contract dollars under $41,100. This underutilization is statistically significant.

Asian American Businesses represent 3.05 percent of the available construction firms and received 0.35 percent of the construction prime contract dollars under $41,100. This underutilization is statistically significant.

Hispanic American Businesses represent 5.71 percent of the available construction firms and received 2.16 percent of the construction prime contract dollars under $41,100. This underutilization is statistically significant.

Native American Businesses represent 0.08 percent of the available construction firms and received none of the construction prime contract dollars under $41,100. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 15.26 percent of the available construction firms and received 3.01 percent of the construction prime contract dollars under $41,100. This underutilization is statistically significant.

Women Business Enterprises represent 11.6 percent of the available construction firms and received 7.48 percent of the construction prime contract dollars under $41,100. This underutilization is statistically significant.

Minority and Women Business Enterprises represent 26.86 percent of the available construction firms and received 10.49 percent of the construction prime contract dollars under $41,100. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 73.14 percent of the available construction firms and received 89.51 percent of the construction prime contract dollars under $$41,100. This overutilization is statistically significant.

Table 5.03 State Agencies, Authorities, and Commissions Disparity Analysis: Construction Prime Contracts under $41,100, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$80,613	0.50%	6.42%	$1,032,941	-$952,328	0.08	< .05 *
Asian Americans	$56,106	0.35%	3.05%	$490,417	-$434,311	0.11	< .05 *
Hispanic Americans	$348,228	2.16%	5.71%	$919,532	-$571,304	0.38	< .05 *
Native Americans	$0	0.00%	0.08%	$12,260	-$12,260	0.00	----
Caucasian Females	$1,203,488	7.48%	11.60%	$1,866,650	-$663,162	0.64	< .05 *
Caucasian Males	$14,403,373	89.51%	73.14%	$11,770,008	$2,633,365	1.22	< .05 †
TOTAL	$16,091,808	100.00%	100.00%	$16,091,808			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	0.90%	$144,060	-$144,060	0.00	----
African American Males	$80,613	0.50%	5.52%	$888,881	-$808,268	0.09	< .05 *
Asian American Females	$49,410	0.31%	0.57%	$91,953	-$42,543	0.54	----
Asian American Males	$6,696	0.04%	2.48%	$398,464	-$391,768	0.02	< .05 *
Hispanic American Females	$146,550	0.91%	1.35%	$217,623	-$71,073	0.67	not significant
Hispanic American Males	$201,678	1.25%	4.36%	$701,909	-$500,231	0.29	< .05 *
Native American Females	$0	0.00%	0.00%	$0	$0	----	----
Native American Males	$0	0.00%	0.08%	$12,260	-$12,260	0.00	----
Caucasian Females	$1,203,488	7.48%	11.60%	$1,866,650	-$663,162	0.64	< .05 *
Caucasian Males	$14,403,373	89.51%	73.14%	$11,770,008	$2,633,365	1.22	< .05 †
TOTAL	$16,091,808	100.00%	100.00%	$16,091,808			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$195,960	1.22%	2.82%	$453,636	-$257,676	0.43	< .05 *
Minority Males	$288,987	1.80%	12.44%	$2,001,514	-$1,712,527	0.14	< .05 *
Caucasian Females	$1,203,488	7.48%	11.60%	$1,866,650	-$663,162	0.64	< .05 *
Caucasian Males	$14,403,373	89.51%	73.14%	$11,770,008	$2,633,365	1.22	< .05 †
TOTAL	$16,091,808	100.00%	100.00%	$16,091,808			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$484,947	3.01%	15.26%	$2,455,150	-$1,970,203	0.20	< .05 *
Women Business Enterprises	$1,203,488	7.48%	11.60%	$1,866,650	-$663,162	0.64	< .05 *
Minority and Women Business Enterprises	**$1,688,435**	**10.49%**	**26.86%**	**$4,321,800**	**-$2,633,365**	**0.39**	**< .05 ***
Caucasian Male Business Enterprises	$14,403,373	89.51%	73.14%	$11,770,008	$2,633,365	1.22	< .05 †

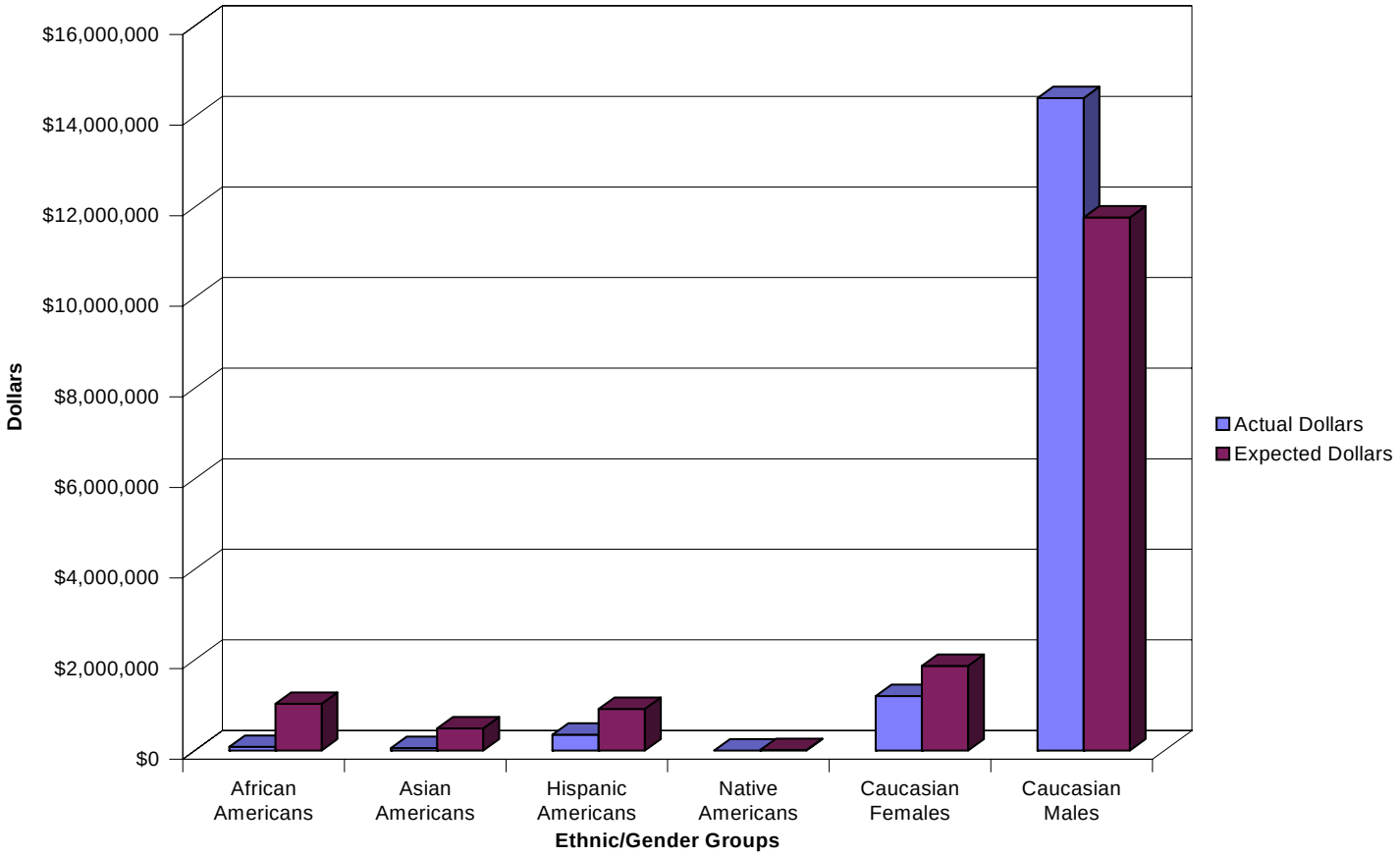
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 5.03 State Agencies, Authorities, and Commissions Disparity Analysis: Construction Prime Contracts under $41,100, July 1, 2000 to June 30, 2002



D. State Agencies, Authorities, and Commissions Disparity Analysis: Construction-Related Prime Contracts, under $25,000

The disparity analysis of construction-related prime contract dollars under $25,000 is depicted in Table 5.04 and Chart 5.04.

African American Businesses represent 4.94 percent of the available construction-related firms and received 0.49 percent of the construction-related prime contract dollars under $25,000. This underutilization is statistically significant.

Asian American Businesses represent 7.93 percent of the available construction-related firms and received none of the construction-related prime contract dollars under $25,000. This underutilization is statistically significant.

Hispanic American Businesses represent 4.39 percent of the available construction-related firms and received 0.4 percent of the construction-related prime contract dollars under $25,000. This underutilization is statistically significant.

Native American Businesses represent 0.1 percent of the available construction-related firms and received 1.77 percent of the construction-related prime contract dollars under $25,000. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 17.36 percent of the available construction-related firms and received 2.65 percent of the construction-related prime contract dollars under $25,000. This underutilization is statistically significant.

Women Business Enterprises represent 12.42 percent of the available construction-related firms and received 2.22 percent of the construction-related prime contract dollars under $25,000. This underutilization is statistically significant.

Minority and Women Business Enterprises represent 29.78 percent of the available construction-related firms and received 4.87 percent of the construction-related prime contract dollars under $25,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 70.22 percent of the available construction-related firms and received 95.13 percent of the construction-related prime contract dollars under $25,000. This overutilization is statistically significant.

Table 5.04 State Agencies, Authorities, and Commissions Disparity Analysis: Construction-Related Prime Contracts under $25,000, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$13,701	0.49%	4.94%	$139,273	-$125,572	0.10	< .05 *
Asian Americans	$0	0.00%	7.93%	$223,680	-$223,680	0.00	< .05 *
Hispanic Americans	$11,150	0.40%	4.39%	$123,798	-$112,648	0.09	< .05 *
Native Americans	$50,000	1.77%	0.10%	$2,814	$47,186	17.77	**
Caucasian Females	$62,639	2.22%	12.42%	$350,292	-$287,653	0.18	< .05 *
Caucasian Males	$2,683,132	95.13%	70.22%	$1,980,766	$702,366	1.35	< .05 †
TOTAL	$2,820,622	100.00%	100.00%	$2,820,622			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	1.15%	$32,356	-$32,356	0.00	< .05 *
African American Males	$13,701	0.49%	3.79%	$106,916	-$93,215	0.13	< .05 *
Asian American Females	$0	0.00%	1.35%	$37,983	-$37,983	0.00	< .05 *
Asian American Males	$0	0.00%	6.58%	$185,697	-$185,697	0.00	< .05 *
Hispanic American Females	$11,150	0.40%	1.15%	$32,356	-$21,206	0.34	not significant
Hispanic American Males	$0	0.00%	3.24%	$91,442	-$91,442	0.00	< .05 *
Native American Females	$0	0.00%	0.05%	$1,407	-$1,407	0.00	----
Native American Males	$50,000	1.77%	0.05%	$1,407	$48,593	35.54	**
Caucasian Females	$62,639	2.22%	12.42%	$350,292	-$287,653	0.18	< .05 *
Caucasian Males	$2,683,132	95.13%	70.22%	$1,980,766	$702,366	1.35	< .05 †
TOTAL	$2,820,622	100.00%	100.00%	$2,820,622			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$11,150	0.40%	3.69%	$104,103	-$92,953	0.11	< .05 *
Minority Males	$63,701	2.26%	13.67%	$385,462	-$321,761	0.17	< .05 *
Caucasian Females	$62,639	2.22%	12.42%	$350,292	-$287,653	0.18	< .05 *
Caucasian Males	$2,683,132	95.13%	70.22%	$1,980,766	$702,366	1.35	< .05 †
TOTAL	$2,820,622	100.00%	100.00%	$2,820,622			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$74,851	2.65%	17.36%	$489,564	-$414,713	0.15	< .05 *
Women Business Enterprises	$62,639	2.22%	12.42%	$350,292	-$287,653	0.18	< .05 *
Minority and Women Business Enterprises	**$137,490**	**4.87%**	**29.78%**	**$839,856**	**-$702,366**	**0.16**	**< .05 ***
Caucasian Male Business Enterprises	$2,683,132	95.13%	70.22%	$1,980,766	$702,366	1.35	< .05 †

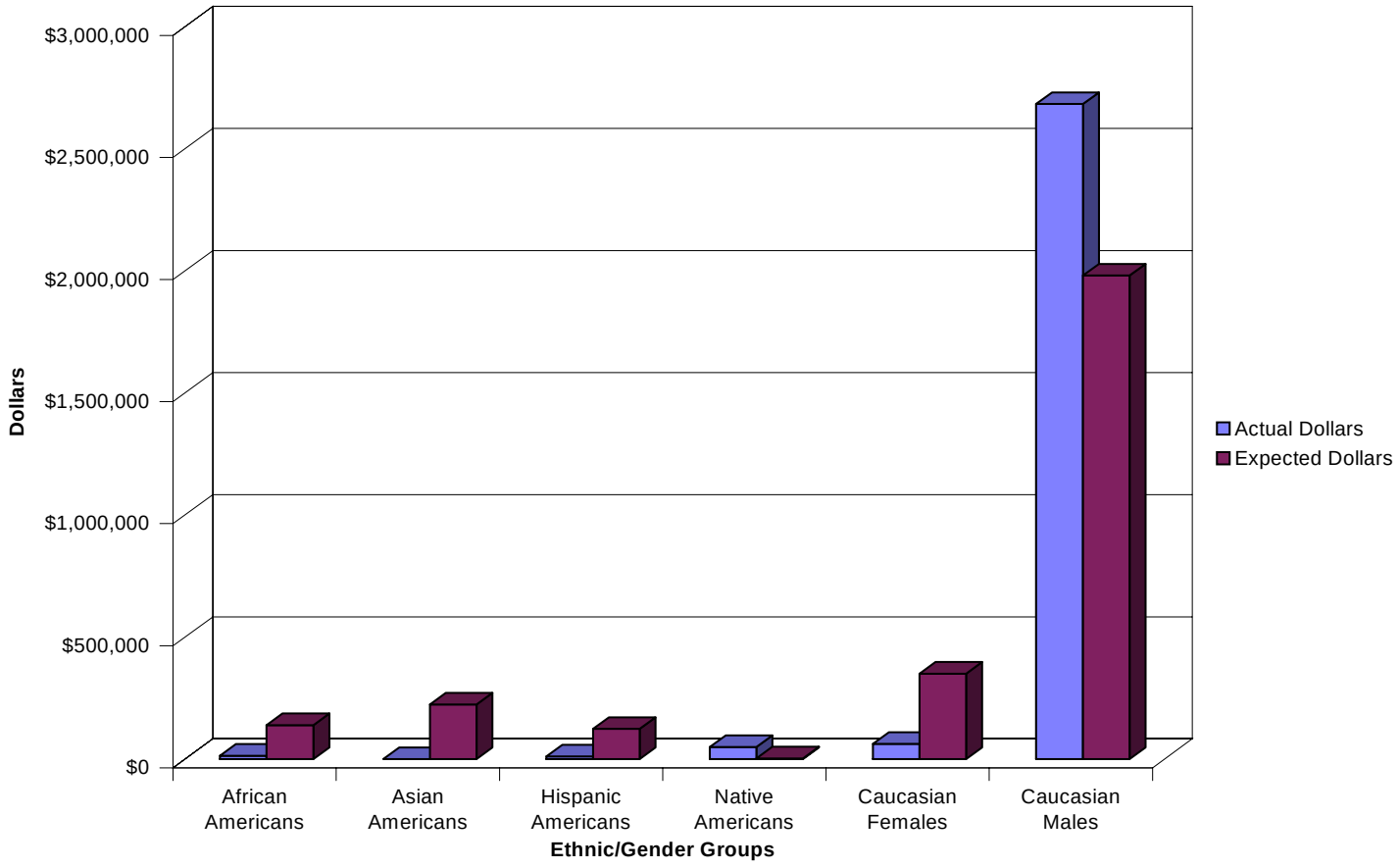
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 5.04 State Agencies, Authorities, and Commissions Disparity Analysis: Construction-Related Prime Contracts under $25,000, July 1, 2000 to June 30, 2002



The disparity findings for State Agencies, Authorities, and Commissions are summarized in the tables below.

1. Construction Prime Contracts

As indicated in Table 5.05, with the exception of Asian American and Hispanic American firms at the formal contract level, minority construction prime contractors were determined to be underutilized at both contract levels. Women Business Enterprises were underutilized at the informal contract level.

Table 5.05 Disparity Summary: Construction Prime Contract Dollars, July 1, 2000 to June 30, 2002

Ethnicity/Gender	Contracts Under $500,000	Contracts $41,100 and Under
African Americans	Yes	Yes
Asian Americans	**	Yes
Hispanic Americans	No	Yes
Native Americans	---	---
Minority Business Enterprises	Yes	Yes
Women Business Enterprises	**	Yes
Minority and Woman Business Enterprises	Yes	Yes

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

2. Construction-Related Prime Contracts

As indicated in Table 5.06 minority construction-related prime contractors were determined to be underutilized at both contract levels. Women Business Enterprises were also underutilized at both contract levels.

Table 5.06 Disparity Summary: Construction-Related Prime Contract Dollars, July 1, 2000 to June 30, 2002

Ethnicity/Gender	Contracts Under $500,000	Contracts $25.000 and Under
African Americans	Yes	Yes
Asian Americans	Yes	Yes
Hispanic Americans	Yes	Yes
Native Americans	---	**
Minority Business Enterprises	Yes	Yes
Women Business Enterprises	Yes	Yes
Minority and Woman Business Enterprises	Yes	Yes

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

In conclusion, there is documented disparity in each of the industries studied. Remedies to address the observed prime contractor disparities are presented in Chapter 7: Recommendations.

6

SUBCONTRACTOR DISPARITY ANALYSIS

I. INTRODUCTION

The objective of this analysis is to determine if minority and woman-owned business enterprise (M/WBE) subcontractors were underutilized at a statistically significant level. A detailed discussion of the statistical procedure for conducting a disparity analysis is set forth in Chapter 5: Prime Contractor Disparity Analysis. The same statistical procedure was used in performing the State Agencies, Authorities, and Commissions subcontractor disparity analysis. In sum, under a fair and equitable system of awarding subcontracts, the proportion of subcontracts and of subcontract dollars awarded to M/WBEs should be approximate to the proportion of M/WBEs in the relevant market area. If the proportions are not approximate, and a disparity exists between these proportions, the probability that the disparity is due to chance can be determined using a statistical test. If there is a low probability that the disparity is due to chance, *Croson* states that an inference of discrimination can be made.[1]

II. STATE AGENCIES, AUTHORITIES, AND COMMISSIONS SUBCONTRACTOR DISPARITY ANALYSIS

As detailed in Chapter 2: Subcontractor Utilization Analysis, extensive efforts were undertaken to obtain subcontract records for State Agencies, Authorities, and Commissions

[1] When conducting statistical tests, a level of confidence must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by the Courts as an acceptable level in determining whether an inference of discrimination can be made. Thus the data analyzed here was done within the 95 percent confidence level.

formal construction and construction-related contracts. Subcontractor records were compiled for both industries within the July 1, 2000 to June 30, 2002 study period.

A. State Agencies, Authorities, and Commissions Disparity Analysis: All Formal Construction Subcontracts, July 1, 2000 to June 30, 2002

The disparity analysis of all construction subcontract dollars is depicted in Table 6.01 and Chart 6.01.

African American Businesses represent 6.3 percent of the available construction firms and received 2.54 percent of the construction subcontract dollars. This underutilization is statistically significant.

Asian American Businesses represent 4.34 percent of the available construction firms and received 0.89 percent of the construction subcontract dollars. This underutilization is statistically significant.

Hispanic American Businesses represent 5.52 percent of the available construction firms and received 10.04 percent of the construction subcontract dollars. This study does not test statistically the overutilization of minority groups.

Native American Businesses represent 0.12 percent of the available construction firms and received 0.02 percent of the construction subcontract dollars. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 16.28 percent of the available construction firms and received 13.5 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Women Business Enterprises represent 12.67 percent of the available construction firms and received 20.18 percent of the construction subcontract dollars. This study does not test statistically the overutilization of Women Business Enterprises.

Minority and Women Business Enterprises represent 28.94 percent of the available construction firms and received 33.69 percent of the construction subcontract dollars. This study does not test statistically the overutilization of Minority and Women Business Enterprises.

Caucasian Male Business Enterprises represent 71.06 percent of the available construction firms and received 66.31 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Table 6.01 State Agencies, Authorities, and Commissions Disparity Analysis: All Formal Construction Subcontracts, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$12,414,801	2.54%	6.30%	$30,748,330	-$18,333,528	0.40	< .05 *
Asian Americans	$4,346,947	0.89%	4.34%	$21,175,736	-$16,828,790	0.21	< .05 *
Hispanic Americans	$49,052,375	10.04%	5.52%	$26,977,308	$22,075,067	1.82	**
Native Americans	$121,500	0.02%	0.12%	$580,157	-$458,657	0.21	----
Caucasian Females	$98,571,229	20.18%	12.67%	$61,859,258	$36,711,971	1.59	**
Caucasian Males	$323,840,441	66.31%	71.06%	$347,006,504	-$23,166,063	0.93	**
TOTAL	$488,347,293	100.00%	100.00%	$488,347,293			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$6,222,648	1.27%	0.98%	$4,786,297	$1,436,352	1.30	**
African American Males	$6,192,153	1.27%	5.32%	$25,962,033	-$19,769,880	0.24	< .05 *
Asian American Females	$1,203,136	0.25%	0.85%	$4,133,620	-$2,930,484	0.29	----
Asian American Males	$3,143,811	0.64%	3.49%	$17,042,117	-$13,898,306	0.18	< .05 *
Hispanic American Females	$28,663,352	5.87%	1.40%	$6,816,847	$21,846,505	4.20	**
Hispanic American Males	$20,389,023	4.18%	4.13%	$20,160,461	$228,562	1.01	**
Native American Females	$0	0.00%	0.00%	$0	$0	----	----
Native American Males	$121,500	0.02%	0.12%	$580,157	-$458,657	0.21	----
Caucasian Females	$98,571,229	20.18%	12.67%	$61,859,258	$36,711,971	1.59	**
Caucasian Males	$323,840,441	66.31%	71.06%	$347,006,504	-$23,166,063	0.93	**
TOTAL	$488,347,293	100.00%	100.00%	$488,347,293			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$36,089,136	7.39%	3.22%	$15,736,763	$20,352,373	2.29	**
Minority Males	$29,846,487	6.11%	13.05%	$63,744,768	-$33,898,281	0.47	< .05 *
Caucasian Females	$98,571,229	20.18%	12.67%	$61,859,258	$36,711,971	1.59	**
Caucasian Males	$323,840,441	66.31%	71.06%	$347,006,504	-$23,166,063	0.93	**
TOTAL	$488,347,293	100.00%	100.00%	$488,347,293			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$65,935,623	13.50%	16.28%	$79,481,531	-$13,545,908	0.83	not significant
Women Business Enterprises	$98,571,229	20.18%	12.67%	$61,859,258	$36,711,971	1.59	**
Minority and Women Business Enterprises	**$164,506,852**	**33.69%**	**28.94%**	**$141,340,789**	**$23,166,063**	**1.16**	****
Caucasian Male Business Enterprises	$323,840,441	66.31%	71.06%	$347,006,504	-$23,166,063	0.93	**

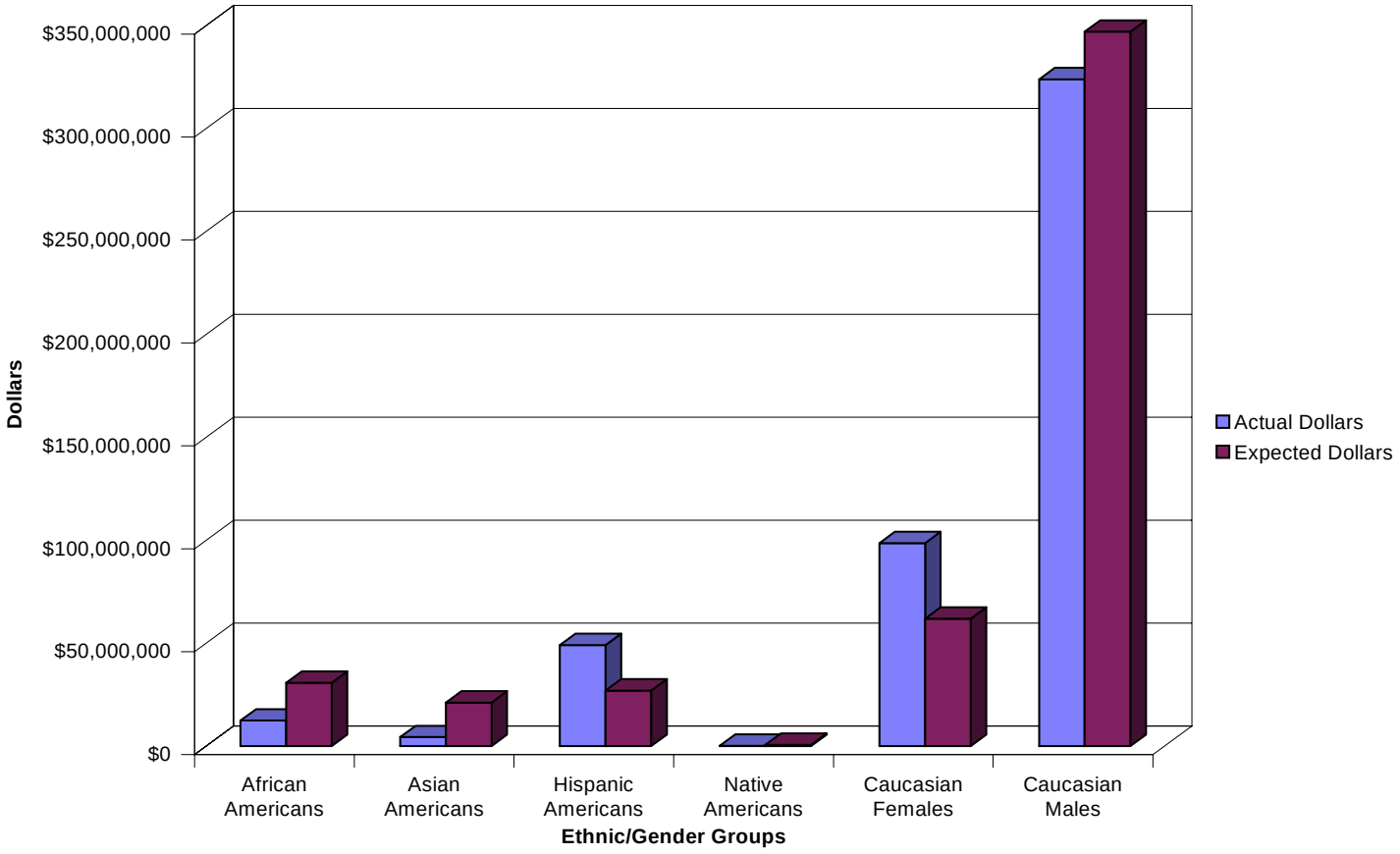
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 6.01 State Agencies, Authorities, and Commissions Disparity Analysis: All Formal Construction Subcontracts, July 1, 2000 to June 30, 2002



B. State Agencies, Authorities, and Commissions Disparity Analysis: All Formal Construction-Related Subcontracts, July 1, 2000 to June 30, 2002

The disparity analysis of all construction-related prime contract dollars is depicted in Table 6.02 and Chart 6.02.

