

Review of the Procurement/Small Business Enterprise (SBE) Program

FINAL REPORT



Submitted to:



Submitted by:



January 14, 2009

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EXECUTIVE SUMMARY

E.0 EXECUTIVE SUMMARY

In late 2007, the City Council of the City of Pensacola (City) identified the need to review the City's procurement practices to improve participation of small and minority businesses as a priority goal. In December 2007, MGT of America, Inc. (MGT), was invited to appear before the Committee of the Whole (Committee) to discuss the firm's experience and provide an overall orientation regarding the issues of legally defensible small and minority business enterprise (SBE and MBE) programs, disparity studies, pre-disparity studies, and related issues. The Committee directed staff to pursue an engagement with MGT to assist the City in conducting an initial review of its procurement practices, and to make recommendations for improvements. In April 2008, the City contracted with MGT to conduct the review of its Procurement and Small Business Enterprise (SBE) Program. The primary focus of the study is to determine what race-neutral techniques might be useful for the City to increase the diversity of the pool of vendors utilized by the City.

Please note, the following report is not a disparity study sufficient to justify a minority- and women-owned business enterprise (M/WBE) program. More detailed findings and recommendations, along with associated best practices, are located in **Chapter 5.0** of this report.

E.1 KEY FINDINGS

FINDING E-1: Legal Review

The key results from the legal review are:

- Local government minority business programs are subject to strict scrutiny by the federal courts. Strict scrutiny means that an agency must have a compelling interest, that is, a strong basis in evidence of exclusionary barriers associated with race. This compelling interest can be based on discrimination by the agency itself, or on discrimination by the private sector if the agency is a passive participant in such private discrimination. The Eleventh Circuit, which covers Pensacola, has not upheld an MBE program under strict scrutiny in the last 15 years.
- Diversity has not been found to serve as a compelling interest for an MBE program by the federal courts.
- A compelling interest is not required for an SBE program.
- If a strong basis in evidence is found for an MBE program, that program must be narrowly tailored to serve that compelling interest. Key elements of narrow tailoring in the Eleventh Circuit include considering race-neutral alternatives, reducing the burden on third parties, the flexibility and duration of the remedy, and the relationship of program goals to business availability. The federal

disadvantaged business enterprises (DBE) program has been found by several circuit courts to be narrowly tailored.

FINDING E-2: Minority Business Availability

Different data sources provides different estimates of the absolute number and percentage of available minority businesses. Key findings for minority business availability in the Pensacola Metropolitan Statistical Area (MSA) are the following:

- There were 70 African American-owned professional services firms (2.1 percent of all professional service firms) and 166 African American-owned construction firms (3.8 percent of all construction firms) in the 2002 *Survey of Business Owners* data from the United States (U.S.) Census Bureau.
- There were 73 firms in the City *African American Business Directory*.
- There were 42 firms owned by African Americans in the February 2008 Escambia County Minority and Women Vendors List.
- There were 122 minority firms in the U.S. Small Business Administration (SBA) Central Contract Registry (CCR) in the Pensacola MSA. Sixteen of these minority firms had a construction bonding level per contract of greater than \$1 million. Twenty-eight of these firms had revenue in excess of \$1 million.
- There were 62 DBEs in the Florida Department of Transportation (FDOT) District 3, which includes Pensacola and Tallahassee, in August 2008.
- There were 47 African American vendors (0.3 percent of the total) in the Pensacola vendor database in August 2008.

FINDING E-3: Small and Minority Business Utilization

- Minorities were awarded approximately 1 percent of the total dollars expended by the City during the study period, about \$2.9 million.
- Eight African American firms were utilized by the City over the study period, about 0.5 percent of the number of firms utilized.
- African American-owned firms won \$80,490 in subcontracts over the study period, 3.2 percent of total SBE subcontracts.
- SBEs received \$16.4 million on City projects from FY2005 through FY2007, 6.27 percent of City spending.
- African American-owned SBE firms received \$373,789 in prime and subcontracts, 0.14 percent of City spending over the same time period.
- The City airport reported that 10 percent of spending was with DBEs in FY2002 and FY2003.

E.2 KEY RECOMMENDATIONS

RECOMMENDATION E-1: Construction Management, Requests for Proposals

Using a request for proposal (RFP) process can provide the flexibility for including M/WBE participation in prime contractor requirements and selection. One of the nonfinancial criteria can be the proposer's approach to and past history with M/WBE subcontractor utilization, as well as female and minority workforce participation.

RECOMMENDATION E-2: Bidder Rotation

Some political jurisdictions use bidder rotation schemes to limit habit purchases from majority firms and to ensure that M/WBEs have an opportunity to bid along with majority firms. The City should review areas where bidder rotation may be established to increase M/WBE prime utilization.

COMMENDATION AND RECOMMENDATION E-3: SBE Program

The City should be commended for establishing an SBE program. A strong SBE program is central to maintaining a narrowly-tailored program to promote M/WBE utilization. In particular, the City should focus on increasing M/WBE utilization through the SBE program. Possible measures include set asides, bid preferences, department goals, and mandatory subcontracting.

RECOMMENDATION E-4: Annual Aspirational SBE and M/WBE Goals

The City should set annual aspirational goals by business category, not rigid project goals. To establish a benchmark for goal setting, goals should be based on relative M/WBE availability.¹ The primary means for achieving these aspirational goals should be an SBE program, race-neutral joint ventures, bidder rotation, outreach, race-neutral good faith efforts, and adjustments in the City procurement policy.

RECOMMENDATION E-5: Good Faith Efforts

The City should review the good faith effort requirements in its contracts. The core theme should be that prime contractors should document their outreach efforts to subcontractors and the reasons why they may have rejected qualified M/WBEs who were the low-bidding subcontractors. Accordingly, the following narrow tailoring elements should be considered:

- Good faith effort requirements should apply to both M/WBE and nonminority prime contractors.
- A documented excessive subcontractor bid can be a basis for not subcontracting with an M/WBE.

¹ The M/WBE aspirational goal is 80 percent of availability. These aspirational goals are set below estimated M/WBE availability. The 80 percent is derived from the concept that if M/WBE utilization is less than 80 percent, then disparity is substantial. This conservative adjustment reflects a concern that the program errs on the side of narrow tailoring. In principle, goals can be slightly above estimated M/WBE availability.

- A documented record of poor performance can be a basis for not subcontracting with an M/WBE.²

COMMENDATION AND RECOMMENDATION E-6: Economic Development

The City should be commended for its efforts at including MBEs in housing rehabilitation and the Maritime Park. The City should extend its SBE ordinance to private sector projects subsidized with City funds.

² The last two elements were adopted by the North Carolina Department of Transportation (NCDOT). 19A NCAC 02D.1110(7).

1.0 INTRODUCTION

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1.1 Background

In late 2007, the City Council of the City of Pensacola (City) identified the need to review the City's procurement practices to improve participation of small and minority businesses as a priority goal. In December 2007, MGT was invited to appear before the Committee of the Whole (Committee) to discuss the firm's experience and provide an overall orientation regarding the issues of legally defensible small and minority business enterprise programs, disparity studies, pre-disparity studies, and related issues. The Committee directed staff to pursue an engagement with MGT to assist the City in conducting an initial review of its procurement practices, and to make recommendations for improvements. In April 2008, the City contracted with MGT to conduct the review of its Procurement and Small Business Enterprise (SBE) Program. The primary focus of the study is to determine what race neutral techniques might be useful for the City to increase the diversity of the pool of vendors utilized by the City.

Please note, the following report is not a disparity study sufficient to justify an M/WBE program. More detailed findings and recommendations, along with associated best practices, are located in **Chapter 5.0** of this report.

1.2 Overview of Study Approach

MGT followed a carefully designed work plan that allowed study team members to review and determine estimates for market area, availability, and utilization with regard to small, minority-, and woman-owned business enterprise (S/M/WBE) participation. The final work plan included the following major tasks:

- Conducting a legal review and analysis.
- Reviewing policies, procedures, and programs.
- Reviewing the purchasing and SBE programs.
- Establishing data parameters.
- Conducting data assessment and collection.
- Conducting market area and utilization estimates.
- Determining estimates regarding the availability of qualified firms.
- Identifying race- and gender-neutral remedies.
- Developing recommendations and an implementation plan.
- Preparing the final report for this study.

1.3 Report Organization

In addition to this introductory chapter, this report consists of:

- **Chapter 2.0** – a review of the City's legal background/climate for S/M/WBE programs.

- **Chapter 3.0** – a review of the City’s procurement policies and procedures and an analysis of its S/M/WBE program and race- and gender-neutral efforts.
- **Chapter 4.0** – a description of the methodology used to develop estimates of the City’s relevant market area, vendor utilization by the City, and the availability of firms for procurement activities.
- **Chapter 5.0** – a summary of the findings presented in previous chapters as well as recommendations and an implementation plan.

We recommend reading the report in its entirety to understand the basis for the recommendations presented in **Chapter 5.0**.

2.0 LEGAL REVIEW

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2.1 Introduction

This chapter provides legal background for the City of Pensacola (City). The material that follows does not constitute legal advice to the City on minority- and woman-owned business enterprise (M/WBE) programs, affirmative action, or any other matter. Instead, it provides a context for the statistical and anecdotal analyses that appear in subsequent chapters of this report.

The Supreme Court decision in *City of Richmond v. J.A. Croson Company*¹ (*Croson*) and later cases have established and applied the constitutional standards for an affirmative action program. This chapter identifies and analyzes those decisions, summarizing how courts evaluate the constitutionality of race- and gender-specific programs. Decisions of the Eleventh Circuit, which includes Pensacola, offer the most directly binding authority, but where those decisions leave issues unsettled, the review considers decisions from other circuits.

By way of a preliminary outline, the courts have determined that an affirmative action program involving governmental procurement of goods or services must meet the following standards:

- A remedial, race-conscious program is subject to strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
 - Strict scrutiny has two basic components: a compelling governmental interest in the program and narrow tailoring of the program.
 - To survive the strict scrutiny standard, a remedial, race-conscious program must be based on a compelling governmental interest.
 - * “Compelling interest” means the government must prove past or present racial discrimination requiring remedial attention.
 - * There must be a specific “strong basis in the evidence” for the compelling governmental interest.
 - * Statistical evidence is preferred and possibly necessary as a practical matter; anecdotal evidence is permissible and can offer substantial support, but it more than likely cannot stand on its own.
 - A program designed to address the compelling governmental interest must be narrowly tailored to remedy the identified discrimination.
 - * “Narrow tailoring” means the remedy must fit the findings.

¹ 488 U.S. 469 (1989).

- * The evidence showing compelling interest must guide the tailoring very closely.
- * Race-neutral alternatives must be considered first.
- A lesser standard, intermediate judicial scrutiny, applies to programs that establish gender preferences.
 - * To survive the intermediate scrutiny standard, a remedial, gender-conscious program must serve important governmental objectives and be substantially related to the achievement of those objectives.
 - * The evidence does not need to be as strong and the tailoring does not need to be as specific under the lesser standard.

2.2 Standards of Review for Race- and Gender-Specific Programs

2.2.1 Race-Specific Programs: The Croson Decision

Croson established the framework for testing the validity of programs based on racial discrimination. In 1983, the Richmond City Council (the Council) adopted a Minority Business Utilization Plan (the Plan) following a public hearing in which citizens testified about historical societal discrimination. In adopting the Plan, the Council also relied on a study indicating that “while the general population of Richmond was 50 percent black, only 0.67 percent of the City’s prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983.”²

The evidence before the Council also established that a variety of state and local contractor associations had little or no minority business membership. The Council relied on statements by a Council member whose opinion was that “the general conduct of the construction industry in this area and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.”³ There was, however, no direct evidence of race discrimination on the part of the City in its contracting activities, and no evidence that the City’s prime contractors had discriminated against minority-owned subcontractors.⁴

The Plan required the City’s prime contractors to subcontract at least 30 percent of the dollar amount of each contract to one or more minority-owned business enterprise (MBE). The Plan did not establish any geographic limits for eligibility. Therefore, an otherwise qualified MBE from anywhere in the United States could benefit from the 30 percent set-aside.

J.A. Croson Company, a non-MBE mechanical plumbing and heating contractor, filed a lawsuit against the city of Richmond alleging that the Plan was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment. After a considerable record of litigation and appeals, the Fourth Circuit struck down the Richmond Plan and the Supreme Court affirmed this decision.⁵ The Supreme Court determined that strict scrutiny was the appropriate standard of judicial review for MBE programs, so that a race-conscious

² Id. at 479-80.

³ Id. at 480.

⁴ Id.

⁵ Id. at 511.

program must be based on a compelling governmental interest and be narrowly tailored to achieve its objectives. This standard requires a firm evidentiary basis for concluding that the underutilization of minorities is a product of past discrimination.⁶

2.2.2 Gender-Specific Programs

The Supreme Court has not addressed the specific issue of a gender-based classification in the context of a woman-owned business enterprise (WBE) program. *Croson* was limited to the review of an MBE program. In evaluating gender-based classifications, the Court has used what some call “intermediate scrutiny,” a less stringent standard of review than the “strict scrutiny” applied to race-based classifications. Intermediate scrutiny requires that classifying persons on the basis of sex “must carry the burden of showing an exceedingly persuasive justification for the classification.”⁷ The classification meets this burden “only by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”⁸

Several federal courts have applied intermediate scrutiny to WBE programs and yet have found the programs to be unconstitutional.⁹ Nevertheless, in *Coral Construction v. King County*, the Ninth Circuit upheld a WBE program under the intermediate scrutiny standard.¹⁰ Even using intermediate scrutiny, the court in *Coral Construction* noted that some degree of discrimination must be demonstrated in a particular industry before a gender-specific remedy may be instituted in that industry. As the court stated, “the mere recitation of a benign, compensatory purpose will not automatically shield a gender-specific program from constitutional scrutiny.”¹¹ Indeed, one court has questioned the concept that it might be easier to establish a WBE program than it is to establish an MBE program.¹²

More recently, the Tenth Circuit, on the second appeal in *Concrete Works of Colorado v. City of Denver (Concrete Works IV)*,¹³ approved the constitutionality of a WBE program based on evidence comparable to that supporting an MBE program that the court also upheld in the same decision. Unlike *Coral Construction*, however, *Concrete Works IV* offered no independent guidance on the level of evidence required to support a WBE program.

⁶ Id. at 493.

⁷ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)); see also *United States v. Virginia*, 518 U.S. 515, 531 (1996), *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60 (2001).

⁸ *Mississippi Univ. for Women*, *supra*, at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)); see also *Virginia*, *supra*, at 533, *Nguyen*, *supra*, at 60.

⁹ See *Assoc. Util. Contrs. v. Baltimore*, 83 F. Supp. 2d 613 (D Md 2000); *Eng’g Contrs. Ass’n of S. Florida, Inc. v. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001). The Eighth Circuit did not address the application of intermediate scrutiny to WBE participation in the federal DBE program in *MnDOT*, 345 F.3d 964 (8th Cir. 2003); cert. denied, 158 L.Ed. 2d 729 (2004) – 541 U.S. 1041 *Sherbrooke Turf, Inc. v.*

¹⁰ *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

¹¹ Id. at 932.

¹² *Builders Ass’n of Greater Chicago*, 256 F.3d at 644. See also *States Paving Co. v. Washington State DOT*, 407 F.3d 983, 991, n.6 (9th Cir. 2005) (rejecting need for separate analysis of WBE program under intermediate scrutiny).

¹³ 321 F.3d 950 (10th Cir. 2003).

2.2.3 An Overview of the Applicable Case Law

Croson did not find a compelling justification for a complete MBE program. *Croson* found the city of Richmond's evidence to be inadequate as a matter of law. Nevertheless, more recent cases in other federal circuits have addressed applications of the law that were not considered in *Croson*. Thus, it becomes necessary to look to the decisions of other federal circuits to predict what level of evidence might be required to establish an affirmative action program.

The discussion in this review will also attend closely to the most relevant decisions in the area of government contracting. Justice O'Connor, distinguishing her majority opinion on affirmative action in law school admissions from her opinions in government contracting cases, wrote:

*Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.*¹⁴

Further, some caution must be exercised in relying upon opinions of the federal district courts, which make both findings of fact and holdings of law. As to holdings of law, the district courts are ultimately subject to rulings by their circuit courts. As to matters of fact, their decisions depend heavily on the precise record before them, in these cases frequently including matters such as evaluations of the credibility and expertise of witnesses. Such findings are not binding precedents outside of their districts, even if they indicate the kind of evidence and arguments that might succeed elsewhere.

Finally, the ways in which municipalities participate in national disadvantaged business enterprise (DBE) programs is a specialized issue distinct from that of supporting municipal programs, even if the same kinds of evidence and same levels of review apply. In *Adarand Constructors, Inc. v. Peña*,¹⁵ the Supreme Court did decide that federal DBE programs should be examined by the same strict scrutiny standard that *Croson* mandated for state and local programs. Nevertheless, cases considering national DBE programs have many important distinctions from cases considering municipal programs, particularly when it comes to finding a compelling governmental interest.¹⁶ The national DBE cases have somewhat more application in determining whether a local program is narrowly tailored (to be discussed in Section 2.6).¹⁷

¹⁴ *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

¹⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200-227 (1995).

¹⁶ See *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147-1165 (10th Cir. 2000), cert. granted in part sub nom., *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 967 (2001); cert. dismissed as improvidently granted, 534 U.S. 103 (2001); *Sherbrooke Turf*, 345 F.3d at 970-1.

¹⁷ Recently the Ninth Circuit ruled in *Western States Paving Co. v. Washington State DOT* that specific evidence of discrimination was necessary at a state level in order for the implementation of race-conscious goals to be narrowly tailored. *States Paving Co.*, 407 F.3d at 997-8. In *Northern Contracting v. Illinois DOT*, the district court, while not striking down the program, also required the Illinois DOT to develop local evidence of discrimination sufficient to justify the imposition of race-conscious goals. In this sense, for these cases narrow tailoring still requires factual predicate information to support race-conscious program elements in a DBE program. *N. Contr. v. Illinois*, No. 00 4515 (ND IL 2004), decided 3/3/04 (2004 U.S. Dist. LEXIS 3226) 139-160.

Thus, the majority of this review will be based on decisions of the federal circuit courts applying *Croson* to city or county programs designed to increase participation by M/WBEs in government contracting. This is not a large body of case law. While other cases are useful as to particular points, only a small number of circuit court cases have reviewed strictly local M/WBE programs and given clear, specific, and binding guidance about the adequacy of a complete factual record including thorough, local disparity studies with at least some statistical analysis. Further, in one of the three directly applicable circuit court cases, the Third Circuit evaded the issue of compelling justification after lengthy discussion, holding that the Philadelphia M/WBE program was unconstitutional because it was not narrowly tailored.¹⁸

Ultimately, only two circuit court decisions since *Croson* have passed definitively on thorough, strictly local disparity studies: *Engineering Contractors Association of South Florida, Inc.*,¹⁹ and *Concrete Works IV*.²⁰ In *Engineering Contractors*, the Eleventh Circuit ultimately upheld the district court finding that Dade County's disparity studies were not adequate to support an M/WBE program, at least in the face of rebuttal evidence.²¹ By contrast, in *Concrete Works IV*, the Tenth Circuit, after holding that the district court had used an improper standard for weighing the evidence, went on to evaluate the evidence and determine that it was adequate as a matter of law to establish a compelling justification for Denver's program. The Supreme Court refused to hear the appeal in *Concrete Works IV*,²² although the refusal in itself has no precedential effect. The dissent to that denial, written by Justice Scalia with the Chief Justice joining, argues that these cases may mark a split in approach among the circuits that will need to be reconciled.

2.3 To Withstand Strict Scrutiny, an MBE Program Must Be Based on Thorough Evidence Showing a Compelling Governmental Interest

For government contracting programs, courts have yet to find a compelling governmental interest for affirmative action other than remedying discrimination in the relevant marketplace. In other arenas, diversity has served as a compelling governmental interest for affirmative action. For example, the Ninth Circuit upheld race-based admission standards at an experimental elementary school in order to provide a more real world education experience.²³ More recently, in *Petit v. City of Chicago*, the Seventh Circuit relied on *Grutter v. Bollinger* in stating that urban police departments had "an even more compelling need for diversity" than universities and upheld the Chicago program "under the *Grutter* standards."²⁴ The recent holding that other compelling interests may support affirmative action does not yet appear to have any application to public contracting.²⁵

¹⁸ *Contractors Ass'n of E. Penn. Inc. v. City of Philadelphia*, 91 F.3d 586, 605 (3rd Cir. 1996).

¹⁹ 122 F.3d 895.

²⁰ 321 F.3d 950.

²¹ Compare *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990), an earlier decision of the Eleventh Circuit reversing summary judgment against an MBE program where more limited statistical evidence was found adequate to require a trial on the merits in the face of a relatively weak challenge.

²² *Concrete Works of Colo. v. City of Denver*, Scalia, J. dissenting, 540 U.S. 1027, 1027-35 (2003).

²³ *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999).

²⁴ *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003).

²⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003). For an argument that other bases could serve as a compelling interest in public contracting, see Michael K. Fridkin, "The Permissibility of Non-Remedial Justifications for Racial Preferences in Public Contracting," 24 *N. Ill. U. L. Rev.* 509-510 (Summer 2004).

Croson identified two necessary factors for establishing racial discrimination sufficiently to demonstrate a compelling governmental interest in establishing an M/WBE program. First, there needs to be identified discrimination in the relevant market.²⁶ Second, “the governmental actor enacting the set-aside program must have somehow perpetuated the discrimination to be remedied by the program,”²⁷ either actively or at least passively with the “infusion of tax dollars into a discriminatory industry.”²⁸

Although the Supreme Court in *Croson* did not specifically define the methodology that should be used to establish the evidentiary basis required by strict scrutiny, the Court did outline governing principles. Lower courts have expanded the Supreme Court’s *Croson* guidelines and have applied or distinguished these principles when asked to decide the constitutionality of state, county, and city programs that seek to enhance opportunities for minorities and women.

2.3.1 Post-Enactment Evidence

The Supreme Court in *Croson* found pre-enactment evidence of discrimination insufficient to justify the program. The defendant in *Croson* did not seek to defend its program based on post-enactment evidence. However, following *Croson*, a number of circuits did defend the use of post-enactment evidence to support the establishment of a local public affirmative action program.²⁹ Some cases required both pre-enactment and post-enactment evidence.³⁰

The Supreme Court case in *Shaw v. Hunt*³¹ raised anew the issue of post-enactment evidence in defending local public sector affirmative action programs. *Shaw* involved the use of racial factors in drawing voting districts in North Carolina. In *Shaw*, the Supreme Court rejected the use of reports providing evidence of discrimination in North Carolina because the reports were not developed before the voting districts were designed. Thus, the critical issue was whether the legislative body believed that discrimination had existed before the districts were drafted.³² Following the *Shaw* decision, two districts courts rejected the use of post-enactment evidence in the evaluation of the constitutionality of local minority business programs.³³

2.3.2 Agency Evidence

An agency contemplating an M/WBE program should have evidence expressly and specifically linked to the agency itself. The Fifth Circuit criticized the city of Jackson for commissioning a disparity study but not adopting the findings of the study.³⁴ A district court in New Jersey struck down a set-aside involving New Jersey casino licenses that was based

²⁶ *Croson*, 488 U.S. at 492.

²⁷ *Coral Construction*, 941 F.2d at 916.

²⁸ *Id.*

²⁹ See *Eng’g Contrs. Ass’n of S. Florida, Inc. v. Dade County*, 122 F.3d 895, 911 (11th Cir. 1997); *Contrs. Ass’n of E. Philadelphia v. Philadelphia*, 6 F.3d 990, 1009 n.18 (2nd Cir. 1993); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994).

³⁰ See *Coral Construction Co. v. King County*, 941 F.2d 910-920 (9th Cir. 1991).

³¹ *Shaw v. Hunt*, 517 U.S. 899 (1996).

³² *Id.* at 910.

³³ *AUC v. Baltimore*, 83 F. Supp. 2d 613, 620-22 (D. Md. 2000); *West Tenn. ABC v. Memphis City Schools*, 64 F. Supp. 2d 714, 718-21 (W.D. Tenn. 1999).

³⁴ *Scott v. City Of Jackson*, 199 F.3d 206, 218 (1999).

on the factual predicate study for the state of New Jersey M/WBE program, which did not cover the casino industry.³⁵

2.3.3 Outreach Programs

There is some debate about whether or not outreach programs are subject to strict scrutiny. In *Peightal v. Metropolitan Dade County*, the Eleventh Circuit treated recruiting and outreach efforts as “race-neutral” policies.³⁶ Other lower court cases have stated that expanding the pool disadvantages no one and thus a distinction should be made between inclusive and exclusive outreach.³⁷ Similarly, in *Allen v. Alabama State Board of Education*, a case involving teacher certification examinations, the Eleventh Circuit stated that the,

*Board must be conscious of race in developing the examination, choosing test items to minimize any racially disparate impact within the framework of designing a valid and comprehensive teaching examination. Nothing in Adarand requires the application of strict scrutiny to this sort of race-consciousness.*³⁸

However, in *Virdi v. DeKalb County School District*, litigation involving a minority vendor program (MVP), the Eleventh Circuit stated that,

*It is well settled that “all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny”. Grutter v. Bollinger, 539 U.S. 306, 326, 123 S. Ct. 2325, 2337 (2003) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227, 115 S.Ct. 2097, 2113 (1995)). To the extent that Defendants argue that the MVP did not contain racial classifications because it did not include set-asides or mandatory quotas, we note that strict scrutiny applies to all racial classifications, not just those creating binding racial preferences. The MVP includes racial classifications. It is therefore subject to strict scrutiny.*³⁹

2.3.4 Prime Contracting and Subcontracting

Typically, agencies only have subcontractor programs, not race conscious prime contractor set asides or bid preferences, but some studies have only analyzed prime contracting. For example, the Fifth Circuit noted, with regard to a disparity study for the city of Jackson, Mississippi, that, “...the study was restricted to the letting of prime contracts by the City under the City’s Program; it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City’s construction projects.”⁴⁰ Similarly, in a more recent case in the Eleventh Circuit addressing an MBE program of the city of Augusta, Georgia, the federal district court stated that, “The discrimination the City is attempting to justify operates between subcontractors. Only evidence showing that subcontractors of race “A” are discriminated against to the advantage of subcontractors of race “B” justifies governmental action attempting to cure the burden by

³⁵ *Ass’n. for Fairness in Business, Inc. v. New Jersey*, 82 F. Supp. 2d 353, 361 (D.N.J. 2000).

³⁶ 26 F.3d 154, 1557-58 (11th Cir. 1994).

³⁷ *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1551-52 (M.D. Ala. 1995).

³⁸ 164 F.3d 1347, 1352 (11th Cir.1999).

³⁹ 135 Fed. Appx. 262, 267, 2005 U.S. App. LEXIS 11203 (11th Cir. 2005).

⁴⁰ *Scott v. Jackson*, 199 F.3d 206, 218 (5th Cir. 1999).

favoring subcontractors of race A.”⁴¹

2.3.5 Disabled Business Enterprise

Disabled business enterprise programs are quite common in federal, state, and local government. Section 15(g) of the Small Business Act provides for a goal of not less than 3 percent utilization of service-disabled veteran businesses in federal contracting.⁴² Section 36 of that Act grants the authority to set-aside for service-disabled veteran-owned businesses.⁴³ These policies were strengthened and reaffirmed in October 2004, in Executive Order 13360. The U.S. Army alone projects \$1.8 billion in set-asides to service-disabled veteran-owned businesses in FY2008.⁴⁴

Disabled business enterprise programs are also common at the state and local government level and are often a component of an M/WBE program.⁴⁵ Some local government agencies, in particular California and Connecticut, also set aside government contracts for disabled business enterprises or disabled veteran’s business enterprises. California follows the federal program with a 3 percent disabled goal.⁴⁶ The state of Connecticut set aside 25 percent of its project for SBEs and then 25 percent of the SBE program is for certified M/WBEs. Disabled firms are classified as minority firms for purposes of the rule.⁴⁷ There are also state laws granting preferences of some sort to the disabled, and particularly the service disabled veterans.⁴⁸

While there has been an extensive body of case law involving the Americans for Disabilities Act, there have been no federal court cases challenging the constitutionality of disabled business enterprises under the Equal Protection clause. There are at least two reasons for this absence of a court record. First, at the state and local government level, these programs are typically very small, having only a handful of participants. Second, and more importantly, the U.S. Supreme Court has not ruled that the disabled are a suspect class and thus government programs addressing the disabled are not subject to strict scrutiny, or even intermediate scrutiny.⁴⁹ Instead programs both favoring and hampering the disabled are subject to the rational relationship test, the lowest level of judicial scrutiny. Nevertheless, this report will separately analyze data on disabled business enterprises.

⁴¹ *Thompson Building Wrecking Company v. Augusta*, 2007 U.S. Dist. Lexis 27127 (Sd Ga 2007), at 20-21.

⁴² 15 U.S.C. 644(g).

⁴³ 15 U.S.C. 657f.

⁴⁴ U.S. Army Office of Small Business Programs, www.vetbiz.gov/library/Army.pdf

⁴⁵ See North Carolina, Executive Order #150 and General Statutes 143-48 & 143-128.2(g)(1)(2)(3), Philadelphia, Executive Order 05 Relating To The Participation Of Minority, Women And Disabled Businesses In City Contracts, March 2005; Rhode Island GL 37-2.2-3, (procurement of Goods and services are available from certified Rhode Island Disability Business Enterprises (dbes) whose workforce consists of more than 75% persons with disabilities or certified nonprofit rehabilitation facilities); The regional Texas certification agencies certify for disabled business enterprises.

⁴⁶ California Executive Order D-43-01, June 22, 2001. California Disabled Veteran Business Enterprise Set Aside Program (establishes a goal for state entities to award at least 3% of their contracts for materials, supplies, equipment, alterations, repairs, or improvements to disabled veteran business enterprises. A 2001 act (Assembly Bill 941) requires the departments subject to this goal to appoint disabled veteran business enterprise advocates).

⁴⁷ Executive Order D-37-1

⁴⁸ See Fl. Stat. _295.07(1) (1991) (exempting disabled veterans from specific hiring procedures and employment exams for state jobs); Fl. Stat. _196.031 (1991) (hiring preferences for disabled veterans).

⁴⁹ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (no rational basis for discriminatory application of special use permit for group home for mentally disabled).

2.4 Sufficiently Strong Evidence of Significant Statistical Disparities Between Qualified Minorities Available and Minorities Utilized Will Satisfy Strict Scrutiny and Justify a Narrowly Tailored M/WBE Program

The Supreme Court in *Croson* stated that “where gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination.”⁵⁰ But the statistics must go well beyond comparing the rate of minority presence in the general population to the rate of prime construction contracts awarded to MBEs. The Court in *Croson* objected to such a comparison, indicating that the proper statistical evaluation would compare the percentage of qualified MBEs in the relevant market with the percentage of total municipal construction dollars awarded to them.⁵¹

To meet this more precise requirement, courts have accepted the use of a disparity index.⁵² The Supreme Court in *Croson* recognized statistical measures of disparity that compared the number of qualified and available M/WBEs with the rate of municipal construction dollars actually awarded to M/WBEs in order to demonstrate discrimination in a local construction industry.⁵³ The Ninth Circuit has stated, “In our recent decision [*Coral Construction*] we emphasized that such statistical disparities are ‘an invaluable tool’ in demonstrating the discrimination necessary to establish a compelling interest.”⁵⁴

2.4.1 Determining Availability

To perform proper disparity analysis, the government must determine “availability”—the number of qualified minority contractors willing and able to perform a particular service for the municipality. In *Croson*, the Court stated:

*Where there is 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 the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.*⁵⁵

An accurate determination of availability also permits the government to meet the requirement that it “determine the precise scope of the injury it seeks to remedy” by its program.⁵⁶ Following *Croson*’s statements on availability, lower courts have considered how legislative bodies may determine the precise scope of the injury sought to be remedied by an MBE program. Nevertheless, the federal courts have not provided clear guidance on the best data sources or techniques for measuring M/WBE availability.

Different forms of data used to measure availability give rise to particular controversies. Census data have the benefit of being accessible, comprehensive, and objective in measuring availability. In *Contractors Ass’n of Eastern Pennsylvania, Inc.*, the Third Circuit,

⁵⁰ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Division v. United States*, 433 U.S. 299, 307-308 (1977).

⁵¹ *Id.* at 502.

⁵² See *Engineering Contractors Ass’n of South Florida, Inc.*, 122 F.3d at 914; *Concrete Works IV*, 321 F.3d at 964-69.

⁵³ *Croson*, 488 U.S. at 503-504.

⁵⁴ *Ass’d. General Contrs. of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991) (*AGCC II*) citing *Coral Construction*, 941 F.2d at 918; see also *Croson*, 488 U.S. at 509.

⁵⁵ *Croson*, 488 U.S. at 509 (emphasis added).

⁵⁶ *Id.* at 498.

while noting some of the limitations of census data, acknowledged that such data could be of some value in disparity studies.⁵⁷ In that case, the city of Philadelphia's consultant calculated a disparity using data showing the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of African American construction firms. The consultant combined these data with data from the Census Bureau on the number of construction firms in the Philadelphia Standard Metropolitan Statistical Area.⁵⁸ Despite the district court's reservations about mixing data sources, the Third Circuit appeared to have been prepared to accept such data had it ruled on the showing of a compelling interest.

At least one commentator has suggested using bidder data to measure M/WBE availability,⁵⁹ but *Croson* does not require the use of bidder data to determine availability. In *Concrete Works*, in the context of the plaintiffs' complaint that the city of Denver had not used such information, the Tenth Circuit noted that bid information also has its limits.⁶⁰ Firms that bid may not be qualified or able, and firms that do not bid may be qualified and able, to undertake agency contracts.

2.4.2 Racial Classifications

In determining availability, choosing the appropriate racial groups to consider becomes an important threshold interest.⁶¹ In *Croson*, the Supreme Court criticized the city of Richmond's inclusion of "Spanish speaking, Oriental, Indian, Eskimo, or Aleut persons" in its affirmative action program.⁶² These groups had not previously participated in city contracting and "The 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."⁶³ To evaluate availability properly, data must be gathered for each racial group in the marketplace. The Federal Circuit has also required that evidence as to the inclusion of particular groups be kept reasonably current.⁶⁴

2.4.3 Relevant Market Area

Another issue in availability analysis is the definition of the relevant market area. Specifically, the question is whether the relevant market area should be defined as the area from which a specific percentage of purchases is made, the area in which a specific percentage of willing and able contractors may be located, or the area determined by a fixed geopolitical boundary.

The Supreme Court has not yet established how the relevant market area should be defined, but some circuit courts have done so, including the Tenth Circuit in *Concrete Works II*, the first appeal in the city of Denver litigation.⁶⁵ *Concrete Works of Colorado*, a non-M/WBE construction company, argued that *Croson* precluded consideration of discrimination evidence from the six-county Denver Metropolitan Statistical Area (MSA), so Denver should use data only from within the city and county of Denver. The Tenth Circuit, interpreting

⁵⁷ *Contractors Assn v. Philadelphia*, 91 F.3d 586, 604 (3rd Cir 1996).

⁵⁸ *Contractors Association of Eastern Pennsylvania, Inc.*, 91 F.3d at 604.

⁵⁹ LaNoue, George R., "Who Counts? Determining the Availability of Minority Businesses for Public Contracting After *Croson*," 21 *Harv. J. L. and Pub. Pol.* 793, 833-834 (1998).

⁶⁰ *Concrete Works IV*, 321 F.3d at 983-84.

⁶¹ Racial groups, as the term is used herein, include both racial and ethnic categories.

⁶² 488 U.S. at 506.

⁶³ *Id.*

⁶⁴ *Rothe Development Co. v. U.S. Dept. of Defense*, 262 F.3d 1306, 1323 (Fed. Cir. 2003).

⁶⁵ *Concrete Works II*, 36 F.3d at 1520.

Croson, concluded, “The relevant area in which to measure discrimination . . . is the local construction market, but that is not necessarily confined by jurisdictional boundaries.”⁶⁶ The court further stated, “It is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program we scrutinize, but here Denver’s contracting activity, insofar as construction work is concerned, is closely related to the Denver MSA.”⁶⁷

The Tenth Circuit ruled that because more than 80 percent of Denver Department of Public Works construction and design contracts were awarded to firms located within the Denver MSA, the appropriate market area should be the Denver MSA, not the city and county of Denver alone.⁶⁸ Accordingly, data from the Denver MSA were “adequately particularized for strict scrutiny purposes.”⁶⁹

2.4.4 Firm Qualifications

Another availability consideration is whether M/WBE firms are qualified to perform the required services. In *Croson*, the Supreme Court noted that although gross statistical disparities may demonstrate *prima facie* proof of discrimination, “when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”⁷⁰ The Court, however, did not define the test for determining whether a firm is qualified.

Considering firm qualifications is important not only to assess whether M/WBEs in the relevant market area can provide the goods and services required, but also to ensure proper comparison between the number of qualified M/WBEs and the total number of similarly qualified contractors in the marketplace.⁷¹ In short, proper comparisons ensure the required integrity and specificity of the statistical analysis. For instance, courts have specifically ruled that the government must examine prime contractors and subcontractors separately when the M/WBE program is aimed primarily at one or the other.⁷²

2.4.5 Willingness

Croson requires that an “available” firm must be not only qualified but also willing to provide the required services.⁷³ In this context, it can be difficult to determine whether a business is willing. Courts have approved including businesses in the availability pool that may not be on the government’s certification list. In *Concrete Works II*, Denver’s availability analysis indicated that while most MBEs and WBEs had never participated in City contracts, “almost all firms contacted indicated that they were interested in [municipal work].”⁷⁴ In *Contractors Association of Eastern Pennsylvania, Inc.*, the Third Circuit explained, “[i]n the absence of some reason to believe otherwise, one can normally assume that participants in a market

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Croson*, 488 U.S. at 501 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308, n.13 (1977)).

⁷¹ See *Hazelwood School Dist.*, 433 U.S. at 308; *Contractors Ass’n*, 91 F.3d at 603.

⁷² *W. H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir.1999).

⁷³ *Croson*, 488 U.S. at 509.

⁷⁴ *Concrete Works II*, 36 F.3d at 1529, quoting, *Appellant’s Appendix*.

with the ability to undertake gainful work will be ‘willing’ to undertake it.”⁷⁵ The court went on to note:

*[P]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. . . . [I]f there has been discrimination in City contracting, it is to be expected that [African American] firms may be discouraged from applying, and the low numbers [of African American firms seeking to prequalify for City-funded contracts] may tend to corroborate the existence of discrimination rather than belie it.*⁷⁶

Even so, the strongest possible disparity study would also present information about the willingness of M/WBEs to perform the required services.

2.4.6 Ability

Another availability consideration is whether the firms being considered are able to perform a particular service. Those who challenge affirmative action often question whether M/WBE firms have the “capacity” to perform particular services.

The Eleventh Circuit accepted a series of arguments that firm size has a strong impact on “ability” to enter contracts, that M/WBE firms tend to be smaller, and that this smaller size, not discrimination, explains the resulting disparity.⁷⁷ By contrast, the Tenth Circuit in *Concrete Works II* and *IV* recognized the shortcomings of this treatment of firm size.⁷⁸ *Concrete Works IV* noted that the small size of such firms can itself be a result of discrimination.⁷⁹ The Tenth Circuit acknowledged the city of Denver’s argument that a small construction firm’s precise capacity can be highly elastic.⁸⁰ Under this view, the relevance of firm size may be somewhat diminished. Further, the Eleventh Circuit was dealing with a statute which itself limited remedies to M/WBEs that were smaller firms by definition.⁸¹

2.4.7 Statistical Evidence of Discrimination in Disparity Studies

While courts have indicated that anecdotal evidence may suffice without statistical evidence, no case without statistical evidence has been given serious consideration by any circuit court. In practical effect, courts require statistical evidence. Further, the statistical evidence needs to be held to appropriate professional standards.⁸²

The Eleventh Circuit has addressed the role of statistical significance in assessing levels of disparity in public contracting. Generally, disparity indices of 80 percent or higher—indicating close to full participation—are not considered significant.⁸³ The court referenced the Equal Employment Opportunity Commission’s disparate impact guidelines, which establish the 80 percent test as the threshold for determining a *prima facie* case of discrimination.⁸⁴

⁷⁵ *Contractors Association of Eastern Pennsylvania, Inc.*, 91 F.3d at 603 (in original quotation marks).

⁷⁶ *Id.* at 603-04.

⁷⁷ *Eng’g. Contr. of S. Florida, Inc.*, 122 F.3d at 917-18, 924.

⁷⁸ *Concrete Works II*, 36 F.3d at 1528-29; *Concrete Works IV*, 321 F.3d at 980-92.

⁷⁹ *Concrete Works IV*, 321 F.3d at 982.

⁸⁰ *Id.* at 981

⁸¹ *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 900.

⁸² See *Contrs. Ass’n of E. Pennsylvania, Inc.*, 91 F.3d at 599-601.

⁸³ *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 914.

⁸⁴ *Id.* at 914, citing 29 C.F.R. § 1607.4D (concerning the disparate impact guidelines and threshold used in employment cases).

According to the Eleventh Circuit, no circuit that has explicitly endorsed using disparity indices has held that an index of 80 percent or greater is probative of discrimination, but they have held that indices below 80 percent indicate “significant disparities.”⁸⁵

In support of the use of standard deviation analyses to test the statistical significance of disparity indices, the Eleventh Circuit observed that “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.”⁸⁶ With standard deviation analyses, the reviewer can determine whether the disparities are substantial or statistically significant, lending further statistical support to a finding of discrimination. On the other hand, if such analyses can account for the apparent disparity, the study will have little if any weight as evidence of discrimination.

Further, the interpretations of the studies must not assume discrimination has caused the disparities, but must account for alternative explanations of the statistical patterns.⁸⁷ The Third and Fifth Circuits have also indicated that statistics about prime contracting disparity have little, if any, weight when the eventual M/WBE program offers its remedies solely to subcontractors.⁸⁸

2.4.8 Anecdotal Evidence of Discrimination in Disparity Studies

Most disparity studies present anecdotal evidence along with statistical data. The Supreme Court in *Croson* discussed the relevance of anecdotal evidence and explained: “[E]vidence 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.”⁸⁹ Although *Croson* did not expressly consider the form or level of specificity required for anecdotal evidence, the Ninth Circuit has addressed both issues.

In *Coral Construction*, the Ninth Circuit addressed the use of anecdotal evidence alone to prove discrimination. Although King County’s anecdotal evidence was extensive, the court noted the absence in the record of any statistical data in support of the program. Additionally, the court stated, “While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a *systemic pattern of discrimination necessary for the adoption of an affirmative action plan*.”⁹⁰ The court concluded, by contrast, that “the combination of convincing anecdotal and statistical evidence is potent.”⁹¹

Regarding the appropriate form of anecdotal evidence, the Ninth Circuit in *Coral Construction* noted that the record provided by King County was “considerably more

⁸⁵ *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 914, citing *Contrs. Ass’n of E. Pennsylvania, Inc.*, 6 F.3d at 1005 (crediting disparity index of 4 percent) and *Concrete Works II*, 36 F.3d at 1524 (crediting disparity indices ranging from 0 percent to 3.8 percent).

⁸⁶ *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 914 quoting *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1556 n.16 (11th Cir. 1994) (quoting *Waisome v. Port Authority*, 948 F.2d 1370, 1376 (2nd Cir. 1991)).

⁸⁷ *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 922.

⁸⁸ *Contrs. Ass’n of E. Pennsylvania, Inc.*, 91 F.3d at 599 (3rd Cir.); *W.H. Schott Constr. Co.*, 199 F.3d at 218 (5th Cir.).

⁸⁹ *Croson*, 488 U.S. at 509.

⁹⁰ *Coral Construction*, 941 F.2d at 919 (emphasis added).

⁹¹ *Id.* See also *AGCC II*, 950 F.2d at 1414-1415.

extensive than that compiled by the Richmond City Council in *Croson*.⁹² The King County record contained “affidavits of at least 57 minority or [female] contractors, each of whom complain[ed] in varying degree[s] of specificity about discrimination within the local construction industry.”⁹³ The *Coral Construction* court stated that the M/WBE affidavits “reflect[ed] a broad spectrum of the contracting community” and the affidavits “certainly suggest[ed] that ongoing discrimination may be occurring in much of the King County business community.”⁹⁴

In *Associated General Contractors of California v. Coalition for Economic Equity (AGCC II)*, the Ninth Circuit discussed the specificity of anecdotal evidence required by *Croson*.⁹⁵ Seeking a preliminary injunction, the contractors contended that the evidence presented by the city of San Francisco lacked the specificity required by both an earlier appeal in that case and by *Croson*.⁹⁶ The court held that the City’s findings were based on substantially more evidence than the anecdotes in the two prior cases, and “were clearly based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as significant statistical disparities in the award of contracts.”⁹⁷

The court also ruled that the City was under no burden to identify specific practices or policies that were discriminatory.⁹⁸ Reiterating the City’s perspective, the court stated that the City “must simply demonstrate the existence of past discrimination with specificity; there is no requirement that the legislative findings specifically detail each and every instance that the legislative body ha[d] relied upon in support of its decision that affirmative action is necessary.”⁹⁹

Not only have courts found that a municipality does not have to specifically identify all the discriminatory practices impeding M/WBE utilization, but the Tenth Circuit in *Concrete Works IV* also held that anecdotal evidence collected by a municipality does not have to be verified. The court stated:

*There is no merit to [the plaintiff’s] argument that witnesses’ accounts must be verified to provide support for Denver’s burden. Anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions...Denver was not required to present corroborating evidence and [the plaintiff] was free to present its own witnesses to either refute the incidents described by Denver’s witnesses or to relate their own perceptions on discrimination in the Denver construction industry.*¹⁰⁰

⁹² *Coral Construction*, 941 F.2d at 917.

⁹³ *Id.* at 917-18.

⁹⁴ *Id.*

⁹⁵ *AGCC II*, 950 F.2d at 1414-1415.

⁹⁶ See *AGCC II*, 950 F.2d at 1403-1405.

⁹⁷ *AGCC II*, 950 F.2d at 1416. This evidence came from 10 public hearings and “numerous written submissions from the public.” *Id.* at 1414.

⁹⁸ *Id.* at 1416, n.11.

⁹⁹ *Id.* at 1416.

¹⁰⁰ *Concrete Works IV*, 321 F.3d at 989.

2.5 The Governmental Entity or Agency Enacting an M/WBE Program Must Be Shown to Have Actively or Passively Perpetuated the Discrimination

In *Croson*, the Supreme Court stated, “It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that *public* dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of *private* prejudice.”¹⁰¹ *Croson* provided that the government “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.”¹⁰² The government agency’s active or passive participation in discriminatory practices in the marketplace may show the compelling interest. Defining passive participation, *Croson* stated:

*Thus, if the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.*¹⁰³

The Tenth Circuit decision in *Adarand* concluded that evidence of private sector discrimination provided a compelling interest for a DBE program.¹⁰⁴ Later cases have reaffirmed that the government has a compelling interest in avoiding the financing of private discrimination with public dollars.¹⁰⁵

Relying on this language in *Croson*, a number of local agencies have increased their emphasis on evidence of discrimination in the private sector. This strategy has not always succeeded. In the purest case, Cook County did not produce a disparity study but instead presented anecdotal evidence that M/WBEs were not solicited for bids in the private sector.¹⁰⁶ Cook County lost the trial and the resulting appeal.¹⁰⁷ Similarly, evidence of private sector discrimination presented in litigation was found inadequate in the Philadelphia and Dade County cases.¹⁰⁸ The Third Circuit stated, in discussing low MBE participation in a local contractors association in the city of Philadelphia, that “racial discrimination can justify a race-based remedy only if the city has somehow participated in or supported that discrimination.”¹⁰⁹ Nevertheless, recently in *Concrete Works IV*, the Tenth Circuit upheld the relevance of data from the private marketplace to establish a factual predicate for M/WBE programs.¹¹⁰ That is, courts mainly seek to ensure that M/WBE programs are based on findings of active or passive discrimination in the government contracting marketplace, and not simply attempts to remedy general societal discrimination.

¹⁰¹ *Croson*, 488 U.S. at 492 (emphasis added).

¹⁰² *Croson*, 488 U.S. at 492. See generally Ayres, Ian and Frederick E. Vars, “When Does Private Discrimination Justify Public Affirmative Action?” 98 *Columbia Law Review* 1577 (1998).

¹⁰³ *Croson*, 488 U.S. at 492.

¹⁰⁴ *Adarand Contrs., Inc.*, 228 F.3d at 1155, 1164-65.

¹⁰⁵ *Associated Gen. Contrs. of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734-35 (6th Cir. 2000). See also *Concrete Works II*, 36 F.3d at 1529; *Coral Constr. Co.*, 941 F.2d at 916.

¹⁰⁶ *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp. 2d 1087, 1117 (N.D. I.L. 2000).

¹⁰⁷ *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp. 2d 1087 (N.D. I.L. 2000); 256 F.3d 642, 648 (7th Cir. 2001).

¹⁰⁸ *Contrs. Ass’n of E. Pennsylvania, Inc.*, 91 F.3d at 599-602; *Engineering Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 920-926.

¹⁰⁹ *Contrs. Ass’n of E. Pennsylvania, Inc.*, 91 F.3d at 602; see also *Webster v. Fulton County*, 51 F. Supp. 2d 1354, 1363 (N.D. G.A. 1999).

¹¹⁰ *Concrete Works IV*, 321 F.3d at 976.

Courts also seek to find a causal connection between a statistical disparity and actual underlying discrimination. In *Engineering Contractors*, one component of the factual predicate was a study comparing entry rates into the construction business for M/WBEs and non-M/WBEs.¹¹¹ The analysis provided statistically significant evidence that minorities and women entered the construction business at rates lower than would be expected, given their numerical presence in the population and human and financial capital variables. The study argued that those disparities persisting after the application of appropriate statistical controls were most likely the result of current and past discrimination. Even so, the Eleventh Circuit criticized this study for reliance on general census data and for the lack of particularized evidence of active or passive discrimination by Dade County, holding that the district court was entitled to find that the evidence did not show compelling justification for an M/WBE program.¹¹²

The Seventh Circuit has perhaps set a higher bar for connecting private discrimination with government action. The trial court in the Cook County case extensively considered evidence that prime contractors simply did not solicit M/WBEs as subcontractors and considered carefully whether this evidence on solicitation served as sufficient evidence of discrimination, or whether instead it was necessary to provide further evidence that there was discrimination in hiring M/WBE subcontractors.¹¹³ The Seventh Circuit held that this evidence was largely irrelevant.¹¹⁴ Beyond being anecdotal and partial, evidence that contractors failed to solicit M/WBEs on Cook County contracts was not the same as evidence that M/WBEs were denied the opportunity to bid.¹¹⁵ Furthermore, such activities on the part of contractors did not necessarily implicate the county as even a passive participant in such discrimination as might exist because there was no evidence that the county knew about it.¹¹⁶

Interestingly, some courts have been willing to see capital market discrimination as part of the required nexus between private and public contracting discrimination, even if capital market discrimination could arguably be seen as simply part of broader societal discrimination. In *Adarand v. Slater*, the Tenth Circuit favorably cited evidence of capital market discrimination as relevant in establishing the factual predicate for the federal DBE program.¹¹⁷ The same court, in *Concrete Works IV*, found that barriers to business formation were relevant insofar as this evidence demonstrated that M/WBEs were “precluded from the outset from competing for public construction contracts.”¹¹⁸ Along related lines, the court also found a regression analysis of census data to be relevant evidence showing barriers to M/WBE formation.¹¹⁹

Courts have come to different conclusions about the effects of M/WBE programs on the private sector evidence itself. For instance, is M/WBE participation in public sector projects higher than on private sector projects simply because the M/WBE program increases M/WBE participation in the public sector, or is such a pattern evidence of private sector discrimination? The Seventh Circuit raised the former concern in the recent Cook County

¹¹¹ *Engineering Contractors Ass’n of South Florida, Inc.*, 122 F.3d at 921-22.