African American Businesses represent 4.51 percent of the available construction-related firms and received 3.01 percent of the construction-related subcontract dollars. This underutilization is not statistically significant.

Asian American Businesses represent 7.11 percent of the available construction-related firms and received 11.26 percent of the construction-related subcontract dollars. This study does not test statistically the overutilization of minority groups.

Hispanic American Businesses represent 4.09 percent of the available construction-related firms and received 6.45 percent of the construction-related subcontract dollars. This study does not test statistically the overutilization of minority groups.

Native American Businesses represent 0.13 percent of the available construction-related firms and received none of the construction-related subcontract dollars. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 15.84 percent of the available construction-related firms and received 20.72 percent of the construction-related subcontract dollars. This study does not test statistically the overutilization of minority groups.

Women Business Enterprises represent 12.72 percent of the available construction-related firms and received 12.95 percent of the construction-related subcontract dollars. This study does not test statistically the overutilization of Women Business Enterprises.

Minority and Women Business Enterprises represent 28.11 percent of the available construction-related firms and received 33.67 percent of the construction-related subcontract dollars. This study does not test statistically the overutilization of Minority and Women Business Enterprises.

Caucasian Male Business Enterprises represent 71.89 percent of the available construction-related firms and received 66.33 percent of the construction-related subcontract dollars. This underutilization is not statistically significant.

Table 6.02 State Agencies, Authorities, and Commissions Disparity Analysis: All Formal Construction-Related Subcontracts, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$2,018,104	3.01%	4.51%	$3,030,473	-$1,012,369	0.67	not significant
Asian Americans	$7,560,708	11.26%	7.11%	$4,774,424	$2,786,284	1.58	**
Hispanic Americans	$4,328,829	6.45%	4.09%	$2,744,579	$1,584,250	1.58	**
Native Americans	$0	0.00%	0.13%	$85,768	-$85,768	0.00	----
Caucasian Females	$8,694,585	12.95%	12.27%	$8,233,737	$460,848	1.06	**
Caucasian Males	$44,525,603	66.33%	71.89%	$48,258,848	-$3,733,245	0.92	**
TOTAL	$67,127,829	100.00%	100.00%	$67,127,829			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$625,928	0.93%	0.98%	$657,555	-$31,628	0.95	----
African American Males	$1,392,176	2.07%	3.53%	$2,372,917	-$980,741	0.59	< .05 *
Asian American Females	$3,185,126	4.74%	1.19%	$800,502	$2,384,624	3.98	**
Asian American Males	$4,375,582	6.52%	5.92%	$3,973,922	$401,661	1.10	**
Hispanic American Females	$2,208,024	3.29%	1.06%	$714,734	$1,493,290	3.09	**
Hispanic American Males	$2,120,805	3.16%	3.02%	$2,029,845	$90,960	1.04	**
Native American Females	$0	0.00%	0.09%	$57,179	-$57,179	0.00	----
Native American Males	$0	0.00%	0.04%	$28,589	-$28,589	0.00	----
Caucasian Females	$8,694,585	12.95%	12.27%	$8,233,737	$460,848	1.06	**
Caucasian Males	$44,525,603	66.33%	71.89%	$48,258,848	-$3,733,245	0.92	**
TOTAL	$67,127,829	100.00%	100.00%	$67,127,829			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$6,019,078	8.97%	3.32%	$2,229,970	$3,789,107	2.70	**
Minority Males	$7,888,563	11.75%	12.52%	$8,405,273	-$516,710	0.94	not significant
Caucasian Females	$8,694,585	12.95%	12.27%	$8,233,737	$460,848	1.06	**
Caucasian Males	$44,525,603	66.33%	71.89%	$48,258,848	-$3,733,245	0.92	**
TOTAL	$67,127,829	100.00%	100.00%	$67,127,829			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$13,907,641	20.72%	15.84%	$10,635,244	$3,272,397	1.31	**
Women Business Enterprises	$8,694,585	12.95%	12.27%	$8,233,737	$460,848	1.06	**
Minority and Women Business Enterprises	**$22,602,226**	**33.67%**	**28.11%**	**$18,868,981**	**$3,733,245**	**1.20**	****
Caucasian Male Business Enterprises	$44,525,603	66.33%	71.89%	$48,258,848	-$3,733,245	0.92	**

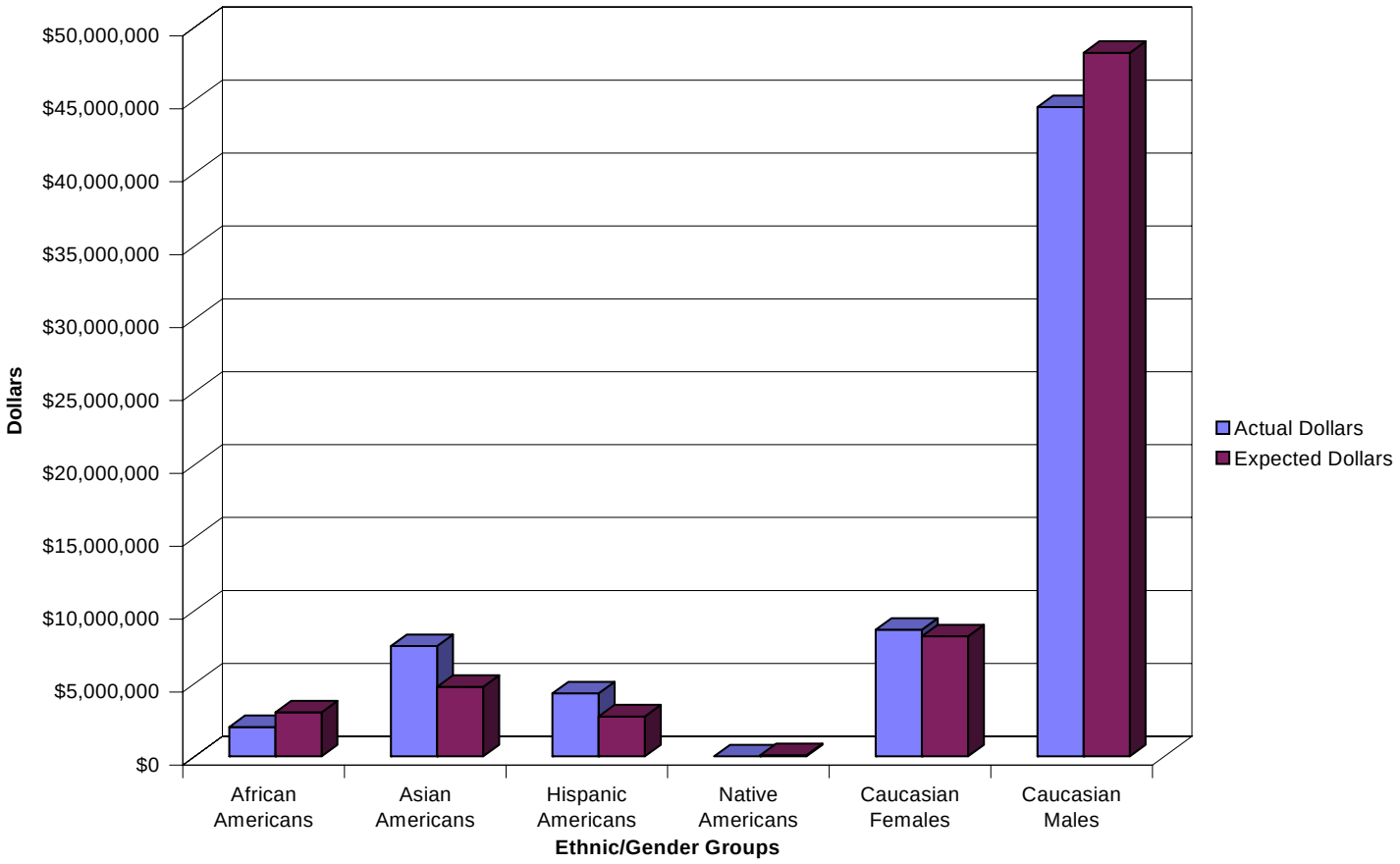
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 6.02 State Agencies, Authorities, and Commissions Disparity Analysis: All Formal Construction-Related Subcontracts, July 1, 2000 to June 30, 2002



The State Agencies, Authorities, and Commissions subcontractor disparity findings are summarized in Table 6.03 below. African American and Asian American firms were underutilized only in construction.

Table 6.03 State Agencies, Authorities, and Commissions Subcontractor Disparity Summary, July 1, 2000 to June 30, 2002

Ethnicity/Gender	Construction	Construction-Related
African Americans	Yes	No
Asian Americans	Yes	**
Hispanic Americans	**	**
Native Americans	--	--
Minority Business Enterprises	No	**
Women Business Enterprises	**	**
Minority and Women Business Enterprises	**	**

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

7

DISPARITY STUDY RECOMMENDATIONS

I. INTRODUCTION

Race and gender-conscious and race and gender-neutral recommendations are offered to remedy the statistically significant underutilization of minorities identified in the two industries studied - construction and construction-related. The race and gender-conscious measures include prime contracting and subcontracting remedies for the ethnic and gender groups where disparities were found. The race and gender-neutral recommendations are offered as strategies to increase equity in contracting without regard to race or gender. They are presented as best practices applicable to all units of State government contracting. These same race and gender-conscious and race and gender-neutral recommendations are also found in the State Colleges and Universities Volume 3, Chapter 7.

II. SUMMARY OF STATISTICAL FINDINGS

The statistical analysis is a key research component of the Study. The purpose of the statistical analysis is to identify disparity between the use of M/WBEs and their availability in the marketplace. Disparity is defined as statistically significant underutilization. Statistical significance means that disparity results did not occur by chance.

Tables 7.01 and 7.02 depict the disparity findings. In summary, in the award of prime contracts for construction and construction-related services there was disparity at both the formal and informal contracting levels for State Agencies, Authorities, and Commissions. At the subcontractor level, there was only disparity in construction.

III. RACE AND GENDER-CONSCIOUS RECOMMENDATIONS

Several remedies are proposed to address the statistically significant prime contractor and subcontractor underutilization of minority groups. It is critical that race and gender-conscious remedies are narrowly tailored to correct documented statistically significant underutilization. Therefore, the remedies recommended address the underutilization of those racial groups with a disparity. Since the statistical analysis does not examine the overutilization of M/WBEs, remedies are not applicable. Table 7.01 depicts the ethnic and gender groups which had documented disparity.

Table 7.01 Prime Contract Disparity Findings: State Agencies, Authorities, and Commissions

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

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

A. Prime Contractor Remedies

The prime contractor remedies apply to both formal and informal contracts. However, remedies for formal contracts are limited to contracts under $500,000. Remedies for informal contracts apply to both industries and to groups with a disparity finding since

awards need not be determined by price. The recommendations below apply only to those groups with identified disparity.

1. Formal Prime Contract Remedies: Incentive Credits

a. Incentive Credits

Incentive credits should be given to statistically significant underutilized groups on construction-related contracts since these contracts can be awarded based on qualifications. The incentive credits can counterbalance the competitive disadvantage experienced by these groups. Offsetting the comparative disadvantage could mitigate the disparity in this industry. The credits would be applied to the rating for formally awarded contracts under $500,000.

b. Evaluation Criteria

Utilization of the groups with a disparity could be a weighted criterion in the evaluation of statements of qualifications and proposals for construction-related contracts.

c. Bid Discounts

Bid discounts could be applied to the construction bids submitted by the groups with identified disparity. The price cost considered in the evaluation of the bid would be the actual less the discount.

d. Joint Venture Incentive Credits

Incentive credits should be given for joint ventures where the statistically significant underutilized groups own at least 51%. The joint venture incentive credits can increase depending on the level of the underutilized groups' participation.

2. Informal Prime Contract Remedies

a. Sheltered Market

A Sheltered Market program should be established for informal contracts. The Sheltered Market would limit competition to firms from the statistically significant underutilized groups and other firms of comparable capacity. A Sheltered Market program would ensure that quotations for informal contracts are solicited from a diverse pool of certified small businesses. Because the Sheltered Market program would award prime contracts, it would be a means for building the capacity of small businesses.

Firms would be required to qualify for the program. In addition, the statistically significant underutilized groups would be presumptive members of the program. The eligibility of any

other groups would be determined through a certification process. The existence of the small contracts rotation process should be widely advertised to the target ethnic and gender groups in each industry.

An approved list of Sheltered Market participants should be developed for each industry, and as needed, specialized lists would be compiled within industries. The businesses would be randomly ranked on each list, and twice a year there would be an open enrollment period. When the open enrollment period closed, the random list of new businesses would be appended to the existing list. The lists of Sheltered Market firms would be posted for public review. Sheltered Market contract awards, like other current State contract awards, should also be posted for public review.

Informally bid contracts, where the State Agencies, Authorities, and Commissions can identify a fixed unit price for the services, should be rotated among all firms that can provide the services. This list should include M/WBE and non-M/WBE firms interested in participating in the rotation. Where M/WBE firms were found to be underutilized at a statistically significant level, every fifth contract should be limited to competition between the underutilized groups. Contracts for which the State Agencies, Authorities, and Commissions cannot identify a fixed unit price should be competitively bid.

Departments should be deterred from issuing change orders on contracts under the informal threshold and instead select a contractor from the Sheltered Market list. Maximum use of Sheltered Market firms should be encouraged.

Financial and technical assistance should also be made available to firms that participate in the Sheltered Market program. Finally, the Sheltered Market program should require that firms graduate after they reach a certain size threshold or participate in the program over a specified time period.

b. State Staff Good Faith Efforts

Staff with informal contract purchasing authority should consistently document a Good Faith Effort to solicit quotes from the statistically significant underutilized groups. Informal contracts do not require public bidding; and therefore, the solicitation and selection are under the discretion of staff. Informal solicitations and awards should be published on each State Agency, Authority, and Commission website. Access to this page should be limited to certified SBEs using a unique password. Monthly reports should be published by each State Agency, Authority, and Commission detailing awards made in order to document compliance. Good Faith Efforts would standardize the solicitation of statistically significant underutilized groups for informal contracts.

One example of Good Faith Effort documentation is a checklist that would require buyers to demonstrate their efforts to solicit quotes from the statistically significant underutilized groups. The checklist would outline Good Faith Effort criteria, detail the level of effort

required, and list the documentation required to demonstrate that effort. Whenever there is an intent to award an informal contract to a business other than one from a statistically significant underutilized group, supervisory review and approval of the Good Faith Effort would be required to award the contract.

B. Subcontractor Remedies

M/WBE remedies are proposed for construction and construction-related contracts for groups with identified statistically significant underutilization. Table 7.02 depicts the groups which had a documented disparity.

Table 7.02 Subcontract Disparity Findings: State Agencies, Authorities, and Commissions

Ethnicity and Gender	Construction Services	Construction-Related Services
Subcontracts	All Formal Contracts	All Formal Contracts
African Americans	Yes	No
Asian Americans	Yes	No
Hispanic Americans	No	No
Native Americans	---	---
Caucasian Females	No	No

Yes = Statistically significant disparity was found
No = Statistically significant disparity was not found
--- = There were insufficient records to determine statistical disparity

1. Overall M/WBE Subcontracting Goals

An overall goal should be established as a target for the participation of the underutilized groups in the State's subcontracts. The goal should reflect the availability of the statistically significant underutilized groups as calculated in the Study. The overall goal should be reviewed periodically. Table 7.03 depicts the construction subcontractor availability of the statistically underutilized groups. Based on the group's availability, the overall construction subcontract goals for State Agencies, Authorities, and Commissions would be 6.30 percent for African Americans and 4.34 percent for Asian Americans.

Table 7.03 Construction Subcontractor Availability - State Agencies, Authorities, and Commissions

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

No overall goals can be established for construction-related contracts.

2. Contract-Specific M/WBE Subcontracting Goals

Contract-specific subcontracting goals should be set on all construction contracts for groups with an identified disparity. Goals should reflect the availability at the time each contract is advertised. Setting contract specific goals narrowly tailored to the current availability of the businesses to perform the identified subcontracting opportunities is the most prudent method to remedy the disparity. This contract specific goal setting method also ensures that the goals are reasonably attainable.

Both the items of work in the contract and the availability of M/WBEs to perform the work items must be determined beforehand in order to set a contract-specific goal. To set contract-specific goals, the State Agencies, Authorities, and Commissions will need to maintain a current database with M/WBE and non-M/WBE available firms to perform contracts.

3. Weighted Good Faith Efforts

Good faith effort criteria that define and quantify the minimum behavior required to demonstrate an affirmative effort to meet the subcontracting goal should be developed. A waiver provision is also necessary in order to address the circumstances in which the goals cannot be met. Good Faith Efforts will measure a prime contractor's endeavor to meet the M/WBE subcontracting goals.

There would be a minimum score for the prime contractor to demonstrate a Good Faith Effort. Prime contractors failing to meet the M/WBE subcontractor goal or make a Good Faith Effort to do so would be deemed non-responsive.

C. Disadvantaged Business Enterprise Programs

Federal Disadvantaged Business Enterprise (DBE) subcontracting goals should be utilized whenever the contract is funded by federal dollars. The U.S. Department of Transportation's Disadvantaged Business Enterprise Program and the U.S. Environmental

Protection Agency's (EPA) Fair Share Program, require subcontracting goals to achieve disadvantaged businesses' participation (which includes M/WBEs). These federal programs, used in combination with State-funded programs, will help to alleviate the identified disparity. These federal programs do not require a factual finding of disparity however, they do require funding recipients to implement measures to ensure equitable contracting. For the DOT, these measures are outlined in 49 CFR Part 26. The EPA is currently developing its draft rules.

Both the DOT and EPA require goal setting based on the relative availability of ready, willing and able DBEs in the relevant market area. Additionally, the DOT rules require a recipient agency to determine each year the apportionment between race-conscious method and race-neutral method to achieve the annual DBE goal. The recipient agency must meet at least some of the DBE goal through race-neutral means. The race-neutral recommendations offered are designed to promote use of M/WBEs in State-funded contracts, but they could also be used to enhance the race-neutral components of the State's DBE programs.

IV. RACE AND GENDER-NEUTRAL RECOMMENDATIONS

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

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

1. Unbundle Large Procurement into Smaller Contracts Where Feasible

Bundling occurs when a procurement consolidates small purchases into one contract, or when goods and services previously purchased individually are grouped together in a single solicitation.

Large contracts should be unbundled to maximize small business participation. During the data collection process for this study, it was found that there were a number of large contracts awarded by the State. Unbundling large procurement will increase the opportunity for small businesses to compete for State contracts.

In determining whether projects should be divided, the following criteria should be reviewed:

- Whether or not the project takes place in more than one location
- Size and complexity of the procurement
- Similarity of the goods and services procured
- Sequencing and delivery of the work
- Public safety issues and convenience
- Procurement segmentation options

The federal government has made contract unbundling a key element of its small business agenda.[1]

2. Raise Pre-Qualification Contract Levels

The use of pre-qualification standards should only be considered on large and complex projects above $10 million. Only contracts above $10 million that require specialized technical expertise beyond licensing requirements and a demonstration of financial capacity beyond what is needed to acquire bonding should be considered for pre-qualification.

Pre-qualification standards may inhibit the development of small firms by denying capable and experienced entrepreneurs opportunities on public-funded projects. Eliminating pre-qualification standards, except for large and complex projects above $10 million, will provide otherwise capable firms the opportunity to compete for State contracts.

New Jersey Statute §52:35-2 requires all bidders on state public works to submit a statement that fully develops the financial ability, adequacy of plant and equipment, organization and prior experience of the prospective bidder, and other pertinent information. Pre-qualification standards, as they exist under New Jersey Statute §52:35-2, are not uniformly applied.

State licensing, bond, and insurance requirements and bid and proposal specifications already serve as mechanisms to ensure the capability and capacity of contractors and consultants, rendering many pre-qualification standards redundant. Projects that do not require capability or capacity beyond that demonstrated through licensing, bonding, and bid or proposal specifications, should not be subjected to pre-qualification standards.

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[1] United States. The Office of Federal Procurement Policy (OFPP) *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business.* Washington D.C. Executive Office of the President, October 2002.

3. Use Direct Contracting As a Means to Award Small Contracts

Direct contracting occurs when a public agency directly awards construction support services contracts that normally are included within the general contract. They include construction support services such as trucking, landscaping, demolition, site clearing, surveying, and site security.

Construction support services should be awarded as direct contracts. Many construction support services are distinct tasks often performed by small firms. Direct contracting will increase the opportunities for, and build the capacity of, small firms by allowing them to work as prime contractors.

4. Evaluate Bonding and Insurance Requirements

Bonding and insurance requirements should be evaluated to ensure that smaller contracts do not carry a disproportionately high level of coverage. Prohibitive bonding and insurance requirements can be a disincentive to bidders, constitute a barrier to small business, and increase the costs of goods and services. Revised bonding and insurance requirements will attract more small firms as bidders, thus increasing competition and reducing costs.

The revised bonding and insurance requirements should address bid, performance, and payment bonds; general and professional liability; and errors and omissions insurance. Risk management standards could be developed that are applicable to the industry and associated liability. For example, a $100,000 air conditioning installation contract would have one set of bonding and insurance requirements, while a $500,000 overpass construction contract would have another. Both would be based on the project's size, scope, scale, and risk to the State.

5. Phase Bonding and Retainage Requirements

a. Bonding

Prime contractors' bonds should be proportionally released as goods and services are accepted and rolled over into the remaining portion of the contract. Subcontractors' bonds should be released upon completion and acceptance of their portion of work. Phasing bonding requirements will increase a small firm's access to credit, promoting business growth.

b. Retainage

Retainage is the percent of the contract value withheld until the successful completion of a contract.

The subcontractors' portion of the retainage should be released once work has been completed and accepted. Retainage should be eliminated for small subcontracts and reduced for all certified M/WBE contractors. This will reduce the cash flow burden experienced by small construction subcontractors. Increased cash flow will allow these small firms to build capacity.

6. Post Project Forecast on the Internet

A quarterly forecast should be posted on the Internet to provide firms with adequate notice and lead time. There were several anecdotes of firms that could not secure timely information about upcoming contract opportunities. Project forecasting will provide prime contractors and subcontractors more lead time for networking and outreach.

The State should also consider "listing" contract opportunities prior to the issue of contract solicitation. Upcoming contract opportunities could be listed 15 to 30 days prior to the actual release date. The "listing" would consist of the draft project specifications, anticipated release date, and subcontracting goals for the project. The "listings" should be posted the same day each week.

7. Consider Reducing SBE Size Standards

The State should consider reducing SBE size standards to enable M/WBEs to compete with similarly situated businesses. The current SBE size standard is based on firms with no more than 100 full time employees. The number of small businesses in the State and the small size of State construction and construction-related contracts, provide compelling reasons for creating a small business definition individualized to the profile of State businesses and expanding the existing preferences for small business.

According to the 1997 U.S. Census, 93.37 percent of the construction businesses and 88.3 percent of the construction-related businesses with paid employees in the State had fewer than 20 employees, creating a large pool of potentially available firms. For the construction industry, 63.19 percent of the State Agencies, Authorities, and Commissions' contracts were under $25,000, 72.2 percent were under $50,000, and more than 75 percent were under $100,000. For the construction-related industry, 35.49 percent of the State Agencies, Authorities, and Commissions' contracts were under $25,000, 42.61 percent were under $50,000, and more than 53 percent were under $100,000. Therefore, small businesses would have the capacity to provide services on the average State Agencies, Authorities, and Commissions' contract. However, analysis of awarded contracts shows that small businesses are not being utilized on small contracts.

8. Allow Certified M/WBEs to Register Their Interest as Subcontractors for State Projects Via the Internet

For each contract solicitation with subcontracting opportunities, the State could set up a link on its web site that would allow M/WBEs to express interest in subcontracting on a particular project. Many M/WBE companies that are too small to be prime contractors on large projects are available to perform as subcontractors. Prime contractors could use this on-line source list to solicit M/WBEs for subcontracting opportunities.

9. Require Prime Contractors to List All Subcontractors with Their Bids and Proposals

The State should require prime contractors submitting bids and proposals to include a list of their subcontractors' contract amounts and certifications standards. The State would then verify the amounts with the subcontractors prior to awarding the contract. The State will be able to reject non-responsive bids and proposals during the submission review process, avoiding the administrative issues of handling non-compliance after the awarding of the contract.

Currently, the State requires prime contractors to maintain and submit a list of subcontractors after contract award. The requirement is set forth in New Jersey Statute §52:32-44(d). The State could consider requiring prime contractors to secure a "letter of intent" from each subcontractor to be submitted prior to awarding the contract. The letter of intent is a statement from the subcontractor stating its agreement to provide the services listed in the bid or proposal for the amount listed. Prime contractors should be penalized for the unauthorized listing of subcontractors. This additional level of scrutiny can prevent prime contractors from listing subcontractors without their consent.

10. Debrief Unsuccessful Bidders and Proposers

The State should develop an official policy to encourage firms to review unsuccessful bids and proposals. Debriefing helps businesses learn about their areas of strength and weakness and how to create a more successful bid or proposal. Debriefing is a means to increase the quality of bids and proposals received by the State from M/WBEs.

As part of the debriefing process, a firm could schedule an appointment to review the successful submission and also receive specific critiques on its unsuccessful submission. M/WBE bidders who have three successive failed bids or proposals should be strongly encouraged to schedule a debriefing appointment.

11. Establish Uniform Bid and Proposal Protest Procedures

The State should establish uniform bid and proposal protest procedures. Specific bid and proposal protest procedures afford vendors with a due process to challenge what may be a questionable contract award. Uniform bid and proposal protest procedures would minimize the time and resources needed by all parties to respond to a protest.

The State should establish uniform regulations applicable to all State Agencies, Authorities, and Commissions similar to those used by the Department of the Treasury's Division of Property Management and Construction (DPMC), with some modifications. DPMC, under Title 17, Chapter 19, Subchapter 4 of New Jersey's Administrative Code, requires firms wishing to protest a bid decision to submit a written request specifying the grounds on which the award of a contract or the rejection of a bid is challenged. The protest must be received within five calendar days after the opening of bids. An informal hearing is held within fifteen calendar days of the receipt of the request and is overseen by an impartial hearing officer. The hearing officer then prepares a report within ten calendar days of the hearing's conclusion, unless greater time is required. This report is merely advisory and is not binding. All parties to the hearing also receive copies of the hearing officer's report and then have ten calendar days to provide written comments on exceptions. After this ten-day period, the final decision on the matter is issued.

DPMC's bid protest procedures should be revised by shortening the bid protest period, including a bid appeals process by an independent appeals panel, and making the rule applicable to both bid and proposal protests. An informal hearing should be overseen by a hearing officer, but it should be held within five calendar days of the receipt of the request. The hearing officer should make a final decision on the protest within five days of the hearing.