¹¹² *Id.* at 922.

¹¹³ *Builders Ass’n of Chicago*, 123 F.Supp. 2d at 1112-1116.

¹¹⁴ *Builders Ass’n of Greater Chicago*, 256 F.3d at 645.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Adarand Contrs., Inc.*, 228 F.3d at 1169-70.

¹¹⁸ *Concrete Works IV*, 321 F.2d at 977. The district court had rejected evidence of credit market discrimination as adequate to provide a factual predicate for an M/WBE program. *Concrete Works of Colorado, Inc. v. City of Denver*, 86 F.Supp. 2d 1042, 1072-73 (D Co. 2000) (*Concrete Works III*).

¹¹⁹ *Id.* at 967.

litigation.¹²⁰ *Concrete Works IV*, however, expressly cited as evidence of discrimination that M/WBE contractors used for business with the city of Denver were not used by the same prime contractors for private sector contracts.¹²¹

Finally, is evidence of a decline in M/WBE utilization following a change in or termination of an M/WBE program relevant and persuasive evidence of discrimination? The Eighth Circuit in *Sherbrooke Turf* and the Tenth Circuit in *Concrete Works IV* did find that such a decline in M/WBE utilization was evidence that prime contractors were not willing to use M/WBEs in the absence of legal requirements.¹²² Other lower courts have arrived at similar conclusions.¹²³

2.6 To Withstand Strict Scrutiny, an M/WBE Program Must Be Narrowly Tailored to Remedy Identified Discrimination

The discussion of compelling interest in the court cases has been extensive, but narrow tailoring may be the more critical issue. Many courts have held that even if a compelling interest for the M/WBE program can be found, the program has not been narrowly tailored.¹²⁴ Moreover, *Concrete Works IV*,¹²⁵ a case that did find a compelling interest for a local M/WBE program, did not consider the issue of narrow tailoring. Instead, the Tenth Circuit held that the plaintiffs had waived any challenge to the original ruling of the district court¹²⁶ that the program was narrowly tailored.

Nevertheless, the federal courts have found that the DBE program established pursuant to federal regulations (49 CFR, Part 26) and issued under the Transportation Equity Act (TEA-21) (1998) has been narrowly tailored to serve a compelling interest.¹²⁷ The federal courts had previously ruled that there was a factual predicate for the federal Department of Transportation (DOT) DBE program, but that in its earlier versions the program was not narrowly tailored.¹²⁸ The more recent rulings provide some guidance as to what program configurations the courts will judge to be narrowly tailored. The Eleventh Circuit in particular has identified the following elements of narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.¹²⁹

¹²⁰ *Builders Ass'n of Greater Chicago*, 256 F.3d at 645.

¹²¹ *Concrete Works IV*, 321 F.3d at 984-85.

¹²² *Concrete Works IV*, 321 F.3d at 985; *Sherbrooke Turf, Inc.*, 345 F.3d at 973.

¹²³ See *Northern Contracting, Inc. v. Illinois*, No. 00 4515 (ND IL 2004) – 2004 U.S. Dist. LEXIS 3226 150-1.

¹²⁴ *Contrs. Ass'n of E. Pennsylvania, Inc.*, 91 F.3d at 606; *Eng'g Contrs. Ass'n of S. Florida, Inc.*, 122 F.3d at 926-929; *Verdi v. DeKalb County Sch. Dist.*, 135 Fed. Appx. 262, 268, 2005 WL 38942 (11th Cir. 2005).

¹²⁵ *Concrete Works IV*, 321 F.3d at 992-93.

¹²⁶ *Concrete Works of Colo., Inc. v. City of Denver*, 823 F.Supp. 821, 844-845 (D.Co. 1993) (*Concrete Works I*).

¹²⁷ *Adarand Constrs., Inc.*, 228 F.3d at 1158, 1187; *Sherbrooke Turf Inc.*, 345 F.3d at 968-969, 974; *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983 (9th Cir. 2005).

¹²⁸ *Inre Sherbrooke Sodding*, 17 F. Supp. 2d 1026, 1034-35, 1037 (D.Minn. 1998) (*Sherbrooke I*) (finding the program was not narrowly tailored). In 1996, before the new DBE regulations, the district court in Colorado, upon remand from the 1995 U.S. Supreme Court, had made a similar ruling in *Adarand Constrs., Inc. v. Peña*, 965 F. Supp. 1556, 1581 (D.Co. 1997).

¹²⁹ *Engineering Contractors*, 122 F.3d at 973 (citing *Ensley Branch*, 31 F.3d at 1569).

2.6.1 Race-Neutral Alternatives

Concerning race-neutral alternatives, the Supreme Court in *Croson* concluded that a governmental entity must demonstrate that it has evaluated the use of race-neutral means to increase MBE participation in contracting or purchasing activities. In upholding the narrow tailoring of federal DBE regulations, the Eighth Circuit noted that those regulations “place strong emphasis on ‘the use of race-neutral means to increase minority business participation in government contracting.’”¹³⁰ The Tenth Circuit had noted that the DBE regulations provided that “if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures, and enumerate a list of race-neutral measures.”¹³¹ Those measures included “helping overcome bonding and financing obstacles, providing technical assistance, [and] establishing programs to assist start-up firms.”¹³²

Strict scrutiny does not mandate that every race-neutral measure be considered and found wanting. The Eighth Circuit also affirmed that “Narrow tailoring does not require exhaustion of every conceivable race neutral alternative,” but it does require “serious, good faith consideration of workable race-neutral alternatives.”¹³³

2.6.2 Flexibility and Duration of the Remedy

The Eighth Circuit also found that “the revised DBE program has substantial flexibility.”¹³⁴

*A State may obtain waivers or exemptions from any requirement and is not penalized for a good faith failure to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$ 750,000 cannot qualify as economically disadvantaged.*¹³⁵

DBE and M/WBE programs achieve flexibility by using waivers and variable project goals to avoid merely setting a quota. *Croson* favorably mentioned the contract-by-contract waivers in the federal DOT DBE program.¹³⁶ Virtually all successful MBE programs have this waiver feature in their enabling legislation. As for project goals, the approved DBE provisions set aspirational, nonmandatory goals; expressly forbid quotas; and use overall goals as a framework for setting local contract goals, if any, based on local data. All of these factors have impressed the courts that have upheld the constitutionality of the revised DOT DBE program.¹³⁷

With respect to program duration, in *Adarand Constructors, Inc. v. Peña*, the Supreme Court wrote that a program should be “appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate.”¹³⁸ The Eighth Circuit also noted the limits in the DBE program, stating that “the DBE program contains built-in durational limits,” in that

¹³⁰ *Sherbrooke Turf, Inc.*, 345 F. 3d at 972, quoting *Adarand Constrs., Inc.*, 515 U.S. at 237-38.

¹³¹ *Adarand Constrs., Inc.*, 228 F.3d. at 1179 (parentheses removed).

¹³² *Id.*

¹³³ *Sherbrooke Turf, Inc.*, 345 F. 3d at 972, quoting *Grutter*, 123 S. Ct. at 2344-45. See also *Coral Constr. Co.*, 941 F.2d at 923; *AGCC II*, 950 F.2d at 1417.

¹³⁴ *Sherbrooke Turf, Inc.*, 345 F. 3d at 972.

¹³⁵ *Id.* at 972, citing, 49 C.F.R. § 26.67(b).

¹³⁶ *Croson*, 488 U.S. at 488-489. *Coral Constr. Co.*, 941 F.2d at 924-925.

¹³⁷ See *Coral Constr. Co.*, 941 F. 2d at 924-925.

¹³⁸ 515 U.S. at 238 (internal quotations and citations omitted).

a “State may terminate its DBE program if it meets its annual overall goal through race-neutral means for two consecutive years.”¹³⁹ The Eighth Circuit also found durational limits in the fact that “TEA-21 is subject to periodic congressional reauthorization. Periodic legislative debate assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”¹⁴⁰

Other appellate courts have noted several possible mechanisms for limiting program duration: such as required termination if goals have been met,¹⁴¹ decertification of MBEs who achieve certain levels of success, or mandatory review of MBE certification at regular, relatively brief periods.¹⁴² Governments thus have some duty to ensure that they update their evidence of discrimination regularly enough to review the need for their programs and to revise programs by narrowly tailoring them to fit the fresh evidence.¹⁴³ It is still an open question whether all of these provisions are necessary in every case.

2.6.3 Relationship of Goals to Availability

Narrow tailoring under the *Croson* standard requires that remedial goals be in line with measured availability. Merely setting percentages without a carefully selected basis in statistical studies, as the city of Richmond did in *Croson* itself, has played a strong part in decisions finding other programs unconstitutional.¹⁴⁴

By contrast, the Eighth, Ninth, and Tenth Circuits have approved the goal-setting process for the DOT DBE program, as revised in 1999.¹⁴⁵ The approved DOT DBE regulations require that goals be based on one of several methods for measuring DBE availability.¹⁴⁶ The Eighth Circuit noted that the “DOT has tied the goals for DBE participation to the relevant labor markets,” insofar as the “regulations require grantee States to set overall goals based upon the likely number of minority contractors that would have received federally assisted highway contracts but for the effects of past discrimination.”¹⁴⁷ The Eighth Circuit acknowledged that goal setting was not exact, but nevertheless, the exercise...

*requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in Croson, which rested upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.*¹⁴⁸

Moreover, the approved DBE regulations use built-in mechanisms to ensure that DBE goals are not set excessively high relative to DBE availability. For example, the approved DBE goals are to be set-aside if the overall goal has been met for two consecutive years by race-

¹³⁹ *Sherbrooke Turf, Inc.*, 345 F. 3d at 972, citing 49 C.F.R. § 26.51(f)(3).

¹⁴⁰ *Id.*, quoting, *Grutter*, 123 S. Ct. at 2346.

¹⁴¹ *Sherbrooke Turf, Inc.*, 345 F.3d at 972.

¹⁴² *Adarand Constrs. Inc.*, 228 F.3d at 1179-1180.

¹⁴³ *Rothe Dev. Co.*, 262 F.3d at 1323-1324 (commenting on the possible staleness of information after seven, 12, and 17 years).

¹⁴⁴ See *Builders Ass'n of Greater Chicago*, 256 F.3d at 647; *Kohlbeck*, 447 F.3d at 556-557.

¹⁴⁵ *Adarand Constrs. Inc.*, 228 F.3d at 1181-1182; *Sherbrooke Turf, Inc.*, 345 F.3d at 971-973. *W. States Paving Co.*, 407 F.3d at 994-995.

¹⁴⁶ 49 C.F.R., § 26.45 (2006).

¹⁴⁷ *Sherbrooke Turf, Inc.*, at 972, 345 F. 3d citing, 49 C.F.R. § 26.45(c)-(d) (Steps 1 and 2).

¹⁴⁸ *Id.* at 972, quoting, *Croson*, 488 U.S. at 507.

neutral means. The approved DBE contract goals also must be reduced if overall goals have been exceeded with race-conscious means for two consecutive years. The Eighth Circuit courts found these provisions to be narrowly tailored, particularly when implemented according to local disparity studies that carefully calculate the applicable goals.¹⁴⁹

2.6.4 Burden on Third Parties

Narrow tailoring also requires minimizing the burden of the program on third parties. The Eighth Circuit stated the following with respect to the revised DBE program:

*Congress and DOT have taken significant steps to minimize the race based nature of the DBE program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA21 creates a rebuttable presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor.*¹⁵⁰

Waivers and good faith compliance are also tools that serve this purpose of reducing the burden on third parties.¹⁵¹ The DOT DBE regulations have also sought to reduce the program burden on non-DBEs by avoiding DBE concentration in certain specialty areas.¹⁵² These features have gained the approval of the only circuit court to have discussed them at length as measures of lowering impact on third parties.¹⁵³

2.6.5 Over-Inclusion

Narrow tailoring also involves limiting the number and type of beneficiaries of the program. As noted above, there must be evidence of discrimination to justify a group-based remedy, and over-inclusion of uninjured individuals or groups can endanger the entire program.¹⁵⁴ Federal DBE programs have succeeded in part because regulations covering DBE certification do not provide blanket protection to minorities.¹⁵⁵

Critically, the MBE program must be limited in its geographical scope to the boundaries of the enacting government's marketplace. The Supreme Court indicated in *Croson* that a local agency has the power to address discrimination only within its own marketplace. One fault of the Richmond MBE programs was that minority firms were certified from around the United States.¹⁵⁶

In *Coral Construction*, the Ninth Circuit concluded that the King County MBE program failed this part of the narrow tailoring test because the definition of MBEs eligible to benefit from

¹⁴⁹ Id. at 973-974.

¹⁵⁰ *Sherbrooke Turf, Inc.* 345 F.3d at 972-73, citing, *Grutter*, 123 S. Ct. at 2345-46; *Gratz v. Bollinger*, 123 S. Ct. 2411, 2429 (2003)

¹⁵¹ See 49 CFR, § 26.53 (2006).

¹⁵² See 49 CFR, § 26.33 (2006).

¹⁵³ *Adarand Constrs. Inc.*, 228 F.3d at 1183.

¹⁵⁴ See *Builders Ass'n of Greater Chicago*, 256 F.3d at 647-648.

¹⁵⁵ *Sherbrooke Turf, Inc.*, 345 F.3d 972-73.

¹⁵⁶ *Croson*, 488 U.S. at 508.

the program was overbroad. The definition included MBEs that had had no prior contact with King County if the MBE could demonstrate that discrimination occurred “in the particular geographic areas in which it operates.”¹⁵⁷ This MBE definition suggested that the program was designed to eradicate discrimination not only in King County but also in the particular area in which a non-local MBE conducted business. In essence, King County’s program focused on the eradication of societywide discrimination, which is outside the power of a state or local government. “Since the County’s interest is limited to the eradication of discrimination within King County, the only question that the County may ask is whether a business has been discriminated against in King County.”¹⁵⁸

In clarifying an important aspect of the narrow tailoring requirement, the court defined the issue of eligibility for MBE programs as one of participation, not location. For an MBE to reap the benefits of an affirmative action program, the business must have been discriminated against in the jurisdiction that established the program.¹⁵⁹ As a threshold matter, before a business can claim to have suffered discrimination, it must have attempted to do business with the governmental entity.¹⁶⁰ It was found significant that “if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County.”¹⁶¹

To summarize, according to the Ninth Circuit, the presumptive rule requires that the enacting governmental agency establish that systemic discrimination exists within its jurisdiction and that the MBE is, or has attempted to become, an active participant in the agency’s marketplace.¹⁶² Since King County’s definition of an MBE permitted participation by those with no prior contact with King County, its program was overbroad. By useful contrast, *Concrete Works II* held that the more extensive but still local designation of the entire Denver MSA constituted the marketplace to which the programs could apply.¹⁶³

2.7 Personal Liability for Implementing an M/WBE Program

One lower court decision in the Eleventh Circuit, *Herschell Gill Consulting v. Miami-Dade County*,¹⁶⁴ held that Dade County and its Commissioners were held jointly and severally liable for nominal damages and attorney’s fees for implementing an M/WBE program in violation of constitutional rights under Section 1983.

In general, government officials have absolute immunity for legislative acts, but not for administrative acts. Thus, government officials are immune from personal liability for adopting an M/WBE program but can be personally liable for applying specific policies to particular contracts. Government officials are entitled to “qualified immunity” if their actions did not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁶⁵ In *Herschell Gill*, there was no recent disparity study, there was parity in contracting, the previous program had been struck down by the same federal

¹⁵⁷ *Coral Constr. Co.*, 941 F. 2d at 925 (internal modifications and citations omitted).

¹⁵⁸ *Id.* (emphasis omitted).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Concrete Works II*, 36 F.3d at 1520.

¹⁶⁴ 2004 WL 1924812 (S.D.Fla. 2004).

¹⁶⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

court, there was no substantial consideration of race-neutral alternatives and the County had not followed its own ordinance in adjusting goals.

2.8 DBE Programs: The “As Applied” Challenge in Western States Paving

The Washington DOT DBE program was struck down in *Western States Paving* not because the federal DBE program had no factual predicate and not because the federal DBE program lacked narrow tailored program features. Instead, the Ninth Circuit ruled that the Washington DOT DBE program was not narrowly tailored “as applied.”¹⁶⁶ While a state does not have to independently provide a factual predicate for its DBE program, the Ninth Circuit found that, “it cannot be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present.”¹⁶⁷ In effect, while Washington DOT was not required to produce a separate factual predicate for a DBE program, it was still required to produce a factual predicate (of sorts) to justify race-conscious elements in the local implementation of its DBE program.

While Washington DOT conceded that it had no studies of discrimination in highway contracting, it argued that there was evidence of discrimination in the fact that DBEs received 9 percent of subcontracting dollars on state-funded projects where there were no DBE goals and 18 percent of federal funded projects where there were DBE goals. But the Ninth Circuit stated that, “even in States in which there has never been discrimination, the proportion of work that DBEs receive on contracts that lack affirmative action requirements will be lower than the share that they obtain on contracts that include such measures because minority preferences afford DBEs a competitive advantage.”¹⁶⁸

In contrast, the Eighth Circuit in *Sherbrooke Turf* and the Tenth Circuit in *Adarand v. Slater* found that a decline in DBE utilization following a change in or termination of a DBE program was relevant evidence of discrimination in subcontracting.¹⁶⁹ The Tenth Circuit stated that while this evidence “standing alone is not dispositive, it strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting.”¹⁷⁰

The Ninth Circuit also dismissed the disparity between the proportion of DBE subcontractors and the proportion of DBE dollars on state-funded contracts, because “DBE firms may be smaller and less experienced than non-DBE firms (especially if they are new businesses started by recent immigrants) or they may be concentrated in certain geographic areas of the State, rendering them unavailable for a disproportionate amount of work.”¹⁷¹ The Ninth Circuit quoted the DC Circuit in *O’Donnell* to the effect that:

Minority firms may not have bid on . . . construction contracts because they were generally small companies incapable of taking on large projects; or

¹⁶⁶ The Ninth Circuit distinguished a previous case which did not involve an “as applied” challenge to the federal DBE program. *Milwaukee County Pavers Ass’n v. Fiedler*, 922 F.2d 419 (7th Cir. 1991). The Seventh Circuit disagreed with the Ninth Circuit’s reading of *Milwaukee County Pavers*. See *Northern Contracting*, at fn 4.

¹⁶⁷ *Western States Paving*, 407 F. 3d at 998.

¹⁶⁸ *Western States Paving*, 407 F. 3d at 1000.

¹⁶⁹ *Sherbrooke Turf*, 345 F.3d at 973.

¹⁷⁰ *Adarand v. Slater*, 228 F.3d at 1174; see also *Concrete Works IV*, 321 F.3d at 985.

¹⁷¹ *Western States Paving*, at 1001.

*they may have been fully occupied on other projects; or the District's contracts may not have been as lucrative as others available in the Washington metropolitan area; or they may not have had the expertise needed to perform the contracts; or they may have bid but were rejected because others came in with a lower price.*¹⁷²

The Ninth Circuit noted further that “if this small disparity has any probative value, it is insufficient, standing alone, to establish the existence of discrimination against DBEs.” The Ninth Circuit contrasted this minor disparity with the Ninth Circuit’s decision in *Associated General Contractors of California, Inc. v. Coalition for Economic Equity (AGCCII)* where “discrimination was likely to exist where minority availability for prime contracts was 49.5 percent but minority dollar participation was only 11.1 percent.”¹⁷³

2.9 Small Business Procurement Preferences

Small business procurement preferences have existed since the 1940s. The first small business program had its origins in the Smaller War Plants Corporation (SWPC), established during World War II.¹⁷⁴ The SWPC was created to channel war contracts to small business. In 1947, Congress passed the Armed Forces Procurement Act, declaring that “[i]t is the policy of Congress that a fair proportion of the purchases and contracts under this chapter be placed with small business concerns.”¹⁷⁵ Continuing this policy, the 1958 Small Business Act requires that government agencies award a “fair proportion” of procurement contracts to small business concerns.¹⁷⁶

Section 8(b)(11) of the Small Business Act authorizes the Small Business Administration (SBA) to set-aside contracts for placement with small business concerns. The SBA has the power:

*to make studies and recommendations to the appropriate Federal agencies to insure that a fair proportion of the total purchases and contracts for property and services for the Government be placed with small-business enterprises, to insure that a fair proportion of Government contracts for research and development be placed with small-business concerns, to insure that a fair proportion of the total sales of Government property be made to small-business concerns, and to insure a fair and equitable share materials, supplies, and equipment to small-business concerns.*¹⁷⁷

Every acquisition of goods and services anticipated to be between \$3,000 and \$100,000 is set aside exclusively for small business unless the contracting officer has a reasonable expectation of fewer than two bids by small businesses.¹⁷⁸

¹⁷² Id. (quoting *O'Donnell Constr. Co.*, 963 F.2d at 426).

¹⁷³ *Western States Paving*, at 1001. (Quoting *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991).

¹⁷⁴ See, generally, Hasty III, Thomas J., “Minority Business Enterprise Development and the Small Business Administration’s 8(a) Program: Past, Present, and (Is There a) Future?” 145 Mil. L. Rev. 1.

¹⁷⁵ 10 U.S.C. § 2301 (1976) quoting, *J.H. Rutter Rex Mfg. Co. v. United States*, 706 F. 2d 702, 704 (5th Cir. 1983).

¹⁷⁶ 15 USC 631(a).

¹⁷⁷ 15 U.S.C. § 637(b)(11).

¹⁷⁸ 18 C.F.R. § 19.502-2 (2006).

There has been only one constitutional challenge to the long-standing federal small business enterprise (SBE) programs. In *J.H. Rutter Rex Manufacturing Co. v. United States*,¹⁷⁹ a federal vendor unsuccessfully challenged the Army's small business set-aside program as in violation of the due process clause of the Fifth Amendment to the U.S. Constitution, as well as the Administrative Procedures Act and the Armed Forces Procurement Act.¹⁸⁰ The court held that classifying businesses as small was not a "suspect classification" subject to strict scrutiny. Instead the court ruled:

*Since no fundamental rights are implicated, we need only determine whether the contested socio-economic legislation rationally relates to a legitimate governmental purpose. Our previous discussion adequately demonstrates that the procurement statutes and the regulations promulgated thereunder are rationally related to the sound legislative purpose of promoting small businesses in order to contribute to the security and economic health of this Nation.*¹⁸¹

A large number of state and local governments have maintained small business preference programs for many years.¹⁸² No district court cases were found overturning a state or local small business reference program. One reason for the low level of litigation in this area is that there is significant organizational opposition to SBE programs. There are no reported cases of Associated General Construction (AGC) litigation against local SBE programs. And the legal foundations that have typically sued M/WBE programs have actually promoted SBE procurement preference programs as a race-neutral substitute for M/WBE programs.

There has been one state court case in which an SBE program was struck down as unconstitutional. The Cincinnati SBE program called for maximum practical M/WBE participation and required bidders to use good faith effort requirements to contract with M/WBEs up to government-specified M/WBE availability. Failure to satisfy good faith effort requirements triggered an investigation of efforts to provide opportunities for M/WBE subcontractors. In *Cleveland Construction v. Cincinnati*,¹⁸³ the state court ruled that the Cincinnati SBE program had race and gender preferences and had deprived the plaintiff of constitutionally protected property interest without due process of law. The city acknowledged that it had not offered evidence to satisfy strict scrutiny because it felt that it had been operating a race-neutral program.

2.10 Local Business Preferences

The constitutional analysis of local business preferences is somewhat less clear than SBE programs. Again, local business preferences are widespread and some have been in place for almost two decades (for example, the City of Oakland Local Business Enterprise (LBE)

¹⁷⁹ 706 F.2d 702 (5th Cir. 1983), cert. denied, 464 U.S. 1008 (1983).

¹⁸⁰ *J.H. Rutter Rex Mfg. Co. v. United States*, 534 F. Supp. 331, 332 (E.D. La. 1982), app'd 706 F. 2d 702 ("Administrative Procedures Act, 5 U.S.C. §§ 552(a)(1)(E) (1976) and the "fair proportion" language of the Armed Forces Procurement Act, 10 U.S.C. § 2301 et seq. (1976), and the Small Business Act, 15 U.S.C. § 631 et seq. (1976)").

¹⁸¹ *J.H. Rutter Rex Mfg. Co.*, 706 F.2d at 713 (internal citations omitted and emphasis added). See also *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

¹⁸² See Fla. Stat. § 287.001 et seq. (starting small business program in 1985); Minn. Stat. § 137.31 (Univ. of Minn. Started in 1979); N.J. Stat. § 52:32-17 et seq. (small business program started in 1983).

¹⁸³ See instead *Cleveland Constr. Inc. v. Cincinnati*, 2006 Ohio App. LEXIS 6410, *P1-*P19 (Ohio Ct. App. Dec. 8, 2006).

program started in 1979).¹⁸⁴ More common is the preference for small local businesses, which is an even more widespread practice. While called small business programs, these programs often set-aside contracts for bidding by local SBEs.

There are no federal court cases expressly stating that local business preference programs are unconstitutional. However, local business preferences should be distinguished from preferences for hiring local residents, which have been struck down on constitutional grounds. But LBE programs could be subject to some doubt on constitutional grounds. The three bases for constitutional challenges are the Equal Protection Clause, Dormant Commerce Clause, and the Privileges and Immunities Clause.

2.10.1 Equal Protection Clause

A challenge to an LBE program under the Equal Protection Clause is straightforward. The content of the Equal Protection Clause has been discussed above. All challenges to local purchasing preferences based on the Equal Protection Clause have failed. Federal courts have ruled that programs to favor local companies do not involve a suspect classification, and can be justified as having a rational basis under the Equal Protection Clause. For example, Pennsylvania enacted a statute requiring the purchase of Pennsylvania steel.¹⁸⁵ A challenge was made to the Pennsylvania Steel Products Procurement Act, as a “blatant attempt at economic protectionism,” in violation of the Equal Protection Clause. But the federal court found that Pennsylvania’s distinction between domestic and foreign steel products was “rationally related to a legitimate governmental purpose,” that is, to support a struggling industry that contributed significant employment and tax revenue to the agency.

2.10.2 The Dormant Commerce Clause

The next objection to LBE programs comes from the Commerce Clause. Article One of the Constitution confers upon Congress the power to regulate interstate commerce.¹⁸⁶ The Supremacy Clause of the Constitution grants to the federal government the power to preempt state laws that conflict with federal laws. The Supreme Court has found implicit in the Constitution “a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.”¹⁸⁷ Consequently, a state statute is unconstitutional under what has become known as the Dormant Commerce Clause if it poses undue burdens on interstate commerce.¹⁸⁸ It follows that under the Dormant Commerce Clause, “discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.”¹⁸⁹

The Dormant Commerce Clause has been justified on both economic and political grounds.

¹⁸⁴ See, e.g., City of Detroit’s Detroit-Based Business Program (Executive Order No. 2003-4), City of San Francisco Minority/Women Local Business Enterprise Program (San Francisco Ordinance, CHAPTER 12D), City of Oakland Local Business Enterprise Program (City Ordinance 9739), City of New York Local Business Enterprise Program (New York Administrative Code § 6-108.1program).

¹⁸⁵ *Trojan Technologies v. Pennsylvania*, 916 F.2d 903 (3d Cir 1990).

¹⁸⁶ U.S. Const., art. I., § 8 (reading, “Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes ...”).

¹⁸⁷ *S.-C. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984); see also *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

¹⁸⁸ See *Big Country Foods, Inc. v. Bd. of Educ. Anchorage Sch. Dist.*, 952 F.2d 1173, 1177 (9th Cir. 1992).

¹⁸⁹ *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

On economic grounds, the Dormant Commerce Clause “prohibits economic protectionism.”¹⁹⁰ From a political standpoint, a state law that only harms interests from other states “is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.”¹⁹¹

Historically, the Supreme Court employed a two-part test for the Dormant Commerce Clause: (1) does the state regulation discriminate against interstate commerce on its face; or, (2) are the burdens imposed on interstate commerce excessive relative to the alleged local benefits.¹⁹² A statute that fails either part of this test (the “Pike test”) is invalid under the Dormant Commerce Clause. LBE programs facially discriminate against interstate commerce and thus should fail the Pike test.

But there is an important exception to the Dormant Commerce Clause relevant to an LBE program. The “Market Participant” doctrine allows an agency to pass ‘protectionist’ legislation so long as an agency is participating in the market as a buyer or seller of goods and services, rather than regulating the market.¹⁹³ Thus, the Commerce Clause was not intended to prohibit an agency from favoring its own citizens over others when acting as a market participant. The Supreme Court has ruled that governments enjoy unrestricted ability to select their trading partners.¹⁹⁴ Indeed, in light of “the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal...” and that ‘when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.’¹⁹⁵

The U.S. Supreme Court has clarified, however, that the Market Participant doctrine does not allow an agency to impose conditions “that have a substantial regulatory effect outside of that particular market.”¹⁹⁶ Note that the line between market participant and market regulator has not always been clear. Nevertheless, under the Market Participant Exception LBE programs should pass constitutional hurdles.

Finally, under the Commerce Clause, the Supreme Court has ruled that when local preferences are required under federal grants there is no Dormant Commerce Clause issue, ruling that “where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.”¹⁹⁷

Given these results, it is not surprising that no federal court case was found overturning, or even challenging, an LBE program under the Dormant Commerce Clause.

2.10.3 Privileges and Immunities Clause

The most serious risk to an LBE program comes from the Privileges and Immunities Clause. The Supreme Court has identified the original purpose of the Privileges and Immunities Clause as prohibiting discrimination on the basis of state citizenship. Historically, the U.S.

¹⁹⁰ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988).

¹⁹¹ *S.C. St. Hwy. Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185, n. 2 (1938).

¹⁹² *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

¹⁹³ *S.-C. Timber Dev., Inc.*, 467 U.S. at 93 (holding that “if a state is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities”).

¹⁹⁴ *Perkins v. Lukens Steel*, 310 U.S. 113, 127 (1940).

¹⁹⁵ *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980).

¹⁹⁶ *S.-C. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

¹⁹⁷ *White v. Massachusetts Council of Construction Employers, Inc.* 460 U.S. 204, 213 (1983).

Supreme Court has applied a two-part test under the Privileges and Immunities Clause: (1) did the state or local government agency violate a fundamental right, and (2) did the state or local government agency have a substantial reason for doing so.¹⁹⁸

While similar and interrelated with the Dormant Commerce Clause, the Immunities Clause and the Commerce Clause provide different constitutional protections. The Dormant Commerce Clause is a judicially-created doctrine designed to prevent economic protectionism while the Privileges and Immunities Clause is a Constitutional provision created to protect individual rights.

A clarification of the application of the Immunities Clause to a local preference came in *United Building & Constr. Trades v. Camden*.¹⁹⁹ In *Camden* a municipal ordinance required that at least 40 percent of the employees of contractors and subcontractors working on city construction projects be Camden, New Jersey, residents. The Supreme Court devised a three-part test to evaluate the constitutionality of such an ordinance under the Privileges and Immunities Clause:

- The jurisdiction must document “substantial reason” for the preference.
- The jurisdiction must demonstrate that non-residents can be held partly responsible for the documented problem.
- The proposed remedy must be narrowly tailored.

The Supreme Court held that the Camden ordinance might be unconstitutional and remanded the case for consideration under the specified legal standard. There were three significant elements of the Court’s holding. First, the *Camden* Court ruled that the Market Participant exception does not apply to Privileges and Immunities analysis. Second, the Court ruled that the Immunities Clause does apply to laws that discriminate on the basis of municipal residency, not simply state residency. Third, the Court ruled that only those rights fundamental to interstate harmony were protected by the Immunities clause. In *Camden* the Court found that employment was a fundamental right under the Immunities Clause, but direct public employment was not.²⁰⁰ Hence, employment by a city vendor was a fundamental right while employment by the city itself was not a fundamental right. All of these results would seem to operate against a constitutional finding sustaining an LBE program.

The application of *Camden* can be seen in *Hudson County Building and Construction v. Jersey City*,²⁰¹ which involved a program requiring city vendors to make good faith efforts to hire 51 percent city residents. The district court again noted that there is no fundamental right to direct government employment, but there is a fundamental right to private employment with government contractors. Consequently, the program did unduly burden out-of-state residents. While Jersey City provided data on unemployment and poverty in Jersey City, the evidence did not show “that out-of-state workers [were] a cause of unemployment and poverty within its borders.” Thus just reciting data on unemployment and poverty will not be enough to overcome an Immunities Clause challenge.

¹⁹⁸ *Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948).

¹⁹⁹ *United Building & Constr. Trades v. Camden*, 465 U.S. 208 (1984).

²⁰⁰ *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976) (upholding a municipal ordinance that required all Philadelphia city government employees to be residents of the city).

²⁰¹ 960 F.Supp. 823, 831 (Dist Ct D NJ 1996)

Camden involved a preference for hiring city residents, not a local business enterprise program. Arguably there should be no distinction between public contracting and direct government hiring under the Privileges and Immunities Clause; that is, public contracts are like public jobs, public works, and other government benefits that are owned by the residents. Public contracts are not a fundamental right for Immunities Clause analysis.

In addition, while local hiring programs may face challenge under the Immunities Clause, the Supreme Court has held that the Privileges and Immunities Clause does not protect corporations.²⁰² Consequently, an Immunities challenge should only arise relative to an individual seeking to contract with a local government. But local contracting programs can and should have a clear statement of the economic basis of the program to protect it from challenge by an individual vendor on the basis of the Immunities Clause.

It is worth observing that no case was found overturning, or even challenging, an LBE program based upon the Immunities clause.²⁰³ Only municipal resident hiring programs have been challenged on Immunities Clause grounds.

2.10.4 Implications for LBE Program

In conclusion, no constitutional challenges have been succeeded with regard to an LBE program. A LBE program should survive: (1) a challenge under the Equal Protection Clause because LBE programs generally have a rational basis for their existence, (2) a challenge under the Dormant Commerce Clause based upon the Market Participant exception, and (3) a challenge under the Immunities Clause, because the clause does not apply to corporations, public contracts are not a fundamental right, and an agency should be able to provide economic justification for an LBE program.

2.11 Conclusions

As summarized earlier, when governments develop and implement a contracting program that is sensitive to race and gender, they must understand the case law that has developed in the federal courts. These cases establish specific requirements that must be addressed so that such programs can withstand judicial review for constitutionality and prove to be just and fair. Under the developing trends in the application of the law, local governments must engage in specific fact-finding processes to compile a thorough, accurate, and specific evidentiary foundation to determine whether there is, in fact, discrimination sufficient to justify an affirmative action plan. Further, local governments must continue to update this information and revise their programs accordingly.

While the Supreme Court has yet to return to this exact area of law to sort out some of the conflicts, the circuit courts have settled on the core standards. Though there are differences among the circuits in the level of deference granted to the finder of fact, these differences do not appear to be profound. The differences in the individual outcomes have been overwhelmingly different in the level of evidence, mostly concerning the rigor with which disparity studies have been conducted and then used as the foundation for narrowly tailored

²⁰² *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177, 181 (1869). This result was reaffirmed by the Supreme Court in *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981).

²⁰³ One state court case challenging an LBE program, argued that an Illinois School Board did not have the authority under state statutes to authorize an LBE program. *Best Bus Joint Venture v. The Board of Education of the City of Chicago*, First District Appellate Court No. 1-96-2927 (May 9, 1997).

remedies. Most significantly, nationally, the DBE program has been consistently upheld as a narrowly tailored remedial program. Ultimately, MBE and WBE programs can withstand challenges if local governments comply with the requirements outlined by the courts.

3.0 REVIEW OF CONTRACTING POLICIES, PROCEDURES, AND PROGRAMS

3.0 REVIEW OF CONTRACTING POLICIES, PROCEDURES, AND PROGRAMS

This chapter focuses on policies, procedures, and programs used by the City of Pensacola (City), to purchase goods and services. It provides a brief description of the procurement and contracting environment in which minority and women business enterprises (M/WBEs) operate, as well as background for the data analysis and foundations for the report recommendations. Finally, we discuss the remedial efforts undertaken by the City and various agencies with regard to procurement in the categories of Construction, Professional Services, Other Services, and Goods and Supplies.

Our review is presented in 19 sections. Section 3.1 describes the methodology used to conduct the review of contracting policies, procedures, and programs. Sections 3.2 through 3.8 present a brief summary of the purchasing policies and procedures, and Sections 3.9 through 3.19 cover programs to assist small, minority-, and woman-owned businesses (S/M/WBEs).

3.1 Methodology

This section discusses the steps taken to summarize the City's contracting and purchasing policies, procedures, and programs; race- and gender-based programs; and race- and gender-neutral programs. Our review focused on elements of the purchasing process, including remedial programs that might impact S/M/WBE utilization. The analysis included the following steps:

- Collection, review, and summarization of City contracting and purchasing policies currently in use. Discussions with managers about the changes that contracting and purchasing policies underwent during the study period and their effects on the remedial programs.
- Development of questionnaires administered to key City contracting and purchasing staff and officials to determine how existing contracting and purchasing policies have been implemented. Interviews were conducted with City management and staff regarding the application of policies, discretionary use of policies, exceptions to written policies and procedures, and impact of policies on key users.
- Review of applicable City ordinances, regulations, resolutions, and policies that guide the remedial programs. This included discussing with both City personnel and program participants the operations, policies, and procedures of the remedial programs and any remedial policy changes over time.

Finally, MGT collected and reviewed copies of previous studies of minority business development conducted in the geographic region and performed a review of race- and gender-neutral programs.

In all, nine interviews were conducted with current City staff and local agencies during May of 2008. City documents collected and reviewed for this portion of the study are itemized in **Exhibit 3-1**.

**EXHIBIT 3-1
DOCUMENTS REVIEWED DURING POLICY AND PROCEDURE REVIEW**

INDEX	DESCRIPTION
	Procurement Documents
1.	City of Pensacola, Purchasing Ordinance
2.	City of Pensacola, Proposed Ordinance No.12-88
3.	City of Pensacola, Ordinance No.14-88
4.	City of Pensacola, Purchasing Policy and Procedures Manual
5.	City of Pensacola, Doing Business With the City of Pensacola, Vendor Guide
6.	City of Pensacola, Sample Purchase Order
7.	City of Pensacola, City Manager Organizational Chart
8.	City of Pensacola, Fiscal Year 2008 Annual Budget
9.	City of Pensacola, Vendor Application
10.	Community Redevelopment Plan, 1989, and Subsequent Amendments
	SBE/DBE/MWBE Documents
11.	City of Pensacola, <i>African American Enterprise Directory</i>
12.	City of Pensacola, <i>Small Business Enterprise Directory</i>
13.	Florida SBDC, Small Business Dividends
14.	University of West Florida, Small Business Resource Kit
15.	Florida SBDC, Small Business Highlights
16.	Florida SBDC, Procurement Technical Assistance Center Program
17.	City of Pensacola, Application for Small Business Certification
18.	City of Pensacola, Small Business Enterprise Report for Fiscal Year Ending September 30, 2007
19.	City of Pensacola, Small Business Enterprise Report for Fiscal Year Ending September 30, 2006
20.	City of Pensacola, Small Business Enterprise Report for Fiscal Year Ending September 30, 2005
21.	City of Pensacola, Small Business Enterprise Report for Fiscal Year Ending September 30, 2004
22.	City of Pensacola, Small Business Enterprise Report for Fiscal Year Ending September 30, 2003
23.	City of Pensacola, Small Business Enterprise Report for Fiscal Year Ending September 30, 2002
24.	City of Pensacola, Small Business Enterprise Report for Fiscal Year Ending September 30, 2001
25.	City of Pensacola, Small Business Enterprise Report for Fiscal Year Ending September 30, 2000
26.	Pensacola Regional Airport DBE Program - 49cfr Part 26, August 1, 2004
27.	City of Pensacola, SBE Tracking Chart, Award of Bid, Year Ending September 30, 2004
28.	City of Pensacola, SBE Tracking Chart, Award of Bid, Year Ending September 30, 2006
29.	City of Pensacola, SBE Tracking Chart, Award of Bid, Year Ending September 30, 2007

EXHIBIT 3-1 (Continued)
DOCUMENTS REVIEWED DURING POLICY AND PROCEDURE REVIEW

INDEX	DESCRIPTION
30.	City of Pensacola, SBE Tracking Chart, Award of Bid, Year Ending September 30, 2008
31.	Office of City Attorney, Memorandum, Minority Business Enterprise (MBE) Programs (Disparity Studies), December 10, 2007
32.	William D. Wells, Assistant City Attorney, Memorandum, Pensacola MBE Ordinance – <i>City of Richmond v. J.A. Croson Company</i> , February 7, 1989

3.2 Purchasing Policies

3.2.1 Purchasing Methods

The City purchasing manual lists the following purchasing methods:

- Formal Invitations to Bid and Requests for Proposals (RFP)
- Purchase Agreements
- Professional Services
- Sole Source Purchases
- Emergency Purchases
- Purchases from Law Enforcement Contraband Forfeiture Trust Fund
- Informal Quotes and Negotiated Purchases
- Computer Hardware and Software Maintenance Services
- Acquisition of Materials for Value-Added Services¹

Some of these methods are discussed below.

3.2.2 Informal and Written Quotes

The City Manager has the authority to award contracts for the purchase of goods and services not in excess of \$25,000 without competitive bids.² For purchases up to \$500, the using City department generally selects verbal quotes from a set of vendors. The City department is to select the lowest and most responsive bidder meeting specifications. For purchases up to \$25,000, the Purchasing Office or the City department issues a written Request for Quote. Telephone quotes are acceptable when the purchase does not involve detailed specifications. City buyers then review the quotes and seek Department/Division concurrence on which is the lowest and most responsive bidder meeting specifications. The City purchasing manual suggests seeking a minimum of three quotes when it is practical. Vendors can be selected from a variety of sources to ensure that three responses are acquired.³

¹ City of Pensacola Purchasing Manual, Section 6.02 entitled "Procurement Methods." The City does not use e-procurement or on-line bidding.

² Code of Ordinances, City of Pensacola, Section 3-3-2(c).

³ City vendor list, product catalogs, purchasing records, MacRae's Blue Book, department recommendations, salespersons, State purchasing contracts, telephone directories, Thomas Register, BIDNET and trade journals.

The City recently started using a procurement card. There are approximately ten procurement cards in use at present. Bank of America is the procurement card vendor under a state contract. The City procurement card is used primarily for travel at present. The City does not report M/WBE spending on the procurement card at present.

3.2.3 Formal Sealed Bids

The City purchasing manual provides that competitive price quotes are not required for:

- Professional services of auditors, attorney, physicians, and consultants that are not governed by the Consultants Competitive Negotiations Act (CCNA), FS § 287.055.
- Emergency purchases.
- Sole source purchases.
- Purchase contracts.
- Negotiated purchases.⁴

All purchases of \$25,001 or more *may* be acquired through a formal sealed bid. The City Council has the option of using invitation to bid, RFPs, informal quotes, or to authorize the City manager to negotiate.⁵ Bids are to be awarded based on the lowest quotation by a responsible bidder meeting all conditions and requirements of the specifications.⁶ City staff estimates that between 5 to 10 percent of City procurement is formally bid.

3.2.4 Public Notice

Bid advertisements for public works or improvements as well as advertisements for goods and services, which are required to be published by law, are published for two weeks in a newspaper that satisfied state requirements.⁷ Invitations to bid, or bid specifications, are posted on the Web sites of the City, DemandStar and the Florida Panhandle Purchasing Group. Bid notices are also mailed to vendors and available at the Purchasing Division. The mail notification of bids is a courtesy designed to attract bidding by local firms.

3.2.5 Use of Other Government Contracts

The City can purchase goods and services: (1) under state purchasing contracts, (2) from vendors at federal contract prices, (3) from any vendor so long as prices are at or below state/federal contracts prices, and (4) from a contract of another government agency providing that the vendor extends the same terms and conditions of the contract to the City.⁸ The City uses Florida state contracts for vehicles, computers, and heavy equipment. The City has used a local government purchasing alliance for bigger

⁴ City of Pensacola Purchasing Manual, Section 5.02(b).

⁵ City of Pensacola Purchasing Manual, Section 6.01(c).

⁶ Code of Ordinances, City of Pensacola, Section 3-3-2(b).

⁷ Code of Ordinances, City of Pensacola, Section 3-3-2; F.S. § 50.031.

⁸ FS § 287.042(2), Section 3-3-2(e).

equipment such as street sweepers, dump trucks and specialty equipment. The City has made substantial purchases of automobiles from an African American car dealer with a Florida state contract.

3.2.6 Annual Contracts

There is no City policy on annual contracts. Traditionally, annual contracts are two to three years, some with two one-year renewal options.

3.3 Selected Procurement Categories

3.3.1 Construction

The City has the option to award construction projects through three project delivery methods:

- Competitive bidding.
- Design-build contracts, a construction process where a single source has responsibility for design and construction of a project.
- Construction manager-at-risk (CM-at-risk), a delivery method which involves a guarantee by a construction manager to deliver the project within a maximum price.

The City has generally employed a lowest responsible bidder process to award construction contracts to prime contractors. Two CM-at-risk projects were canceled last year because the company could not bring the preliminary estimates within budget. In general, procurement of construction has been impacted by the destruction following Hurricane Ivan in 2004, which sharply increased the demand for construction services. The Pensacola Regional Airport (City Airport), discussed below, has used CM-at-risk to procure construction services.

3.3.2 Professional Services

For purchases of professional services up to \$10,000, the City purchasing manual calls for selection based on written proposals and interviews with at least two firms. For acquisition of professional services in excess of \$25,000, procurement is either through an RFP, or a process required under the CCNA. The City is subject to the bidding and advertising rules of the CCNA, which covers architecture, engineering, landscape architecture, surveying and mapping, and other projects subject to competitive negotiation rules.⁹ The City has rotated firms on storm water contracts amongst three different contractors.

⁹ Fl Stat § 287.055; Code of Ordinances, City of Pensacola, Section 3-3-25.

3.3.3 Other Services

One issue impacting SBE utilization of other services is that the City janitorial contract has been held for a long time by Respect of Florida, a non-profit organization that hires the disabled. While not required by state of Florida law, janitorial contracts with similar organizations are a common practice nationally.

3.4 Community and Economic Development Projects

The City Community Development Department addresses land development and neighborhood economic development and revitalization, amongst other services. Created in 1980, the Community Redevelopment Agency (CRA), made up of City Council members and citizens, addresses downtown redevelopment and waterfront and inner-city revitalization. The CRA is a separate legal entity, but follows City procedures and operates as part of the City Community Development Department.

Community Development projects do involve some procurement. Community Development does have three teams of engineers and architects hired for three-year terms. Purchasing has no set SBE goals for small construction projects, although many of the projects are performed by noncertified small businesses. Community Development staff estimates that 50 percent of the small construction projects involving community development are awarded to M/WBEs.

The Community Maritime Park is a mixed-use development project that utilizes City and private funds. Community Maritime Park is projecting the use of tax increment finance (TIF) funds, but the use of TIF funds faces general legal challenges in the state of Florida. The Community Maritime Park has made some outreach efforts to M/WBE contractors, discussed below, including a covenant on the use of MBE contractors.

3.5 Pensacola Regional Airport

The City Airport is a City department and follows City purchasing rules. The City Airport is 100 percent funded through user fees and not funded by City revenue. The Airport does, on occasion, receive Federal Aviation Administration (FAA) funds (for example, for the runway that was completed in 2007). The City Airport used CM-at-risk procurement method for terminal expansion. The City Airport has a disadvantaged business enterprise (DBE) program, discussed below.

3.6 Bonding and Insurance

3.6.1 Bonding

The state of Florida requires performance bonds and payment bond on construction contracts to perform public work over \$200,000.¹⁰ Bonds are recommended for projects

¹⁰ FS § 255.05(1)(a).

in excess of \$100,000. Bonds must be equal to the contract amount. City staff reports that bonding is a problem with SBE and M/WBE contactors.

3.6.2 Insurance

Insurance requirements are not standardized, and can vary project-by-project. Every project is reviewed by the risk management department, which develops the insurance requirements.

3.7 Vendor Registration and Pre-qualification

The City maintains a vendors list organized by commodity code. There is no bidders list and vendors are not purged from the vendors list if they do not bid. There is no pre-qualification of vendors.

3.8 Prompt Payment

The state of Florida has had a prompt payment statute applying to local governments since 1989. For non-construction purchases of goods and services, payment is generally due within 45 days of receipt of a proper invoice.¹¹ Interest of 1 percent a month begins after the due date for payment.¹² Payment time for contractors depends on whether the payment requests must be approved by an agent. If agent approval is required payments must be made within 25 days of the request for payment.¹³ Contractors are to pay subcontractors and suppliers interest beginning on the fifteenth day after the receipt of payment by the contractor.¹⁴ Staff reports no problems with prompt payment. The City looks to the payment bond to handle the prompt payment of subcontractors.

3.9 Historical Background on Remedial Programs

On April 28, 1988, the City Council passed a Minority Business Enterprise Ordinance. The program set a 15 percent aspirational goal (paralleling the M/WBE goal of the state of Florida at that time), of which there was a 7.5 percent goal for African American firms and a 7.5 percent goal for women and other minority-owned firms. Following the U.S. Supreme Court decision in *Richmond v. Croson*, the City appointed an advisory committee to investigate the possibility of conducting a disparity study, but found the costs to be prohibitive. The City made an internal effort to establish a factual predicate for continuing the MBE program. The City found the evidence collected at that time to be inadequate to provide a factual predicate for an M/WBE program and established an SBE program, discussed below. Since that time, the City has not conducted a comprehensive disparity study.

¹¹ FS § 218.74(2).

¹² FS § 218.74(4).

¹³ FS § 218.735(a).

¹⁴ FS § 218.735(6).

3.10 SBE Program

The City approved Small Business Enterprise Ordinance #61-89 in 1991. The ordinance encourages the participation of small business in the procurement process and provides for participation goals on a project-by-project basis, depending on the availability of certified small businesses. There are no set-asides or bid preferences for SBEs. The SBE program is not to sacrifice the cost effectiveness of the lowest and best responsible bidder criteria.¹⁵

Small businesses are defined as an independently owned and operated business with (1) 50 or fewer full time employees, and (2) a net worth of not more than \$1 million. The business must be located in the 325 zip code prefix geographic area.

3.11 SBE Project Goal Setting

There is no overall aspirational goal for SBE spending by the City. The City does set goals on projects. Staff reports that SBE project goals are typically 5 to 10 percent. The City does not set goals if there is no availability. The City asks that bidders make good faith efforts to meet the SBE goal, including attending pre bid meetings. No bid has ever been rejected by the City for not meeting the SBE goal. The Council does have the option of skipping over the low bid. No bid has been rejected for inadequate good faith efforts. Staff reports that contractors generally do not have a problem meeting the SBE project goals. In practice, the SBE program has operated primarily in construction.