The State should create a bid and proposal protest appeals process by which the business can appeal. The appeals process should be overseen by an independent three person hearing panel. One of the individuals in the appeals panel should be a vendor who would represent the bidders on State contracts. Members of the three member appeals panel should be subject to term limits.

The appeals panel should hold a hearing within ten days of receipt of a written appeal of the hearing officer's determination and it should issue a final decision within five days of the appeals hearing. The decision of the three person panel should be appealable in a court of law.

12. Develop an Expedited Payment Program

An expedited payment program should be developed for M/WBEs. Expedited payments will remove a major barrier to small business participation in public contracting by

improving cash flow. They will also provide additional incentives for businesses to compete for State contracts by establishing the State as a preferred public sector client.

In an expedited payment program, M/WBEs would be paid on an accelerated schedule. Non-certified prime contractors who meet M/WBE participation goals would also be eligible for the expedited payment program. When a participating firm submits an invoice, it would include an identification number that marks it for a 15-day expedited payment. State staff would date stamped invoices immediately upon receipt. If an invoice is not date stamped, the 15-day cycle would begin on the date specified in the invoice.

As an alternative to the 15-day expedited payment, firms participating in the expedited payment program could be permitted to submit invoices for progress payment at two-week intervals. Firms would be paid according to the normal State schedule, but because they would be allowed to invoice more frequently, they would be paid more frequently.

The State should assess an interest penalty for late payments to certified firms. Penalties would be assessed the day after the contractual payment due date. If there is no payment due date stipulated in the contract, penalties would be assessed on the 31st day after receipt of the invoice. The penalty would be a nominal percentage of the invoice amount assessed daily until a check is issued.

13. Provide for Partial Payment of Invoices

The State should be required to notify a firm within five days of receiving an invoice if there are any items in dispute. Project managers should be granted line item approval authority. This would allow undisputed invoice amounts to be paid promptly and disputed items to be resolved in a timely fashion. As a result, small businesses that contract with the State would be able to maintain a positive cash flow while providing goods or services to the State.

14. Assess the Contract Dispute Resolution Process

The State should assess its dispute resolution process to ensure that it does not unduly disadvantage or burden M/WBEs. Small businesses may be deterred from seeking legitimate redress if the process is costly and time consuming. Streamlined dispute resolution procedures can also establish a greater degree of fairness.

15. Avoid Overly Complex or Restrictive Specifications

To encourage M/WBE contractor participation, requiring a base bid with multiple alternatives should be avoided. This type of specification requires a considerable degree of expertise and resources to prepare what ultimately is several bids at once. Simplified specifications can promote accurate bids, minimizing the needs for Requests for Information and change orders.

In addition, unnecessary work hour restrictions can also limit a small contractor's flexibility in meeting demanding construction schedules. Proprietary specifications can be costly as well. When a supplier is granted an artificial monopoly on materials by a public agency owner, the supplier can and often will demand an excessive price. If brand-name material is required in the bid specifications, it should be purchased by the State and not the contractor.

16. Develop Subcontractor Substitution Standards

Formal subcontractor substitution standards should be developed so that subcontractors are not removed from a project without due process. Eliminating a subcontractor from a project or reducing its scope of work can pose a significant hardship on small contractors. Formalizing subcontractor substitution standards ensures that prime contractors are accountable to commitments made to M/WBEs at the time of bid or proposal submission.

A subcontractor should be notified in writing of an intended substitution, and afforded the opportunity to respond. Substitutions should only be allowed after the subcontractor has had a chance to respond, and only with the approval of the State. In addition, any reduction in the scope of work or contract value for a subcontractor should be considered as a substitution. Failure to adhere to the substitution standard should be a breach of contract and the appropriate sanctions applied.

17. Post Prime Contractor Payments to the Internet

Prime contractor payments should be published on the internet. This will allow subcontractors and subconsultants to monitor the progress of their project and to track when the prime contractor receives payment.

18. Conduct Routine Post-Award Contract Compliance

Routine contract compliance monitoring should be conducted to ensure that M/WBE goals are met throughout the duration of a contract. This type of monitoring will verify the prime contractors' commitments both prior to and after the contract award. Consistent contract compliance should minimize the hardships experienced by small firms with limited resources.

The following contract compliance methods are recommended:

- Periodically collect copies of canceled checks to subcontractors to verify payment information
- Penalize prime contractors and subcontractors for non-compliance with program requirements
- Fine prime contractors for unapproved substitutions

- Include a provision for liquidated damages if a contract is breached due to non-compliance with M/WBE requirements

19. Publish M/WBE Utilization Reports

Prime contractor and subcontractor utilization should be reported on a regular basis. Reporting will measure the success of the M/WBE programs' efforts and determine if they require modification. Periodic reporting can also serve as a public relations tool, informing the community of the State's efforts to ensure diversity.

These reports should include verified payment in addition to award data. The verification process should be standardized. The reports should also include change orders and substitutions, be posted to the State's web site, and circulated to local chambers of commerce and trade organizations. The utilization reports should include an assessment of M/WBE program activities and recommendations for improvement on an annual basis.

V. ADMINISTRATIVE RECOMMENDATIONS

A. Organizational Recommendations

1. Establish a Centralized M/WBE Office with Adequate Staff

A centralized M/WBE contract compliance office should assume responsibility for the design, implementation, and operation of the business equity programs. Currently contract compliance is decentralized. Consolidating all of these units into one office will ensure that all business equity programs are uniformly implemented and monitored.

The M/WBE contract compliance office should be under the jurisdiction of the Secretary of State and separate from any agency, authority, and commission with purchasing authority. This will relieve the natural tension between the deliberation required to ensure contract compliance and the need to expediently procure products and services. The contract compliance office will need the authority to approve solicitations, reject bids or proposals, and enforce penalties to contractors and staff for non-compliance with the business equity program requirements. The Secretary of State would be the final arbitrator of the competing interest between contract compliance and procurement.

The centralized contract compliance office should be adequately staffed with experienced professionals capable of fulfilling the new responsibilities. Adequate staffing is necessary to promote the smooth implementation of the State's new business equity programs. Personnel staffing the contract compliance office should have knowledge about procurement procedures, public contracting law, affirmative action programs, and the business community. The personnel should have education or professional experience in

public administration and be knowledgeable about current business trends and the operation of a small business.

2. Recognize Buyers that Utilize M/WBEs

Staff who comply with Program requirements to utilize M/WBEs on informal contract solicitations should be recognized. Such acknowledgment could be in the form of a letter from supervisory staff. Formal recognition will provide State staff an additional incentive to meet M/WBE program requirements and reward those that consistently demonstrate a commitment to diversity.

3. Develop a Statewide M/WBE Program Manual

A Statewide M/WBE Program Manual should be developed. Creating a uniform manual would streamline the contract compliance process and provide one source that is applicable to all State contracting. A uniform M/WBE Program Manual will also provide staff with clear guidance on their responsibilities and State requirements.

The recommendations in this report should be included in drafting the M/WBE Program Manual. Training should be provided when the manual is approved. Staff compliance should be evaluated through both department-level reports of M/WBE utilization and staff performance reviews.

4. Conduct Outreach and Implement Marketing Strategies

The proposed M/WBE program should have an outreach component. The outreach component should include the following three elements:

- Promote new programs
- Solicit firms to pursue certification
- Advertise contract opportunities in order to increase the number of businesses responding to informal and formal solicitations

Effective outreach will also attract more bidders and proposers and inform them of new requirements.

The table below lists the strategies and tactics that can be used to market the programs, inform the business community of new requirements, and attract M/WBE firms to certify with the State, and to bid on State contracts.

Table 7.04 Outreach and Marketing Strategies

Strategy	Tactics
Design tagline and display banner	• Develop tagline • Design banner with placement of existing logo and new tagline
Define design standards, layout, and appearance of procurement documents for the organization	• Revise all procurement materials to include the program logo and tagline in order to have a uniform appearance
Develop collateral print material for outreach campaign	• Revise brochure to reflect program changes • Develop articles and media packets
Launch outreach campaign	• Distribute media packets and press releases • Place public service announcements • Pitch campaign to broadcast media
Host semi-annual contractors' open house and other networking events	• Plan and coordinate open house events • Send out invitations via mail, fax, and e-mail • Include buyers in outreach events • Make informal contract opportunities available • Distribute contract forecasts and certification forms
Distribute forecasts of contracting opportunities via facsimile and e-mail	• Distribute contract forecast • Post to web site • Distribute through fax and e-mail
Partner with agencies and organizations to disseminate program information	• Continue current agency partnerships • Develop local business and trade group partners
Conduct an annual program evaluation	• Establish measurable outcomes • Conduct surveys • Examine bidding history

B. Data Management Recommendations

1. Track All Subcontract Bidders

All subcontract bidders should be tracked electronically, on a Statewide basis. Setting M/WBE contract goals will require a list of available firms. Electronically recording bidders is a comprehensive means of tracking ready, willing, and able firms.

In order to maintain a list of available subcontractors, the following information should be collected from prime contractors at the time of bid opening:

- Subcontractors' names
- Subcontractors' certification status
- Service to be provided by each subcontractor
- Subcontractors' bid amount

2. Consistently Track All Subcontractor Payments

There should be uniform tracking of all subcontractor payments. Tracking subcontractor payments is a critical element of contract compliance. Tracking subcontractor payments will also identify problematic areas in contract compliance and project management.

Data should be stored electronically in a relational database. Each agency that manages contracts should maintain its own relational database. The databases should be based on the same platform, in order for the data to be easily integrated when needed. In addition, the contract numbering system should be the same across all State Agencies, Authorities, Commissions, and it should match the one used in New Jersey Comprehensive Financial System (NJCFS).

3. Code Contracts by Industry Classification in the New Jersey Comprehensive Financial System (NJCFS)

State Agencies, Authorities, and Commissions contracts should be coded by industry and entered into the NJCFS at the time of the contract award. Coding each record by industry would facilitate compliance reporting and in producing utilization reports.

The numeric code for the type of industry should be based on the federal North American Industrial Classification Standard (NAICS). Then, the existing contract description field in the NJCFS would be used to verify the classification.

4. Consolidate All Payment Tracking into the New Jersey Comprehensive Financial System (NJCFS)

The NJCFS should be used by State Agencies, Authorities, and Commissions to track and monitor payments. Currently, only State Agencies consistently use the NJCFS. A centralized system will streamline payment monitoring and financial reporting for all entities in the State government.

Volume 3

State of New Jersey

Construction Services Disparity Study 2000 - 2002

STATE COLLEGES AND UNIVERSITIES

Submitted to:
The Disparity Study Commission

Submitted by:
Mason Tillman Associates, Ltd.

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MASON TILLMAN
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STATE COLLEGES AND UNIVERSITIES PRIME CONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

As set forth in *Croson* and its progeny, a disparity study must document minority contracting in the jurisdiction under review. The first step in a disparity analysis is the statistical review of prime contracts. The objective of this statistical analysis is to determine the level of minority and woman-owned business enterprise (M/WBE) prime contractor utilization compared to non-M/WBE prime contractor utilization on contracts awarded between July 1, 2000 and June 30, 2002. The definition of prime contractors for the Study is all firms to which the State Colleges and Universities awarded contracts during the study period.

The prime utilization analysis included construction and construction-related contracts awarded by the State Colleges and Universities. Only those colleges and universities that awarded construction and construction-related contracts to for-profit businesses were included in the Study. State Agencies, Authorities, and Commissions contracts are analyzed separately from the State Colleges and Universities. Findings from the analysis of State Agencies, Authorities, and Commissions are presented in Volume 2, Chapter 1: Prime Contractor Utilization Analysis.

Construction contracts included new construction and renovations, except routine building maintenance. All residential and non-residential building construction; heavy construction such as streets, roads, and bridges; and special trade construction such as fencing, HVAC, paving, and electrical were included.

Construction-related contracts included design services, such as architectural, engineering, and construction management services, performed as part of a construction project.

This chapter will discuss the State Colleges and Universities' utilization of prime contractors in the two industries.

II. STATE COLLEGES AND UNIVERSITIES PRIME CONTRACT DATA SOURCES

The State Colleges and Universities prime contract data were collected from each State College and University, with two exceptions. Firstly, Richard Stockton College managed their own small construction and construction-related contracts. Their data for large contracts were provided by the State Treasury Department's Division of Property Management and Construction (DPMC). Secondly, Rowan College provided their contracts in a hard copy report. Additional contracts for Rowan College were identified by the Treasury's Division of Contract Compliance data and collected by Mason Tillman.

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

Colleges and Universities

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

The following data were used as additional sources of information to assess the comprehensiveness of the provided prime data:

- Treasury's Division of Contract Compliance

Treasury's Division of Contract Compliance provided a list of construction contracts awarded by State Colleges and Universities, for which the prime contractor had filed Equal Employment Opportunity forms. This information was cross-referenced with the data provided by the State Colleges and Universities and DPMC to insure accuracy and completeness of the prime contract records included in the study. All discrepancies found between the sources of data were resolved with State College or University staff.

- Department of Labor (DOL) business registration database

DOL provided a database listing all contractors that have been registered since the beginning of the study period. This database was used as a source of addresses and contact information for prime and subcontractors.

III. STATE COLLEGES AND UNIVERSITIES PRIME CONTRACTOR UTILIZATION THRESHOLDS

Prime contracts within each industry classification were grouped into three size categories. One category included all the contract records without regard to size of the award. The other two categories were defined by the industry's informal and formal procurement standards. Informal contracts were the small purchases that had a maximum size threshold of $19,500 and did not require advertising. Although some State Colleges and Universities had different formal and informal levels, the size categories chosen for the analysis reflect the procurement policies governing most of the State Colleges and Universities. Table 1.01 details the informal thresholds used in the analysis.

Formal contracts were the advertised solicitations above the informal threshold. Formal contracts have no maximum size threshold. However, the analysis of formal contracts was capped at $500,000 for both industries because there was demonstrated capacity within the pool of willing M/WBEs to perform contracts at this level.

Table 1.01 Prime Contract Procurement Thresholds

State Colleges and Universities	Informal
Construction	$19,500 and under
Construction-Related	$19,500 and under

Prime contract awards have been grouped, by amount, into these three categories and are presented in the tables and charts that follow. The three categories of contracts are all contracts, contracts under $500,000, and contracts under $19,500. The number of contracts and dollar amounts are presented within each of the three categories.

IV. STATE COLLEGES AND UNIVERSITIES PRIME CONTRACTOR UTILIZATION

As depicted in Table 1.02 below, the State Colleges and Universities issued 1,594 construction and construction-related prime contracts during the July 1, 2000 to June 30, 2002 study period. The 1,594 contracts included 1,331 for construction contracts and 266 for construction-related contracts.

Also, State Colleges and Universities expended $502,995,582 for construction and construction-related contracts during the study period, with $357,178,758 for construction services and $145,816,824 for construction-related services.

Table 1.02 Total Construction and Construction-Related Prime Contracts and Dollars Expended between July 1, 2000 and June 30, 2002

State Colleges and Universities	Total Number of Contracts	Total Dollars Expended
Construction	1,331	$357,178,758
Construction-Related	266	$145,816,824
Total	1,597	$502,995,582

A. All State Colleges and Universities Prime Contracts by Industry

1. Construction Prime Contractor Utilization: All Contracts

Table 1.03 summarizes all contract dollars expended by State Colleges and Universities on construction prime contracts. Minority Business Enterprises received 3.06 percent of the construction prime contract dollars; Women Business Enterprises received 4.47 percent; and Caucasian Male Business Enterprises received 92.47 percent.

African American Businesses received 11 or 0.83 percent of the construction contracts during the study period, representing $88,865 or 0.02 percent of the contract dollars.

Asian American Businesses received 19 or 1.43 percent of the construction contracts during the study period, representing $5,906,569 or 1.65 percent of the contract dollars.

Hispanic American Businesses received 29 or 2.18 percent of the construction contracts during the study period, representing $4,940,392 or 1.38 percent of the contract dollars.

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

Minority Business Enterprises received 59 or 4.43 percent of the construction contracts during the study period, representing $10,935,826 or 3.06 percent of the contract dollars.

Women Business Enterprises received 149 or 11.19 percent of the construction contracts during the study period, representing $15,957,167 or 4.47 percent of the contract dollars.

Minority and Women Business Enterprises received 208 or 15.63 percent of the construction contracts during the study period, representing $26,892,993 or 7.53 percent of the contract dollars.

Caucasian Male Business Enterprises received 1,123 or 84.37 percent of the construction contracts during the study period, representing $330,285,765 or 92.47 percent of the contract dollars.

Table 1.03 Construction Prime Contractor Utilization: All Contracts, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	11	0.83%	$88,865	0.02%
Asian Americans	19	1.43%	$5,906,569	1.65%
Hispanic Americans	29	2.18%	$4,940,392	1.38%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	149	11.19%	$15,957,167	4.47%
Caucasian Males	1,123	84.37%	$330,285,765	92.47%
TOTAL	1,331	100.00%	$357,178,758	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	11	0.83%	$88,865	0.02%
Asian American Females	0	0.00%	$0	0.00%
Asian American Males	19	1.43%	$5,906,569	1.65%
Hispanic American Females	1	0.08%	$312,849	0.09%
Hispanic American Males	28	2.10%	$4,627,543	1.30%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	149	11.19%	$15,957,167	4.47%
Caucasian Males	1,123	84.37%	$330,285,765	92.47%
TOTAL	1,331	100.00%	$357,178,758	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	1	0.08%	$312,849	0.09%
Minority Males	58	4.36%	$10,622,977	2.97%
Caucasian Females	149	11.19%	$15,957,167	4.47%
Caucasian Males	1,123	84.37%	$330,285,765	92.47%
TOTAL	1,331	100.00%	$357,178,758	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	59	4.43%	$10,935,826	3.06%
Women Business Enterprises	149	11.19%	$15,957,167	4.47%
Minority and Women Business Enterprises	**208**	**15.63%**	**$26,892,993**	**7.53%**
Caucasian Male Business Enterprises	1,123	84.37%	$330,285,765	92.47%
TOTAL	1,331	100.00%	$357,178,758	100.00%

2. Construction-Related Prime Contractor Utilization: All Contracts

Table 1.04 summarizes all contract dollars expended by State Colleges and Universities on construction-related prime contracts. Minority Business Enterprises received 0.09 percent of the construction-related prime contract dollars; Women Business Enterprises received 1.53 percent; and Caucasian Male Business Enterprises received 98.38 percent.

African American Businesses received none of the construction-related contracts during the study period.

Asian American Businesses received none of the construction-related contracts during the study period.

Hispanic American Businesses received 10 or 3.76 percent of the construction-related contracts during the study period, representing $129,006 or 0.09 percent of the contract dollars.

Native American Businesses received none of the construction-related contracts during the study period.

Minority Business Enterprises received 10 or 3.76 percent of the construction-related contracts during the study period, representing $129,006 or 0.09 percent of the contract dollars.

Women Business Enterprises received 34 or 12.78 percent of the construction-related contracts during the study period, representing $2,237,821 or 1.53 percent of the contract dollars.

Minority and Women Business Enterprises received 44 or 16.54 percent of the construction-related contracts during the study period, representing $2,366,827 or 1.62 percent of the contract dollars.

Caucasian Males Business Enterprises received 222 or 83.46 percent of the construction-related contracts during the study period, representing $143,297,997 or 98.38 percent of the contract dollars.

Table 1.04 Construction-Related Prime Contractor Utilization: All Contracts, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	$0	0.00%
Asian Americans	0	0.00%	$0	0.00%
Hispanic Americans	10	3.76%	$129,006	0.09%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	34	12.78%	$2,237,821	1.53%
Caucasian Males	222	83.46%	$143,449,997	98.38%
TOTAL	266	100.00%	$145,816,824	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	0	0.00%	$0	0.00%
Asian American Females	0	0.00%	$0	0.00%
Asian American Males	0	0.00%	$0	0.00%
Hispanic American Females	0	0.00%	$0	0.00%
Hispanic American Males	10	3.76%	$129,006	0.09%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	34	12.78%	$2,237,821	1.53%
Caucasian Males	222	83.46%	$143,449,997	98.38%
TOTAL	266	100.00%	$145,816,824	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	0	0.00%	$0	0.00%
Minority Males	10	3.76%	$129,006	0.09%
Caucasian Females	34	12.78%	$2,237,821	1.53%
Caucasian Males	222	83.46%	$143,449,997	98.38%
TOTAL	266	100.00%	$145,816,824	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	10	3.76%	$129,006	0.09%
Women Business Enterprises	34	12.78%	$2,237,821	1.53%
Minority and Women Business Enterprises	**44**	**16.54%**	**$2,366,827**	**1.62%**
Caucasian Male Business Enterprises	222	83.46%	$143,449,997	98.38%
TOTAL	266	100.00%	$145,816,824	100.00%

B. All State Colleges and Universities Prime Contracts under $500,000, by Industry

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

Table 1.05 summarizes all contract dollars expended by State Colleges and Universities on construction prime contracts under $500,000. Minority Business Enterprises received 5.2 percent of the prime contract dollars; Women Business Enterprises received 12.15 percent; and Caucasian Male Business Enterprises received 82.65 percent.

African American Businesses received 11 or 0.88 percent of the construction contracts under $500,000 during the study period, representing $88,865 or 0.16 percent of the contract dollars.

Asian American Businesses received 14 or 1.12 percent of the construction contracts under $500,000 during the study period, representing $711,551 or 1.29 percent of the contract dollars.

Hispanic American Businesses received 25 or 2 percent of the construction contracts under $500,000 during the study period, representing 2,076,869 or 3.75 percent of the contract dollars.

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

Minority Business Enterprises received 50 or 4 percent of the construction contracts under $500,000 during the study period, representing $2,877,285 or 5.2 percent of the contract dollars.

Women Business Enterprises received 142 or 11.37 percent of the construction contracts under $500,000 during the study period, representing $6,726,884 or 12.15 percent of the contract dollars.

Minority and Women Business Enterprises received 192 or 15.37 percent of the construction contracts under $500,000 during the study period, representing $9,604,169 or 17.35 percent of the contract dollars.

Caucasian Male Business Enterprises received 1,057 or 84.63 percent of the construction contracts under $500,000 during the study period, representing $45,757,892 or 82.65 percent of the contract dollars.

Table 1.05 Construction Prime Contractor Utilization: Contracts under $500,000, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	11	0.88%	$88,865	0.16%
Asian Americans	14	1.12%	$711,551	1.29%
Hispanic Americans	25	2.00%	$2,076,869	3.75%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	142	11.37%	$6,726,884	12.15%
Caucasian Males	1,057	84.63%	$45,757,892	82.65%
TOTAL	1,249	100.00%	$55,362,061	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	11	0.88%	$88,865	0.16%
Asian American Females	0	0.00%	$0	0.00%
Asian American Males	14	1.12%	$711,551	1.29%
Hispanic American Females	1	0.08%	$312,849	0.57%
Hispanic American Males	24	1.92%	$1,764,020	3.19%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	142	11.37%	$6,726,884	12.15%
Caucasian Males	1,057	84.63%	$45,757,892	82.65%
TOTAL	1,249	100.00%	$55,362,061	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	1	0.08%	$312,849	0.57%
Minority Males	49	3.92%	$2,564,436	4.63%
Caucasian Females	142	11.37%	$6,726,884	12.15%
Caucasian Males	1,057	84.63%	$45,757,892	82.65%
TOTAL	1,249	100.00%	$55,362,061	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	50	4.00%	$2,877,285	5.20%
Women Business Enterprises	142	11.37%	$6,726,884	12.15%
Minority and Women Business Enterprises	**192**	**15.37%**	**$9,604,169**	**17.35%**
Caucasian Male Business Enterprises	1,057	84.63%	$45,757,892	82.65%
TOTAL	1,249	100.00%	$55,362,061	100.00%

2. Construction-Related Prime Contractor Utilization: Contracts under $500,000

Table1.06 summarizes all contract dollars expended by State Colleges and Universities on construction-related prime contracts under $500,000. Minority Business Enterprises received 0.89 percent of the prime contract dollars; Women Business Enterprises received 11.76 percent; and Caucasian Male Business Enterprises received 87.36 percent.

African American Businesses received none of the construction-related contracts under $500,000 during the study period.

Asian American Businesses received none of the construction-related contracts under $500,000 during the study period.

Hispanic American Businesses received 10 or 4.46 percent of the construction-related contracts under $500,000 during the study period, representing $129,006 or 0.89 percent of the contract dollars.

Native American Businesses received none of the construction-related contracts under $500,000 during the study period.

Minority Business Enterprises received 10 or 4.46 percent of the construction-related contracts under $500,000 during the study period, representing $129,006 or 0.89 percent of the contract dollars.

Women Business Enterprises received 33 or 14.73 percent of the construction-related contracts under $500,000 during the study period, representing $1,712,821 or 11.76 percent of the contract dollars.

Minority and Women Business Enterprises received 43 or 19.2 percent of the construction-related contracts under $500,000 during the study period, representing $1,841,827 or 12.64 percent of the contract dollars.

Caucasian Male Business Enterprises received 181 or 80.8 percent of the construction-related contracts under $500,000 during the study period, representing $12,727,542 or 87.36 percent of the contract dollars.

Table 1.06 Construction-Related Prime Contractor Utilization: Contracts under $500,000, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	$0	0.00%
Asian Americans	0	0.00%	$0	0.00%
Hispanic Americans	10	4.46%	$129,006	0.89%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	33	14.73%	$1,712,821	11.76%
Caucasian Males	181	80.80%	$12,727,542	87.36%
TOTAL	224	100.00%	$14,569,369	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	0	0.00%	$0	0.00%
Asian American Females	0	0.00%	$0	0.00%
Asian American Males	0	0.00%	$0	0.00%
Hispanic American Females	0	0.00%	$0	0.00%
Hispanic American Males	10	4.46%	$129,006	0.89%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	33	14.73%	$1,712,821	11.76%
Caucasian Males	181	80.80%	$12,727,542	87.36%
TOTAL	224	100.00%	$14,569,369	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	0	0.00%	$0	0.00%
Minority Males	10	4.46%	$129,006	0.89%
Caucasian Females	33	14.73%	$1,712,821	11.76%
Caucasian Males	181	80.80%	$12,727,542	87.36%
TOTAL	224	100.00%	$14,569,369	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	10	4.46%	$129,006	0.89%
Women Business Enterprises	33	14.73%	$1,712,821	11.76%
Minority and Women Business Enterprises	**43**	**19.20%**	**$1,841,827**	**12.64%**
Caucasian Male Business Enterprises	181	80.80%	$12,727,542	87.36%
TOTAL	224	100.00%	$14,569,369	100.00%

C. All State Colleges and Universities Prime Contracts under $19,500, by Industry

1. Construction Prime Contractor Utilization: Contracts under $19,500

Table 1.07 summarizes all contract dollars expended by State Colleges and Universities on construction prime contracts under $19,500. Minority Business Enterprises received 4.73 percent of the prime contract dollars; Women Business Enterprises received 10.36 percent; and Caucasian Male Business Enterprises received 84.91 percent.

African American Businesses received 11 or 1.41 percent of the construction contracts under $19,500 during the study period, representing $88,865 or 1.83 percent of the contract dollars.

Asian American Businesses received 10 or 1.29 percent of the construction contracts under $19,500 during the study period, representing $72,381 or 1.49 percent of the contract dollars.

Hispanic American Businesses received 11 or 1.41 percent of the construction contracts under $19,500 during the study period, representing $68,057 or 1.4 percent of the contract dollars.

Native American Businesses received none of the construction contracts under $19,500 during the study period.

Minority Business Enterprises received 32 or 4.11 percent of the construction contracts under $19,500 during the study period, representing $229,303 or 4.73 percent of the contract dollars.

Women Business Enterprises received 78 or 10.03 percent of the construction contracts under $19,500 during the study period, representing $502,530 or 10.36 percent of the contract dollars.

Minority and Women Business Enterprises received 110 or 14.14 percent of the construction contracts under $19,500 during the study period, representing $731,833 or 15.09 percent of the contract dollars.

Caucasian Male Business Enterprises received 668 or 85.86 percent of the construction contracts under $19,500 during the study period, representing $4,119,120 or 84.91 percent of the contract dollars.

Table 1.07 Construction Prime Contractor Utilization: Contracts under $19,500, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	11	1.41%	$88,865	1.83%
Asian Americans	10	1.29%	$72,381	1.49%
Hispanic Americans	11	1.41%	$68,057	1.40%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	78	10.03%	$502,530	10.36%
Caucasian Males	668	85.86%	$4,119,120	84.91%
TOTAL	778	100.00%	$4,850,953	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	11	1.41%	$88,865	1.83%
Asian American Females	0	0.00%	$0	0.00%
Asian American Males	10	1.29%	$72,381	1.49%
Hispanic American Females	0	0.00%	$0	0.00%
Hispanic American Males	11	1.41%	$68,057	1.40%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	78	10.03%	$502,530	10.36%
Caucasian Males	668	85.86%	$4,119,120	84.91%
TOTAL	778	100.00%	$4,850,953	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	0	0.00%	$0	0.00%
Minority Males	32	4.11%	$229,303	4.73%
Caucasian Females	78	10.03%	$502,530	10.36%
Caucasian Males	668	85.86%	$4,119,120	84.91%
TOTAL	778	100.00%	$4,850,953	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	32	4.11%	$229,303	4.73%
Women Business Enterprises	78	10.03%	$502,530	10.36%
Minority and Women Business Enterprises	**110**	**14.14%**	**$731,833**	**15.09%**
Caucasian Male Business Enterprises	668	85.86%	$4,119,120	84.91%
TOTAL	778	100.00%	$4,850,953	100.00%

2. Construction-Related Prime Contractor Utilization: Contracts under $19,500

Table 1.08 summarizes all contract dollars expended by State Colleges and Universities on construction-related prime contracts under $19,500. Minority Business Enterprises received 4.14 percent of the prime contract dollars; Women Business Enterprises received 13.23 percent; and Caucasian Male Business Enterprises received 82.63 percent.

African American Businesses received none of the construction-related contracts under $19,500 during the study period.

Asian American Businesses received none of the construction-related contracts under $19,500 during the study period.

Hispanic American Businesses received 8 or 5.88 percent of the construction-related contracts under $19,500 during the study period, representing $34,156 or 4.14 percent of the contract dollars.

Native American Businesses received none of the construction-related contracts under $19,500 during the study period.

Minority Business Enterprises received 8 or 5.88 percent of the construction-related contracts under $19,500 during the study period, representing $34,156 or 4.14 percent of the contract dollars.

Women Business Enterprises received 22 or 16.18 percent of the construction-related contracts under $19,500 during the study period, representing $109,045 or 13.23 percent of the contract dollars.

Minority and Women Business Enterprises received 30 or 22.06 percent of the construction-related contracts under $19,500 during the study period, representing $143,201 or 17.37 percent of the contract dollars.

Caucasian Male Business Enterprises received 106 or 77.94 percent of the construction-related contracts under $19,500 during the study period, representing $681,265 or 82.63 percent of the contract dollars.

Table 1.08 Construction-Related Prime Contractor Utilization: Contracts under $19,500, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	$0	0.00%
Asian Americans	0	0.00%	$0	0.00%
Hispanic Americans	8	5.88%	$34,156	4.14%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	22	16.18%	$109,045	13.23%
Caucasian Males	106	77.94%	$681,265	82.63%
TOTAL	136	100.00%	$824,467	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	0	0.00%	$0	0.00%
Asian American Females	0	0.00%	$0	0.00%
Asian American Males	0	0.00%	$0	0.00%
Hispanic American Females	0	0.00%	$0	0.00%
Hispanic American Males	8	5.88%	$34,156	4.14%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	22	16.18%	$109,045	13.23%
Caucasian Males	106	77.94%	$681,265	82.63%
TOTAL	136	100.00%	$824,467	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	0	0.00%	$0	0.00%
Minority Males	8	5.88%	$34,156	4.14%
Caucasian Females	22	16.18%	$109,045	13.23%
Caucasian Males	106	77.94%	$681,265	82.63%
TOTAL	136	100.00%	$824,467	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	8	5.88%	$34,156	4.14%
Women Business Enterprises	22	16.18%	$109,045	13.23%
Minority and Women Business Enterprises	**30**	**22.06%**	**$143,201**	**17.37%**
Caucasian Male Business Enterprises	106	77.94%	$681,265	82.63%
TOTAL	136	100.00%	$824,467	100.00%

2

SUBCONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

The objective of the subcontractor utilization analysis of construction and construction-related services contracts is to determine the level of minority and woman-owned business enterprise (M/WBE) subcontractor utilization compared to non-M/WBE subcontractor utilization. The subcontractor utilization analysis presents the choices made by prime contractors in their selection of M/WBE and non-M/WBE subcontractors on State Colleges and Universities prime contracts.

The subcontractor utilization analysis includes construction and construction-related contracts awarded by State Colleges and Universities between July 1, 2000 and June 30, 2002. State Colleges and Universities contracts were analyzed separately from the State Agencies, Authorities, and Commissions.

II. SUBCONTRACTOR UTILIZATION DATA SOURCES

The first step in compiling subcontractor data was the determination of the size of the prime contracts to be researched. The research in identifying subcontractor utilization was limited to prime contracts $50,000 and greater. Once the threshold was defined, the State Colleges and Universities were surveyed to determine if there were subcontractor records on file for prime contracts $50,000 and greater.

It was determined that there was no centralized source for the State Colleges and Universities' construction and construction-related subcontracts, and few State Colleges and Universities had complete subcontractor records for their prime contracts. While none of the State Colleges and Universities maintained comprehensive subcontractor records,

several could provide subcontractor award records for some of their prime contracts. In collecting the payment and award data needed for all subcontractors, a number of strategies were employed.

Six State Colleges and Universities have compiled subcontracting data that could be provided in an electronic format. The six State Colleges and Universities which provided such records are listed below:

- The College of New Jersey
- New Jersey City University
- Ramapo College
- Rowan University
- Rutgers University
- University Medicine & Dentistry of New Jersey

After reviewing the electronic files provided, it was determined that additional research should be performed to review project files at three of the six State Colleges and Universities. Hard copy records were copied on site at seven State Colleges and Universities and the relevant information was entered into an electronic file. State Colleges and Universities where hard copy subcontractor records were reviewed are listed below:

- The College of New Jersey
- Kean University
- Montclair State University
- New Jersey Institute of Technology
- Rowan University
- Rutgers University
- William Paterson University

The Office of Contract Compliance maintained records of subcontractors, which had been submitted by prime contractors in response to the requirement to file Equal Employment Opportunity forms. There were only a limited number of these records which included the project award date, contract, title, and subcontractors.

Once the electronic and hard copy subcontractor records were compiled, the prime contractors were surveyed to collect payment data for the identified subcontracts and secure information on any utilized subcontractors which had not been identified through documentary research.

Identified subcontractors were contacted to verify their subcontract dollars. As a result of this intensive effort to collect subcontracting subcontracts, a total of 715 subcontracts were identified in the two industries.

III. STATE COLLEGES AND UNIVERSITIES SUBCONTRACTOR UTILIZATION ANALYSIS: ALL SUBCONTRACTS

As depicted in Table 2.01 below, the State Colleges and Universities prime contractors issued 715 construction and construction-related subcontracts during the July 1, 2000 to June 30, 2002 study period. These included 319 for construction contracts and 396 for construction-related contracts.

Also, the State Colleges and Universities prime contractors expended $167,997,451 construction and construction-related subcontract dollars during the study period, with $93,541,355 for construction contracts and $74,456,096 for construction-related contracts.

Table 2.01 Total Construction and Construction-Related Subcontracts and Dollars Expended between July 1, 2000 and June 30, 2002

State Colleges and Universities	Total Number of Subcontracts	Total Dollars Expended
Construction	319	$93,541,355
Construction-Related	396	$74,456,096
Total	715	$167,997,451

State Colleges and Universities Subcontractor Utilization

1. State Colleges and Universities Construction Subcontract Utilization: All Subcontracts

Table 2.02 depicts construction subcontracts awarded by prime contractors. Minority Business Enterprises received 3.81 percent of the construction subcontract dollars; Women Business Enterprises received 7.25 percent; and Caucasian Male Business Enterprises received 88.94 percent.

African American Businesses received 4 or 1.25 percent of the construction subcontracts during the study period, representing $426,480 or 0.46 percent of the subcontract dollars.

Asian American Businesses received 4 or 1.25 percent of the construction subcontracts during the study period, representing $381,825 or 0.41 percent of the subcontract dollars.

Hispanic American Businesses received 12 or 3.76 percent of the construction subcontracts during the study period, representing $2,753,351 or 2.94 percent of the subcontract dollars.

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

Minority Business Enterprises received 20 or 6.27 percent of the construction subcontracts during the study period, representing $3,561,656 or 3.81 percent of the subcontract dollars.

Women Business Enterprises received 18 or 5.64 percent of the construction subcontracts during the study period, representing $6,781,374 or 7.25 percent of the subcontract dollars.

Minority and Women Business Enterprises received 38 or 11.91 percent of the construction subcontracts during the study period, representing $10,343,030 or 11.06 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 281 or 88.09 percent of the construction subcontracts during the study period, representing $83,198,324 or 88.94 percent of the subcontract dollars.

Table 2.02 Construction Utilization: All Subcontracts, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	4	1.25%	$426,480	0.46%
Asian Americans	4	1.25%	$381,825	0.41%
Hispanic Americans	12	3.76%	$2,753,351	2.94%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	18	5.64%	$6,781,374	7.25%
Caucasian Males	281	88.09%	$83,198,324	88.94%
TOTAL	319	100.00%	$93,541,355	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	4	1.25%	$426,480	0.46%
Asian American Females	1	0.31%	$57,469	0.06%
Asian American Males	3	0.94%	$324,356	0.35%
Hispanic American Females	4	1.25%	$205,054	0.22%
Hispanic American Males	8	2.51%	$2,548,297	2.72%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	18	5.64%	$6,781,374	7.25%
Caucasian Males	281	88.09%	$83,198,324	88.94%
TOTAL	319	100.00%	93,541,355	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	5	1.57%	$262,523	0.28%
Minority Males	15	4.70%	$3,299,133	3.53%
Caucasian Females	18	5.64%	$6,781,374	7.25%
Caucasian Males	281	88.09%	$83,198,324	88.94%
TOTAL	319	100.00%	$93,541,355	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	20	6.27%	$3,561,656	3.81%
Women Business Enterprises	18	5.64%	$6,781,374	7.25%
Minority and Women Business Enterprises	**38**	**11.91%**	**$10,343,030**	**11.06%**
Caucasian Male Business Enterprises	281	88.09%	$83,198,324	88.94%
TOTAL	319	100.00%	$93,541,355	100.00%

2. State Colleges and Universities Construction-Related Subcontracts July 1, 2000 to June 30, 2002

Table 2.03 depicts construction-related subcontracts awarded by prime contractors. Minority Business Enterprises received 4 percent of the construction-related subcontract dollars; Women Business Enterprises received 20.53 percent; and Caucasian Male Business Enterprises received 75.46 percent.

African American Businesses received 3 or 0.76 percent of the construction-related subcontracts during the study period, representing $350,008 or 0.47 percent of the subcontract dollars.

Asian American Businesses received 15 or 3.79 percent of the construction-related subcontracts during the study period, representing $2,165,481 or 2.91 percent of the subcontract dollars.

Hispanic American Businesses received 6 or 1.52 percent of the construction-related subcontracts during the study period, representing $466,222 or 0.63 percent of the subcontract dollars.

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

Minority Business Enterprises received 24 or 6.06 percent of the construction-related subcontracts during the study period, representing $2,981,711 or 4 percent of the subcontract dollars.

Women Business Enterprises received 54 or 13.64 percent of the construction-related subcontracts during the study period, representing $15,289,014 or 20.53 percent of the subcontract dollars.

Minority and Women Business Enterprises received 78 or 19.7 percent of the construction-related subcontracts during the study period, representing $18,270,725 or 24.54 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 318 or 80.3 percent of construction-related subcontract dollars during the study period, representing $56,185,372 or 75.46 percent of the subcontract dollars.

Table 2.03 Construction-Related Utilization: All Subcontracts, July 1, 2000 to June 30, 2002

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	3	0.76%	$350,008	0.47%
Asian Americans	15	3.79%	$2,165,481	2.91%
Hispanic Americans	6	1.52%	$466,222	0.63%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	54	13.64%	$15,289,014	20.53%
Caucasian Males	318	80.30%	$56,185,372	75.46%
TOTAL	396	100.00%	$74,456,096	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	0	0.00%	$0	0.00%
African American Males	3	0.76%	$350,008	0.47%
Asian American Females	0	0.00%	$0	0.00%
Asian American Males	15	3.79%	$2,165,481	2.91%
Hispanic American Females	1	0.25%	$2,300	0.00%
Hispanic American Males	5	1.26%	$463,922	0.62%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	54	13.64%	$15,289,014	20.53%
Caucasian Males	318	80.30%	$56,185,372	75.46%
TOTAL	396	100.00%	74,456,096	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	1	0.25%	$2,300	0.00%
Minority Males	23	5.81%	$2,979,411	4.00%
Caucasian Females	54	13.64%	$15,289,014	20.53%
Caucasian Males	318	80.30%	$56,185,372	75.46%
TOTAL	396	100.00%	$74,456,096	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	24	6.06%	$2,981,711	4.00%
Women Business Enterprises	54	13.64%	$15,289,014	20.53%
Minority and Women Business Enterprises	**78**	**19.70%**	**$18,270,725**	**24.54%**
Caucasian Male Business Enterprises	318	80.30%	$56,185,372	75.46%
TOTAL	396	100.00%	$74,456,096	100.00%

3

MARKET AREA ANALYSIS

I. MARKET AREA DEFINITION

A. Legal Criteria for Geographic Market Area

The Supreme Court's decision in *Richmond v. Croson*[1] firmly established that programs which set aside a certain percentage of state and local contracts for minority and woman-owned firms must be supported by *evidence of past discrimination in the award of their contracts*.

Prior to the *Croson* decision, many agencies and jurisdictions implementing race-conscious programs had done so without developing a detailed public record to document discrimination in their award of contracts. Instead, they relied upon common knowledge and widely-recognized patterns of discrimination, both local and national.[2]

Croson established that a local government should not rely on society-wide discrimination as the basis for a race-based program, but should instead identify discrimination within its own jurisdiction.[3] In *Croson*, the Court found the City of Richmond's Minority Business Enterprise (MBE) construction program to be unconstitutional due to 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 the statistical comparison of business availability and business utilization. Therefore, the identification of the local market area

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

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

3 *Croson*, 488 U.S. at 497.

is particularly important as it establishes the parameters within which to conduct a disparity study.

B. Application of the Croson Standard

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

In analyzing the cases following *Croson,* a pattern emerges which provides us with additional guidance. The body of cases examining market area support a definition of market area that is reasonable.[7] In *Cone Corporation v. Hillsborough County*,[8] the Eleventh Circuit Court of Appeals considered a study in support of Florida's Hillsborough County MBE program, which used minority contractors located in the County as the measure of available firms. The program was found to be constitutional under the compelling governmental interest prong of strict scrutiny.

Hillsborough County's program was based on statistics indicating that specific discrimination existed in the construction contracts awarded by the County, not in the construction industry in general. Hillsborough County had extracted data from within its own jurisdictional boundaries and assessed the percentage of minority businesses available in Hillsborough County. The court stated that the study was properly conducted within the "local construction industry."[9]

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII),*[10] the Ninth Circuit Court of Appeals found the City and County of San Francisco's MBE

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4 *Croson*, 488 U.S. at 471.

5 *Id.* at 500.

6 *Id.* at 470.

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

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

9 *Id*. at 915.

10 *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

program to have the factual predicate necessary to survive strict scrutiny. The MBE program was supported by a study that assessed the number of available MBE contractors within the City and County of San Francisco. The court found it appropriate to use the City and County as the relevant market area within which to conduct a disparity study.[11]

In *Coral Construction v. King County*, the Ninth Circuit Court of Appeals held that, "a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program."[12] In support of its MBE program, Washington's King County offered studies compiled by other jurisdictions, including entities completely within the County or coterminous with the boundaries of the County, as well as a separate jurisdiction completely outside of the County. The plaintiffs contended that *Croson* required King County to compile its own data and cited *Croson* to prohibit data sharing.

The court found that data sharing could potentially lead to the improper use of societal discrimination data as the factual basis for a local MBE program and that innocent third parties could be unnecessarily burdened if an MBE program were based on outside data.

However, the court also found that the data from entities within the County and from coterminous jurisdictions to be relevant to discrimination in the County and posed no risk of unfairly burdening innocent third parties. As for data gathered by a neighboring county, the court concluded that this data could not be used to support King County's MBE program. The court noted, "It is vital that a race-conscious program align itself as closely to the scope of the problem legitimately sought to be rectified by the governmental entity. To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries."[13] However, the court did acknowledge that the "world of contracting does not conform itself neatly to jurisdictional boundaries."[14]

In other situations courts have approved a definition of market area that extends beyond a jurisdiction's boundaries. In *Concrete Works v. City and County of Denver*,[15] the court directly addressed the issue of whether extra-jurisdictional evidence of discrimination can be used to determine "local market area" for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA) to support its MBE program. Relying on *Croson*, plaintiffs argued that the extra jurisdictional evidence should not be considered. The court disagreed, finding

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11 *Id.* at 1415.

12 *Coral Construction v. King County*, 941 F.2d 910, 916 (9th Cir. 1991).

13 *Id.* at 917.

14 *Ibid.*

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

that *Croson*'s concern was that cities not use vaguely defined societal discrimination as the factual predicate for a disparity study. The court explained that evidence of discrimination should be specific so that race-conscious programs are designed to minimize burdens upon nonculpable third parties.

Critical to the court's acceptance of the Denver MSA as the relevant local market was the finding that more than 80 percent of construction and design contracts awarded by Denver were awarded to contractors within the MSA. Another consideration was that Denver's analysis was based on U.S. Census data, which was available for the Denver MSA, but not for the city itself. There was no undue burden placed on nonculpable parties, as Denver had conducted a majority of its construction contracts within the area defined as the local market. Citing *AGCCII*,[16] the court noted, "that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions that the city has taken in the past have visited racial discrimination on such individuals."[17]

Similarly, New York State conducted a disparity study in which the geographic market consisted of New York State and eight counties in northern New Jersey. The geographic market was defined as the area encompassing the location of businesses which received more than 90 percent of the dollar value of all contracts awarded by the agency.[18]

State and local governments must pay special attention to the geographical scope of their disparity studies. *Croson* determined that the statistical analysis should focus on the number of qualified minority individuals or qualified minority business owners in the government's marketplace.[19] The text of *Croson* itself suggests that the geographical boundaries of the government entity comprise an appropriate market area, and other courts have agreed with this finding. In addition, other cases have approved the use of a percentage of the dollars spent by an agency on contracting.

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

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16 *AGCCII*, 950 F.2d at 1401.

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

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

19 *Croson*, 488 U.S. at 501.

II. STUDY'S MARKET AREA

The clear implication of the market area cases is that in applying the test of reasonableness, one can limit the area to that of the jurisdiction if the facts support it. The following table depicts the overall number of construction and construction-related contracts and the dollar value of contracts awarded by the State Colleges and Universities between July 1, 2000 and June 30, 2002. As depicted in the table, the State Colleges and Universities awarded 1,597 prime contracts valued at $502,995,582. Of these contracts, 1,451 or 90.86 percent were awarded to New Jersey-based companies. The dollar value of those contracts was $471,359,360 or 93.71 percent of all dollars. For construction prime contracts, 1,232 or 92.56 percent were awarded to New Jersey-based companies. The dollar value of those contracts was $330,019,713 or 92.4 percent of the total construction dollars. Of the construction-related services prime contracts, 219 or 82.33 percent of the contracts were awarded to New Jersey-based companies. The dollar value of those contracts was $141,339,647 or 96.93 percent of the total construction-related dollars. Given that geographical distribution, the State of New Jersey is determined to be this study's geographical market area.

Table 3.01 State Colleges and Universities Market Area: July 1, 2000 to June 30, 2002

Market Area	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Combined Types of Work				
Market Area: State of New Jersey	1,451	90.86%	$471,359,360	93.71%
Outside Market Area	146	9.14%	$31,636,222	6.29%
Total	1,597	100.00%	$502,995,582	100.00%
Construction				
Market Area: State of New Jersey	1,232	92.56%	$330,019,713	92.40%
Outside Market Area	99	7.44%	$27,159,045	7.60%
Total	1,331	100.00%	$357,178,758	100.00%
Construction-Related Services				
Market Area: State of New Jersey	219	82.33%	$141,339,647	96.93%
Outside Market Area	47	17.67%	$4,477,178	3.07%
Total	266	100.00%	$145,816,824	100.00%

4

AVAILABILITY ANALYSIS

I. INTRODUCTION

According to *Croson*, availability is defined as businesses in the jurisdiction's market area that are willing and able to provide goods or services the jurisdiction procures.[1] To determine availability, minority and woman-owned business enterprises (M/WBEs) and non-M/WBEs within the jurisdiction's market area that are willing and able to perform its contracts need to be enumerated. When considering sources for determining the number of willing and able M/WBEs and non-M/WBEs, the selection must be based on whether two significant aspects about the population in question can be gauged from the various sources. The source must indicate first the firm's interest in doing business with the local government, as implied by the term "willing," and second, the willing business' capacity to provide goods or services, as implied by the term "able."

The determination of availability must follow from the definition of an entity's market area. The market area analysis presented in Chapter 3 defined the State of New Jersey (State) as the market area for State Colleges and Universities because the majority of businesses utilized are domiciled within the State's jurisdiction.

The compiled list of available businesses includes minority, women, and Caucasian male-owned businesses in the areas of construction and construction-related services. Separate availability lists were compiled for prime contractors and subcontractors in those industries.

[1] *Croson*, 488 U.S. at 509.

II. SOURCES OF POTENTIALLY WILLING AND ABLE PRIME CONTRACTORS

A. Prime Contractor Sources

M/WBEs and non-M/WBEs willing and able to do business with the State were identified from various sources. Businesses that demonstrated willingness to contract with the State were identified from State and other agency sources. The willingness of businesses identified from non-governmental sources had to be determined. Table 4.01 lists the sources used. These sources include government and private listings of M/WBEs and non-M/WBEs in the market area.

Table 4.01 Summary of Prime Contractor Availability Data Sources

Source of Record	Type of Information
State of New Jersey and Other Government Records	
State of New Jersey: State Agency, Authority, Commission, College, and University Vendors	M/WBEs and Non-M/WBEs
State of New Jersey: State Agency, Authority, Commission, College, and University Utilized Businesses	M/WBEs and Non-M/WBEs
State of New Jersey: State Agency, Authority, Commission, College, and University Unsuccessful Bidders	M/WBEs and Non-M/WBEs
State of New Jersey: State Agency, Authority, Commission, College, and University Pre-qualification Lists	M/WBEs and Non-M/WBEs
Government Agency Certification Lists	
Department of Commerce Certification List	M/WBEs and Non-M/WBEs
New Jersey Department of Transportation Certification List	M/WBEs and Non-M/WBEs
The Port Authority of New York and New Jersey Certification Database	M/WBEs
United States Small Business Administration PRO-Net Database	M/WBEs and Non-M/WBEs
Business Outreach Events	
State of New Jersey Public Hearings' Attendee Lists	M/WBEs and Non-M/WBEs
State of New Jersey Business Surveys	M/WBEs and Non-M/WBEs
Trade Association Membership Lists	
Associated General Contractors	M/WBEs and Non-M/WBEs

Table 4.01 Summary of Prime Contractor Availability Data Sources

Source of Record	Type of Information
Atlantic Plumbing & Heating	M/WBEs and Non-M/WBEs
Better Business Bureau	M/WBEs and Non-M/WBEs
Builders League of South Jersey	M/WBEs and Non-M/WBEs
Building Construction Association of NJ	M/WBEs and Non-M/WBEs
Maple Shade Progress Business Association	M/WBEs and Non-M/WBEs
New Jersey Association of Women Business Owners	M/WBEs
South Jersey Mechanic Contractors Association	M/WBEs and Non-M/WBEs
Chamber of Commerce Membership and Business Directory Lists	
Asian Indian Chamber of Commerce	M/WBEs
Atlantic County Chamber of Commerce	M/WBEs and Non-M/WBEs
Avalon Chamber of Commerce	M/WBEs and Non-M/WBEs
Bayshore New Jersey	M/WBEs and Non-M/WBEs
Bloomfield Chamber of Commerce	M/WBEs and Non-M/WBEs
Bridgeton Chamber of Commerce	M/WBEs and Non-M/WBEs
Brigantine Chamber of Commerce	M/WBEs and Non-M/WBEs
Cherry Hill Chamber of Commerce	M/WBEs and Non-M/WBEs
Chinese American Chamber of Commerce	M/WBEs
Cranford Chamber of Commerce	M/WBEs and Non-M/WBEs
Dennis Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Denville Chamber of Commerce	M/WBEs and Non-M/WBEs
East Brunswick Regional Chamber of Commerce	M/WBEs and Non-M/WBEs
Eastern Monmouth Chamber of Commerce	M/WBEs and Non-M/WBEs
Elmwood Park Chamber of Commerce	M/WBEs and Non-M/WBEs
Franklin Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Garfield Chamber of Commerce	M/WBEs and Non-M/WBEs
Glassboro Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Elizabeth Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Fort Lee Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Hammonton Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Mercer County Chamber of Commerce	M/WBEs and Non-M/WBEs
Greater Vineland Chamber of Commerce	M/WBEs and Non-M/WBEs
Highland Park Chamber of Commerce	M/WBEs and Non-M/WBEs
Hope Chamber of Commerce	M/WBEs and Non-M/WBEs
Howell Chamber of Commerce	M/WBEs and Non-M/WBEs

Table 4.01 Summary of Prime Contractor Availability Data Sources

Source of Record	Type of Information
Hudson Chamber of Commerce	M/WBEs and Non-M/WBEs
Irvington Chamber of Commerce	M/WBEs and Non-M/WBEs
Jackson Chamber Member Directory	M/WBEs and Non-M/WBEs
Jefferson Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Lower Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Main Street Hammonton Businesses	M/WBEs and Non-M/WBEs
Matawan Aberdeen Chamber of Commerce	M/WBEs and Non-M/WBEs
Metropolitan Trenton African American Chamber of Commerce	M/WBEs
Metuchen Chamber of Commerce	M/WBEs and Non-M/WBEs
Middlesex County Regional Chamber of Commerce	M/WBEs and Non-M/WBEs
Millburn Chamber of Commerce	M/WBEs and Non-M/WBEs
Montville Chamber of Commerce	M/WBEs and Non-M/WBEs
North Jersey Chamber of Commerce	M/WBEs and Non-M/WBEs
North Essex Chamber of Commerce	M/WBEs and Non-M/WBEs
Ocean Township Chamber of Commerce	M/WBEs and Non-M/WBEs
Paramus Chamber of Commerce	M/WBEs and Non-M/WBEs
Paulsboro Chamber of Commerce	M/WBEs and Non-M/WBEs
Perth Amboy Chamber of Commerce	M/WBEs and Non-M/WBEs
Phillipsburg Chamber of Commerce	M/WBEs and Non-M/WBEs
Piscataway-Middlesex-South Plainfield Chamber of Commerce	M/WBEs and Non-M/WBEs
Point Pleasant Chamber of Commerce	M/WBEs and Non-M/WBEs
Pompton Lakes Chamber of Commerce	M/WBEs and Non-M/WBEs
Regional Business Partnership Directory	M/WBEs and Non-M/WBEs
Ridgewood Chamber of Commerce	M/WBEs and Non-M/WBEs
Ringwood Chamber of Commerce	M/WBEs and Non-M/WBEs
Salem County Chamber of Commerce	M/WBEs and Non-M/WBEs
Sea Isle City Chamber of Commerce	M/WBEs and Non-M/WBEs
Somerset County Business Partnership	M/WBEs and Non-M/WBEs
Southern New Jersey Chamber of Commerce	M/WBEs and Non-M/WBEs
Tom's River Ocean County Chamber of Commerce	M/WBEs and Non-M/WBEs
Westfield Area Chamber of Commerce	M/WBEs and Non-M/WBEs
Westfield Business Directory	M/WBEs and Non-M/WBEs

B. Determination of Willingness

The term "willingness" refers to a firm's indicated interest in doing government contracting. This term, as it has been used in *Croson* and its progeny, is addressed in detail in the Legal Analysis chapter in Volume 1. Companies secured through the State of New Jersey and other governmental agencies, listed in Table 4.01, have demonstrated their willingness to perform on public contracts. These businesses had either bid on State projects, sought government contracts, secured government certification, or responded to the outreach campaign conducted in conjunction with this Disparity Study and other State outreach programs. It is therefore presumed that companies that sought government contracts are willing to provide the goods and services needed by the State.