3.12 S/M/WBE Reporting

The City has reports on spending with SBEs dating back to FY2000. In these reports the City has tracked spending with M/WBEs that were SBEs, by indicating the distribution of SBE dollars at the prime and subcontract level by race and gender. As can be seen in **Exhibit 3-2**, SBEs received \$16.4 million on City projects from FY2005 through FY2007, 6.27 percent of City spending. African American-owned SBE firms received \$373,789, 0.14 percent of City spending, over the same time period. More detailed data on SBE utilization on City projects are reported in **Chapter 4.0**. The City recently starting tracking City spending with M/WBEs.

**EXHIBIT 3-2
CITY OF PENSACOLA
SBE UTILIZATION
FY2005 – FY2007**

Year	SBE Spending	
	Dollars	Percent
FY2005	\$2,170,748.08	2.50
FY2006	\$5,763,410.41	7.31
FY2007	\$8,471,569.72	8.84
Total	\$16,405,728.21	6.27

Source: City of Pensacola, DBE Program FY 2005.

¹⁵ Code of Ordinances, City of Pensacola, Section 3-3-4(1).

3.13 S/M/WBE Certification

The City has a limited certification process. As part of vendor registration, the City asks for the relevant commodity code and minority designation (African American, Hispanic American, Asian American, Native American, Native Hawaiian American, and Female).¹⁶ There is no body certifying M/WBEs in Escambia County. The City and Escambia County use the state M/WBE certification list.

There were 73 firms in the City *African American Business Directory* in April 2008 and 291 firms in the April 2008 *City Small Business Directory*. The *City Small Business Directory* and *African American Business Directory* are not on the Web, but are located on the City intranet for staff use.

3.14 DBE Program

The City has a modest DBE program at the City Airport (local transit is not part of the City). The DBE program is applied to projects with Airport Improvement Program (AIP) funding. There is no dedicated DBE staff or DBE consultant. There is one DBE concessionaire at the City Airport with multiple locations for over eight years as well as a joint venture with a larger majority-owned firm. The City Airport also used a DBE advertising company for over five years that was subsequently sold to a majority-owned firm. The City Airport also requests DBE participation in agreements with car rental companies. The City airport has used the Florida Department of Transportation certification list for certification. The City set an overall DBE goal of 5.9 percent for FY2005, of which 2.92 percent was to be achieved through race-neutral means.¹⁷ The City did use DBE contract goals on projects with demonstrated DBE subcontractor availability. The City DBE aspirational goals and achievements are presented in **Exhibit 3-3**.

**EXHIBIT 3-3
CITY OF PENSACOLA
DBE GOALS, DBE ACHIEVEMENT
FY2002 – FY2005**

Year	DBE Goal	DBE Achievement
FY2005	5.9%	N/A
FY2004	6.9%	N/A
FY2003	10%	10%
FY2002	10%	10%

Source: City of Pensacola, DBE Program FY2005.

¹⁶ City of Pensacola, Purchasing, Vendor Application (revised 3/18/2008).

¹⁷ City of Pensacola, DBE Program FY2005, at 3.

3.15 Staffing

The City does not maintain a separate staff to address S/M/W/DBE utilization. The Purchasing office has a staff of three, one of which addresses S/M/WBE utilization on a part-time basis.

3.16 Nondiscrimination in Contracting

There is no provision governing discrimination in contracting in City ordinances at present.

3.17 Financial Assistance Programs

3.17.1 City

The City does not maintain a lending assistance program for S/M/WBE firms. Lending assistance programs in the Pensacola area, are discussed below.

3.17.2 Other Loan Programs

The United States Small Business Administration (SBA) maintains the 504 Loan Program, the 7A Loan Guarantee Program, the SBA's Community Express program, and the SBA's Pre-qualification program. The 504 Program, available through Southwest Business Financing Corporation, is for the acquisition of fixed assets only, such as real estate and equipment. SBA 504 loans range from \$250,000 to \$1.5 million. The 7A Guaranty Program provides lines of credit or term loans for most business purposes. SBA 7A loans range from \$50,000 to \$2 million. The Community Express Program targets MBEs in low and moderate income neighborhoods with a high concentration of minority residents. The program provides an 85 percent guarantee for loans of less than \$150,000 and a 75 percent guarantee for loans ranging from \$150,000 to \$250,000. There are nine financial institutions in the City providing SBA loans.

3.17.3 Bonding and Insurance Assistance

The City does not maintain a bonding assistance program. There are no local bonding assistance programs in the Pensacola area.

3.18 Management and Technical Assistance

3.18.1 City

The City does not maintain any direct business development efforts. However, the City has participated in and partnered with some business development organizations in the Pensacola area.

3.18.2 Other Business Development Assistance Programs

A number of business organizations and local centers also support business development in the Pensacola metropolitan area.

Contractors Academy. In 2007, the non-profit Community Maritime Park Associates (CMPA) partnered with the Gulf Coast African-American Chamber of Commerce to sponsor a Contractors Academy, a series of training workshops to assist businesses to compete for contracts for the Maritime Park.

Procurement Technical Assistance Center. The National Procurement Technical Assistance Program (PTAP) was started in 1985 to assist businesses selling to the United States Department of Defense. PTAP assists firms with market research, identifying business codes, Web site registering, bid matching, specifications, marketing, support documentation, e-commerce and networking assistance, and the federal acquisition regulations. The Procurement Technical Assistance Center serving the City, based at the University of West Florida, sponsors small business procurement workshops as well as workshops on procurement with various local governments in the Pensacola area.

Small Business Development Center (SBDC). The Florida SBDC Network assists start-up and growth of small business expansion in the areas of business structure and management issues. The SBDCs provide business planning, financial statement analysis, market feasibility, financing assistance, SBA loan assistance, micro loan funds access, employee training, operations assessment, and marketing strategy. The Florida SBDC Network also provides online consulting. The University of West Florida hosts the branch of the SBDC in the City.

3.19 Outreach

The City's outreach efforts have included:

- Maintaining the City Web site, which includes information on upcoming bids.
- Holding pre-bid conferences.
- Holding workshops on how to do business with the City.
- Publishing an *African American Enterprise Directory* and a *Small Business Enterprise Directory*.

3.20 Conclusions

The City has considerable flexibility in its procurement rules. The City briefly attempted an M/WBE program in the late 1980s. In the absence of a factual predicate for continuing an M/WBE program, the City established an SBE program, which primarily operates as a small contractors subcontracting program in construction. The City has limited staff and resources to devote to business development programs in general, and the SBE program in particular.

4.0 RELEVANT MARKET AREA, UTILIZATION, AND AVAILABILITY ANALYSES

4.0 RELEVANT MARKET AREA, UTILIZATION, AND AVAILABILITY ANALYSES

This chapter presents the results of our review of data on minority- and women-owned business enterprise (M/WBE) availability in the Pensacola area and M/WBE utilization by the City of Pensacola (City) occurring between January 1, 2005, and December 31, 2007.

4.1 Methodology

This section presents the methodology for the collection of data and analysis of market areas, utilization, and availability estimates of minority-, woman-, small business, and nonminority-owned firms for this evaluation; as well as the procedures for determining estimates for the geographical market areas, utilization, and availability of firms.

4.1.1 Minority Classifications

In this evaluation, businesses classified as minority-owned are firms at least 51 percent owned and controlled by members of one of five groups: African Americans, Hispanic Americans, Asian Americans, Native Americans, and nonminority women. These groups have been defined by the United States Census Bureau as follows:

- **African Americans:** U.S. citizens or lawfully admitted permanent residents having an origin in any of the black racial groups of Africa.
- **Hispanic Americans:** U.S. citizens or lawfully admitted permanent residents of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese cultures or origins regardless of race.
- **Asian Americans:** U.S. citizens or lawfully admitted permanent residents who originate from the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.
- **Native Americans:** U.S. citizens or lawfully admitted permanent residents who originate from any of the original peoples of North America and who maintain cultural identification through tribal affiliation or community recognition.
- **Women:** U.S. citizens or lawfully admitted permanent residents who are non-Hispanic white females. Minority women are included in their respective minority category.

The City defines a small business enterprise (SBE) as an independently owned and operated business with (1) 50 or fewer full-time employees, and (2) a net worth of not more than \$1 million. The business must be located in the 325 ZIP code prefix geographic area.

The minority determinations reflected in this report were based on the source data discussed below in **Section 4.1.3**. If the business owner classification was unclear in the source data, MGT of America, Inc. (MGT), classified the firm as a nonminority/non-small business. Firms that were identified in the source data as nonminorities and firms for which there was no indication of minority classification in the source data were considered to be nonminority-owned firms in the analysis conducted for this evaluation.

4.1.2 Availability Methodology

MGT utilized several sources to estimate M/WBE availability within the relevant market area. The use of vendor data is preferable because it considers firms that have expressed a desire and ability to provide goods and/or services to procuring entities. The following source agencies provided lists that were used to develop the availability counts and percentage estimates:

- Minority Business Economic Council (MBEC).
- City of Pensacola Small Business Enterprise Directory.
- City of Pensacola African American Enterprise Directory.
- Escambia County Minority & Women Vendors List.
- State of Florida certification list.
- Florida Department of Transportation Disadvantaged Business Enterprise (DBE).
- Federal government Central Contract Registry.
- Census data from the U.S. Census Bureau *Survey of Business Owners* 2002.

4.1.3 Collection and Management of Utilization Data

The prime-level utilization analyses were based on information derived from the City's procurement database for activity occurring between January 1, 2005, and December 31, 2007. Electronic procurement data were provided by the City's Purchasing Department for the three year evaluation period. The following electronic files were provided by the City:

- City of Pensacola Account History 2005-07
- City of Pensacola Vendor Database

Data from the electronic files listed above were combined to create a master file of the City procurement activity, as well as a master vendor list of available firms, for the evaluation period. The electronic lists provided the following contract data that MGT used for analysis:

- The name of the firm awarded the contract.
- The award amount of the contract.
- The award date of the contract.

Because of the absence of electronic data showing subcontractor participation, MGT utilized SBE reports presented to the City council by the City Purchasing Department. This approach provided a basis for inferring the level of subcontractor participation in the City's contracts and procurement opportunities.

Once collected and entered into the MGT database, the data were processed as follows:

- Exclusion of records not relevant to the evaluation. Examples of procurement activity excluded from analysis include duplicate procurement records; contracts out of the time frame of the evaluation; contracts awarded to nonprofits and government entities; and utility payments such as water, gas, and electricity.
- Identification of the county in which the vendor operated. To accomplish this, the ZIP Code of the vendor was matched against an MGT ZIP Code database of all United States counties.

4.1.3 Market Area Methodology

In order to establish the appropriate geographic boundaries for the statistical analysis, MGT used the counties surrounding the City as the market area. The counties included were Escambia, Santa Rosa, Okaloosa, Florida, and Baldwin and Mobile counties, Alabama. MGT determined the counties that constituted the City's overall market area by counting the location of vendors in the City vendor database. The results were then summarized by county according to the location of each firm that provided services to the City.

4.2 M/WBE Availability Data

4.2.1 City Vendor Database

There were over 18,500 individual firms in the City Vendor Database in the five-county Pensacola Metropolitan Statistical Area (Pensacola MSA) in August 2008 (**Exhibit 4-1**). Over 87 percent of the vendors in the Pensacola MSA were located in Escambia County. There were 103 M/WBEs, which represented 0.55 percent of the total number of firms. There were 47 African American-owned firms, or 0.25 percent of the total firms in the database. Over 91 percent of the African American-vendors in the Pensacola MSA (excluding Baldwin and Mobile counties, Alabama) were located in Escambia County.

**EXHIBIT 4-1
THE CITY OF PENSACOLA
AVAILABILITY OF M/WBE FIRMS
WITHIN THE RELEVANT MARKET AREA**

COUNTY, STATE	Nonminority Woman	Asian American	African American	Hispanic American	Native American	Nonminority Male
ESCAMBIA, FL	33	2	43	3	3	16231
BALDWIN, AL						207
MOBILE, AL						342
OKALOOSA, FL	4		2			288
SANTA ROSA, FL	10	1	2			1524
TOTAL	47	3	47	3	3	18592

Source: Pensacola Vendor Database.

Other M/WBE lists in the Pensacola MSA have the following counts of SBEs and M/WBEs:

- There were 73 firms in the *City African American Business Directory* in April 2008.
- There were 291 firms in the April 2008 *City Small Business Directory*.¹
- There were 400 firms in the February 2008 Escambia County Minority and Women Vendors List, of which 42 were owned by African Americans.
- There were 118 firms in the Minority Business Enterprise Center (MBEC) Clients list (undated).²

These lists are not mutually exclusive, as some of these firms may appear in more than one list.

4.2.2 State of Florida Certified Firms

Exhibit 4-2 shows that there were 122 M/WBEs certified by the State of Florida Office of Supplier Diversity located in Escambia, Okaloosa, and Santa Rosa counties (Baldwin and Mobile County, Alabama, are not included in the state of Florida certification database). Over 57 percent of the firms in the three counties are in Escambia County. Over 29 percent of the total number of firms in the three counties were in construction.

¹ The City African American Business Directory is a subset of the City Small Business Directory.

² The MBEC Clients list is drawn from the Alabama Minority Business Development Council, covering Mobile, Pensacola, Fort Walton, and Milton.

**EXHIBIT 4-2
STATE OF FLORIDA
CERTIFIED M/WBES
ESCAMBIA, OKALOOSA, AND SANTA ROSA COUNTIES
2008**

Florida County	Total Number of Vendors	Percent of Total Vendors	Construction Vendors	Percent of Vendors in the County
Escambia County	70	57.3%	15	21.4%
Okaloosa County	24	19.6%	13	54.1%
Santa Rosa County	28	22.9%	8	28.5%
Total	122		36	29.5%

Source: State of Florida Office of Supplier Diversity.

4.2.3 DBE Availability

There were eight DBEs in the City, 11 in Escambia County, and 62 in the Florida Department of Transportation (FDOT) District 3, which includes Pensacola and Tallahassee in August 2008.³ The registered DBEs in the City provide services in computer systems design and related services, all other specialty trade contractors, civil engineering service, environmental consulting services, electrical contractors, passenger ground transportation, miscellaneous consultant service, and other transit and ground passenger transportation.

4.2.4 Central Contract Registry Availability

There were 264 total M/WBE firms in the United States Small Business Administration (SBA) Central Contract Registry⁴ (CCR) database in the Pensacola MSA in September 2008. This represents 32.9 percent of the registered firms (**Exhibit 4-3**). There were 74 M/WBE firms in services and 39 in construction.

**EXHIBIT 4-3
CENTRAL CONTRACT REGISTRY AVAILABILITY
PENSACOLA MSA
CONSTRUCTION, SERVICES, OTHER FIRMS
2002**

	Construction		Services		Other		Total	
	No.	%	No.	%	No.	%	No.	%
Minority	26	31.7%	47	34.8%	49	8.39%	122	15.23%
Women	13	15.9%	27	20.0%	102	17.47%	142	17.73%
M/WBE Subtotal	39	47.6%	74	54.8%	151	25.86%	264	32.96%
Non M/WBE Subtotal	43	52.4%	61	45.2%	433	74.14%	537	67.04%
Total	82		135		584		801	

Source: Central Contract Registry, September 2008.

³ <http://www.dot.state.fl.us/equalopportunityoffice>.

⁴ The Central Contract Registry is a database of firms used by procurement staff for the federal government. This list is subject to change due to regular updates regarding addition or deletion of firms.

There were 122 minority firms, 15.2 percent of the total CCR registered firms. Sixteen of these minority firms had a construction bonding level per contract of greater than \$1 million. Eight of the minority service firms had a bonding level in excess of \$1 million per contract. Of the 122 minority firms in the SBA database in the City, 28 minority firms had revenue in excess of \$1 million and nine had revenue in excess of \$5 million (**Appendix A**).

A list of CCR registered firms for November 2008 is attached as **Appendix B**. Out of the minority firms, 48 were African American, 24 were Asian American, 27 were Hispanic American, and 27 were Native American.

4.2.5 HUBZone Availability

Another variant of an SBE program provides incentives for SBEs located in distressed areas. For example, under the 1997 Small Business Reauthorization Act, the federal government started the federal HUBZone program.⁵ HUBZone programs can serve as a vehicle for encouraging M/WBE contract utilization. Nationally, there were 6,390 female and minority HUBZone firms, representing 55.4 percent of total HUBZone firms in August 2008.⁶ There were 19 M/WBE HUBZone firms in the Pensacola MSA in 2002 (**Exhibit 4-4**).

**EXHIBIT 4-4
M/WBE AVAILABILITY
HUBZONE FIRMS IN THE
CENTRAL CONTRACT REGISTRY
PENSACOLA MSA
2008**

	HUBZone Firms	
	No.	%
Minority	13	48.1%
Women	6	22.2%
M/WBE Subtotal	19	70.4%
Non-M/WBE Subtotal	8	29.6%
Total	27	100%

Source: Central Contract Registry, September 2008.

4.2.6 Census Availability

There was limited census data on M/WBE availability in the Pensacola MSA in the 2002 *Survey of Business Owners* for construction and professional services.⁷ There were extremely limited data on M/WBEs with paid employees in the census data. There were 70 African American professional service firms and 166 African American construction

⁵ To qualify as a HUBZone firm, a small business must meet the following criteria: (1) it must be owned and controlled by U.S. citizens; (2) at least 35 percent of its employees must reside in a HUBZone; and (3) its principal place of business must be located in a HUBZone. (3) its principal place of business must be located in a HUBZone. The same preferences that can be given to SBEs can be given to HUBZone firms.

⁶ Calculations based on data from the SBA pro-net database located at <http://pro-net.sba.gov/pro-net/search.html>.

⁷ www.census.gov/csd/sbo/.

firms in the Pensacola MSA in 2002 according to the census data. Additionally, the data also showed that:

- African American-owned firms (70) were 2.06 percent of all professional service firms (3,393). They were 3.8 percent (166 of 4,323) of all construction firms.
- Women-owned firms (923) were 27.2 percent of all professional service firms (3,393), and 7 percent (303 of 4,323) of all construction firms.
- There were no data in the 2002 census on for Native American, Hispanic American, or Asian American-owned professional service and construction firms in the Pensacola MSA.

4.3 Relevant Market Analysis

Based on the payments data from FY2005 through FY2007, 65.9 percent, or 18,695, of vendors with the City were located in the Pensacola MSA; and 72.6 percent, or 20,600, were located in the state of Florida (**Exhibit 4-5**). There were a total of 28,386 vendors in the payments database.

**EXHIBIT 4-5
CITY OF PENSACOLA
LOCATION OF VENDORS BY COUNTY, MSA, STATE
2008**

Location	Number	Percent
Escambia, FL	16,315	57.5%
Baldwin, AL	207	7.3%
Mobile, AL	342	1.2%
Okaloosa, FL	294	1.0%
Santa Rosa, FL	1,537	5.4%
Pensacola MSA Total	18,695	65.9%
State of Florida	20,600	72.6%
Total Vendors in Database	28,386	

Source: City of Pensacola Payments Data.

4.4 Utilization Analysis

4.4.1 Prime Contractor Analysis

For firms located in the City, the following analyses were conducted:

- Utilization analysis of all minority and nonminority primes by year for the evaluation period.
- Utilization analysis of the number of contracts awarded, and the individual firms awarded those contracts, according to race/ethnicity/gender classifications.

The utilization analysis of prime contractors by the City is shown in **Exhibit 4-6**. Minorities, excluding nonminority women, were awarded approximately 1 percent of the total dollars expended by the City during the study period, about \$2.9 million. Firms owned by nonminority women were awarded 0.87 percent of the dollars expended, about \$2.4 million.

**EXHIBIT 4-6
THE CITY OF PENSACOLA
PRIME CONTRACTOR UTILIZATION
BY RACE/ETHNIC/GENDER CLASSIFICATION
FY2005-FY2007**

Fiscal Year	African Americans		Hispanic Americans		Asian Americans		Native Americans		Nonminority Women		Minority Subtotal		Nonminority Firms		Total Dollars Awarded
	\$	% ¹	\$	% ¹	\$	% ¹	\$	% ¹	\$	% ¹	\$	% ¹	\$	% ¹	\$
2005	\$577,903	0.61%	\$402	0.00%	\$19,320	0.02%	\$4,497	0.00%	\$286,435	0.30%	\$888,558	0.94%	\$93,517,256	99.06%	\$94,405,814
2006	\$928,057	1.10%	\$521	0.00%	\$5,668	0.01%	\$53,415	0.06%	\$849,715	1.01%	\$1,837,376	2.18%	\$82,380,353	97.82%	\$84,217,729
2007	\$1,335,064	1.43%	\$0	0.00%	\$1,410	0.00%	\$0	0.00%	\$1,229,022	1.31%	\$2,565,496	2.74%	\$91,083,109	97.26%	\$93,648,605
Total	\$2,841,025	1.04%	\$923	0.00%	\$26,398	0.01%	\$57,912	0.02%	\$2,365,172	0.87%	\$5,291,430	1.94%	\$266,980,717	98.06%	\$272,272,147

Source: Procurement activity compiled from the City of Pensacola's data, January 1, 2005, through December 30, 2007.

Exhibit 4-7 shows the distribution of the number of vendors utilized by the City by race, ethnicity, and gender. Twenty-eight M/WBEs were utilized, 1.7 percent of the total number of vendors utilized by the City during the study period.

**EXHIBIT 4-7
CITY OF PENSACOLA
PRIME CONTRACTOR UTILIZATION
BY RACE/ETHNIC/GENDER CLASSIFICATION
NUMBER OF UNIQUE PRIME VENDORS
FY2005-FY2007**

Total Of Vendors Utilized	African American	Asian American	Hispanic American	Native American	Nonminority	Nonminority Woman	Physically Disabled	Small Business
1,616	8	1	1	2	1,542	16	1	45

Source: Procurement activity compiled from the City of Pensacola's data.

Exhibit 4-8 shows the distribution of City spending by race, gender, and City department. Because of the coding in the data, this analysis from FY2005 through FY2007 is not complete. In this sample of data, the largest spending with M/WBE firms in absolute terms was through the airport, with \$125,069 in spending with African American-owned firms and \$180,719 with women-owned firms. The largest spending in percentage terms was through the City's Athletics Department and Parks Department with African American-owned firms, 9.97 percent and 7.39 percent, respectively.

**EXHIBIT 4-8
THE CITY OF PENSACOLA
PRIME CONTRACTOR UTILIZATION
BY RACE/ETHNIC/GENDER CLASSIFICATION
BY DEPARTMENT
FY2005-FY2007**

Department Name	Total	Asian American	%	African American	%	Hispanic American	%	Native American	%	Nonminority Woman	%	Nonminority	%	Small Business	%
Airport	\$9,795,507	\$0	0.00%	\$125,069	1.28%	\$0	0.00%	\$767	0.01%	\$180,719	1.84%	\$8,899,583	90.85%	\$74,456	0.76%
Athletics	\$259,018	\$0	0.00%	\$25,829	9.97%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$224,323	86.61%	\$8,770	3.39%
Building Maintenance	\$211,146	\$0	0.00%	\$210	0.10%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$205,761	97.45%	\$5,175	2.45%
Fire	\$1,046,600	\$0	0.00%	\$1,994	0.19%	\$0	0.00%	\$0	0.00%	\$37,355	3.57%	\$839,054	80.17%	\$168,196	16.07%
Neighborhood	\$185,357	\$0	0.00%	\$29	0.02%	\$0	0.00%	\$0	0.00%	\$3,404	1.84%	\$181,001	97.65%	\$923	0.50%
Police	\$1,692,810	\$0	0.00%	\$8,055	0.48%	\$0	0.00%	\$0	0.00%	\$13,968	0.83%	\$1,607,216	94.94%	\$63,093	3.73%
Parks	\$828,798	\$630	0.08%	\$61,212	7.39%	\$0	0.00%	\$0	0.00%	\$13,447	1.62%	\$703,130	84.84%	\$50,378	6.08%
Purchasing	\$80,585	\$0	0.00%	\$618	0.77%	\$0	0.00%	\$0	0.00%	\$1,446	1.79%	\$77,260	95.87%	\$1,261	1.57%
Manager Office	\$24,176	\$0	0.00%	\$243	1.01%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$23,098	95.54%	\$834	3.45%
Planning	\$51,528	\$0	0.00%	\$986	1.91%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$49,371	95.81%	\$1,171	2.27%

4.4.2 SBE Utilization Analysis

The City does track spending with SBEs and reports the amount of SBE spending that was received by M/WBEs. SBEs received \$16.4 million in City project contracts from FY2005 through FY2007, 6.27 percent of City spending. African American-owned SBE firms received \$373,789, 0.14 percent of City spending over the same time period. African American-owned SBE firms received \$310,023 from FY2001 through FY2004. The highest utilization for African American-owned SBE firms from FY2001 through FY2007 was \$240,942 in FY2001.

4.5 Summary

This section contains the results of our analysis of the relevant market areas and utilization and availability of firms for the City's projects, as well as Escambia, Santa Rosa, and Okaloosa counties, Florida, and Baldwin and Mobile counties, Alabama, based on contract data. In summary, some key results for MBE availability and utilization follows. There were multiple lists of firms used in the analyses. These lists are not mutually exclusive, and some firms may appear in more than one list.

■ MBE Availability

- There were 47 African American-owned firms, 0.3 percent of total firms in the vendor database.
- There were 73 firms in the City *African American Business Directory*.
- There were 42 firms owned by African Americans in the February 2008 Escambia County Minority and Women Vendors List.
- There were 62 DBEs in the FDOT District 3 in August 2008.
- There were 122 minority firms in the U.S. CCR in the Pensacola MSA. Sixteen of these minority firms had a construction bonding level per contract of greater than \$1 million. Eight of the minority service firms had a bonding level in excess of \$1 million per contract. Of the 122 minority firms in the SBA database in the City, 28 minority firms had revenue in excess of \$1 million, and nine had revenue in excess of \$5 million.
- There were 13 MBE HUBZone firms in the Pensacola MSA in 2002 (**Exhibit 4-4**).
- There were 70 African American professional service firms and 166 African American construction firms in the Pensacola MSA in 2002 according to the survey data, 2.1 percent and 3.8 percent of total firms respectively.