Companies from the non-governmental agency membership lists in Table 4.01 were not presumed to be willing, based on the *Croson* criteria. These companies were surveyed to determine their willingness to bid on State contracts. The businesses that indicated a willingness when surveyed, were added to the database used to create a unique list of willing businesses in the State's market area. The surveyed businesses that indicated an interest in contracting with the State were combined with the businesses from the State and other government lists, certification lists, and outreach lists to compile this unique list of willing businesses.

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

Tables 4.02 through 4.04 represent the distribution of available prime contractors. The sources are ranked, with the highest ranking assigned to the contractors utilized by the State. Each company is *counted only once in the distribution*. For example, a utilized prime contractor is counted once in the prime contractor utilization source and is not counted a second time, even though the company may have been certified or identified as a bidder.

As noted in Table 4.02, 98.24 percent of the prime contractors available in the two industries combined were obtained from public agencies, certification lists, and business outreach events. Companies identified through the willingness survey represented 1.76 percent of the willing firms.

Table 4.02 Distribution of Prime Contractor Availability Data Sources: All Construction and Construction-Related

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor and Subcontractor Utilization	8.92%	19.25%	16.43%
Pre-Qualified Contractors	32.39%	66.86%	57.47%
Bidders Lists	0.31%	1.82%	1.41%
Certification Lists	54.36%	9.07%	21.41%
US SBA Pro-net	2.09%	0.64%	1.04%
Public Hearing Attendees	0.26%	0.57%	0.48%
Subtotal	**98.33%**	**98.20%**	**98.24%**
Willingness Survey	1.67%	1.80%	1.76%
Grand Total*	**100.00%**	**100.00%**	**100.00%**

*The percentages may not total 100 percent due to rounding

The distribution of available businesses by source was performed for each industry. As noted in Table 4.03, 98.18 percent of the construction prime contractors identified were derived from public agencies, certification lists, and business outreach sources. Companies identified through the willingness survey represented 1.82 percent of the willing firms.

Table 4.03 Distribution of Prime Contractor Availability Sources: Construction

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor and Subcontractor Utilization	9.93%	21.06%	18.06%
Pre-Qualified Contractor	32.50%	65.00%	56.27%
Bidders Lists	0.43%	2.39%	1.86%
Certification Lists	52.86%	8.74%	20.60%
US SBA Pro-net	2.14%	0.47%	0.92%
Public Hearing Attendees	0.21%	0.55%	0.46%
Subtotal	**98.07%**	**98.21%**	**98.18%**
Willingness Survey	1.93%	1.79%	1.82%
Grand Total*	**100.00%**	**100.00%**	**100.00%**

*The percentages may not total 100 percent due to rounding

Table 4.04 depicts the data sources for construction-related prime contractors. As noted, 98.54 percent of the prime contractors were obtained from public agencies, certification lists, and business outreach sources. Companies identified through the willingness survey represented 1.46 percent of the willing firms.

Table 4.04 Distribution of Prime Contractor Availability Sources: Construction-Related

Sources	M/WBEs Percentage	Non M/WBEs Percentage	Source Percentage
Prime Contractor and Subcontractor Utilization	8.07%	15.68%	13.40%
Pre-Qualified Contractor	35.46%	71.29%	60.55%
Bidders Lists	0%	0.14%	0.10%
Certification Lists	53.61%	9.50%	22.72%
US SBA Pro-net	1.68%	1.08%	1.26%
Public Hearing Attendees	0.34%	0.58%	0.50%
Subtotal	**99.16%**	**98.27%**	**98.54%**
Willingness Survey	0.84%	1.73%	1.46%
Grand Total*	**100.00%**	**100.00%**	**100.00%**

*The percentages may not total 100 percent due to rounding

III. CAPACITY

The second component of the availability requirement set forth in *Croson* is a firm's capacity or ability to perform the contracts awarded by an agency.[2] However, capacity requirements are not delineated in *Croson*. In fact, a standard for capacity has only been addressed in a few subsequent cases. Each case where capacity has been considered has involved large, competitively bid, construction prime contracts. Therefore, in order to assess the capacity of willing market area firms to do business with the State, four approaches have been employed:

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

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

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

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

A. Size of Prime Contracts Analyzed

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

The State's construction and construction-related services contracts were analyzed to determine the capacity required to perform the contracts and the capacity demonstrated by prime contractors regarding ethnic and gender groups. The size distribution illustrates the fact that limited capacity is needed to perform the overwhelming majority of the State Colleges and Universities' contracts.

1. Construction Prime Contracts, by Size

Table 4.05 depicts the State Colleges and Universities' construction contracts awarded within dollar ranges. The percentage of contracts valued under $25,000 was 63.19 percent, the percentage of those under $100,000 was 82.05 percent, and the percentage of those under $500,000 was 93.85 percent. A P-value calculation was conducted to determine the probability that the findings comprise a pattern or a chance occurrence.

The P-value of <0.05 denotes a significant difference in the size of construction contract dollars across ethnic/gender groups.

2. Construction-Related Services Prime Contracts, by Size

Table 4.06 depicts the State Colleges and Universities' construction-related contracts awarded within dollar ranges. The percentage of contracts valued under $25,000 was 55.26 percent; the percentage of those under $100,000 was 65.79 percent; and the percentage of those under $500,000 was 84.21 percent.

The P-value of >0.05 denotes an insignificant difference in the size of construction-related contract dollars across ethnic/gender groups.

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

Table 4.05 Construction Prime Contracts by Size: July 1, 2000 to June 30, 2002

Size	Caucasian				Minority					
	Females		Males		Females		Males		Total	
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
$1 - $24,999	82	55.03%	726	64.65%	0	0.00%	33	56.90%	841	63.19%
$25,000 - $49,999	24	16.11%	107	9.53%	0	0.00%	3	5.17%	134	10.07%
$50,000 - $99,999	16	10.74%	97	8.64%	0	0.00%	4	6.90%	117	8.79%
$100,000 - $249,999	14	9.40%	77	6.86%	0	0.00%	6	10.34%	97	7.29%
$250,000 - $499,999	6	4.03%	50	4.45%	1	100.00%	3	5.17%	60	4.51%
$500,000 - $999,999	4	2.68%	27	2.40%	0	0.00%	6	10.34%	37	2.78%
$1,000,000 - $2,999,999	3	2.01%	23	2.05%	0	0.00%	3	5.17%	29	2.18%
$3,000,000 and greater	0	0.00%	16	1.42%	0	0.00%	0	0.00%	16	1.20%
Total	149	100.00%	1123	100.00%	1	100.00%	58	100.00%	1331	100.00%

P-Value < 0.05

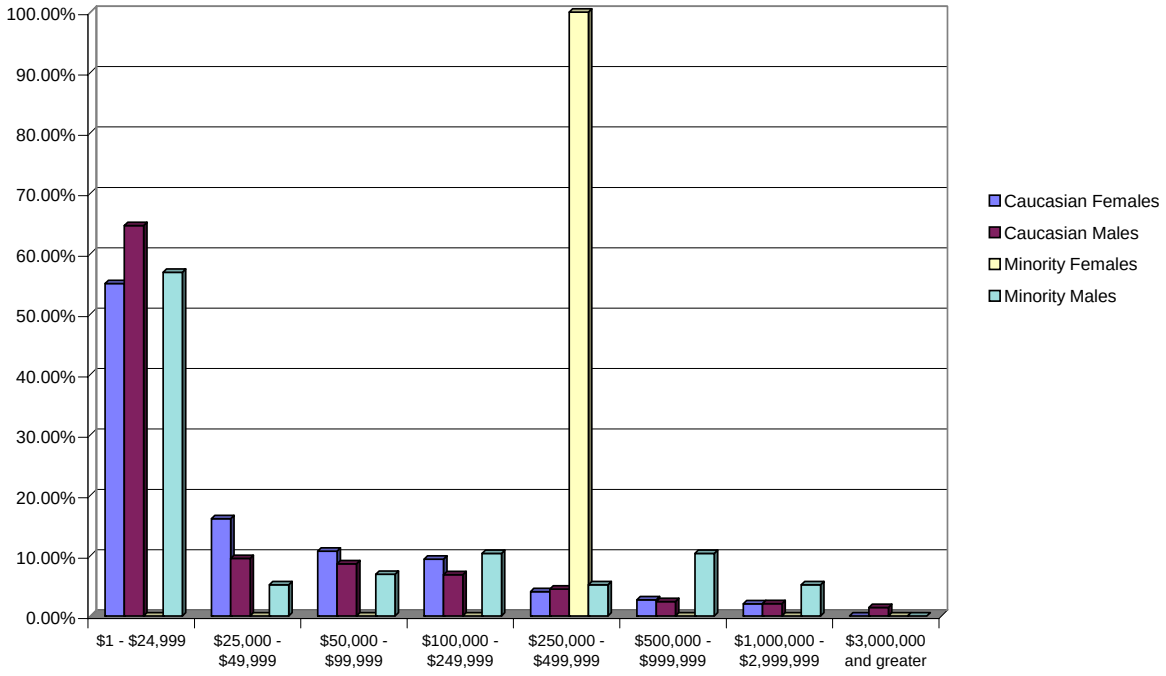
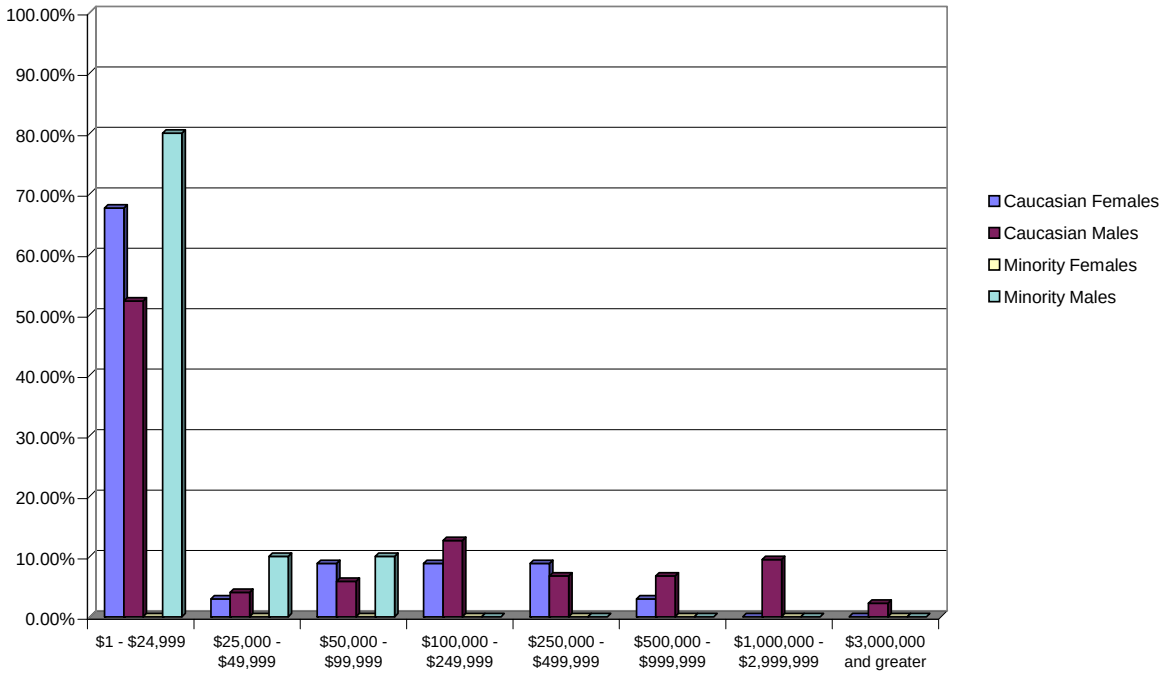


Table 4.06 Construction-Related Prime Contracts by Size: July 1, 2000 to June 30, 2002

Size	Caucasian				Minority					
	Females		Males		Females		Males		Total	
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
$1 - $24,999	23	67.65%	116	52.25%	0	0.00%	8	80.00%	147	55.26%
$25,000 - $49,999	1	2.94%	9	4.05%	0	0.00%	1	10.00%	11	4.14%
$50,000 - $99,999	3	8.82%	13	5.86%	0	0.00%	1	10.00%	17	6.39%
$100,000 - $249,999	3	8.82%	28	12.61%	0	0.00%	0	0.00%	31	11.65%
$250,000 - $499,999	3	8.82%	15	6.76%	0	0.00%	0	0.00%	18	6.77%
$500,000 - $999,999	1	2.94%	15	6.76%	0	0.00%	0	0.00%	16	6.02%
$1,000,000 - $2,999,999	0	0.00%	21	9.46%	0	0.00%	0	0.00%	21	7.89%
$3,000,000 and greater	0	0.00%	5	2.25%	0	0.00%	0	0.00%	5	1.88%
Total	34	100.00%	222	100.00%	0	0.00%	10	100.00%	266	100.00%

P-Value > 0.05



B. Largest M/WBE Prime Contract Awards, by Industry

Large prime contracts were awarded to M/WBEs in construction and construction-related industries by State Agencies, Authorities, Commissions, and State Colleges and Universities. The distribution of the largest M/WBE prime contracts awarded is depicted in Table 4.07 below. In each industry, M/WBEs were awarded very large, competitively bid contracts. The utilization analysis shows that M/WBEs demonstrated the capacity to successfully compete for contracts as large as $34.4 million in construction and $3.1 million in construction-related services. WBEs were awarded contracts over $15 million in construction and over $760,000 in construction-related services.

Table 4.07 The Largest M/WBE Prime Contract Awards, by Industry: State Agencies, Authorities, Commissions, and State Colleges and Universities

Ethnicity	Construction	Construction-Related
African Americans	$799,900	$2,827,742
Asian Americans	$10,634,531	$3,160,061
Hispanic Americans	$34,438,866	$2,346,208
Native Americans	$851,908	$365,503
Caucasian Females	$15,004,003	$761,313

IV. PRIME CONTRACTOR AVAILABILITY ANALYSIS

The availability analysis above demonstrates that the capacity needed to perform on most of the State's Agency, Authority, Commission, and State College and University contracts is limited. Furthermore, M/WBE firms in the State's market area do in fact have the capacity to bid on large contracts in each of the industries studied.

The prime contractor availability findings are summarized below.

A. Construction Prime Contractor Availability

The distribution of available construction prime contractors is summarized in Table 4.08.

African American Businesses account for 6.42 percent of the construction firms in the State's market area.

Asian American Businesses account for 3.05 percent of the construction firms in the State's market area.

Hispanic American Businesses account for 5.71 percent of the construction firms in the State's market area.

Native American Businesses account for 0.08 percent of the construction firms in the State's market area.

Minority Business Enterprises account for 15.26 percent of the construction firms in the State's market area.

Women Business Enterprises account for 11.6 percent of the construction firms in the State's market area.

Minority and Women Business Enterprises account for 26.86 percent of the construction firms in the State's market area.

Caucasian Male Business Enterprises account for 73.14 percent of the construction firms in the State's market area.

Table 4.08 Available Construction Prime Contractors

Ethnicity	Percent of Businesses
African Americans	6.42%
Asian Americans	3.05%
Hispanic Americans	5.71%
Native Americans	0.08%
Caucasian Females	11.60%
Caucasian Males	73.14%
TOTAL	100.00%
Ethnicity and Gender	**Percent of Businesses**
African American Females	0.90%
African American Males	5.52%
Asian American Females	0.57%
Asian American Males	2.48%
Hispanic American Females	1.35%
Hispanic American Males	4.36%
Native American Females	0.00%
Native American Males	0.08%
Caucasian Females	11.60%
Caucasian Males	73.14%
TOTAL	100.00%
Minority and Gender	**Percent of Businesses**
Minority Females	2.82%
Minority Males	12.44%
Caucasian Females	11.60%
Caucasian Males	73.14%
TOTAL	100.00%
Minority and Females	**Percent of Businesses**
Minority Business Enterprises	15.26%
Women Business Enterprises	11.60%
Minority and Women Business Enterprises	**26.86%**
Caucasian Male Business Enterprises	73.14%
TOTAL	100.00%

B. Construction-Related Prime Contractor Availability

The distribution of available construction-related prime contractors is summarized in Table 4.09.

African American Businesses account for 4.94 percent of the construction-related firms in the State's market area.

Asian American Businesses account for 7.93 percent of the construction-related firms in the State's market area.

Hispanic American Businesses account for 4.39 percent of the construction-related firms in the State's market area.

Native American Businesses account for 0.1 percent of the construction-related firms in the State's market area.

Minority Business Enterprises account for 17.36 percent of the construction-related firms in the State's market area.

Women Business Enterprises account for 12.42 percent of the construction-related firms in the State's market area.

Minority and Women Business Enterprises account for 29.78 percent of the construction-related firms in the State's market area.

Caucasian Male Business Enterprises account for 70.22 percent of the construction-related firms in State's market area.

Table 4.09 Available Construction-Related Prime Contractors

Ethnicity	Percent of Businesses
African Americans	4.94%
Asian Americans	7.93%
Hispanic Americans	4.39%
Native Americans	0.10%
Caucasian Females	12.42%
Caucasian Males	70.22%
TOTAL	100.00%
Ethnicity and Gender	**Percent of Businesses**
African American Females	1.15%
African American Males	3.79%
Asian American Females	1.35%
Asian American Males	6.58%
Hispanic American Females	1.15%
Hispanic American Males	3.24%
Native American Females	0.05%
Native American Males	0.05%
Caucasian Females	12.42%
Caucasian Males	70.22%
TOTAL	100.00%
Minority and Gender	**Percent of Businesses**
Minority Females	3.69%
Minority Males	13.67%
Caucasian Females	12.42%
Caucasian Males	70.22%
TOTAL	100.00%
Minority and Females	**Percent of Businesses**
Minority Business Enterprises	17.36%
Women Business Enterprises	12.42%
Minority and Women Business Enterprises	**29.78%**
Caucasian Male Business Enterpris	70.22%
TOTAL	100.00%

V. SOURCES OF POTENTIALLY WILLING AND ABLE SUBCONTRACTORS AND AVAILABILITY

A. Subcontractor Sources

All available State Colleges and Universities prime contractors were included in the subcontractor availability. Additional subcontractors were identified using sources in Table 4.10.

Table 4.10 Unique Subcontractor Availability Data Sources

Type of Record	Type of Information
• Subcontracting records provided by the State	• M/WBEs and non-M/WBEs
• Subcontractors identified by utilized prime contractors through the prime contractor survey	• M/WBEs and non-M/WBEs

B. Determination of Willingness and Capacity

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

The subcontractor availability findings are summarized below.

C. Construction Subcontractor Availability

The distribution of available construction subcontractors is summarized in Table 4.11.

African American Businesses account for 6.3 percent of the construction firms in the State's market area.

Asian American Businesses account for 4.34 percent of the construction firms in the State's market area.

Hispanic American Businesses account for 5.52 percent of the construction firms in the State's market area.

Native American Businesses account for 0.12 percent of the construction firms in the State's market area.

Minority Business Enterprises account for 16.28 percent of the construction firms in the State's market area.

Women Business Enterprises account for 12.67 percent of the construction firms in the State's market area.

Minority and Women Business Enterprises account for 28.94 percent of the construction firms in the State's market area.

Caucasian Male Business Enterprises account for 71.06 percent of the construction firms in the State's market area.

Table 4.11 Available Construction Subcontractors

Ethnicity	Percent of Businesses
African Americans	6.30%
Asian Americans	4.34%
Hispanic Americans	5.52%
Native Americans	0.12%
Caucasian Females	12.67%
Caucasian Males	71.06%
TOTAL	100.00%
Ethnicity and Gender	**Percent of Businesses**
African American Females	0.98%
African American Males	5.32%
Asian American Females	0.85%
Asian American Males	3.49%
Hispanic American Females	1.40%
Hispanic American Males	4.13%
Native American Females	0.00%
Native American Males	0.12%
Caucasian Females	12.67%
Caucasian Males	71.06%
TOTAL	100.00%
Minority and Gender	**Percent of Businesses**
Minority Females	3.22%
Minority Males	13.05%
Caucasian Females	12.67%
Caucasian Males	71.06%
TOTAL	100.00%
Minority and Females	**Percent of Businesses**
Minority Business Enterprises	16.28%
Women Business Enterprises	12.67%
Minority and Women Business Enterprises	**28.94%**
Caucasian Male Business Enterprises	71.06%
TOTAL	100.00%

D. Construction-Related Subcontractor Availability

The distribution of available construction-related prime contractors is summarized in Table 4.12.

African American Businesses account for 4.51 percent of the construction-related firms in the State's market area.

Asian American Businesses account for 7.11 percent of the construction-related firms in the State's market area.

Hispanic American Businesses account for 4.09 percent of the construction-related firms in the State's market area.

Native American Businesses account for 0.13 percent of the construction-related firms in the State's market area.

Minority Business Enterprises account for 15.84 percent of the construction-related firms in the State's market area.

Women Business Enterprises account for 12.27 percent of the construction-related firms in the State's market area.

Minority and Women Business Enterprises account for 28.11 percent of the construction-related firms in the State's market area.

Caucasian Male Business Enterprises account for 71.89 percent of the construction-related firms in State's market area.

Table 4.12 Available Construction-Related Subcontractors

Ethnicity	Percent of Businesses
African Americans	4.51%
Asian Americans	7.11%
Hispanic Americans	4.09%
Native Americans	0.13%
Caucasian Females	12.27%
Caucasian Males	71.89%
TOTAL	100.00%
Ethnicity and Gender	**Percent of Businesses**
African American Females	0.98%
African American Males	3.53%
Asian American Females	1.19%
Asian American Males	5.92%
Hispanic American Females	1.06%
Hispanic American Males	3.02%
Native American Females	0.09%
Native American Males	0.04%
Caucasian Females	12.27%
Caucasian Males	71.89%
TOTAL	100.00%
Minority and Gender	**Percent of Businesses**
Minority Females	3.32%
Minority Males	12.52%
Caucasian Females	12.27%
Caucasian Males	71.89%
TOTAL	100.00%
Minority and Females	**Percent of Businesses**
Minority Business Enterprises	15.84%
Women Business Enterprises	12.27%
Minority and Women Business Enterprises	**28.11%**
Caucasian Male Business Enterprises	71.89%
TOTAL	100.00%

5

PRIME CONTRACTOR DISPARITY ANALYSES

I. INTRODUCTION

The objective of the disparity analysis is to determine the level minority and woman-owned business enterprises (M/WBEs) were utilized on State Colleges and Universities contracts. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) would be approximate to the proportion of available MBEs[1] and WBEs in the relevant market area. If the available M/WBE businesses are underutilized, a statistical test could determine the probability that the disparity is due to chance. If there is a low probability that the disparity is due to chance,[2] *Croson* states that an inference of discrimination can be made. This type of analysis is applied to M/WBEs by both ethnicity and gender.

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

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1 Availability is defined as willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 4.

2 When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by the courts to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within the 95 percent confidence level.

A disparity ratio less than 0.80 indicates a relevant degree of disparity. This disparity may be detected using a parametric analysis,[3] where the number of contracts is sufficiently large and the variation of the contract amount is not too large. When the variation in contract dollar amounts is high, a disparity may not be detectable. Under the condition when the variation in contract dollar amounts is high, a non-parametric analysis[4] would be employed to analyze the contracts ranked by dollar amount.

In order to assess whether the difference in contract values is attributable to chance, a P-value[5] is calculated. The P-value takes into account the number of contracts, amount of contract dollars, and variation in contract dollars. If the difference between the actual and expected number of contracts and total contract dollars has a P-value of less than 0.05, the difference is statistically significant.[6]

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

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

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3 Parametric analysis is a statistical examination based on the actual values of the variable. In this case, the parametric analysis consists of the actual dollar values of the contracts.

4 Non-parametric analysis is a method to make data more suitable for statistical testing by allowing one variable to be replaced with a new variable that maintains the essential characteristics of the original one. In this case, the contracts are ranked from the smallest to the largest. The dollar value of each contract is replaced with its rank order number.

5 P-value is a measure of statistical significance.

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

II. DISPARITY ANALYSES

Prime contractor disparity analysis was performed on construction and construction-related services contracts awarded by the State Colleges and Universities between July 1, 2000 and June 30, 2002.