■ Relevant Market

- Based on the payments data from FY2005 through FY2007, 65.9 percent of vendors with the City were located in the Pensacola MSA.

■ **MBE Utilization**

- Minorities were awarded approximately 1 percent of the total dollars expended by the City during the study period, about \$2.9 million.
- Eight African American firms were utilized by the City over the study period, about 0.5 percent of the number of firms utilized.
- African American-owned SBE firms received \$310,023 in prime and subcontracts, from FY2001 through FY2004. The highest utilization for African American-owned SBE firms from FY2001 through FY2007 was \$240,942 in FY2001.
- African American-owned SBE firms won \$80,490 in subcontracts over the period, 3.2 percent of total subcontracts.

5.0 FINDINGS AND RECOMMENDATIONS

5.0 FINDINGS AND RECOMMENDATIONS

In April 2008, MGT of America, Inc. (MGT), was retained to conduct a Procurement and Small Business Enterprise Study for the City of Pensacola (City) to study avenues for increasing small, minority, and women business enterprise (S/M/WBE) utilization by the City. The focus of the study is on what race-neutral techniques might be useful for the City to increase the diversity of the pool of vendors utilized by the City. The following report is not a disparity study sufficient to justify an M/WBE program. The results of this study and conclusions drawn are presented in detail in **Chapters 2.0** through **4.0** of this report.

The following sections summarize each of the study's findings, which are followed by related major recommendations. Commendations are also noted in those instances in which the City already has procedures, programs, and policies in place that respond to findings. Selected best practices are described at the end of this chapter. These best practices expand on the findings and recommendations that are marked with an asterisk (*).

5.1 Legal Review

The key results from the legal review are:

- Local government minority business programs are subject to strict scrutiny by the federal courts. Strict scrutiny means that an agency must have a compelling interest, in particular, a strong basis in evidence of exclusionary barriers associated with race. This compelling interest can be based on discrimination by the agency itself or on discrimination by the private sector if the agency has been a passive participant in such private discrimination. The Eleventh Circuit, which covers Pensacola, has not upheld an MBE program under strict scrutiny in the last 15 years.
- Diversity has not been found to serve as a compelling interest for an MBE program by the federal courts.
- A compelling interest is not required for a small business enterprise (SBE) program.
- If a strong basis in evidence is found for an MBE program, that program must be narrowly tailored to serve that compelling interest. Key elements of narrow tailoring in the Eleventh Circuit include consideration of race-neutral alternatives, reducing the burden on third parties, the flexibility and duration of the remedy, and the relationship of program goals to business availability. The federal disadvantaged business enterprises (DBE) program has been found by several circuit courts to be narrowly tailored.

5.2 Findings for MBE Utilization and Availability

FINDING 5-1: Relevant Market

The key finding for the relevant market for the City is the following:

- Based on the payments data from FY2005 through FY2007, 65.1 percent of vendors with the City were located in the Pensacola Metropolitan Statistical Area (Pensacola MSA).

FINDING 5-2: MBE Availability

Key findings for minority business availability in the Pensacola MSA are the following:

- There were 70 African American-owned professional services firms (2.1 percent of all professional service firms) and 166 African American-owned construction firms (3.8 percent of all construction firms) in the 2002 *Survey of Business Owners* data from the United States (U.S.) Census Bureau.
- There were 73 firms in the City *African American Business Directory*.
- There were 42 firms owned by African Americans in the February 2008 Escambia County Minority and Women Vendors List.
- There were 122 minority firms in the U.S. Small Business Administration (SBA) Central Contract Registry (CCR) in the Pensacola MSA. Sixteen of these minority firms had a construction bonding level per contract of greater than \$1 million. Eight of the minority service firms had a bonding level in excess of \$1 million per contract. Of the 122 minority firms in the SBA database in Pensacola 28 firms had revenue in excess of \$1 million and nine had revenue in excess of \$5 million.
- There were 13 MBE HUBZone firms in the Pensacola MSA in August 2008.
- There were 62 DBEs in the Florida Department of Transportation (FDOT) District 3, which includes Pensacola and Tallahassee in August 2008.
- There were 47 African American vendors (0.3 percent of the total in the Pensacola vendor database) in August 2008.

FINDING 5-3: MBE Utilization

- Minorities were awarded approximately 1 percent of the total dollars expended by the City during the study period, about \$2.9 million.
- Eight African American firms were utilized by the City over the study period, about 0.5 percent of the number of firms utilized.

- African American-owned firms won \$80,490 in subcontracts over the study period, 3.2 percent of total SBE subcontracts.

FINDING 5-4: SBE Program

The City briefly attempted an M/WBE program in the late 1980s. In the absence of a factual predicate for continuing an M/WBE program, the City established an SBE program, which primarily operates as a small contractors subcontracting program in construction. There are no citywide SBE aspirational goals, but SBE goal are set on construction projects. The City has limited staff and resources to devote to business development programs in general, and the SBE program in particular.

FINDING 5-5: SBE Utilization

Key findings for SBE utilization by the City are the following:

- SBEs received \$16.4 million on City projects from FY2005 through FY2007, 6.27 percent of City spending.
- African American-owned SBE firms received \$373,789 in prime and subcontracts, 0.14 percent of City spending over the same time period.

FINDING 5-6: Airport DBE Program

The Pensacola Regional Airport (City Airport) has set DBE goals between 5.9 percent and 10 percent. The City Airport reported that 10 percent of spending was with DBEs in FY2002 and FY2003.

5.3 Recommendations

COMMENDATION and RECOMMENDATION 5-1: Outreach*

The City should be commended for conducting workshops and seminars on doing business with the City. The City should consider sponsoring a major procurement conference, in conjunction with the county, school board, state and federal agencies, private sector companies, and business development providers such as the SBA, Small Business Development Center (SBDC), and Procurement Technical Assistance Center. Bexar County, Texas, provides a model for such a conference.

RECOMMENDATION 5-2: Construction

Construction Management, Requests for Proposals

One method of debundling in construction is to use multiprime construction contracts in which a construction project is divided into several prime contracts that are then overseen by a construction manager. For example, this approach has been used on projects where each prime contractor is responsible for installation and repair in

particular areas. The construction manager is responsible for obtaining materials at volume discounts based upon total agency purchases. If one contractor defaults, a change order is issued to another prime contractor working in an adjacent area.

Construction management also facilitates the rotation of contracts within an area of work. For example, if several subcontractors have the capacity to bid on an extended work activity, such as concrete flat work, traffic control, or hauling, the construction manager can rotate contracting opportunities over the duration of the activity.

Using a request for proposal (RFP) process can provide the flexibility for including M/WBE participation in prime contractor requirements and selection. One of the nonfinancial criteria can be the proposer's approach to and past history with M/WBE subcontractor utilization, as well as female and minority workforce participation. A number of universities around the country, the Charlotte-Mecklenburg School System in North Carolina, and the Tri-County Metropolitan Transportation District of Oregon, have had success with this approach.¹

Fully Operated Rental Agreements

Under these arrangements, a firm may bid an hourly rate for using certain equipment and the necessary staff. In these field-let contracts, engineers select the firm with the appropriate equipment and the lowest bid rate. If that firm is not available, the engineers select the next lowest hourly rate. This rental agreement technique is used primarily to supplement agency equipment in the event of agency equipment failure or peak demand for agency services. The rental agreement technique is attractive to small contractors because the typical small firm has much better knowledge of its own hourly costs than it does of the costs to complete an entire project.

RECOMMENDATION 5-3: Professional Services and Other Services

Bidder Rotation*

Some political jurisdictions use bidder rotation schemes to limit habit purchases from majority firms and to ensure that M/WBEs have an opportunity to bid along with majority firms. The City should review areas where bidder rotation may be established to increase M/WBE prime utilization.

COMMENDATION AND RECOMMENDATION 5-4: Goods

Procurement Card Purchases

The City should require its procurement card vendor to provide reports of City spending with M/WBEs. Several procurement card vendors provide such services. The city of Hampton, Virginia, for example, collects this information. Moreover, the City should provide departments with M/WBE directories, in addition to existing certification lists, that can be used when making procurement card purchases.

¹ Federal Transit Administration, *Lessons Learned #45* (May 2002). www.fta.dot.gov/library/program/II/man/II45.html.

State Contracts, Master Contracts, and Cooperative Agreements

The City should be commended for its use of an MBE on a Florida state contract for vehicle purchases. The City should institute a policy of encouraging purchasing staff to use M/WBEs that are on state contracts and identified as such when the City uses state term contracts in purchasing. The City should also ask vendors on state contracts, master contracts, and cooperative contracts to report their M/WBE utilization.

COMMENDATION AND RECOMMENDATION 5-5: SBE Program

The City should be commended for establishing an SBE program. A strong SBE program is central to maintaining a narrowly-tailored program to promote M/WBE utilization. In particular, the City should focus on increasing M/WBE utilization through the SBE program. Guidance on SBE programs can be found in features of other such programs around the United States, including:

- Setting aside contracts for SBEs (City of Phoenix, Arizona, SBE Program; Broward County, Florida, SBE Program; Dade County, Florida, Community SBE Program; Port Authority of New York and New Jersey, SBE Program).
- Providing bid preferences to SBEs in bidding on contracts (Miami-Dade County, Florida, Community SBE Program; Port Authority of New York and New Jersey SBE Program; East Bay Municipal Utility District Contract Equity Program, Port of Portland).²
- Setting SBE goals on formal and informal contracts (city of Charlotte, North Carolina, SBE Program).
- Setting department goals for SBE utilization (city of Charlotte, North Carolina, SBE Program).
- Access to low cost insurance on small projects (city of San Diego, California, Minor Construction Program).
- Providing bid preferences to SBEs on tax-assisted projects (city of Oakland Local Small Business Enterprise Program).
- Requiring good faith negotiations by bidders with SBEs (city of Charlotte, North Carolina, SBE Program).
- Rejecting bids for bidder noncompliance with the SBE program (city of Charlotte, North Carolina, SBE Program).

² The Port of Portland found that 10 percent bid preferences were more effective than 5 percent bid preferences.

- Imposing mandatory subcontracting clauses where such clauses would promote S/M/WBE utilization, and be consistent with industry practice (city of San Diego, California, Subcontractor Outreach Program).³
- Making SBE utilization part of department performance review (city of Charlotte, North Carolina, SBE Program).

HUBZones

Another variant of an SBE program provides incentives for SBEs located in distressed areas. For example, under the 1997 Small Business Reauthorization Act, the federal government started the federal HUBZone program. To qualify as a HUBZone firm, a small business must meet the following criteria: (1) it must be owned and controlled by U.S. citizens; (2) at least 35 percent of its employees must reside in a HUBZone; and (3) its principle place of business must be located in a HUBZone.⁴ The same preferences that can be given to SBEs can be given to HUBZone firms.⁵

RECOMMENDATION 5-6: Commercial Anti-discrimination Rules*

The City should establish a commercial non-discrimination statute. Some courts have noted that establishing anti-discrimination rules is an important component of race-neutral alternatives.⁶ Features of anti-discrimination policy selected from other entities include:

- Submission of a business utilization report on M/WBE subcontractor utilization.
- Review of the business utilization report for evidence of discrimination.
- A mechanism whereby complaints may be filed against firms that have discriminated in the marketplace.
- Due process, in terms of an investigation by agency staff.
- A hearing process before an independent hearing examiner.
- An appeals process to the agency manager and ultimately to a court.
- Imposition of sanctions, including:
 - Disqualification from bidding with the agency for up to five years.

³ San Diego as part of its Subcontractor Outreach Program (SCOPE) has mandatory outreach, mandatory use of subcontractors, and mandatory submission of an outreach document. Whether a contract has subcontracting is determined by the engineer on the project.

⁴ 13 C.F.R. 126.200 (1999). The State of California provides a 5 percent preference for a business work site located in state enterprise zones and an additional 1-4 percent preference (not to exceed \$50,000 on goods and services contracts in excess of \$100,000) for hiring from within the enterprise zone. (Cal Code Sec 4530 *et seq.*) Minnesota's bid preferences are limited to small businesses operating in high unemployment areas.

⁵ Miami-Dade has a Community Workforce Program that requires all Capital Construction Projects contractors to hire 10 percent of their workforce from Designated Target Areas (which include Empowerment Zones, Community Development block grant Eligible Block Groups, Enterprise Zones, and Target Urban Areas) in which the Capital Project is located. (Miami Ordinance 03-237).

⁶ *Engineering Contractors v. Dade County*, 943 F.Supp. 1546 (SD Fla 1996).

- Termination of all existing contracts.
- Referral to prosecution for fraud.

RECOMMENDATION 5-7: Access to Capital*

The City should consider a linked deposit program, or a collateral enhancement program to address issues of access to capital.

COMMENDATION and RECOMMENDATION 5-8: Business Development Assistance*

The City should follow the example of the Port Authority of New York and New Jersey, for which management and technical assistance contracts have been structured to include incentives for producing results, such as the number of M/WBEs being registered as qualified vendors with the City, increasing African American subcontractor utilization, and increasing the number of M/WBEs graduating from subcontract work to prime contracting.

RECOMMENDATION 5-9: Mentor-Protégé Program*

The City should adopt an M/WBE mentor-protégé program where M/WBEs serve as mentors for other M/WBE subcontractors. Such an approach has been tried with some success in Florida.

RECOMMENDATION 5-10: Annual Aspirational SBE and M/WBE Goals

The City should set annual aspirational goals by business category, not rigid project goals. To establish a benchmark for goal setting, goals should be based on relative M/WBE availability.⁷ The primary means for achieving these aspirational goals should be an SBE program, race-neutral joint ventures, outreach, and adjustments in the City procurement policy.

RECOMMENDATION 5-11: Good Faith Efforts

The City should review the good faith effort requirements in its contracts. The core theme should be that prime contractors should document their outreach efforts to subcontractors and the reasons why they may have rejected qualified M/WBEs who were the low-bidding subcontractors. Accordingly, the following narrow tailoring elements should be considered:

- Good faith effort requirements should apply to both M/WBE and nonminority prime contractors.
- A documented excessive subcontractor bid can be a basis for not subcontracting with an M/WBE.

⁷ The M/WBE aspirational goal is 80 percent of availability. These aspirational goals are set below estimated M/WBE availability. The 80 percent is derived from the concept that if M/WBE utilization is less than 80 percent, then disparity is substantial. This conservative adjustment reflects a concern that the program errs on the side of narrow tailoring. In principle, goals can be slightly above estimated M/WBE availability.

- A documented record of poor performance can be a basis for not subcontracting with an M/WBE.⁸

COMMENDATION AND RECOMMENDATION 5-12: Economic Development*

The City should be commended for its efforts at including MBEs in housing rehabilitation and the Maritime Park. The City should extend its SBE ordinance to private sector projects subsidized with City funds. The city of Atlanta, Georgia, and Bexar County, Texas, have encouraged private sector M/WBE utilization by two methods: (1) asking prospective bidders to report their private sector M/WBE utilization, and (2) setting aspirational goals for private sector projects with significant city tax incentives, such as tax allocation districts and community improvement districts. The city of Saint Paul, Minnesota, has established a small developers program to diversify the pool of available developers.

RECOMMENDATION 5-13: Two-Tiered Size Standards*

The federal case law and the United States Department of Transportation (US DOT) disadvantaged business enterprise (DBE) regulations point to the use of size standards and net worth requirements as one factor in the narrow tailoring of remedial procurement programs. A number of agencies use a percentage of the SBA size standard as the starting point for their size standard.

Size standards for remedial procurement programs still face a dilemma. If the standard is placed too high, large firms crowd out new firms. If it is placed too low, too many experienced firms lose the advantages of the remedial program. One solution to this dilemma is to adopt a two-tiered standard for M/WBE and SBE certification. Thus, for example, contracts could be set aside for small and very small firms. Both the states of Oregon and New Jersey and the federal government use a two-tiered size standard.⁹

COMMENDATION AND RECOMMENDATION 5-14: M/WBE Program Data Management*

The City should be commended for tracking M/WBE utilization in the SBE program and beginning to track M/WBE utilization in City spending generally. The City should ensure that spending with M/WBE firms that are not certified SBEs (such as: (1) spending through the airport DBE program, (2) spending on economics development and rehabilitation projects, and (3) spending with firms too large to qualify for the SBE program) is included in reports on M/WBE spending. It is important for the City to closely monitor the utilization of all businesses by race, ethnicity, and gender over time to determine whether the SBE program has the potential to eliminate race and gender disparities without applying specific race and gender goals.

⁸ The last two elements were adopted by the North Carolina Department of Transportation (NCDOT). 19A NCAC 02D.1110(7).

⁹ In this scheme, there are separate size standards for small businesses and emerging small businesses. For large projects, the state of New Jersey carves out portions of the contract for both tiers of small business. Thus, a single solicitation requires that the prime spend a certain percentage of the contract with small firms and another percentage with emerging small firms. Along related lines, the federal government sets aside contracts for bidding only amongst small firms, and other contracts may be set aside for bidding only by emerging small firms.

Ideally, the City data management should rest upon Internet-based data tracking. The services and software should help monitor utilization, availability, and disparity of M/WBEs in the clients' procurement process while adhering to current case law. Such a system would assist in the acquisition of subcontracting data, reduce the costs of disparity analysis, facilitate time management of staff, and allow staff to focus on contract compliance.

RECOMMENDATION 5-15: Oversight Committee

It is important that major stakeholders (including representatives of general contractors and M/WBE contractor organizations) be a part of discussions about the City M/WBE program. Consequently, the City should reestablish a vehicle for stakeholder input in the review of any reforms of the City SBE program.

RECOMMENDATION 5-16: City Web Site

A survey of agencies has found the following information on their M/WBE Web sites: bid opportunities; vendor application and information on the loan programs; directory of certified firms; uniform certification application; M/WBE program description; SBE program description; comprehensive contracting guides; M/WBE ordinance; how to do business information; bid tabulations; status of certification applications; links to management and technical assistance providers; newsletters; data on SBE and M/WBE utilization; annual M/WBE program reports; direct links to online purchasing manuals; capacity, bonding, qualifications, and experience data on certified firms; and 90-day forecasts of business opportunities. Bid tabulations are posted on the City's Web site, many with the individual bid information. The City should consider incorporating additional information into its Web site.

5.4 Selected Best Practices

The following section provides a menu of policies. Some policies that have worked in some localities have not been effective in others. Some policies have been discontinued for budget reasons. In many instances, it is difficult to determine whether a particular policy is directly responsible for the success of a program.

5.4.1 Bidder Rotation

A number of entities, including the city of Indianapolis, Indiana; Fairfax County, Virginia; the Port Authority of New York and New Jersey; and Miami-Dade County, Florida, use bid rotation to encourage M/WBE utilization, particularly in architecture and engineering (A&E). The following are some examples of bidder rotation employed by other agencies:

Miami-Dade County. Miami-Dade County uses small purchase orders for the Community Business Enterprise program and rotates on that basis. In addition, Miami-Dade County utilizes an Equitable Distribution Program, whereby a pool of qualified A&E professionals are rotated awards of miscellaneous A&E services as prime contractors and subcontractors.

DeKalb County, Georgia. DeKalb County has used a form of bidder rotation called a bidder box system to promote M/WBE utilization. This system selects a group of bidders

from the list of county registered vendors to participate in open market procurements. Under the bidder rotation system, the buyer identifies the commodity or service by entering an item box number. Using this item box, the computer selects five or six firms. The lowest responsible bidder is awarded the contract. M/WBEs were afforded an increased number of bid opportunities than would ordinarily be the case with a sequential selection process.

Port Authority of New York and New Jersey. The Port Authority of New York and New Jersey has a Quick Bid rotation system for small contracts less than \$500,000. In this program, the agency solicits bids via telephone and fax from a minimum of six contractors on a rotating basis. The period between bid, award, and contract start is generally not more than six weeks. Bidders are provided free construction documents with which to prepare their bids.¹⁰

5.4.2 SBE Programs

Florida Department of Transportation (FDOT) Business Development Initiative. The FDOT has just undertaken a stepped up small business initiative with the following principal components:

- Reserving certain construction, maintenance, and professional services contracts for SBEs.
- Providing bid preference points to SBEs and to firms offering subcontracts to SBEs on professional services contracts.
- Waiving performance and bid bond requirements for contracts under \$250,000.
- Using a modified pre-qualification process for certain construction and maintenance projects.

Port of Portland, Oregon. The Port of Portland found that a bid preference of 5 percent had no impact on contract outcomes, but a bid preference of 10 percent did affect contract outcomes.

North Carolina Department of Transportation (NCDOT). In the NCDOT program, small contractors are defined as firms with less than \$1.5 million in revenue. There is a small contractor goal of \$2 million for each of the 14 NCDOT divisions. The current cap on project size for small contractors is \$500,000. For contracts of less than \$500,000, NCDOT can solicit three informal bids from SBEs.¹¹ North Carolina law permits the waiving of bonds and licensing requirements on projects in the program.

¹⁰ Port Authority of New York and New Jersey, Engineering Department, *2002 Construction Program*, at 9.

¹¹ NCGS § 136-28.10(a).

5.4.3 Other Race-Neutral Programs

HUBZones

Another variant of an SBE program provides incentives for SBEs located in distressed areas. For example, under the 1997 Small Business Reauthorization Act, the federal government started the federal HUBZone program. A HUBZone firm is a small business that is: (1) owned and controlled by U.S. citizens; (2) has at least 35 percent of its employees who reside in a HUBZone; and (3) has its principle place of business located in a HUBZone.¹² HUBZone programs can serve as a vehicle for encouraging M/WBE contract utilization. Nationally, there are 5,357 female and minority HUBZone firms, representing 56.2 percent of total HUBZone firms.¹³

New York, New York. The city of New York has a HUBZone type program providing subcontracting preferences to small construction firms (with less than \$2 million in average revenue) that either perform 25 percent of their work in economically distressed areas or for which 25 percent of their employees are economically disadvantaged individuals.¹⁴

Miami-Dade County, Florida. Miami-Dade has a Community Workforce Program that requires all Capital Construction Projects contractors to hire 10 percent of their workforce from Designated Target Areas (which include Empowerment Zones, Community Development block grant Eligible Block Groups, Enterprise Zones and Target Urban Areas) in which the Capital Project is located.¹⁵

California. The state of California provides a 5 percent preference for a business work site located in state enterprise zones and an additional 1 to 4 percent preference (not to exceed \$50,000 on goods and services contracts in excess of \$100,000) for hiring from within the enterprise zone.¹⁶

Minnesota. The state of Minnesota's bid preferences are limited to small businesses operating in high unemployment areas.

It is worth noting that some agencies have implemented HUBZone type program and then terminated them, including New Jersey in the 1980s and Seattle's BOOST program in 2001.

Emerging Business Enterprise Program

Milwaukee, Wisconsin. Following the federal model, some agencies have added DBE programs. SBE programs focus on the disadvantage of the business, HUBZone programs focus on the disadvantage of the business location, and DBE programs focus on the disadvantage of the individual operating the business. The city of Milwaukee defines disadvantage along six dimensions:

- Disadvantage with respect to education.

¹² 13 C.F.R. 126.200 (1999).

¹³ Based on the SBA pro-net database located at <http://pro-net.sba.gov/pro-net/search.html>.

¹⁴ New York Administrative Code § 6-108.1. For a description of the New York local business enterprise program see <http://www.nyc.gov/html/sbs/html/lbe.html>.

¹⁵ Miami Ordinance 03-237.

¹⁶ Cal Code Sec 4530 *et seq.*

- Disadvantage with respect to location.
- Disadvantage with respect to employment.
- Social disadvantage (lack of traditional family structure, impoverished background, and related issues).
- Lack of business training.
- Economic disadvantage (credit issues, inability to win contracts, and related issues).

The city of Milwaukee defines an emerging business as a business owned by an individual satisfying the sixth dimension of disadvantage and three out of the five other dimensions of disadvantage.¹⁷ The city of Milwaukee has set a goal of 18 percent spending with emerging businesses, including both prime contracting and subcontracting.

Joint Ventures

The city of Atlanta, Georgia, requires establishment of joint ventures on large projects of over \$10 million.¹⁸ Primes are required to create a joint venture with a firm from a different ethnic/gender group in order to ensure prime contracting opportunities for all businesses. This rule applies to female and minority firms as well as nonminority firms. This rule has resulted in tens of millions of dollars in contract awards to female and minority firms.

5.4.4 Outsourcing

Indianapolis, Indiana. The city of Indianapolis increased M/WBE utilization through privatization. The city prioritized outsourcing in procurement areas where minority businesses had particular expertise and experience. The city claims to have been particularly successful in contracting out street repair.

5.4.5 Other Subcontracting Rules

Mandatory Subcontracting

Columbia, South Carolina. The city of Columbia Subcontractor Outreach Program established in 2003 applies to city contracts of \$200,000 or more. A prime must subcontract a minimum percentage of its bid. The minimums are set out in **Exhibit 5-1**.

¹⁷ Milwaukee Ordinance, Emerging Business Enterprise Program, 360-01 (12).

¹⁸ City of Atlanta Ordinance Sec. 2-1450 and Sec. 2-1451.

**EXHIBIT 5-1
MINIMUM SUBCONTRACTING REQUIREMENTS FOR
COLUMBIA SUBCONTRACTOR OUTREACH PROGRAM**

Projects	Minimum Subcontracting
Parks	20%
Pipelines (water and sewer)	20%
Pump Stations	20%
Street Improvements	20%
Traffic Signals/Street Lighting	20%
Buildings Project by Project	Not to exceed 49%
Miscellaneous Projects	20%

Source: City of Columbia, Subcontracting Outreach Program (March 2003).