As demonstrated in Chapter 4: Availability Analysis, the majority of the State Colleges and Universities contracts are small with 92.24 percent under $500,000 and 61.87 percent $25,000 and under. The fact that the majority of the State Colleges and Universities contracts are small demonstrates that the capacity needed to perform most of the contracts awarded during the study period was minimal. Furthermore, there is evidence that the willing firms had the capacity to perform contracts in excess of $500,000. A threshold of $500,000 was set for the prime contract disparity analysis to ensure that willing firms had the capacity to perform contracts included in the analysis. The prime contract disparity findings in the industries under consideration are summarized in the sections below.

A. State Colleges and Universities Disparity Analysis: Construction Prime Contracts, under $500,000

The disparity analysis of all construction prime contract dollars under $500,000 is depicted in Table 5.01 and Chart 5.01.

African American Businesses represent 6.42 percent of the available construction firms and received 0.16 percent of the construction prime contract dollars under $500,000. This underutilization is statistically significant.

Asian American Businesses represent 3.05 percent of the available construction firms and received 1.29 percent of the construction prime contract dollars under $500,000. This underutilization is statistically significant.

Hispanic American Businesses represent 5.71 percent of the available construction firms and received 3.75 percent of the construction prime contract dollars under $500,000. This underutilization is statistically significant.

Native American Businesses represent 0.08 percent of the available construction firms and received none of the construction prime contract dollars under $500,000. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 15.26 percent of the available construction firms and received 5.2 percent of the construction prime contract dollars under $500,000. This underutilization is statistically significant.

Women Business Enterprises represent 11.6 percent of the available construction firms and received 12.15 percent of the construction prime contract dollars under $500,000. This overutilization is not statistically significant.

Minority and Women Business Enterprises represent 26.86 percent of the available construction firms and received 17.35 percent of the construction prime contract dollars under $500,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 73.14 percent of the available construction firms and received 82.65 percent of the construction prime contract dollars under $500,000. This overutilization is statistically significant.

Table 5.01 State Colleges and Universities Disparity Analysis: Construction Prime Contracts under $500,000, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$88,865	0.16%	6.42%	$3,553,717	-$3,464,852	0.03	< .05 *
Asian Americans	$711,551	1.29%	3.05%	$1,687,225	-$975,674	0.42	< .05 *
Hispanic Americans	$2,076,869	3.75%	5.71%	$3,163,546	-$1,086,678	0.66	< .05 *
Native Americans	$0	0.00%	0.08%	$42,181	-$42,181	0.00	----
Caucasian Females	$6,726,884	12.15%	11.60%	$6,421,999	$304,885	1.05	**
Caucasian Males	$45,757,892	82.65%	73.14%	$40,493,393	$5,264,499	1.13	< .05 †
TOTAL	$55,362,061	100.00%	100.00%	$55,362,061			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	0.90%	$495,622	-$495,622	0.00	----
African American Males	$88,865	0.16%	5.52%	$3,058,095	-$2,969,230	0.03	< .05 *
Asian American Females	$0	0.00%	0.57%	$316,355	-$316,355	0.00	----
Asian American Males	$711,551	1.29%	2.48%	$1,370,870	-$659,319	0.52	< .05 *
Hispanic American Females	$312,849	0.57%	1.35%	$748,706	-$435,857	0.42	< .05 *
Hispanic American Males	$1,764,020	3.19%	4.36%	$2,414,840	-$650,821	0.73	< .05 *
Native American Females	$0	0.00%	0.00%	$0	$0	----	----
Native American Males	$0	0.00%	0.08%	$42,181	-$42,181	0.00	----
Caucasian Females	$6,726,884	12.15%	11.60%	$6,421,999	$304,885	1.05	**
Caucasian Males	$45,757,892	82.65%	73.14%	$40,493,393	$5,264,499	1.13	< .05 †
TOTAL	$55,362,061	100.00%	100.00%	$55,362,061			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$312,849	0.57%	2.82%	$1,560,683	-$1,247,834	0.20	< .05 *
Minority Males	$2,564,436	4.63%	12.44%	$6,885,986	-$4,321,550	0.37	< .05 *
Caucasian Females	$6,726,884	12.15%	11.60%	$6,421,999	$304,885	1.05	**
Caucasian Males	$45,757,892	82.65%	73.14%	$40,493,393	$5,264,499	1.13	< .05 †
TOTAL	$55,362,061	100.00%	100.00%	$55,362,061			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$2,877,285	5.20%	15.26%	$8,446,669	-$5,569,384	0.34	< .05 *
Women Business Enterprises	$6,726,884	12.15%	11.60%	$6,421,999	$304,885	1.05	**
Minority and Women Business Enterprises	**$9,604,169**	**17.35%**	**26.86%**	**$14,868,668**	**-$5,264,499**	**0.65**	**< .05 ***
Caucasian Male Business Enterprises	$45,757,892	82.65%	73.14%	$40,493,393	$5,264,499	1.13	< .05 †

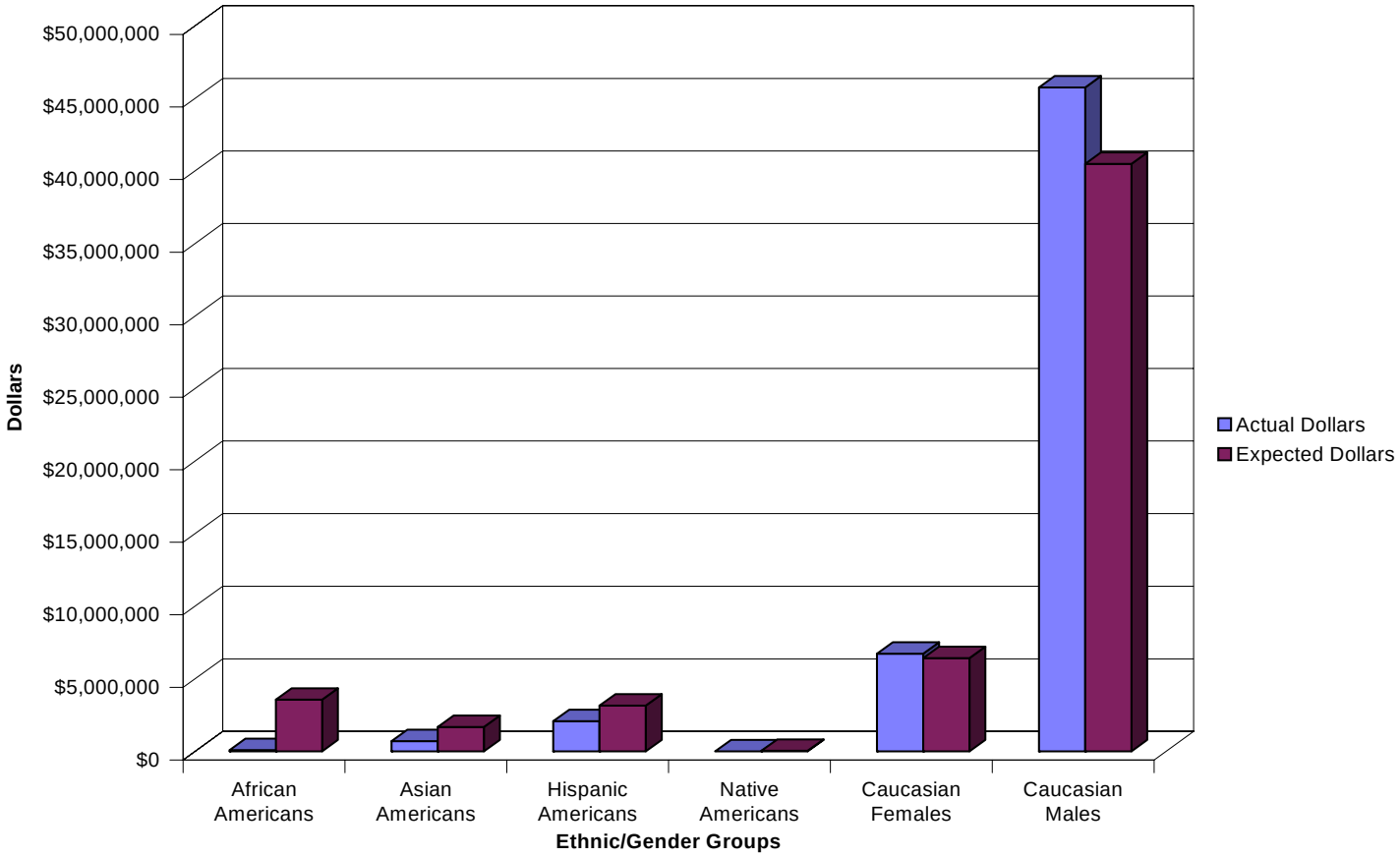
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 5.01 State Colleges and Universities Disparity Analysis: Construction Prime Contracts under $500,000, July 1, 2000 to June 30, 2002



B. State Colleges and Universities Disparity Analysis: Construction-Related Prime Contracts, under $500,000

The disparity analysis of all construction-related prime contract dollars under $500,000 is depicted in Table 5.02 and Chart 5.02.

African American Businesses represent 4.94 percent of the available construction-related firms and received none of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Asian American Businesses represent 7.93 percent of the available construction-related firms and received none of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Hispanic American Businesses represent 4.39 percent of the available construction-related firms and received 0.89 percent of the construction-related prime contract dollars under $500,000. This underutilization is not statistically significant.

Native American Businesses represent 0.1 percent of the available construction-related firms and received none of the construction-related prime contract dollars under $500,000. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 17.36 percent of the available construction-related firms and received 0.89 percent of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Women Business Enterprises represent 12.42 percent of the available construction-related firms and received 11.76 percent of the construction-related prime contract dollars under $500,000. This underutilization is not statistically significant.

Minority and Women Business Enterprises represent 29.78 percent of the available construction-related firms and received 12.64 percent of the construction-related prime contract dollars under $500,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 70.22 percent of the available construction-related firms and received 87.36 percent of the construction-related prime contract dollars under $500,000. This overutilization is statistically significant.

Table 5.02 State Colleges and Universities Disparity Analysis: Construction-Related Prime Contracts under $500,000, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$0	0.00%	4.94%	$719,385	-$719,385	0.00	< .05 *
Asian Americans	$0	0.00%	7.93%	$1,155,376	-$1,155,376	0.00	< .05 *
Hispanic Americans	$129,006	0.89%	4.39%	$639,454	-$510,448	0.20	not significant
Native Americans	$0	0.00%	0.10%	$14,533	-$14,533	0.00	----
Caucasian Females	$1,712,821	11.76%	12.42%	$1,809,363	-$96,542	0.95	not significant
Caucasian Males	$12,727,542	87.36%	70.22%	$10,231,257	$2,496,284	1.24	< .05 †
TOTAL	$14,569,369	100.00%	100.00%	$14,569,369			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	1.15%	$167,130	-$167,130	0.00	not significant
African American Males	$0	0.00%	3.79%	$552,255	-$552,255	0.00	< .05 *
Asian American Females	$0	0.00%	1.35%	$196,196	-$196,196	0.00	not significant
Asian American Males	$0	0.00%	6.58%	$959,180	-$959,180	0.00	< .05 *
Hispanic American Females	$0	0.00%	1.15%	$167,130	-$167,130	0.00	not significant
Hispanic American Males	$129,006	0.89%	3.24%	$472,324	-$343,318	0.27	not significant
Native American Females	$0	0.00%	0.05%	$7,267	-$7,267	0.00	----
Native American Males	$0	0.00%	0.05%	$7,267	-$7,267	0.00	----
Caucasian Females	$1,712,821	11.76%	12.42%	$1,809,363	-$96,542	0.95	not significant
Caucasian Males	$12,727,542	87.36%	70.22%	$10,231,257	$2,496,284	1.24	< .05 †
TOTAL	$14,569,369	100.00%	100.00%	$14,569,369			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$0	0.00%	3.69%	$537,722	-$537,722	0.00	< .05 *
Minority Males	$129,006	0.89%	13.67%	$1,991,026	-$1,862,020	0.06	< .05 *
Caucasian Females	$1,712,821	11.76%	12.42%	$1,809,363	-$96,542	0.95	not significant
Caucasian Males	$12,727,542	87.36%	70.22%	$10,231,257	$2,496,284	1.24	< .05 †
TOTAL	$14,569,369	100.00%	100.00%	$14,569,369			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$129,006	0.89%	17.36%	$2,528,748	-$2,399,743	0.05	< .05 *
Women Business Enterprises	$1,712,821	11.76%	12.42%	$1,809,363	-$96,542	0.95	not significant
Minority and Women Business Enterprises	**$1,841,827**	**12.64%**	**29.78%**	**$4,338,111**	**-$2,496,284**	**0.42**	**< .05 ***
Caucasian Male Business Enterprises	$12,727,542	87.36%	70.22%	$10,231,257	$2,496,284	1.24	< .05 †

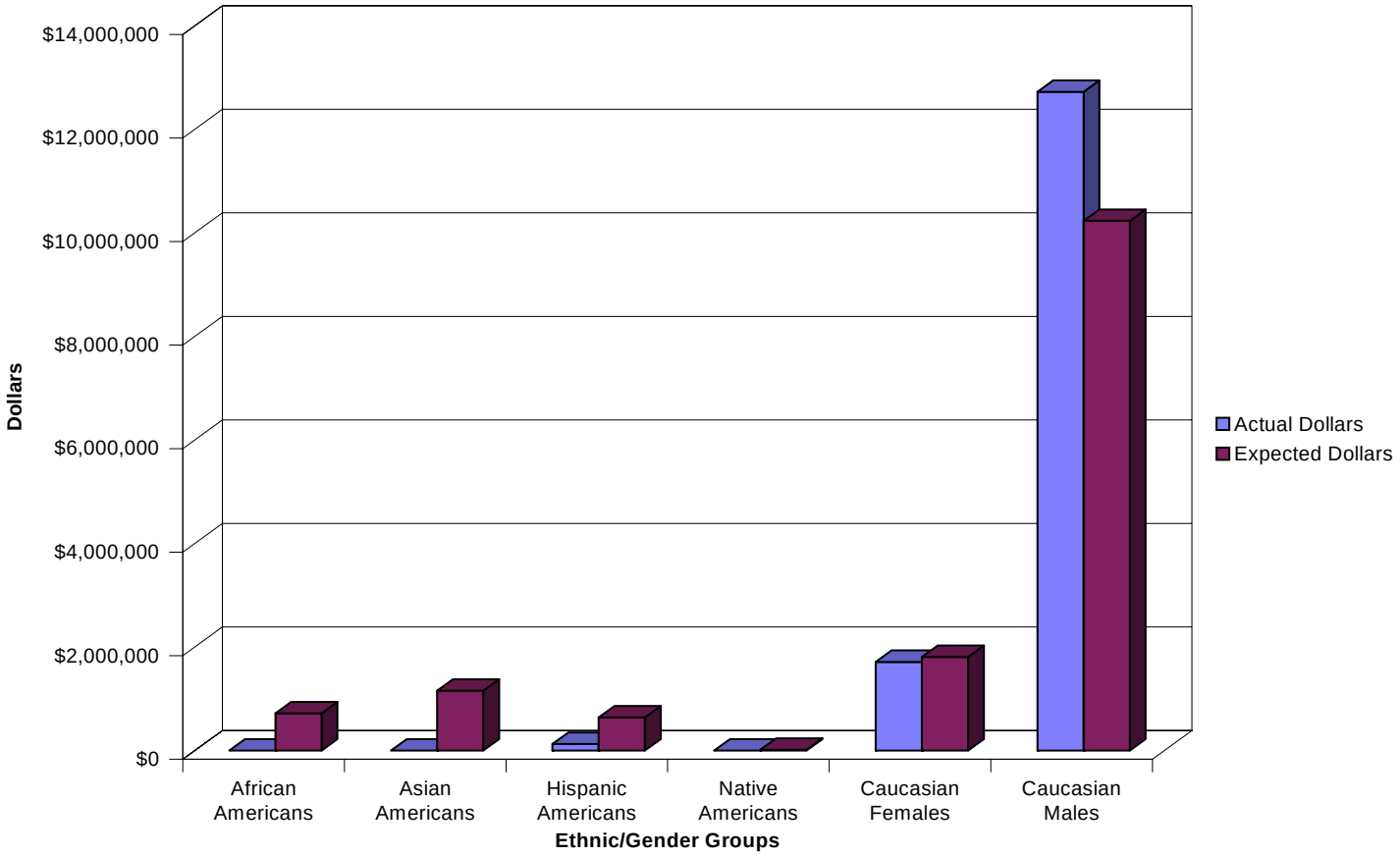
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 5.02 State Colleges and Universities Disparity Analysis: Construction-Related Prime Contracts under $500,000, July 1, 2000 to June 30, 2002



C. State Colleges and Universities Disparity Analysis: Construction Prime Contracts, under $19,500

The disparity analysis of construction prime contract dollars under $19,500 is depicted in Table 5.03 and Chart 5.03.

African American Businesses represent 6.42 percent of the available construction firms and received 1.83 percent of the construction prime contract dollars under $19,500. This underutilization is statistically significant.

Asian American Businesses represent 3.05 percent of the available construction firms and received 1.49 percent of the construction prime contract dollars under $19,500. This underutilization is statistically significant.

Hispanic American Businesses represent 5.71 percent of the available construction firms and received 1.4 percent of the construction prime contract dollars under $19,500. This underutilization is statistically significant.

Native American Businesses represent 0.08 percent of the available construction firms and received none of the construction prime contract dollars under $19,500. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 15.26 percent of the available construction firms and received 4.73 percent of the construction prime contract dollars under $19,500. This underutilization is statistically significant.

Women Business Enterprises represent 11.6 percent of the available construction firms and received 10.36 percent of the construction prime contract dollars under $19,500. This underutilization is not statistically significant.

Minority and Women Business Enterprises represent 26.86 percent of the available construction firms and received 15.09 percent of the construction prime contract dollars under $19,500. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 73.14 percent of the available construction firms and received 84.91 percent of the construction prime contract dollars under $$19,500. This overutilization is statistically significant.

Table 5.03 State Colleges and Universities Disparity Analysis: Construction Prime Contracts under $19,500, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$88,865	1.83%	6.42%	$311,385	-$222,520	0.29	< .05 *
Asian Americans	$72,381	1.49%	3.05%	$147,839	-$75,458	0.49	< .05 *
Hispanic Americans	$68,057	1.40%	5.71%	$277,197	-$209,140	0.25	< .05 *
Native Americans	$0	0.00%	0.08%	$3,696	-$3,696	0.00	----
Caucasian Females	$502,530	10.36%	11.60%	$562,711	-$60,181	0.89	not significant
Caucasian Males	$4,119,120	84.91%	73.14%	$3,548,126	$570,995	1.16	< .05 †
TOTAL	$4,850,953	100.00%	100.00%	$4,850,953			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	0.90%	$43,428	-$43,428	0.00	----
African American Males	$88,865	1.83%	5.52%	$267,957	-$179,092	0.33	< .05 *
Asian American Females	$0	0.00%	0.57%	$27,720	-$27,720	0.00	----
Asian American Males	$72,381	1.49%	2.48%	$120,119	-$47,738	0.60	not significant
Hispanic American Females	$0	0.00%	1.35%	$65,603	-$65,603	0.00	< .05 *
Hispanic American Males	$68,057	1.40%	4.36%	$211,594	-$143,537	0.32	< .05 *
Native American Females	$0	0.00%	0.00%	$0	$0	----	----
Native American Males	$0	0.00%	0.08%	$3,696	-$3,696	0.00	----
Caucasian Females	$502,530	10.36%	11.60%	$562,711	-$60,181	0.89	not significant
Caucasian Males	$4,119,120	84.91%	73.14%	$3,548,126	$570,995	1.16	< .05 †
TOTAL	$4,850,953	100.00%	100.00%	$4,850,953			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$0	0.00%	2.82%	$136,751	-$136,751	0.00	< .05 *
Minority Males	$229,303	4.73%	12.44%	$603,366	-$374,063	0.38	< .05 *
Caucasian Females	$502,530	10.36%	11.60%	$562,711	-$60,181	0.89	not significant
Caucasian Males	$4,119,120	84.91%	73.14%	$3,548,126	$570,995	1.16	< .05 †
TOTAL	$4,850,953	100.00%	100.00%	$4,850,953			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$229,303	4.73%	15.26%	$740,117	-$510,814	0.31	< .05 *
Women Business Enterprises	$502,530	10.36%	11.60%	$562,711	-$60,181	0.89	not significant
Minority and Women Business Enterprises	**$731,833**	**15.09%**	**26.86%**	**$1,302,827**	**-$570,995**	**0.56**	**< .05 ***
Caucasian Male Business Enterprises	$4,119,120	84.91%	73.14%	$3,548,126	$570,995	1.16	< .05 †

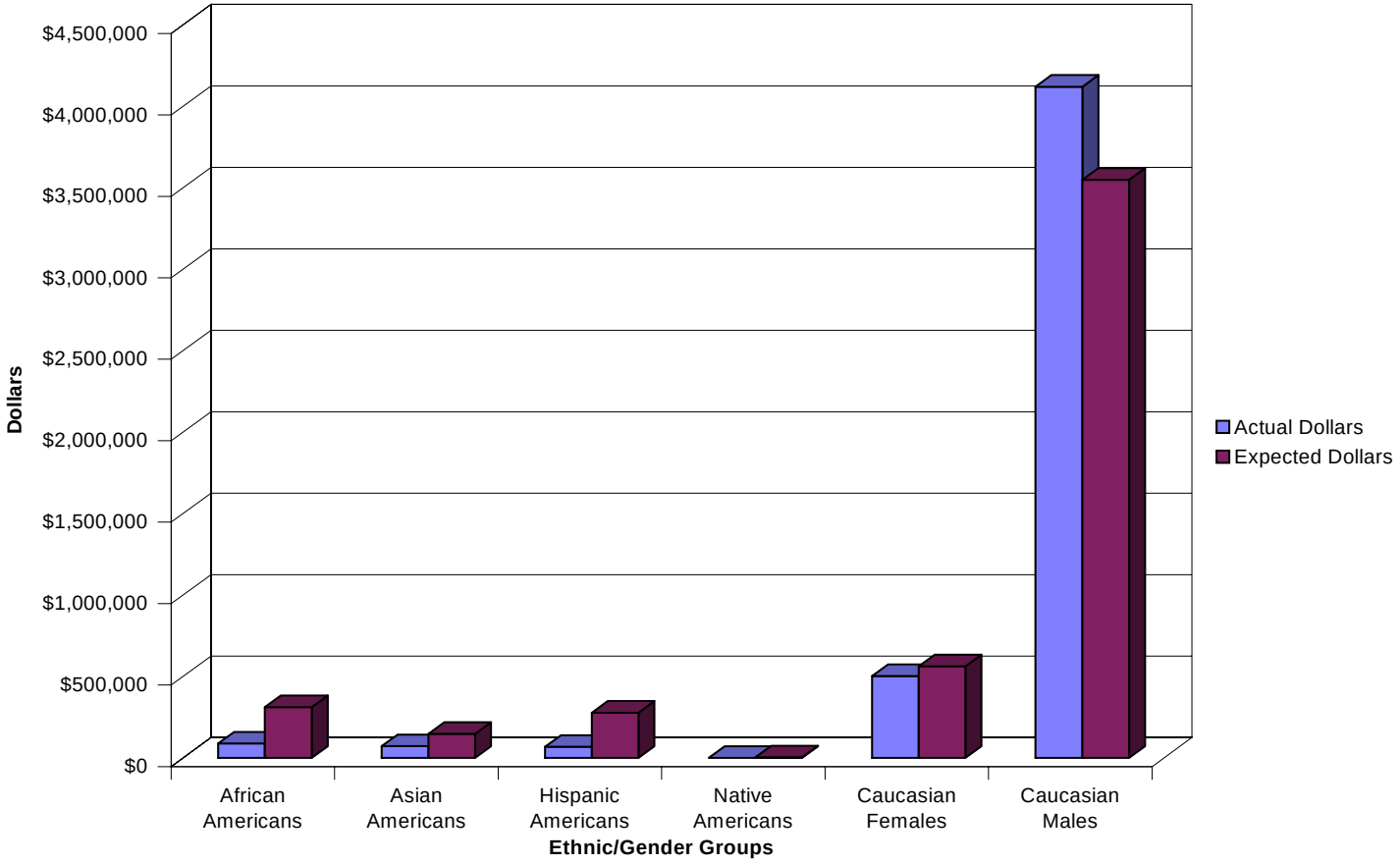
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 5.03 State Colleges and Universities Disparity Analysis: Construction Prime Contracts under $19,500, July 1, 2000 to June 30, 2002



D. State Colleges and Universities Disparity Analysis: Construction-Related Prime Contracts, under $19,500

The disparity analysis of construction-related prime contract dollars under $19,500 is depicted in Table 5.04 and Chart 5.04.

African American Businesses represent 4.94 percent of the available construction-related firms and received none of the construction-related prime contract dollars under $19,500. This underutilization is statistically significant.

Asian American Businesses represent 7.93 percent of the available construction-related firms and received none of the construction-related prime contract dollars under $19,500. This underutilization is statistically significant.

Hispanic American Businesses represent 4.39 percent of the available construction-related firms and received 4.14 percent of the construction-related prime contract dollars under $19,500. This underutilization is not statistically significant.

Native American Businesses represent 0.1 percent of the available construction-related firms and received none of the construction-related prime contract dollars under $19,500. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 17.36 percent of the available construction-related firms and received 4.14 percent of the construction-related prime contract dollars under $19,500. This underutilization is statistically significant.

Women Business Enterprises represent 12.42 percent of the available construction-related firms and received 13.23 percent of the construction-related prime contract dollars under $19,500. This overutilization is not statistically significant.

Minority and Women Business Enterprises represent 29.78 percent of the available construction-related firms and received 17.37 percent of the construction-related prime contract dollars under $19,500. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 70.22 percent of the available construction-related firms and received 82.63 percent of the construction-related prime contract dollars under $19,500. This overutilization is statistically significant.