Bidders must make affirmative efforts in outreach to DBEs, Disabled Veteran Business Enterprises (DVBES), and Other Business Enterprises (OBEs) (defined as a business that does not qualify as either a DBE or a DVBE). A bidder will be deemed non-responsive for failure to meet the subcontractor goal, failure to document their outreach efforts, or failure to meet 80 out of 100 points for good faith efforts. Points are granted on a pass/fail basis, awarding either zero or full points.

San Diego, California. As part of its Subcontractor Outreach Program, San Diego requires mandatory outreach, mandatory use of subcontractors, and mandatory submission of an outreach document. Whether a contract has mandatory subcontracting is determined by the engineer on the project.

Contra Costa County, California. The Contra Costa County Outreach Program sets mandatory subcontracting minimums on a contract-by-contract basis.¹⁹ The Contra Costa County Outreach Program requires that M/WBEs be considered by contractors as possible sources of supply and subcontracting opportunities.

Subcontractor Disclosure and Substitution

Oregon. Under Oregon state law, bidders are required to disclose first-tier subcontractors that will be furnishing labor for the project and have a contract value greater than or equal to 5 percent of the bid or \$15,000 (whichever is greater), or \$350,000 regardless of the percentage of the total project.²⁰ First-tier subcontractor disclosure does not apply to contracts below \$100,000, or contracts exempt from competitive bidding requirements.²¹ Bidders are not required to disclose the race or gender of the first-tier subcontractors.

Bidders are allowed to substitute subcontractors.²² The subcontractor substitution statute provides standards sufficient for cause regarding subcontractor substitution, including subcontractor bankruptcy, poor performance, inability to meet bonding requirement, licensing deficiencies, ineligibility to work based on applicable statutes, and for “good cause” as defined by the Construction Contractors Board.²³ The statute provides a

¹⁹ Contra Costa County, Outreach Program, Ordinance Section 3-2 et seq.

²⁰ ORS § 279C.370(1)(a)(A),(B).

²¹ ORS § 279C.370(1)(c),(d).

²² ORS § 279C.370(5), ORS § 279C.585.

²³ ORS § 279C.585.

process by which subcontractors can issue complaints about substitutions. Violation of subcontractor substitution rules may result in civil penalties.²⁴

Nondiscrimination in Contracting

Oregon. Oregon state law forbids discrimination in subcontracting, providing that a “bidder or proposer who competes for or is awarded a public contract may not discriminate against a subcontractor in the awarding of a subcontract because the subcontractor is a certified minority, woman or emerging small business enterprise.”²⁵ A contractor may be disbarred or disqualified for violating the state’s nondiscrimination rules.²⁶ Violation of the nondiscrimination certification after contract award may be deemed a breach of contract, which can result in contract termination.²⁷

5.4.6 Combined Race-Neutral and Race-Conscious Programs

A number of agencies (Tampa, Florida; Phoenix, Arizona; Charlotte, North Carolina; Hillsborough County, Florida; Jacksonville, Florida; Port Authority of New York and New Jersey; and Connecticut) combine race-neutral and race-conscious program features.

Saint Paul, Minnesota. The City of Saint Paul Vendor Outreach program requires that contractors document their solicitation of bids from S/M/WBEs, in addition to listing subcontracting opportunities, attending pre-bid conferences and seeking assistance from S/M/WBE organizations.²⁸ Saint Paul achieved 10.4 percent SBE spending (out of \$113.2 million in total spending). In the SBE program, 62.5 percent of SBE spending went to WBEs, 21.2 percent to nonminority males, and 16.3 percent to MBEs.²⁹

Jacksonville, Florida. The city of Jacksonville recently implemented a hybrid program by establishing a declining schedule of race-conscious targets.³⁰ In the first program year, Jacksonville proposes to meet 70 percent of its M/WBE goal with race conscious means, the second year, 50 percent, and the third year, 25 percent. At the end of the three-year period, the program is to be evaluated.

Connecticut. The state of Connecticut reserves 25 percent of its SBE contracts for M/WBEs.

5.4.7 Financing Programs

Collateral Enhancement Programs

Phoenix, Arizona. Since 1992, the city of Phoenix Expansion Assistance and Development Program (EXPAND) has allowed businesses to secure financing from traditional lending institutions by offering collateral. EXPAND is not a substitute for conventional loans. The City does not loan funds directly to businesses; rather, it places a collateral reserve account at a bank. The business is then required to secure financing from a lending institution, which may be conditioned on receipt of additional collateral

²⁴ ORS § 279C.590.

²⁵ ORS § 279A.110.

²⁶ ORS § 279A.110(2), OAR 731-005-0710(1)(b).

²⁷ ORS § 279A.110(5).

²⁸ City of St. Paul, Vendor Outreach Program, Ordinance 84.08, .09

²⁹ City of St. Paul, *Vendor Outreach Program Detailed Report*, FY 2004, at 6.

³⁰ City of Jacksonville, Executive Order No. 04-02.

supplied by EXPAND. EXPAND maintains a collateral reserve account, and offers businesses collateral enhancement, which is generally 25 percent of the loan amount (up to \$150,000). EXPAND funds may be used for new construction, to purchase existing buildings (including land), to remodel an existing building, for revolving lines of credit, for working capital, for equipment and machinery, and for leasehold improvements.

In order to be eligible for the program, a business must be located within the city of Phoenix, owned by a citizen or lawful permanent resident of the United States, have a net worth of less than \$7.5 million, and have profits (after federal income tax) of less than \$2.5 million (averaged over the last two-year period). It also must have at least two years of operating history and be a for-profit retail, manufacturing, wholesale, or service company. Priority is given to businesses in the city's redevelopment areas and for economic development projects.

Linked Deposit Programs

Other examples of lending assistance programs include linked deposit programs. Agencies use linked deposit programs to subsidize lower rates for business and housing loans by accepting a lower rate on their deposits with participating financial institutions.

New York. A number of local agencies participate in the New York State Linked Deposit program. The program uses the leverage of public agency deposits to encourage participating banks to loan money to small, female, and minority firms at favorable rates. The benefit to lenders is that they have a new loan product resulting from public agency deposits at a reduced rate. The Linked Deposit program makes loans of up to \$10 million to certified S/M/WBEs that have been awarded Port Authority of New York and New Jersey contracts. The program provides two-year financing at reduced rates to small and minority businesses. Businesses in economic development zones, highly distressed areas, defense, and certified S/M/WBEs are eligible for a 3 percent interest rate reduction. Manufacturing businesses must have fewer than 500 employees, and service businesses must have fewer than 100 employees and not be dominant in their field of operation. The program started in 1993.

Loan Mobilization

Chicago, Illinois. In 2000, the city of Chicago revised its M/WBE ordinance to allow the city to make advance payments of 10 percent of the total contract value, up to a maximum of \$200,000.

Florida. The state of Florida has a loan mobilization program in which minority firms that land a state contract can qualify for a state-backed loan of between \$5,000 and \$250,000 to be used on the project.

Orlando International Airport, Florida. The Greater Orlando Airport Authority has a loan mobilization program called the Designated Mobilization Program (DMP). The authority makes available certain retainers and/or designated mobilization payments to local developing business (LDB) professional services, construction, and procurement firms, up to 5 percent of the contract price. This percentage may be increased to 10 percent, subject to the approval of the executive director. The LDB program is race- and gender-neutral.

5.4.8 Insurance and Bonding Programs

San Diego, California. The city of San Diego Minor Construction Program also provides access to low cost insurance on small projects.

Port of Portland, Oregon. The port has made noteworthy efforts to address barriers to small firms from insurance requirements. A Port Process Management subgroup met on insurance barriers and issued a white paper in August of 2003. The subgroup identified insurance barriers in the areas of insurance in excess of associated risk, complex language, difficulties in small firms obtaining blanket insurance certificates, and additional costs for on-call contractors. The subgroup identified low-risk consultant areas that did not require insurance, simplified insurance language, altered some blanket insurance coverage requirements, clarified what could be met with primary and excess insurance, proposed simplifying the port indemnity, and proposed sending appropriate insurance requirements in sample contracts attached to RFPs and requests for quotes (RFQs). The port also looked at a cooperative insurance program for small business, although this initiative did not meet with much success.

Allegheny County, Pennsylvania. Allegheny County has a bonding program in which participants are preapproved for up to \$100,000 in bonding on a maximum of two projects within the county. Approved firms must attend monthly business development sessions covering financial management, taxes, marketing, and credit management. Firms are allowed to participate in the program for up to 18 months. Amwest Surety Insurance Company issues the bonds. Allegheny County guarantees the bonds through the Industrial Development Authority and Community Development Block Grant (CDBG) funds.

Charleston County, South Carolina. The county has employed wrap-up insurance for the County Judicial Center, a technique that lowers builder insurance costs on large projects.

Charleston County, South Carolina. To encourage M/WBE utilization, Charleston County bonding requirements were changed to be at the discretion of the Procurement Director on all construction projects. The county has waived one or two bonds for small projects under \$25,000.

5.4.9 Management and Technical Assistance

Mentor-Protégé Programs

Florida. An interesting variant of the mentor-protégé program is the Business Roundtable. The Florida African American Business Investment Fund (BBIF) Roundtable Technical and Financial Assistance Program helps build management capacity within firms through an interactive management group that allows for firms to benefit from consulting with qualified advisors and to interface with their peers. The BBIF Roundtable is funded by governmental and quasi-governmental entities.

The Roundtable is a management development tool that utilizes the results of a gap assessment and recommendations from the plan established with the business to develop the management capacity of business owners and the growth capacity of their businesses. Business owners meet once a month and function as resources to one

another. They develop creative solutions by collaborating on common obstacles. The Roundtable is an interactive management development tool, not a training course. In Roundtable sessions, principals present the real issues that they are dealing with in their businesses and work with paid consultants and their peers to develop action plans to resolve those issues.

An additional subgroup of the program is the Construction Roundtable. Construction specialists provide technical and operations guidance to construction firms. Members of the construction industry participate in Roundtable sessions, as mentors, with clients. The purpose of this group is to expose Roundtable participants to business techniques, business opportunities, and professional relationships in the construction industry.

Business challenges are then monitored on a month-to-month basis by advisors. Accountability is encouraged by developing work plans and by tracking and sharing progress toward established goals. Financial ratios are used as baseline measures of business performance. Firms are graduated from the Roundtable when their ratio performance has met pre-determined standards and the firms have become “bankable.”

Port of Portland, Oregon. The prime port management and technical assistance program is the mentor-protégé program (also widely known as the Stempel Plan), which has been nationally recognized as a best practice in management and technical assistance. Other agencies have come to Portland to observe the operations of the port plan. The mentor-protégé program has been in place since 1995. Most port management and technical assistance is run through the mentor-protégé program, which focuses on finances, marketing, and operations. The port’s mentor-protégé program was approved by the Federal Aviation Administration (FAA) in FY2000 as a small business development program.

Protégés must be current in taxes and licensing requirements, must have been in continuous operations for the past 24 months, and must be certified by the state as an S/D/M/WBE. Protégés also must pass an assessment evaluation. About 90 percent of mentor-protégé program participants have been in the construction industry, although assistance has also been provided to concessionaires. Firms are in the program two to three years on average.

The mentor-protégé program partners with the city of Portland, the Oregon Department of Transportation, and the Association of General Contractors (AGC).

The program has a supportive services budget of \$75,000 for outside consultants working with protégés. One firm helps with bookkeeping and certified public accountant (CPA) reporting, one helps with operations and construction management, and another firm assists protégés with bidding and estimating. In addition to the consultants, there are two mentors for every protégé. Protégés are not charged for these services. The mentor-protégé program does not satisfy port DBE goals or good faith efforts requirements and does not promise work to protégés.

The program has sponsored small business development sessions with the city of Portland since program inception. Since 2002, the classes have covered construction subcontracting agreements and lien rights, estimating business planning, project management, human resources, prevailing wage, balance sheet, job costing, work in progress (WIP) schedule, leadership and motivation, marketing, how to do business with

the Port and the city of Portland, general conditions, business law, costing equipment to jobs, and the basics of bonding. Course instructors have included attorneys, CPAs, engineers, construction firm owners, and small business development center (SBDC) staff. About 30 to 40 firms attend fall management and technical assistance sessions every year.

The program's budget has primarily been spent on bookkeeping and accounting, between 50 and 70 percent in most years. The rest of the budget was spent on business plans, operational consulting classes, and the AGC conferences.

Milwaukee Metropolitan Sewerage District (MMSD), Wisconsin. The MMSD has a two-year mentor-protégé program that is overseen by an outside construction consulting firm. The MMSD program has had greater success using former entrepreneurs as mentors as opposed to middle-level managers in larger corporations. The mentors provide advice in bidding, estimating, and project management as well as equipment leasing.

Outsourcing Management and Technical Services

Port Authority of New York and New Jersey. The Port has a three-year fee-for-service contract with the Regional Alliance for Small Contractors capped at \$275,000.³¹ Previously, the contract was a flat grant, but it was changed to a fee-for-service arrangement to reward creative uses of financial resources.

Austin, Texas. The city of Austin has a Development Assistance Services (DAS) Program. The program targeted African American contractors due to the city's underachievement of the 2.6 percent African American construction participation goal. Training and assistance is provided by Business Resource Consultants, a for-profit firm that serves as the program manager and overseer of the day-to-day operations of the delivery of program services. A team of professional firms specializing in construction management, business, and contract law provides consulting services to DAS clientele. Local trade associations and construction networks partner, collaborate, and provide oversight and advocacy for the program. The city of Austin Department of Small and Minority Business Resources serves as the contract administrator.

DAS is funded by City of Austin General Fund Budget, along with in-kind services and contributions from professionals in construction, engineering, architecture, business law, and marketing and volunteer services from major construction companies, trade associations, and the general public.

DAS has developed seven prime contractors from 1998 to 2004, generated \$14.5 million in prime contract awards, generated \$16.2 million in subcontract awards, created 131 new jobs (full- and part-time), maintained 50 jobs, and serves over 350 S/M/WBEs on a monthly basis through the delivery of interactive group training sessions, one-on-one technical assistance, and weekly "Bid Briefs."

³¹ The Regional Alliance was started in 1989. For general background on the Regional Alliance, see Timothy Bates, "Case Studies of City Minority Business Assistance Programs," report for the U.S. Minority Business Development Agency, September 1993.

Los Angeles Unified School District, California. The Los Angeles Unified School District established a small business boot camp that covered certification and bonding, prequalification, safety plan development, public contract law, access to capital, how to bid on school district projects, estimated and labor compliance, ten hours of Occupational Health and Safety Administration (OSHA) training, mock bids, and nine plan viewing sites. As of June 2005, 151 firms had graduated from the program. From October 2003 to June 2005, \$4.3 million in bonding and \$6 million in contract awards have gone to boot camp graduates. The program also had 133 A&E firms submit statements of qualifications; 41 of these were selected, 43 percent of whom were M/WBEs.

Phoenix, Arizona. The First Point Information Center is designed to provide coordinated assistance to Phoenix area businesses through the Phoenix Small Business Assistance Program (SBAP). The center is located within the Community and Economic Development Department (CED) and professionals provide intake, referral, and follow-up services to small business owners. Specifically, the center provides information regarding city licensing and tax requirements, the certification process for women- and minority-owned businesses, ombudsman services for all city of Phoenix offices, assistance in securing business with the city, referrals to other community support programs, and assistance with the city's Enterprise Community. In addition to the above services, the center provides a hotline to assist callers with various business needs. During one calendar year, over 5,000 small businesses phoned or visited the center for assistance.

SBAP also provides small businesses with several forms of technical assistance. First, the program contracts with professionals to counsel businesses in general business administration and marketing, and to assist in developing business plans, human resource plans, and business risk assessment plans. The business counselors also provide assistance in preparing financial reports and any other necessary business reports.

The program provides finance counselors who offer detailed financial assistance to support businesses' external financing requirements, as well as bond packaging assistance. Bond packaging assistance involves preparing detailed information to support a construction company's performance payment, and other business-related bonding requirements. The final form of technical assistance provided is a business needs assessment. This assessment evaluates the adequacy of a company's accounting system, management capabilities, and marketing plan.

SBAP has a consulting program that was developed through a joint partnership with Maricopa Community College's Small Business Development Center. Business consultants are available by appointment to assist with business planning, marketing strategies, financial management, inventory management, and other business-related issues. During one calendar year, consultants met with approximately 300 businesses.

5.4.10 Evaluation of Race-Neutral Alternatives

Port of Portland, Oregon. The Port of Portland has evaluated the effectiveness of its race-neutral efforts. The port produced an analysis of 67 firms that had graduated from its mentor-protégé program. Of the 67 mentor-protégé program graduates studied in the Port data from 2001 to 2006, seven were out of business and 23 had Port experience.

Most firms had between five and 40 employees and one had more than \$1 million in revenue. One firm had more than \$50 million in revenue; another more than \$15 million; and three, more than \$5 million in revenue. The data were incomplete on all firms.

5.4.11 Private Sector Initiatives

Bexar County, Texas, Tax Phase-In Agreements. S/M/WBE participation was added to the Bexar County tax incentive policy in 2004. The county currently considers tax abatements of up to 40 percent on qualified real property improvements and new personal property investment.³² Property taxes are 80 percent of county revenue. The county considers an increased property tax abatement of up to 80 percent based on other project criteria. These criteria include hiring 25 percent of positions created with county residents, hiring 25 percent economically disadvantaged or dislocated individuals, practicing sound environmental practices, and dividing work to the extent practical to assist S/M/WBEs in obtaining contracts. Applicants are encouraged to award 20 percent of projects to M/WBEs and 30 percent to certified small businesses.³³ Currently there are no similar S/M/WBE policies for tax increment financing (TIF).³⁴

In a Tax Phase-In Agreement for Lowe's Home Centers, Lowe's agreed to:

- Use good faith efforts to include certified M/WBEs.
- Work in good faith to set construction and operational services goals for M/WBEs based on M/WBE availability.
- Establish a mutually agreed upon M/WBE reporting format.

The agreement acknowledged that although Lowe's still has national contracts it must comply with, it has retained the right to choose any vendor and has agreed to explore subcontracting opportunities.³⁵

In a HEB Grocery Tax Phase-In Agreement, HEB Grocery committed to 20 percent M/WBE participation and 10 percent SBE participation.³⁶ This was in addition to agreeing to hire 25 percent from Bexar County and 25 percent economically disadvantaged or dislocated workers.

Bexar County, Texas, Public Improvement Districts. Bexar County policies allow for the county to enter into an economic development agreement for Public Improvement Districts (PIDs).³⁷ PIDs are projected to be used in conjunction with TIFs for housing and infrastructure development.³⁸ As a condition of the economic development agreement, the firm seeking such an agreement has to meet, at a minimum, certain criteria involving

³² The County Tax Phase-In Policy is currently being revised.

³³ Bexar County Economic Development & Special Programs Office, Tax Phase-In Guidelines for Bexar County and the City of San Antonio, Effective June 15, 2001 through June 14, 2008, adopted February 28, 2006. Not all agreements include S/M/FBE objectives. For examples, the Kautex Tax Phase-In Agreement did not address S/M/FBE policy. See Bexar County, Tax Phase-In Agreement (Kautex), December 20, 2005.

³⁴ Bexar County, Texas, Tax Increment Financing and Reinvestment Zone (TIF/TIRZ), Guidelines and Criteria, Commissioner's Court Amended and Approved: August 23, 2005.

³⁵ Bexar County, Tax Phase-In Agreement (Lowe's), June 27, 2006, Exhibit E.

³⁶ Bexar County, Tax Phase-In Agreement (HEB Grocery), March 11, 2003, Section 5.01(c).

³⁷ Such an agreement is allowed for under Chapter 372 of the Texas Local Government Code.

³⁸ Bexar County, Texas, 2005 – 2009 Consolidated Plan, Executive Summary, at 61.

employment, health care benefits, environmental practices, and the S/M/WBE policy. The S/M/WBE policy was added to PIDs in 2006.

An agreement Marriott, which has been labeled a “super PID,” provided that Marriott would “use reasonable efforts to comply with the S/M/WBE policies and procedures attached.”³⁹ The Marriott agreement noted that the project owner had established 20 percent S/M/WBE goals in construction. Marriott retained the right to accept the lowest qualified bid. The agreement also provided for the hotel to develop M/WBE goals in operational services, to work with the S/M/WBE office in implementing the Marriott supplier diversity program, to use certified firms, and to provide semi-annual S/M/WBE reporting. “The sole remedy for noncompliance with this provision shall be the obligation of Marriott to prepare and implement a plan that provides for reasonable efforts to achieve the goals...”

5.4.12 Outreach

Bexar County, Texas. Bexar County, in conjunction with the city of San Antonio, Texas, has sponsored annual S/M/WBE owners’ conferences since 2001. The conferences have been co-sponsored by the Central and South Texas Minority Business Council in conjunction with a number of major corporations, including Dell, Toyota, and AT&T. Typically, conference workshops have addressed the following:

- Doing business with federal, state, and local agencies, and the private sector.
- Access to capital.
- Human resources.
- Franchising.
- Management.
- Veterans.
- Responding to bids and RFPs.

Registered attendees grew from 1,200 in 2001 to 2,400 in 2006; estimated total attendance grew from 1,800 in 2001 to 5,000 in 2006. The number of exhibitors grew from 75 in 2001 to 180 in 2006.⁴⁰ Virtually all the major local agencies, loan providers, business development providers, and chambers of commerce participated in the conference along with a number of major corporations. The conference budget for 2007 was \$250,000.

M/WBE Web Sites

Regional Alliance, New York. The Regional Alliance of Small Contractors Opportunities Clearinghouse in New York provides a Web-based forum for small contractors to interact with large construction firms and public development agencies

³⁹ Senior Priority Economic Development Agreement By and Between Cibolo Canyons Special Improvement District, Marriott International, Inc., and Bexar County, Texas, January 12, 2006, Exhibit B.

⁴⁰ Small, Minority, and Women Business Owners (S/M/WBO) Conference, Frequently Asked Questions, at 6.

5.4.13 Two-Tiered Certification of Small Business

Oregon. The state of Oregon has a two-tiered system for small business certification. A tier one firm employs fewer than 20 full-time equivalent employees and has average annual gross receipts for the last three years that do not exceed \$1.5 million (for construction) or \$600,000 (for non-construction). A tier two firm employs fewer than 30 full-time equivalent employees and has average annual gross receipts for the last three years that do not exceed \$3 million (for construction) or \$1 million (for non-construction).⁴¹ An emerging small business (ESB) cannot be a subsidiary or a franchise. In 2006, small business program participation was extended from seven to 12 years.⁴²

5.4.14 M/WBE Reporting

Oregon Department of Transportation (DOT). The Oregon DOT has a very complete reporting system for DBEs in construction, with 105 tables, and includes coverage of DBE utilization at the subcontract and prime contract levels, bidders, small business utilization, prompt payment, commercially useful function review, complaints against prime contractors, on-the-job training, and labor compliance. The system is updated daily.

⁴¹ OAR 445-050-0115.

⁴² OAR 445-050-0135.