Table 5.04 State Colleges and Universities Disparity Analysis: Construction-Related Prime Contracts under $19,500, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$0	0.00%	4.94%	$40,709	-$40,709	0.00	< .05 *
Asian Americans	$0	0.00%	7.93%	$65,382	-$65,382	0.00	< .05 *
Hispanic Americans	$34,156	4.14%	4.39%	$36,186	-$2,030	0.94	not significant
Native Americans	$0	0.00%	0.10%	$822	-$822	0.00	----
Caucasian Females	$109,045	13.23%	12.42%	$102,390	$6,655	1.06	**
Caucasian Males	$681,265	82.63%	70.22%	$578,977	$102,288	1.18	< .05 †
TOTAL	$824,467	100.00%	100.00%	$824,467			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	1.15%	$9,458	-$9,458	0.00	not significant
African American Males	$0	0.00%	3.79%	$31,252	-$31,252	0.00	< .05 *
Asian American Females	$0	0.00%	1.35%	$11,103	-$11,103	0.00	not significant
Asian American Males	$0	0.00%	6.58%	$54,279	-$54,279	0.00	< .05 *
Hispanic American Females	$0	0.00%	1.15%	$9,458	-$9,458	0.00	not significant
Hispanic American Males	$34,156	4.14%	3.24%	$26,728	$7,427	1.28	**
Native American Females	$0	0.00%	0.05%	$411	-$411	0.00	----
Native American Males	$0	0.00%	0.05%	$411	-$411	0.00	----
Caucasian Females	$109,045	13.23%	12.42%	$102,390	$6,655	1.06	**
Caucasian Males	$681,265	82.63%	70.22%	$578,977	$102,288	1.18	< .05 †
TOTAL	$824,467	100.00%	100.00%	$824,467			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$0	0.00%	3.69%	$30,429	-$30,429	0.00	< .05 *
Minority Males	$34,156	4.14%	13.67%	$112,670	-$78,515	0.30	< .05 *
Caucasian Females	$109,045	13.23%	12.42%	$102,390	$6,655	1.06	**
Caucasian Males	$681,265	82.63%	70.22%	$578,977	$102,288	1.18	< .05 †
TOTAL	$824,467	100.00%	100.00%	$824,467			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$34,156	4.14%	17.36%	$143,099	-$108,944	0.24	< .05 *
Women Business Enterprises	$109,045	13.23%	12.42%	$102,390	$6,655	1.06	**
Minority and Women Business Enterprises	**$143,201**	**17.37%**	**29.78%**	**$245,490**	**-$102,288**	**0.58**	**< .05 ***
Caucasian Male Business Enterprises	$681,265	82.63%	70.22%	$578,977	$102,288	1.18	< .05 †

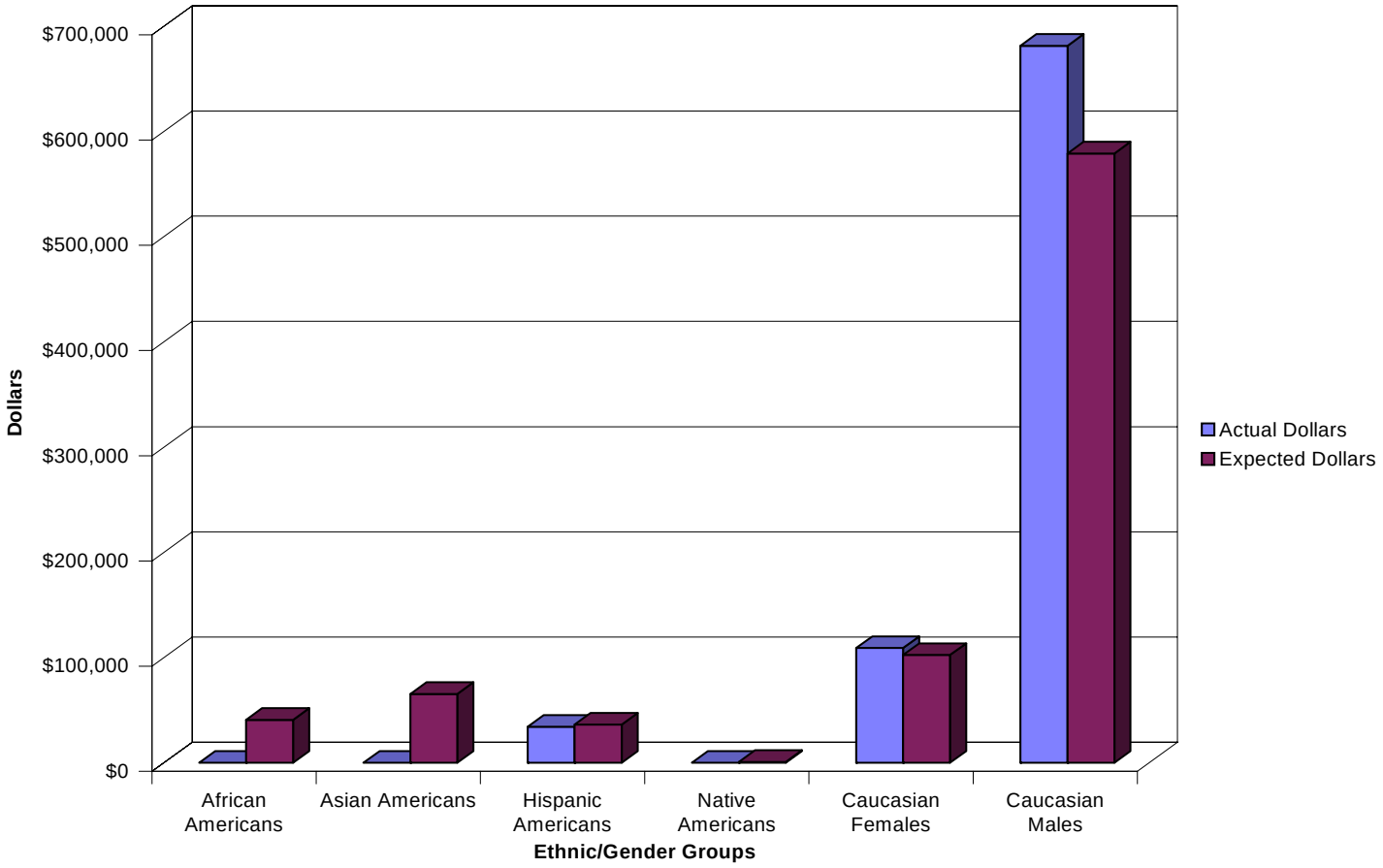
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 5.04 State Colleges and Universities Disparity Analysis: Construction-Related Prime Contracts under $19,500, July 1, 2000 to June 30, 2002



The disparity findings for State Colleges and Universities are summarized in the tables below.

1. Construction Prime Contracts

As indicated in Table 5.05, all minority construction prime contractors were determined to be underutilized at both contract levels. Women Business Enterprises were not underutilized at either contract level.

Table 5.05 Disparity Summary: Construction Prime Contract Dollars, July 1, 2000 to June 30, 2002

Ethnicity/Gender	Contracts Under $500,000	Contracts $19,500 and Under
African Americans	Yes	Yes
Asian Americans	Yes	Yes
Hispanic Americans	Yes	Yes
Native Americans	---	---
Minority Business Enterprises	Yes	Yes
Women Business Enterprises	**	No
Minority and Woman Business Enterprises	Yes	Yes

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

2. Construction-Related Prime Contracts

As indicated in Table 5.06, with the exception of Hispanic Americans, minority construction-related prime contractors were determined to be underutilized at both contract levels. Women Business Enterprises were not underutilized at either contract level.

Table 5.06 Disparity Summary: Construction-Related Prime Contract Dollars, July 1, 2000 to June 30, 2002

Ethnicity/Gender	Contracts Under $500,000	Contracts $19,500 and Under
African Americans	Yes	Yes
Asian Americans	Yes	Yes
Hispanic Americans	No	No
Native Americans	---	---
Minority Business Enterprises	Yes	Yes
Women Business Enterprises	No	**
Minority and Woman Business Enterprises	Yes	Yes

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

In conclusion, there is documented disparity in each of the industries studied. Remedies to address the observed prime contractor disparities are presented in Chapter 7: Recommendations.

6

SUBCONTRACTOR DISPARITY ANALYSIS

I. INTRODUCTION

The objective of this analysis is to determine if minority and woman-owned business enterprise (M/WBE) subcontractors were underutilized at a statistically significant level. A detailed discussion of the statistical procedure for conducting a disparity analysis is set forth in Chapter 5: Prime Contractor Disparity Analysis. The same statistical procedure was used in performing the State Colleges and Universities subcontractor disparity analysis. In sum, under a fair and equitable system of awarding subcontracts, the proportion of subcontracts and subcontract dollars awarded to M/WBEs should be approximate to the proportion of M/WBEs in the relevant market area. If the proportions are not approximate, and a disparity exists between these proportions, the probability that the disparity is due to chance can be determined using a statistical test. If there is a low probability that the disparity is due to chance, *Croson* states that an inference of discrimination can be made.[1]

II. STATE COLLEGES AND UNIVERSITIES DISPARITY ANALYSES

As detailed in Chapter 2: Subcontractor Utilization Analysis, extensive efforts were undertaken to obtain subcontract records for the State Colleges and Universities construction and construction-related contracts. Subcontractor records were compiled for both industries within the July 1, 2000 to June 30, 2002 study period.

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[1] When conducting statistical tests, a level of confidence must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by the Courts as an acceptable level in determining whether an inference of discrimination can be made. Thus the data analyzed here was done within the 95 percent confidence level.

A. State Colleges and Universities Disparity Analysis: All Formal Construction Subcontracts, July 1, 2000 to June 30, 2002

The disparity analysis of all construction subcontract dollars is depicted in Table 6.01 and Chart 6.01.

African American Businesses represent 6.3 percent of the available construction firms and received 0.46 percent of the construction subcontract dollars. This underutilization is statistically significant.

Asian American Businesses represent 4.34 percent of the available construction firms and received 0.41 percent of the construction subcontract dollars. This underutilization is statistically significant.

Hispanic American Businesses represent 5.52 percent of the available construction firms and received 2.94 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Native American Businesses represent 0.12 percent of the available construction firms and received none of the construction subcontract dollars. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 16.28 percent of the available construction firms and received 3.81 percent of the construction subcontract dollars. This underutilization is statistically significant.

Women Business Enterprises represent 12.67 percent of the available construction firms and received 7.25 percent of the construction subcontract dollars. This underutilization is statistically significant.

Minority and Women Business Enterprises represent 28.94 percent of the available construction firms and received 11.06 percent of the construction subcontract dollars. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 71.06 percent of the available construction firms and received 88.94 percent of the construction subcontract dollars. This overutilization is statistically significant.

Table 6.01 State Colleges and Universities Disparity Analysis: All Formal Construction Subcontracts, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$426,480	0.46%	6.30%	$5,889,744	-$5,463,264	0.07	< .05 *
Asian Americans	$381,825	0.41%	4.34%	$4,056,144	-$3,674,319	0.09	< .05 *
Hispanic Americans	$2,753,351	2.94%	5.52%	$5,167,417	-$2,414,066	0.53	not significant
Native Americans	$0	0.00%	0.12%	$111,127	-$111,127	0.00	----
Caucasian Females	$6,781,374	7.25%	12.67%	$11,848,942	-$5,067,568	0.57	< .05 *
Caucasian Males	$83,198,324	88.94%	71.06%	$66,467,981	$16,730,343	1.25	< .05 †
TOTAL	$93,541,355	100.00%	100.00%	$93,541,355			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	0.98%	$916,800	-$916,800	0.00	----
African American Males	$426,480	0.46%	5.32%	$4,972,944	-$4,546,464	0.09	< .05 *
Asian American Females	$57,469	0.06%	0.85%	$791,782	-$734,313	0.07	----
Asian American Males	$324,356	0.35%	3.49%	$3,264,363	-$2,940,007	0.10	< .05 *
Hispanic American Females	$205,054	0.22%	1.40%	$1,305,745	-$1,100,691	0.16	not significant
Hispanic American Males	$2,548,297	2.72%	4.13%	$3,861,672	-$1,313,375	0.66	not significant
Native American Females	$0	0.00%	0.00%	$0	$0	----	----
Native American Males	$0	0.00%	0.12%	$111,127	-$111,127	0.00	----
Caucasian Females	$6,781,374	7.25%	12.67%	$11,848,942	-$5,067,568	0.57	< .05 *
Caucasian Males	$83,198,324	88.94%	71.06%	$66,467,981	$16,730,343	1.25	< .05 †
TOTAL	$93,541,355	100.00%	100.00%	$93,541,355			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$262,523	0.28%	3.22%	$3,014,326	-$2,751,803	0.09	not significant
Minority Males	$3,299,133	3.53%	13.05%	$12,210,106	-$8,910,973	0.27	< .05 *
Caucasian Females	$6,781,374	7.25%	12.67%	$11,848,942	-$5,067,568	0.57	< .05 *
Caucasian Males	$83,198,324	88.94%	71.06%	$66,467,981	$16,730,343	1.25	< .05 †
TOTAL	$93,541,355	100.00%	100.00%	$93,541,355			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$3,561,656	3.81%	16.28%	$15,224,432	-$11,662,776	0.23	< .05 *
Women Business Enterprises	$6,781,374	7.25%	12.67%	$11,848,942	-$5,067,568	0.57	< .05 *
Minority and Women Business Enterprises	**$10,343,030**	**11.06%**	**28.94%**	**$27,073,374**	**-$16,730,343**	**0.38**	**< .05 ***
Caucasian Male Business Enterprises	$83,198,324	88.94%	71.06%	$66,467,981	$16,730,343	1.25	< .05 †

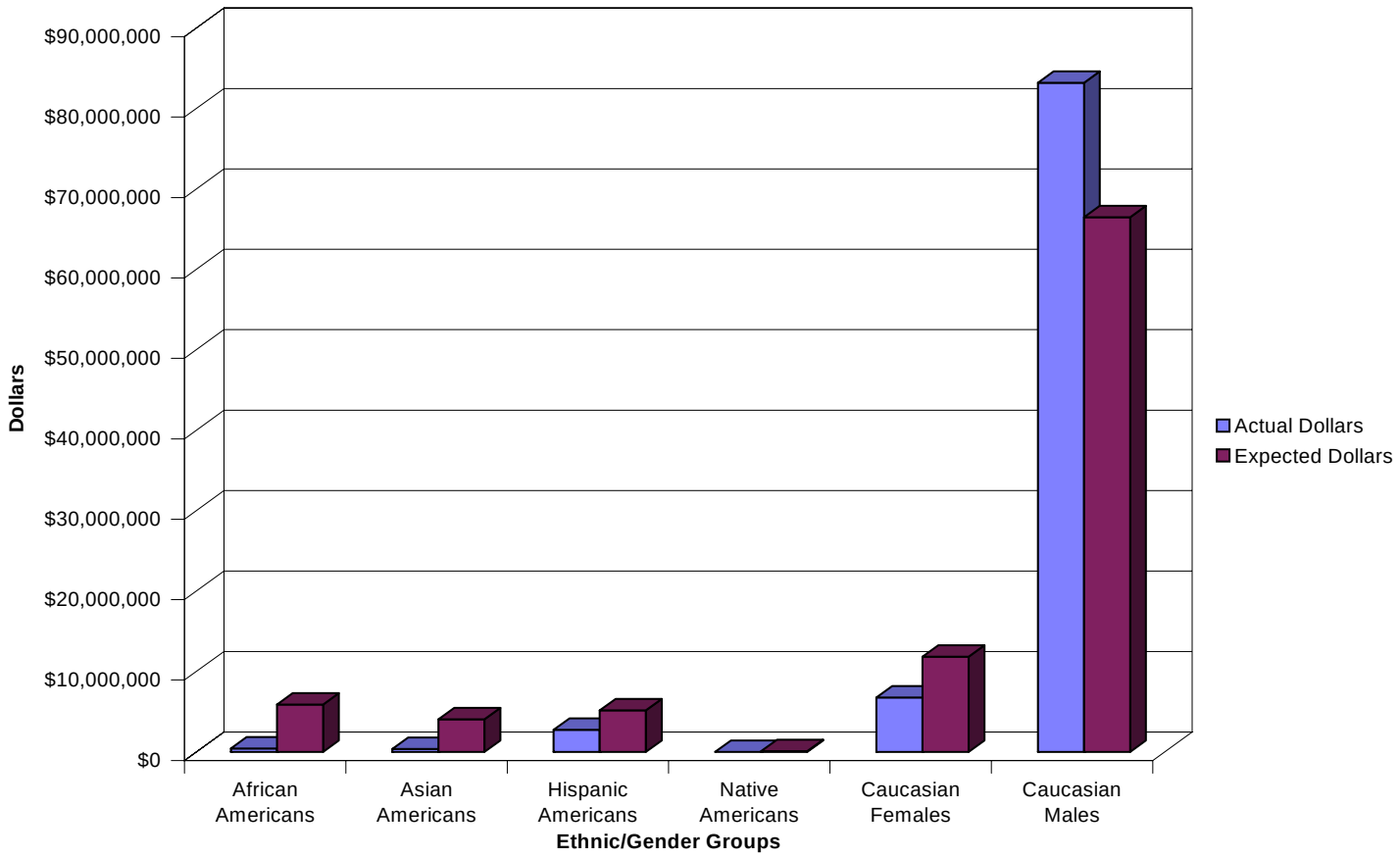
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 6.01 State Colleges and Universities Disparity Analysis: All FormalConstruction Subcontracts, July 1, 2000 to June 30, 2002



B. State Colleges and Universities Disparity Analysis: All Formal Construction-Related Subcontracts, July 1, 2000 to June 30, 2002

The disparity analysis of all construction-related prime contract dollars is depicted in Table 6.02 and Chart 6.02.

African American Businesses represent 4.51 percent of the available construction-related firms and received 0.47 percent of the construction-related subcontract dollars. This underutilization is statistically significant.

Asian American Businesses represent 7.11 percent of the available construction-related firms and received 2.91 percent of the construction-related subcontract dollars. This underutilization is statistically significant.

Hispanic American Businesses represent 4.09 percent of the available construction-related firms and received 0.63 percent of the construction-related subcontract dollars. This underutilization is statistically significant.

Native American Businesses represent 0.13 percent of the available construction-related firms and received none of the construction-related subcontract dollars. The records were not sufficient to determine statistical significance.

Minority Business Enterprises represent 15.84 percent of the available construction-related firms and received 4 percent of the construction-related subcontract dollars. This underutilization is statistically significant.

Women Business Enterprises represent 12.27 percent of the available construction-related firms and received 20.53 percent of the construction-related subcontract dollars. This study does not test statistically the overutilization of Women Business Enterprises.

Minority and Women Business Enterprises represent 28.11 percent of the available construction-related firms and received 24.54 percent of the construction-related subcontract dollars. This underutilization is not statistically significant.

Caucasian Male Business Enterprises represent 71.89 percent of the available construction-related firms and received 75.46 percent of the construction-related subcontract dollars. This overutilization is not statistically significant.

Table 6.02 State Colleges and Universities Disparity Analysis: All Formal Construction-Related Subcontracts, July 1, 2000 to June 30, 2002

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
Ethnicity	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African Americans	$350,008	0.47%	4.51%	$3,361,306	-$3,011,298	0.10	< .05 *
Asian Americans	$2,165,481	2.91%	7.11%	$5,295,642	-$3,130,162	0.41	< .05 *
Hispanic Americans	$466,222	0.63%	4.09%	$3,044,202	-$2,577,980	0.15	< .05 *
Native Americans	$0	0.00%	0.13%	$95,131	-$95,131	0.00	----
Caucasian Females	$15,289,014	20.53%	12.27%	$9,132,605	$6,156,409	1.67	**
Caucasian Males	$56,185,372	75.46%	71.89%	$53,527,211	$2,658,161	1.05	not significant
TOTAL	$74,456,096	100.00%	100.00%	$74,456,096			
Ethnicity and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
African American Females	$0	0.00%	0.98%	$729,340	-$729,340	0.00	----
African American Males	$350,008	0.47%	3.53%	$2,631,966	-$2,281,958	0.13	< .05 *
Asian American Females	$0	0.00%	1.19%	$887,892	-$887,892	0.00	< .05 *
Asian American Males	$2,165,481	2.91%	5.92%	$4,407,750	-$2,242,270	0.49	< .05 *
Hispanic American Females	$2,300	0.00%	1.06%	$792,761	-$790,461	0.00	< .05 *
Hispanic American Males	$463,922	0.62%	3.02%	$2,251,441	-$1,787,519	0.21	< .05 *
Native American Females	$0	0.00%	0.09%	$63,421	-$63,421	0.00	----
Native American Males	$0	0.00%	0.04%	$31,710	-$31,710	0.00	----
Caucasian Females	$15,289,014	20.53%	12.27%	$9,132,605	$6,156,409	1.67	**
Caucasian Males	$56,185,372	75.46%	71.89%	$53,527,211	$2,658,161	1.05	not significant
TOTAL	$74,456,096	100.00%	100.00%	$74,456,096			
Minority and Gender	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Females	$2,300	0.00%	3.32%	$2,473,414	-$2,471,114	0.00	< .05 *
Minority Males	$2,979,411	4.00%	12.52%	$9,322,867	-$6,343,457	0.32	< .05 *
Caucasian Females	$15,289,014	20.53%	12.27%	$9,132,605	$6,156,409	1.67	**
Caucasian Males	$56,185,372	75.46%	71.89%	$53,527,211	$2,658,161	1.05	not significant
TOTAL	$74,456,096	100.00%	100.00%	$74,456,096			
Minority and Females	**Actual Dollars**	**Utilization**	**Availability**	**Expected Dollars**	**Dollars Lost**	**Disp. Ratio**	**P-Value**
Minority Business Enterprises	$2,981,711	4.00%	15.84%	$11,796,281	-$8,814,570	0.25	< .05 *
Women Business Enterprises	$15,289,014	20.53%	12.27%	$9,132,605	$6,156,409	1.67	**
Minority and Women Business Enterprises	**$18,270,725**	**24.54%**	**28.11%**	**$20,928,886**	**-$2,658,161**	**0.87**	**not significant**
Caucasian Male Business Enterprises	$56,185,372	75.46%	71.89%	$53,527,211	$2,658,161	1.05	not significant

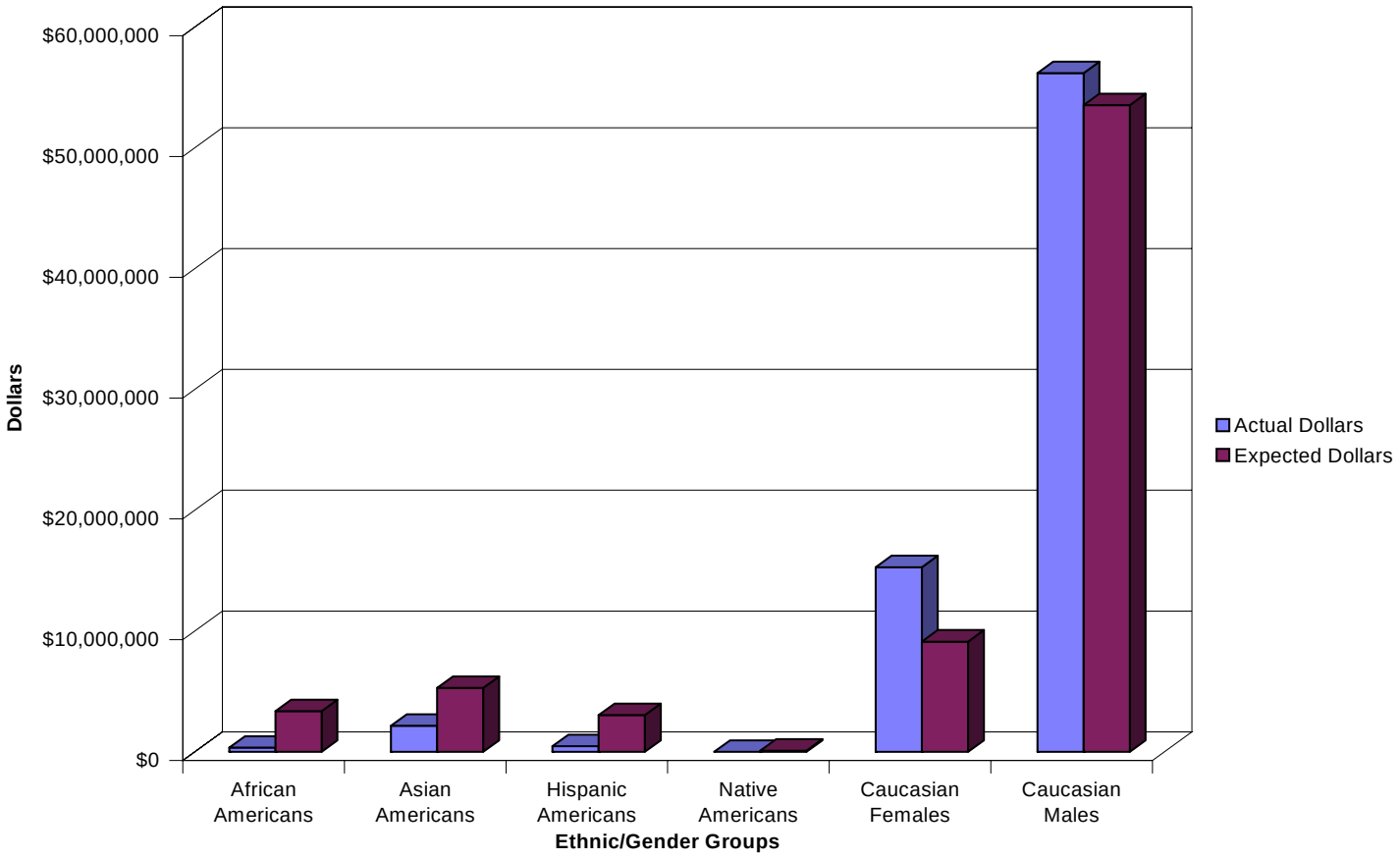
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilzation.

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

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

Chart 6.02 State Colleges and Universities Disparity Analysis: All Formal Construction-Related Subcontracts, July 1, 2000 to June 30, 2002



The State Colleges and Universities subcontractor disparity findings are summarized in Table 6.03 below. All minorities, with the exception of Hispanic Americans, were underutilized at a statistically significant level in construction. All minorities were underutilized at a statistically significant level in construction-related services. Women Business Enterprises were underutilized at a statistically significant level in construction, but not in construction-related services.

Table 6.03 State Colleges and Universities Subcontractor Disparity Summary, July 1, 2000 to June 30, 2002

Ethnicity/Gender	Construction	Construction-Related
African Americans	Yes	Yes
Asian Americans	Yes	Yes
Hispanic Americans	No	Yes
Native Americans	--	--
Minority Business Enterprises	Yes	Yes
Women Business Enterprises	Yes	**
Minority and Women Business Enterprises	Yes	No

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

7

DISPARITY STUDY RECOMMENDATIONS

I. INTRODUCTION

Race and gender-conscious and race and gender-neutral recommendations are offered to remedy the statistically significant underutilization of minorities identified in the two industries studied - construction and construction-related. The race and gender-conscious measures include prime contracting and subcontracting remedies for the ethnic and gender groups where disparities were found. The race and gender-neutral recommendations are offered as a strategy to increase equity in contracting without regard to race or gender. They are presented as best practices applicable to all units of State government contracting. These same race and gender-conscious and race and gender-neutral recommendations are also found in the State Agencies, Authorities, and Commissions Volume 3, Chapter 7.

II. SUMMARY OF STATISTICAL FINDINGS

The statistical analysis is a key research component of the Study. The purpose of the statistical analysis is to identify disparity between the use of M/WBEs and their availability in the marketplace. Disparity is defined as statistically significant underutilization. Statistical significance means that disparity results did not occur by chance.

Tables 7.01 and 7.02 depict the disparity findings. In summary, in the award of prime contracts for construction and construction-related services there was disparity at both the formal and informal contracting levels for State Colleges and Universities. At the subcontractor level, there was also disparity in both construction and construction-related services.

III. RACE AND GENDER-CONSCIOUS RECOMMENDATIONS

Several remedies are proposed to address the statistically significant prime contractor and subcontractor underutilization of minority groups. It is critical that race and gender-conscious remedies are narrowly tailored to correct documented statistically significant underutilization. Therefore, the remedies recommended address the underutilization of those racial groups with a disparity. Since the statistical analysis does not examine the overutilization of M/WBEs, remedies are not applicable. Table 7.01 depicts the ethnic and gender groups which had documented disparity.

Table 7.01 Prime Contract Disparity Findings: State Colleges and Universities

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

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

A. Prime Contractor Remedies

The prime contractor remedies apply to both formal and informal contracts. However, remedies for formal contracts are limited to contracts under $500,000. Remedies for informal contracts apply to both industries and to groups with a disparity finding since

awards need not be determined by price. The recommendations below apply only to those groups with identified disparity.

1. Formal Prime Contract Remedies:

a. Incentive Credits

Incentive credits should be given to statistically significant underutilized groups on construction-related contracts since these contracts can be awarded based on qualifications. The incentive credits can counterbalance the competitive disadvantage experienced by these groups. Offsetting the comparative disadvantage could mitigate the disparity in this industry. The credits would be applied to the rating for formally awarded contracts under $500,000.

b. Evaluation Criteria

Utilization of the groups with a disparity could be a weighted criterion in the evaluation of statements of qualifications and proposals for construction-related contracts.

c. Bid Discounts

Bid discounts could be applied to the construction bids submitted by the groups with identified disparity. The price cost considered in the evaluation of the bid would be the actual less the discount.

d. Joint Venture Incentive Credits

Incentive credits should be given for joint ventures where the statistically significant underutilized groups own at least 51%. The joint venture incentive credits can increase depending on the level of the underutilized groups' participation.

2. Informal Prime Contract Remedies

a. Sheltered Market

A Sheltered Market program should be established for informal contracts. The Sheltered Market would limit competition to firms from the statistically significant underutilized groups and other firms of comparable capacity. A Sheltered Market program would ensure that quotations for informal contracts are solicited from a diverse pool of certified small businesses. Because the Sheltered Market program awards prime contracts, it is a means for building the capacity of small businesses.

Firms would be required to qualify for the program. In addition, the statistically significant underutilized groups would be presumptive members of the program. The eligibility of any

other groups would be determined through a certification process. The existence of the small contracts rotation process should be widely advertised to the target ethnic and gender groups in each industry.

An approved list of Sheltered Market participants should be developed for each industry, and as needed, specialized lists would be compiled within industries. The businesses would be randomly ranked on each list, and twice a year there would be an open enrollment period. When the open enrollment period closed, the random list of new businesses would be appended to the existing list. The lists of Sheltered Market firms would be posted for public review. Sheltered Market contract awards, like other current State College and University contract awards, should also be posted for public review.

Informally bid contracts, where the State Colleges and Universities can identify a fixed unit price for the services, should be rotated among all firms that can provide the services. This list should include M/WBE and non-M/WBE firms interested in participating in the rotation. Where M/WBE firms were found to be underutilized at a statistically significant level, every fifth contract should be limited to competition between the underutilized groups. Contracts for which the State Colleges and Universities cannot identify a fixed unit price should be competitively bid.

Departments should be deterred from issuing change orders on contracts under the informal threshold and instead select a contractor from the Sheltered Market list. Maximum use of Sheltered Market firms should be encouraged.

Financial and technical assistance should also be made available to firms that participate in the Sheltered Market program. Finally, the Sheltered Market program should require that firms graduate after they reach a certain size threshold or participate in the program over a specified time period.

b. Staff Good Faith Efforts

Staff with informal contract purchasing authority should consistently document a Good Faith Effort to solicit quotes from the statistically significant underutilized groups. Informal contracts do not require public bidding; and therefore, the solicitation and selection are under the discretion of staff. Informal solicitations and awards should be published on each State College and University website. Access to this page should be limited to certified SBEs using a unique password. Monthly reports should be published by each State College and University detailing awards made in order to document compliance. Good Faith Efforts would standardize the solicitation of statistically significant underutilized groups for informal contracts.

One example of Good Faith Effort documentation is a checklist that would require buyers to demonstrate their efforts to solicit quotes from the statistically significant underutilized groups. The checklist would outline Good Faith Effort criteria, detail the level of effort

required, and list the documentation required to demonstrate that effort. Whenever there is an intent to award an informal contract to a business other than one from a statistically significant underutilized group, supervisory review and approval of the Good Faith Effort would be required to award the contract.

B. Subcontractor Remedies

M/WBE remedies are proposed for construction and construction-related contracts for groups with identified statistically significant underutilization. Since the statistical analysis does not examine the overutilization of M/WBEs, remedies are not applicable. Table 7.02 depicts the groups which had a documented disparity.

Table 7.02 Subcontract Disparity Findings: State Colleges and Universities

Ethnicity and Gender	Construction Services	Construction-Related Services
Subcontracts	All Formal Contracts	All Formal Contracts
African Americans	Yes	Yes
Asian Americans	Yes	Yes
Hispanic Americans	No	Yes
Native Americans	---	---
Caucasian Females	Yes	**

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

1. Overall M/WBE Subcontracting Goals

An overall goal should be established as a target for the participation of the underutilized groups in the State Colleges and Universities' subcontracts. The goal should reflect the availability of the statistically significant underutilized groups as calculated in the Study. The overall goal should be reviewed periodically. Tables 7.03 and 7.04 depict the construction and construction-related subcontractor availability of the statistically underutilized groups. Based on the group's availability, the overall construction subcontract goals for State Colleges and Universities would be 6.30 percent for African Americans and 4.34 percent for Asian Americans, and 12.67 percent for Caucasian Females.

Table 7.03 Construction Subcontractor Availability - State Colleges and Universities

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

The overall goal for the construction-related industry based on the underutilized groups availability would be 4.51 percent for African Americans, 7.11 percent for Asian Americans, and 4.09 percent for Hispanic Americans.

Table 7.04 Construction-Related Services Subcontractor Availability-State Colleges and Universities

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

2. Contract-Specific M/WBE Subcontracting Goals

Contract-specific subcontracting goals should be set on all construction contracts for groups with an identified disparity. Goals should reflect the availability at the time each contract is advertised. Setting contract specific goals narrowly tailored to the current availability of the businesses to perform the identified subcontracting opportunities is the most prudent method to remedy the disparity. This contract specific goal setting method also ensures that the goals are reasonably attainable.

Both the items of work in the contract and the availability of M/WBEs to perform the work items must be determined beforehand in order to set a contract-specific goal. To set contract- specific goals, the State Colleges and Universities will need to maintain a current database with M/WBE and non-M/WBE available firms to perform contracts.

3. Weighted Good Faith Efforts

Good faith effort criteria that define and quantify the minimum behavior required to demonstrate an affirmative effort to meet the subcontracting goal should be developed. A waiver provision is also necessary in order to address the circumstances in which the goals cannot be met. Good Faith Efforts will measure a prime contractor's endeavor to meet the M/WBE subcontracting goals.

There would be a minimum score for the prime contractor to demonstrate a Good Faith Effort. Prime contractors failing to meet the M/WBE subcontractor goal or make a Good Faith Effort to do so would be deemed non-responsive.

C. Disadvantaged Business Enterprise Programs

Federal Disadvantaged Business Enterprise (DBE) subcontracting goals should be utilized whenever the contract is funded by federal dollars. The U.S. Department of Transportation's Disadvantaged Business Enterprise Program and the U.S. Environmental Protection Agency's (EPA) Fair Share Program, require subcontracting goals to achieve disadvantaged businesses' participation (which includes M/WBEs). These federal programs, used in combination with State-funded programs, will help to alleviate the identified disparity. These federal programs do not require a factual finding of disparity however, they do require funding recipients to implement measures to ensure equitable contracting. For the DOT, these measures are outlined in 49 CFR Part 26. The EPA is currently developing its draft rules.

Both the DOT and EPA require goal setting based on the relative availability of ready, willing and able DBEs in the relevant market area. Additionally, the DOT rules require a recipient agency to determine each year the apportionment between race-conscious method and race-neutral method to achieve the annual DBE goal. The recipient agency must meet at least some of the DBE goal through race-neutral means. The race-neutral recommendations offered are designed to promote use of M/WBEs in State-funded contracts, but they could also be used to enhance the race-neutral components of the State's DBE programs.

IV. RACE AND GENDER-NEUTRAL RECOMMENDATIONS

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

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

1. Unbundle Large Procurement Into Smaller Contracts Where Feasible

Bundling occurs when a procurement consolidates small purchases into one contract, or when goods and services previously purchased individually are grouped together in a single solicitation.

Large contracts should be unbundled to maximize small business participation. During the data collection process for this study, it was found that there were a number of large contracts awarded by the State College and Universities. Unbundling large procurement will increase the opportunity for small businesses to compete for State contracts.

In determining whether projects should be divided, the following criteria should be reviewed:

- Whether or not the project takes place in more than one location
- Size and complexity of the procurement
- Similarity of the goods and services procured
- Sequencing and delivery of the work
- Public safety issues and convenience
- Procurement segmentation options

The federal government has made contract unbundling a key element of its small business agenda.[1]

2. Raise Pre-Qualification Contract Levels

The use of pre-qualification standards should only be considered on large and complex projects above $10 million. Only contracts above $10 million that require specialized technical expertise beyond licensing requirements and a demonstration of financial capacity beyond what is needed to acquire bonding should be considered for pre-qualification.

Pre-qualification standards may inhibit the development of small firms by denying capable and experienced entrepreneurs opportunities on public-funded projects. Eliminating pre-qualification standards, except for large and complex projects above $10 million, will provide otherwise capable firms the opportunity to compete for State Colleges and Universities' contracts.

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[1] United States. The Office of Federal Procurement Policy (OFPP) *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business.* Washington D.C. Executive Office of the President, October 2002.

State licensing, bond and insurance requirements, and bid and proposal specifications already serve as mechanisms to ensure the capability and capacity of contractors and consultants, rendering many pre-qualification standards redundant. Projects that do not require capability or capacity beyond that demonstrated through licensing, bonding, and bid or proposal specifications, should not be subjected to pre-qualification standards.

3. Use Direct Contracting As a Means to Award Small Contracts

Direct contracting occurs when a public agency directly awards construction support services contracts that normally are included within the general contract. These contracts include construction support services such as trucking, landscaping, demolition, site clearing, surveying, and site security.

Construction support services should be awarded as direct contracts. Many construction support services are distinct tasks often performed by small firms. Direct contracting will increase the opportunities for, and build the capacity of, small firms by allowing them to work as prime contractors.

4. Evaluate Bonding and Insurance Requirements

Bonding and insurance requirements should be evaluated to ensure that smaller contracts do not carry a disproportionately high level of coverage. Prohibitive bonding and insurance requirements can be a disincentive to bidders, constitute a barrier to small business, and increase the costs of goods and services. Revised bonding and insurance requirements will attract more small firms as bidders, thus increasing competition and reducing costs.

The revised bonding and insurance requirements should address bid, performance, and payment bonds; general and professional liability; and errors and omissions insurance. Risk management standards could be developed that are applicable to the industry and associated liability. For example, a $100,000 air conditioning installation contract would have one set of bonding and insurance requirements, while a $1,000,000 building renovation contract would have another. Both would be based on the project's size, scope, scale, and risk to the State Colleges and Universities.

5. Phase Bonding and Retainage Requirements

a. Bonding

Prime contractors' bonds should be proportionally released as goods and services, accepted and rolled over into the next portion of the contract. Subcontractors' bonds should be released upon completion and acceptance of their portion of work. Phasing bonding requirements will increase a small firm's access to credit, promoting business growth.

b. Retainage

Retainage is the percent of the contract value withheld until the successful completion of a contract.

The subcontractors' portion of the retainage should be released once work has been completed and accepted. Retainage should be eliminated for small subcontracts and reduced for all certified M/WBE contractors. This will reduce the cash flow burden experienced by small construction subcontractors. Increased cash flow will allow these small firms to build capacity.

6. Post Project Forecast on the Internet

A quarterly forecast should be posted on the Internet to provide firms with adequate notice and lead time. There were several anecdotes of firms that could not secure timely information about upcoming contract opportunities. Project forecasting will provide prime contractors and subcontractors more lead time for networking and outreach.

The State Colleges and Universities should also consider "listing" contract opportunities prior to the issue of contract solicitation. Upcoming contract opportunities could be listed 15 to 30 days prior to the actual release date. The "listing" would consist of the draft project specifications, anticipated release date, and subcontracting goals for the project. The "listings" should be posted the same day each week.

7. Consider Reducing SBE Size Standards

The State should consider reducing SBE size standards to enable M/WBEs to compete with similarly situated businesses. The current SBE size standard is based on firms with no more than 100 full time employees. The number of small businesses in the State and the small size of State construction and construction-related contracts, provide compelling reasons for creating a small business definition individualized to the profile of State businesses and expanding the existing preferences for small business.

According to the 1997 U.S. Census, 93.37 percent of the construction businesses and 88.3 percent of the construction-related businesses with paid employees in the State had fewer than 20 employees, creating a large pool of potentially available firms. For the construction industry, 63.19 percent of the State Colleges and Universities' contracts were under $25,000, 73.26 percent were under $50,000, and more than 82 percent were under $100,000. For the construction-related industry, 55.26 percent of the State Colleges and Universities' contracts were under $25,000, 59.4 percent were under $50,000, and more than 65 percent were under $100,000. Therefore, small businesses would have the capacity to provide services on the average State Colleges and Universities' contract. However, analysis of awarded contracts shows that small businesses are not being utilized on small contracts.

8. Allow Certified M/WBEs to Register Their Interest as Subcontractors for State Colleges and Universities Projects Via the Internet

For each contract solicitation with subcontracting opportunities, the State Colleges and Universities could set up a link on each of their web sites that would allow M/WBEs to express interest in subcontracting on a particular project. Many M/WBE companies that are too small to be a prime contractor on a large project are available to perform as subcontractors. Prime contractors could use this on-line source list to solicit M/WBEs for subcontracting opportunities.

9. Require Prime Contractors to List All Subcontractors with Their Bids and Proposals

The State Colleges and Universities should require prime contractors submitting bids and proposals to include a list of their subcontractors' contract amounts and certification standards. The State Colleges and Universities could then verify the amounts with the subcontractors prior to awarding the contract. The State Colleges and Universities would be able to reject non-responsive bids and proposals during the submission review process, avoiding the administrative issues of handling non-compliance after the awarding of the contract.

The State Colleges and Universities could consider requiring prime contractors to secure a "letter of intent" from each subcontractor to be submitted prior to awarding the contract as well. The letter of intent is a statement from the subcontractor stating its agreement to provide the services listed in the bid or proposal for the amount listed. Prime contractors should be penalized for the unauthorized listing of subcontractors. This additional level of scrutiny can prevent prime contractors from listing subcontractors without their consent.

10. Debrief Unsuccessful Bidders and Proposers

The State Colleges and Universities should develop an official policy to encourage firms to review unsuccessful bids and proposals. Debriefing helps businesses learn about their areas of strength and weakness and how to create a more successful bid or proposal. Debriefing is a means to increase the quality of bids and proposals received by the State Colleges and Universities from M/WBEs.

As part of the debriefing process, a firm could schedule an appointment to review the successful submission and also receive specific critiques on its unsuccessful submission. M/WBE bidders who have three successive failed bids or proposals should be strongly encouraged to schedule a debriefing appointment.

11. Establish Uniform Bid and Proposal Protest Procedures

The State Colleges and Universities should establish uniform bid and proposal protest procedures. Specific bid and proposal protest procedures afford vendors with a due process to challenge what may be a questionable contract award. Uniform bid and proposal protest procedures would minimize the time and resources needed by all parties to respond to a protest.

The State should establish uniform regulations applicable to all State Colleges and Universities similar to those used by the Department of the Treasury's Division of Property Management and Construction (DPMC), with some modifications. DPMC, under Title 17, Chapter 19, Subchapter 4 of New Jersey's Administrative Code, requires firms wishing to protest a bid decision to submit a written request specifying the grounds on which the award of a contract or the rejection of a bid is challenged. The protest must be received within five calendar days after the opening of bids. An informal hearing is held within fifteen calendar days of the receipt of the request and is overseen by an impartial hearing officer. The hearing officer then prepares a report within ten calendar days of the hearing's conclusion, unless greater time is required. This report is merely advisory and is not binding. All parties to the hearing also receive copies of the hearing officer's report and then have ten calendar days to provide written comments on exceptions. After this ten-day period, the final decision on the matter is issued.

DPMC's bid protest procedures should be revised by shortening the bid protest period, including a bid appeals process by an independent appeals panel, and making the rule applicable to both bid and proposal protests. An informal hearing should be overseen by a hearing officer, but it should be held within five calendar days of the receipt of the request. The hearing officer should make a final decision on the protest within five days of the hearing.

The State should create a bid and proposal protest appeals process by which the business can appeal. The appeals process should be overseen by an independent three person hearing panel. One of the individuals in the appeals panel should be a vendor who would represent the bidders on State contracts. Members of the three member appeals panel should be subject to term limits.

The appeals panel should hold a hearing within ten days of receipt of a written appeal of the hearing officer's determination and it should issue a final decision within five days of the appeals hearing. The decision of the three person panel should be appealable in a court of law.

12. Develop an Expedited Payment Program

An expedited payment program should be developed for M/WBEs. Expedited payments will remove a major barrier to small business participation in public contracting. They will

also provide additional incentives for businesses to compete for State Colleges and Universities' contracts by establishing the State Colleges and Universities as preferred public sector clients.

In an expedited payment program, M/WBEs would be paid on an accelerated schedule. Non-certified prime contractors who meet M/WBE participation goals would also be eligible for the expedited payment program. When a participating firm submits an invoice, it would include an identification number that marks it for a 15-day expedited payment. State Colleges and Universities' staff would date stamp invoices immediately upon receipt. If an invoice is not date stamped, the 15-day cycle would begin on the date specified in the invoice.

As an alternative to the 15-day expedited payment, firms participating in the expedited payment program could be permitted to submit invoices for progress payment at two-week intervals. Firms would be paid according to the normal State Colleges and Universities' schedule, but because they would be allowed to invoice more frequently, they would be paid more frequently.

The State Colleges and Universities should assess an interest penalty for late payments to certified firms. Penalties would be assessed the day after the contractual payment due date. If there is no payment due date stipulated in the contract, penalties would be assessed on the 31st day after receipt of the invoice. The penalty would be a nominal percentage of the invoice amount assessed daily until a check is issued.

13. Provide for Partial Payment of Invoices

The State Colleges and Universities should be required to notify a firm within five days of receiving an invoice if there are any items in dispute. Project managers should be granted line item approval authority. This would allow undisputed invoice amounts to be paid promptly and disputed items to be resolved in a timely manner. As a result, small businesses that contract with the State Colleges and Universities would be able to maintain a positive cash flow while providing goods or services to the State Colleges and Universities.

14. Assess the Contract Dispute Resolution Process

The State Colleges and Universities should assess its dispute resolution process to ensure that it does not unduly disadvantage or burden M/WBEs. Small businesses may be deterred from seeking legitimate redress if the process is costly and time consuming. Streamlined dispute resolution procedures can also establish a greater degree of fairness.

15. Avoid Overly Complex or Restrictive Specifications

To encourage M/WBE contractor participation, requiring a base bid with multiple alternatives should be avoided. This type of specification requires a considerable degree of expertise and resources to prepare what ultimately is several bids at once. Simplified specifications can promote accurate bids, minimizing the needs for Requests for Information and change orders.

In addition, unnecessary work hour restrictions can also limit a small contractor's flexibility in meeting demanding construction schedules. Proprietary specifications can be costly as well. When a supplier is granted an artificial monopoly on materials by a public agency owner, the supplier can and often will demand an excessive price. If brand-name material is required in the bid specifications, it should be purchased by the State Colleges and Universities and not the contractor.

16. Develop Subcontractor Substitution Standards

Formal subcontractor substitution standards should be developed so that subcontractors are not removed from a project without due process. Eliminating a subcontractor from a project or reducing its scope of work can pose a significant hardship on small contractors. Formalizing subcontractor substitution standards ensures that prime contractors are accountable to commitments made to M/WBEs at the time of bid or proposal submission.

A subcontractor should be notified in writing of an intended substitution and afforded the opportunity to respond. Substitutions should only be allowed after the subcontractor has had a chance to respond and only with the approval of the State Colleges and Universities. In addition, any reduction in the scope of work or contract value for a subcontractor should be considered as a substitution. Failure to adhere to the substitution standard should be a breach of contract and the appropriate sanctions applied.

17. Post Prime Contractor Payments to the Internet

Prime contractor payments should be published on the internet. This will allow subcontractors and subconsultants to monitor the progress of their project and to track when the prime contractor receives payment.

18. Conduct Routine Post-Award Contract Compliance

Routine contract compliance monitoring should be conducted to ensure that M/WBE goals are met throughout the duration of a contract. This type of monitoring will verify the prime contractor's commitments both prior to and after the contract award. Consistent contract compliance should minimize the hardships experienced by small firms with limited resources.

The following contract compliance methods are recommended:

- Periodically collect copies of canceled checks to subcontractors to verify payment information
- Penalize prime contractors and subcontractors for non-compliance with program requirements
- Fine prime contractors for unapproved substitutions
- Include a provision for liquidated damages if a contract is breached due to non-compliance with M/WBE requirements

19. Publish M/WBE Utilization Reports

Prime contractor and subcontractor utilization should be reported on a regular basis. Reporting will measure the success of the M/WBE programs' efforts and determine if they require modification. Periodic reporting can also serve as a public relations tool, informing the community of the State Colleges and Universities' efforts to ensure diversity.

These reports should include verified payment in addition to award data. The verification process should be standardized. The reports should also include change orders and substitutions. Reports should also be posted to each State College and University web site and circulated to local chambers of commerce and trade organizations. The utilization reports should include an assessment of M/WBE program activities and recommendations for improvement on an annual basis.

V. ADMINISTRATIVE RECOMMENDATIONS

A. Organizational Recommendations

1. Establish a Centralized M/WBE Office with Adequate Staff

A centralized M/WBE contract compliance office should assume responsibility for the design, implementation, and operation of the business equity programs. Currently contract compliance is decentralized. Consolidating all of these units into one office will ensure that all business equity programs are uniformly implemented and monitored.

The M/WBE contract compliance office should be under the jurisdiction of the Office of the President for each State College and University and separate from any college or university office with purchasing authority. This will relieve the natural tension between the deliberation required to ensure contract compliance and the need to expediently procure products and services. The contract compliance office will need the authority to approve solicitations, reject bids or proposals, and enforce penalties to contractors and staff for non-compliance with the business equity program requirements. The Office of the President

would be the final arbitrator of the competing interest between contract compliance and procurement.

The centralized contract compliance office should be adequately staffed with experienced professionals capable of fulfilling the new responsibilities. Adequate staffing is necessary to promote the smooth implementation of the State Colleges and Universities' new business equity programs. Personnel staffing the contract compliance office should have knowledge about procurement procedures, public contracting law, affirmative action programs, and the business community. The personnel should have education or professional experience in public administration and be knowledgeable about current business trends and the operation of a small business.

2. Recognize Buyers that Utilize M/WBEs

Staff who comply with Program requirements to utilize M/WBEs on informal contract solicitations should be recognized. Such acknowledgment could be in the form of a letter from supervisory staff. Formal recognition will provide State Colleges and Universities' staff an additional incentive to meet M/WBE program requirements and reward those that consistently demonstrate a commitment to diversity.

3. Develop a Systemwide M/WBE Program Manual

A systemwide M/WBE Program Manual should be developed for all State Colleges and Universities. Creating a uniform manual would streamline the contract compliance process and provide one source that is applicable to all State Colleges and Universities' contracting. A uniform M/WBE Program Manual will also provide staff with clear guidance on their responsibilities and requirements.

The recommendations in this report should be included in drafting the M/WBE Program Manual. Training should be provided when the manual is approved. Staff compliance should be evaluated through both department-level reports of M/WBE utilization and staff performance reviews.

4. Conduct Outreach and Implement Marketing Strategies

The proposed M/WBE program should have an outreach component. The outreach component should include the following three elements:

- Promote new programs
- Solicit firms to pursue certification
- Advertise contract opportunities in order to increase the number of businesses responding to informal and formal solicitations

Effective outreach will also attract more bidders and proposers and inform them of new requirements.

The table below lists the strategies and tactics that can be used to market the programs, inform the business community of new requirements, and attract M/WBE firms to certify with the State, and to bid on State Colleges and Universities' contracts.

Table 7.05 Outreach and Marketing Strategies

Strategy	Tactics
Design tagline and display banner	• Develop tagline • Design banner with placement of existing logo and new tagline
Define design standards, layout, and appearance of procurement documents for the organization	• Revise all procurement materials to include the program logo and tagline in order to have a uniform appearance
Develop collateral print material for outreach campaign	• Revise brochure to reflect program changes • Develop articles and media packets
Launch outreach campaign	• Distribute media packets and press releases • Place public service announcements • Pitch campaign to broadcast media
Host semi-annual contractors' open house and other networking events	• Plan and coordinate open house events • Send out invitations via mail, fax, and e-mail • Include buyers in outreach events • Make informal contract opportunities available • Distribute contract forecasts and certification forms
Distribute forecasts of contracting opportunities via facsimile and e-mail	• Distribute contract forecast • Post to web site • Distribute through fax and e-mail
Partner with agencies and organizations to disseminate program information	• Continue current agency partnerships • Develop local business and trade group partners
Conduct an annual program evaluation	• Establish measurable outcomes • Conduct surveys • Examine bidding history

B. Data Management Recommendations

1. Track All Subcontract Bidders

All subcontract bidders should be tracked electronically, on a systemwide basis. Setting M/WBE contract goals will require a list of available firms. Electronically recording bidders is a comprehensive means of tracking ready, willing, and able firms.

In order to maintain a list of available subcontractors, the following information should be collected from prime contractors at the time of bid opening:

- Subcontractors' names
- Subcontractors' certification status
- Service to be provided by each subcontractors
- Subcontractors' bid amount

2. Consistently Track All Subcontractor Payments

There should be uniform tracking of all subcontractor payments. Tracking subcontractor payments is a critical element of contract compliance. Tracking subcontractor payments will also identify problematic areas in contract compliance and project management.

Data should be stored electronically in a relational database. Each college or university that manages contracts should maintain its own relational database. The databases should be based on the same platform, in order that the data can be easily integrated when needed. In addition, the contract numbering system should be the same across all the State Colleges and Universities, and it should match the one used in the NJCFS.

3. Code Contracts by Industry Classification in the New Jersey Comprehensive Financial System (NJCFS)

State Colleges and Universities contracts should be coded by industry and entered into the NJCFS at the time of the contract award. Coding each record by industry would facilitate compliance reporting and aid in producing utilization reports.

The numeric code for the type of industry should be based on the federal North American Industrial Classification Standard (NAICS). Then, the existing contract description field in the NJCFS would be used to verify the classification.

4. Consolidate All Payment Tracking into the New Jersey Comprehensive Financial System (NJCFS)

The NJCFS should be used by State Colleges and Universities to track and monitor payments. Currently, only State agencies consistently use the NJCFS. A centralized system will streamline payment monitoring and financial reporting for all State Colleges and Universities.