APPENDICES

APPENDIX A:

***PENSACOLA FIRMS WITH
BONDING LEVELS PER CONTRACT
GREATER THAN \$1 MILLION***

**APPENDIX A
PENSACOLA FIRMS WITH
BONDING LEVELS PER CONTRACT GREATER THAN \$1 MILLION
OCTOBER 2008***

CONSTRUCTION

Vendor Name	Address	Products/ Services	Contact	Ethnic Group
Sunset Marine, LLC (Of DE)	7280 Plantation Rd Ste. L Pensacola, FL 32504-6237	Dredging, heavy construction, levee protection, hauling & grubbing, debris removal	ssetmarinede@aol.com 850-969-0372	African American
Sweat LLC	6430 Monitor Ct Pensacola, FL 32503-7534	Perform all aspects of vegetation management and forestry related services including; fuels reduction, invasive species eradication, ROW maint., herbicide app, site prep, trail building and maint., mech. mastication, chipping and grinding and construction.	dsweat7777@yahoo.com 850-293-7830	Native American
Hixardt Technologies, Inc.	119 W Intendencia St Pensacola, FL 32502-4733	Consulting & Systems Integration. Hardware Sales: Dell, HP, CISCO, SUN, Network Cabling, Fiber, IP Telephony, CISCO Wireless sales & installation. Electrical Services: Generators UPS (APC), Data Center Air & flooring. Surveillance system (Guardian)	mike.hicks@hixardt.com 850-439-3282	African American
American Contractor And Technology, Inc.	1101 Gulf Breeze Pky STE 315 Gulf Breeze, FL 32561-4859	Building, Heavy and Marine Construction, Metal Building, Demolition, Design-Build, Dredging, Levee, Rehabilitation, Historical reservation/ Restoration, Rock Placement, Roofs, Bridges, Concrete, Diving, Electrical, Fences, Mechanical, Masonry, Pile driving, Airport Runways	info@actcorp.us 850-932-9775	Native American
Put 'R Up Incorporated	1000 Navy Blvd Pensacola, FL 32507-1249	Florida General and Roofing Contractor capable of meeting all construction, development and reconstruction for commercial, government, industrial and residential needs.	service@putrup.com 850-723-7225	Hispanic American

Vendor Name	Address	Products/ Services	Contact	Ethnic Group
J2 Engineering, Inc. - Pensacola Office	2101 W Garden St. Pensacola, FL 32501-4423	Design Build, Construction, Environmental, Civil, Geology, Remediation, Abatement, Asbestos, Lead, Mold, Demolition, AST, UST, HTRW, Security, Fencing, Anti-Terrorist, Force Protection, Safety	jmorales@j2-eng.com 813-888-8861	Hispanic American
Ellis Environmental Group, LLC	1249 S Old Corry Field Rd Pensacola, FL 32507-2197	Full Service capabilities providing Design/Build, Elec., General Construction, Demo & Env. Services UXO/OE removal. Emerg. Hurricane Response, Roofing Repairs & Debris Removal. Registered Eng/Geo most states. Outstanding ACASS/CCASS rating	Carla.Riley@ellisenv.com 352-332-3888	Native American
RCG Enterprises Incorporated	1504 W Intendencia St Pensacola, FL 32501-4549	Construction, Highway, Street, Site, Landscape, Grounds Maintenance, Construction Management, Logistics, Facilities Management, Training Development, Administration Support, Computer Hardware, Office Supplies, Packing, Shipping	ryoung@rcgenterprises.com 850-777-7508	African American
RCG- Quality Enterprises USA JV	1101 S Fairfield Dr Pensacola, FL 32506-5909	Construction, Airfield, Paving, Site Work	rguillot@rcgenterprises.com 850-858-0200	African American
Minority Specialty Services, Inc.	7100 Plantation Rd Suite 11 Pensacola, FL 32501-1423	Mechanical, heating & air conditioning, plumbing, electrical, general construction'	office@msscentral.com 850-477-7605	Asian Pacific American
Sun Engineering & Construction Management Corp	6732 Cedar Ridge Circle Milton, FL 32570-3659	Provide Engineering services i.e. design of Multi units housing, multi stories structures (composite & post tension) foundation design (shallow & deep), architecture services, sewer system , design mains, communication tower design and project management	kkhan@secmcorp.com 850-623-2232	Subcontinent Asian American
WPR, Inc.	4175 Briarglen Rd Milton, FL 32583-2884	Manufacture concrete, cement, concrete septic tanks, fill dirt, grading services for land and roads, general construction contractors, demolition, storm water utility install, tree and debris removal, sand, crushed aggregate, site prep, clearing, grubbing	wprinc@bellsouth.net 850-626-7713	Asian Pacific American

Vendor Name	Address	Products/ Services	Contact	Ethnic Group
Shoreline Consultants, Inc.	13599 Perdido Key Dr Pensacola, FL 32507-4634	Facilities Maintenance; Construction Services; Wholesale Coffee and Tea; Promotional items	shorelineforbill@aol.com 251-458-5470	Native American
Cronin Construction, Inc.	6 Calle Hermosa Pensacola Beach, FL 32561-2440	General Contractor, residential, commercial, industrial, renovations, concrete, excavation, site preparation, demolition, mulching, fuel reduction, roofing, rocks, roads, painting, tile	ktcronin@croninconstructionusa.com 850-255-4825	Hispanic American
Robert Sweat	4319 Private Point Dr Pensacola, FL 32503-4302	Reforestation, Site Preparation, Fencing, Trail Building, Herbicide, Right of Way Maintenance, Thinning, Fuel Reduction, Urban Interface, Mastication, Tree Planting. Excavation of Contaminated Soil, Asbestos Abatement, Renovation, New Construction. Landscaping	robsweat@aol.com 850-438-4155	Native American

SERVICES

(All of These Firms are on the Construction List)

Vendor Name	Address	Products/ Services	Contact	Ethnic Group
J2 Engineering, Inc. - Pensacola Office	2101 W Garden St. Pensacola, FL 32501-4423	Design Build, Construction, Environmental, Civil, Geology, Remediation, Abatement, Asbestos, Lead, Mold, Demolition, AST, UST, HTRW, Security, Fencing, Anti-Terrorist, Force Protection, Safety	jmorales@j2-eng.com 813-888-8861	Hispanic American
RCG Enterprises Incorporated	1504 W Intendencia St Pensacola, FL 32501-4549	Construction, Highway, Street, Site, Landscape, Grounds Maintenance, Construction Management, Logistics, Facilities Management, Training Development, Administration Support, Computer Hardware, Office Supplies, Packing, Shipping	ryoung@rcgenterprises.com 850-777-7508	African American
Put 'R Up Incorporated	1000 Navy Blvd Pensacola, FL 32507-1249	Florida General and Roofing Contractor capable of meeting all construction, development and reconstruction for commercial, government, industrial and residential needs.	service@putrup.com 850-723-7225	Hispanic American

Vendor Name	Address	Products/ Services	Contact	Ethnic Group
Robert Sweat	4319 Private Point Dr Pensacola, FL 32503-4302	Reforestation, Site Preparation, Fencing, Trail Building, Herbicide, Right of Way Maintenance, Thinning, Fuel Reduction, Urban Interface, Mastication, Tree Planting, Excavation of Contaminated Soil, Asbestos Abatement, Renovation, New Construction. Landscaping	robsweat@aol.com 850-438-4155	Native American
Ellis Environmental Group, LLC	1249 S Old Corry Field Rd Pensacola, FL 32507-2197	Full Service capabilities providing Design/Build, Elec., General Construction, Demo & Env. Services UXO/OE removal. Emerg. Hurricane Response, Roofing Repairs & Debris Removal. Registered Eng/Geo most states. Outstanding ACASS/CCASS rating.	Carla.Riley@ellisenv.com 352-332-3888	Native American
American Contractor And Technology, Inc.	1101 Gulf Breeze Pkwy STE 315 Gulf Breeze, FL 32561-4859	Building, Heavy and Marine Construction, Metal Building, Demolition, Design-Build, Dredging, Levee, Rehabilitation, Historical Preservation/Restoration, Rock Placement, Roofs, Bridges, Concrete, Diving, Electrical, Fences, Mechanical, Masonry, Pildriving, Airport Runways	info@actcorp.us 850-932-9775	Native American
Hixardt Technologies, Inc.	119 W Intendencia St Pensacola, FL 32502-4733	Consulting & Systems Integration. Hardware Sales: Dell, HP, CISCO, SUN, Network Cabling, Fiber, IP Telephony, CISCO Wireless sales & installation. Electrical Services: Generators UPS (APC), Data Center Air & flooring. Surveillance system (Guardian)	mike.hicks@hixardt.com 850-439-3282	African American
Sweat, LLC	6430 Monitor Ct Pensacola, FL 32503-7534	Perform all aspects of vegetation management and forestry related services including; fuels reduction, invasive species eradication, ROW maint., herbicide app, site prep, trail building and maint., mech. mastication, chipping and grinding and construction.	dsweat7777@yahoo.com 850-293-7830	Native American

APPENDIX B:

ALL CCR REGISTERED FIRMS

APPENDIX B
ALL CCR REGISTERED FIRMS
NOVEMBER 2008

Vendor Name	Products/ Services	Contact	Ethnic Group
WPR, Inc.	Manufacture concrete, cement, concrete septic tanks, fill dirt, grading services for land and roads, general construction contractors, demolition, storm water utility install, tree and debris removal, sand, crushed aggregate, site prep, clearing, grubbing	wprinc@bellsouth.net 850-626-7713	Asian Pacific American
PBrown Builders, LLC		pbrownllc@bellsouth.net 850-346-3175	Black American
Aztech Services, Inc		jdtcorp@bellsouth.net 850-497-9338	Hispanic American
Automation Technology, Inc.	Coatings of metals, panel manufacture and wholesale distributor for electrical and process instrumentation, also design engineering	atirk@bellsouth.net 850-968-5551	Native American
Paloma Air Group, LLC	When and if able, will provide expertise, training, et alia, in electronic warfare of all aspects to only those allowed by US government.	olgaanthony@earthlink.net 850- 453-9750	Hispanic American
Emerald Coast Hygienitech		jojo64def@yahoo.com 850-384-4037	Black American
SSP-Pensacola Lodging, LLC - Comfort Inn		gm.fl712@choicehotels.com 850-484-8070	Subcontinent Asian American
Industrial Masonry & Tile, LLC		rachelrob@bellsouth.net 850-791-6318	Black American
R-Com Enterprise, LLC	Wire & Wireless Hardware/Software Sales. LAN/MAN/WAN Design & Implementation. Cable Certification. Database and Query Application Design. Web Site Design using Windows and Unix utilities. Data Warehousing, Multimedia and Security services.	ruthel_mccormick@rcoment.com 850-969-9989	Black American
Corasa Supply and Services	Hand tools, adhesives, paints, metals (steel, aluminum), band saw blades, machinery, building materials, electronics, miscellaneous parts, oils, lubricants, chemicals, cleaning materials, janitorial equipment, cleaning services, paper products, office supplies	corasa@cox.net 850-221-7098	African American

Vendor Name	Products/ Services	Contact	Ethnic Group
BENCO Construction Services, INC. - BENCO Commercial Roofing		bert@benco-rfg.com 850-475-2163	Hispanic American
Sage Technology Consultants, LLC	Information Technology(IT) expertise in the delivery of IT Strategic planning, IT products and services, Fed. Fin. Mgmt services. Delivery of voice, video & data networks & services & seat mgt. Intelligent Vehicle Health Mgt(IVHM) strategic planning	csimonds@sagetechnology.com 850-525-6410	Native American
Minorityhiringplace.Com, LLC	We are capable of posting job ads for every industry and profession. We can provide a database of thousands of qualified minority candidates for those who wish to take advantage of our services.	jarigsby@minorityhiringplace.com 850-791-0735	Black American
L & ET Dispatching Corporation		ltimmons69@bellsouth.net 850-944-9104	Black American
Cogon Systems, Inc.	Design and development healthcare software for exchange of data	huy.nguyen@cogonsystems.com 850-429-1633	Asian Pacific American
Crosby Landscaping & Building Maintenance		cros.scaping@gmail.com 850-912-8187	Black American
Ohopaki General Contracting & Mechanical, Inc..		daryll.long@ohopaki.com 850-939-0882	Native American
Sun Engineering & Construction Management Corp.	Provide Engineering services i.e. design of multi units housing, multi stories structures (composite & post tension) foundation design (shallow & deep), architecture services, sewer system, design mains, communication tower design and project management	KKHAN@SECMCORP.COM 850-623-2232	Subcontinent Asian American
Put 'R Up Incorporated	Florida General and Roofing Contractor capable of meeting all construction, development and reconstruction for commercial, government, industrial and residential needs	service@putrup.com 850-723-7225	Hispanic American
Service To The Max, Inc.		maxketcher@netzero.net 850-944-1747	Native American
Rockhill Group, Inc., The	Pilots for military flight training. Management of military airfields and operations, government facilities, warehousing and storage. FAA/NWS weather observation services, courier Services, flight academic training, air traffic control services	rockhill@mchsi.com 850-934-9474	Hispanic American

Vendor Name	Products/ Services	Contact	Ethnic Group
Polu Kai - J J Sosa JV, LLC		sjensen@polukaiservices.com 850-476-9900	Native American
Casual Blinds Inc		itsgking@bellsouth.net 850-939-3996	Hispanic American
Goldrush77.Com/ Caruth Central Business Advisory And Educatio		jcaruth@mchsi.com 850-936-0377	Black American
Hernandez Calhoun Design International, P.A - Hernandez Klein Design International	Awarded In 2003- USACE South Atlantic Division Military Small Business A-E Excellence Award, Architecture, Programming, Interior Design, Master Planning, Site/Facility Evaluations, Historic Renovation, Code Analysis, Cost Estimating, Medical Designs	sarah.hernandez@hernandezcalhoun.com 850-434-5142	Hispanic American
Maria Carmen Echegaray		chichigaray@cox.net 850-332-5847	Hispanic American
RDR, Inc.		mtmorrissey@rdrpcola.com 850-453-3866	Asian Pacific American
C. & J. Chef Enterprises Of N. W. Florida, Inc. - C J's Kitchen & Grille		cjspensacola@yahoo.com 850-435-9543	Black American
HX5, LLC	Provide advanced technical, professional, engineering, program management, and administrative services	margie.howard@hxfive.com 850-621-5280	Hispanic American
Srun, Rut-Anne		ruthytv24@yahoo.com 850-515-0616	Hispanic American
Advanced Furniture Services, Inc.		furnitureinstaller@cox.net 850-390-3442	Black American
Phoenix Sales & Marketing Consultants, Inc	Provide sales services to general contractors, locating jobs for them and sales services to entities searching for general contractors. Provide labor resources and subcontractors to general contractors	trevor@phoenixgroupbiz.com 850-554-8714	Black American

Vendor Name	Products/ Services	Contact	Ethnic Group
STOA International/ Florida, Inc. - STOA Architects	Architecture, interior design, CADD services, cost estimating, master planning, hospital design, laboratory design, facility programming, engineering and D.O.D. construction projects. Mechanical, electrical, civil & structural engineering. Full in-house	mgilliland@stoaarchitects.com 850-432-1912	Asian Pacific American
RCG Enterprises Incorporated	Construction, highway, street, site, landscape, grounds maintenance, construction management, logistics, facilities management, training development, administration support, computer hardware, office supplies, packing, shipping	ryoung@rcgenterprises.com 850-777-7508	Black American
Marshall's Contracting Services, Inc.		gwehrhahn@aol.com 850-515-0352	Native American
New Frontier Services, LP		imnewfrontier@aol.com3 850-475-5777	Native American
Success Pipeline		gh32570@yahoo.com 850-313-8822	Black American
Hixardt Technologies, Inc.	Consulting & Systems Integration. Hardware Sales: Dell, HP, CISCO, SUN, Network Cabling, Fiber, IP Telephony, CISCO Wireless sales & installation. Electrical Services: Generators UPS (APC), Data Center Air & flooring. Surveillance system (Guardian)	mike.hicks@hixardt.com 850-439-3282	Black American
Active Moving & Storage Company	Full service moving and storage services; Full service records storage management; Full service warehousing and distribution services	steve@activemoving.biz 850-453-1202	Hispanic American
Armada System Incorporated		armadahull@aol.com 850-912-8962	Native American
Kirby, Andre D		andre.kirby@gmail.com 850-549-3624	Black American
Gulf Coast Electric Motor Service, Inc.	Service and sales of all types of electric motors, submersible pumps, and generators. Armature rewinding, field repairs, U.L. listed, member of E.A.S.A.	info@gcemsinc.com 850-433-5134	Hispanic American
Healtheon, Inc.		jas.walia@healtheoninc.com 504-599-5982	Subcontinent Asian American

Vendor Name	Products/ Services	Contact	Ethnic Group
Fierce Alliance LLC - Fierce Alliance	Strategic and business planning consulting services, change-management, problem-solving, leadership training, business research, education training, market research	macleveland@cox.net 800-258-6313	Black American
Alioth Technical Services, Inc.	Installation, Maintenance, Repair, of Electronics, RF, Microwave, Sensors, equipment including, tower work	wmackie@aliothtech.com 850-313-3137	Native American
Beyond Design DLP, Inc. - Beyond Design	E-learning solutions for educational and training needs to include all phases of instructional design for development, conversion, revision, or maintenance of interactive multimedia instruction, soft skills training, hybrid courseware and other ADL products	patti@beyonddesigninc.net 850-449-3504	Native American
Foward Transportation, Inc. - Forward Transportation		ltimmons69@bellsouth.net 850-255-5502	Black American
Toler Enterprize		angelalafaye@yahoo.com 850-346-5270	Black American
Perez, Arthur		aperezjr11@hotmail.com 850-944-9846	Asian Pacific American
Oshanee Enterprises, Inc.	Professional Consulting, analysis, design and development of human resource development and management solutions	dmazzola@oshanee.com 850-437-0118	Native American
Shoreline Consultants, Inc.	Facilities Maintenance; Construction Services; Wholesale Coffee and Tea; Promotional items	shorelineforbill@aol.com 251-458-5470	Native American
Sleep Study Advisors, Inc.	Perform sleep studies Score sleep studies Interpretations of sleep studies	slpstdyadv@aol.com 850-393-1773	Black American
Pinckard Garage Door, Inc.		pinckardgaragedoors@peoplepc.com 850-994-8321	Native American
Beyond The Horizon Enterprises		bg84cutty@yahoo.com 850-225-6276	Black American
National Black Tourism Bureau, Inc.		hharris@gcaavb.com 850-261-0946	Black American
Vanessa Anoi, Inc. - Proactive Installations		proactiveinstall@aol.com 850-432-8383	Asian Pacific American
Rainbow House - Rainbow House Towel & Linen Outlet	General line supplies to include hotel amenities, janitorial supplies, office equipment and supplies, coffee and condiments, uniforms	samfitzpatrick@worldnet.att.net 850-477-6461	Black American

Vendor Name	Products/ Services	Contact	Ethnic Group
Scarborough Executive Consulting, LLC	Headhunting & Recruiting firm. Direct-hire job vacancy placements in the industries of Office Administration, Finance, IT & Business to Business Sales.	admin@scarboroughexec.com 850-499-6912	Black American
Robinson, Camisha - C And E Concrete Enterprises	C and E Concrete has over 15 years in concrete construction. Our company specializes in commercial and residential from layout to finish.	candeconcrete@yahoo.com 850-259-0901	Black American
Dynamic Systems Management		cstat10@yahoo.com 850-607-0453	Black American
Salinas Technologies, Inc.	Operations Research, analysis, human factors, Man-in-the-loop simulation, training programs, instructional design, testing, surveys, statistical analysis, program evaluation	alsalinas@salinastechnologies.com 850-437-3090	Hispanic American
Olsen Enterprises, Inc. - Olsen, Sean		guidinglightbus@earthlink.net 850-581-0115	Asian Pacific American
Ellis Environmental Group, LLC	Full Service capabilities providing Design/Build, Elec., General Construction, Demo & Env. Services UXO/OE removal. Emerg. Hurricane Response, Roofing Repairs & Debris Removal. Registered Eng/Geo most states. Outstanding ACASS/CCASS rating.	Carla.Riley@ellisenv.com 352-332-3888	Native American
Yolis Cleaning Service, LLC	Janitorial services, residential, industrial, commercial, carpet cleaning, curtains, tile, wax, post- construction cleanup	yolibryant1@yahoo.com 850-496-9687	Black American
Pugh, Kevin D. Site & Dozer Works, LLC	Road Construction, Pipe Installation, drainage, concrete work, asphalt; resurfacing, new const., forestry; tree plant, site prep, erosion control, cruise timber, fire lines, harvest	nativeamerican46@frontiernet.net 850-327-6336	Native American
Jeffrey, Suzie		suzie44119@yahoo.com 850-602-8700	Black American
Huey's Works		hueyworks@aol.com 850-438-0000	Black American
Q A Electric Inc		qaelectricalinc@yahoo.com 850-862-8621	Black American
Global Business Solutions, Inc. - GBSI	Premier IT services provider with extensive credentials in Database Management, Software Engineering and Application Development, Hardware and Network Support, Integrated Web Services, Content Management and Enterprise Technology Education	tramos@gb-solutions.com 850-944-7579	Hispanic American

Vendor Name	Products/ Services	Contact	Ethnic Group
General Precision Manufacturing, Inc	Mechanical & Electrical Hardware Manufacturing, Fabrication & Assembly, Aircraft, Vehicle, Ship & Marine Overhaul, Testing, Maintenance & Repair of Components, Equipment & Systems, Airfield Management, Airport Operations Support, Program Support Services	mwilliams@gpmfl.com 850-469-1212	Black American
Yo Eddie, Inc.	Hydro-Stop authorized installer	info@yoeddieinc.com 850-712-2598	Native American
Sweat LLC - Sweat	Perform all aspects of vegetation management and forestry related services including; fuels reduction, invasive species eradication, ROW maint., herbicide app, site prep, trail building and maint., mech. mastication, chipping and grinding and construction.	dsweat7777@yahoo.com 850-293-7830	Native American
Gifts For Keep LLC		admin@giftsforkeep.com 850-776-5607	Black American
Eagle Environmental Services Of Florida, Inc.		f.posey@mchsi.com 850-336-2385	Native American
William T Walker, Sr.		walkerwtrn@yahoo.com 850-478-2634	Black American
Black Box Technology, Inc.		twhittington@the-black-box.biz 850-293-3184	Asian Pacific American
J & T Custom Works	Project Management specializing in airport improvements. Construction management & General Contracting	j.sessa@mchsi.com 850-529-5623	Native American
Robert Sweat - Sweat	Reforestation, Site Preparation, Fencing, Trail Building, Herbicide, Right of Way Maintenance, Thinning, Fuel Reduction, Urban Interface, Mastication, Tree Planting, Excavation of Contaminated Soil. Asbestos Abatement, Renovation, New Construction. Landscaping	robsweat@aol.com 850-438-4155	Native American
Industrial Tire And Wheel Supply		industrialtireandwheelsupply@yahoo.com 850-478-8865	Asian Pacific American
Lopez, Rolando, MD, PA		tiburon12@aol.com 850-932-7014	Hispanic American
Triune Homes Corp.		sjunco@triunehomes.com 850-380-6199	Black American
E & I Corporate Environments, LLC		Kevin@ei-ce.com 850-777-8385	Asian Pacific American

Vendor Name	Products/ Services	Contact	Ethnic Group
LJH Business Solutions, LLC		harrisljh@mchsi.com 850-232-1427	Black American
Trinity Resources		trinityresources@cox.net 850-780-6287	Asian Pacific American
HERNANDEZ & SWIFT ASSOCIATES INC	Specification writing &/or translation from English to Spanish, conversion of measurements from English to metric system; CADD; comprehensive transportation operations; roadway design; site design; mass transportation operations; computer applications; water & SE	HSA11@bellsouth.net 850-934-1530	Hispanic American
J E I Webb Joint Venture		mwebbschwartz@webbelectric.com 850-477-8181	Hispanic American
West Florida Coatings, Inc.	Painting, wall coverings, floor coverings	bng@cpabizzness.com 850-981-1517	Hispanic American
Palacios, Adrian		karyme716@aol.com 850-313-1225	Hispanic American
KGJ Resources, LLC - KGJ Resources		kgjresources@gmail.com 850-532-1184	Black American
Appriver, LLC		rphilips@appriver.com 850-932-5338	Hispanic American
G B Green Construction Management & Consulting, Inc.	Site & utilities work demolition and hauling of sand and aggregate materials	gbgreen30@hotmail.com 850-698-3785	Black American
Gracia, Jean - Jani-King		jeangracia@hotmail.com 850-554-9847	Black American
Pensacola Dental Lab, Inc.	We make dental prosthetics to include: full dentures, acrylic partials, cast metal partials, cast metal and gold crowns, and porcelain fused to metal, porcelain fused to gold crowns and bridges.	cmsturner@aol.com 850-434-0121	Native American
Cronin Construction, Inc.	General Contractor, residential, commercial, industrial, renovations, concrete, excavation, site preparation, demolition, mulching, fuel reduction, roofing, rocks, roads, painting, tile	ktcronin @croninconstructionusa.com 850-255-4825	Hispanic American

Vendor Name	Products/ Services	Contact	Ethnic Group
All Smiles Dental Lab, Corp.		allsmilesdental@live.com 850-497-5954	Hispanic American
Bolden, Antoine		antoinebolden@bellsouth.net 850-316-0415	Black American
Chosen One Movers, LLC		laderidraedmond@yahoo.com 850-368-0009	Black American
Far East Construction Corporation		mkangcho@aol.com 847-870-7943	Asian Pacific American
Living Water Fire Protection, LLC		gmc@livingwaterfp.com 850-937-1850	Black American
Geis & Wesner Systems, Inc.		pjgeis@cox.net 850-484-0921	Asian Pacific American
Three Feathers Associates	Consultant, Program Management and Logistics analysis in advanced technologies through proof of concept and follow-on support.	kingoffla@bellsouth.net 850-939-0555	Native American
Santos Diagnostics Corp.		perri.santos@eglin.af.mil 850-883-9036	Asian Pacific American
Polu Kai/Acme Roofing, LLC		sjensen@polukaiservices.com 703-533-0039	Native American
Across The Board Consultants, Inc.	Business Management Contract and Consulting Service, Business Management Development Training, Bookkeeping, Tax and Payroll Service, Construction Management Service	abcinfl@gmail.com 850-607-6429	Black American
Blended Learning Solutions Incorporated	Blended Learning Solutions, Incorporated provides tailored solutions to meet the diverse training needs of its customers. We analyze the unique situation and apply the appropriate methodology(s) to create solutions that meets the identified objectives.	lynnh@blsolutionsinc.com 850-206-7156	Native American
M M & T, LLC	Mental health (MH) services for individuals with a MH diagnosis, developmental disability and substance abuse. Behavior analysis/training to individuals, families, MH agencies, hospitals, industrial and business settings, and other agencies.	drlyndatyson@aol.com 850-492-3342	Black American
Summit Environmental Services, LLC	Commercial building Renovation and New Construction, General Construction, Facilities Maintenance and Repairs, Asbestos Abatement, Mold Remediation, Environmental Remediation	HeatherSummit@bellsouth.net3 850-477-6200	Native American

Vendor Name	Products/ Services	Contact	Ethnic Group
Adsync Technologies, Inc.	We offer instructional design, modeling and simulation, and computer systems engineering services to our clients. Our executive management has collectively a Ph.D. in Instructional Design and a M.S. in Computer Science.	business@adsynctechnologies.com 850-529-5117	Asian Pacific American
Alvare Design Associates		c.alvare@alvare-design.com 850-995-0309	Hispanic American
C-4 Solutions, LLC	C-4 Solutions LLC has a proven track record in the field of Communications. The vast experience of this team includes multiple projects completed over the past 25 years on numerous bases. We are ready to meet your communication needs.	goffp01@bellsouth.net 850-217-8842	Asian Pacific American
Vega, Gloria		aquamarine3072@hotmail.com 850-293-4627	Asian Pacific American
Minority Specialty Services, Inc. - MSS	Mechanical, heating & air conditioning, plumbing, electrical, general construction	office @msscentral.com 850-477-7605	Asian Pacific American
RCG- Quality Enterprises USA JV	Construction, Airfield, Paving, Site Work	rguillot@rcgenterprises.com 850-858-0200	Black American
J2 Engineering, Inc. - Pensacola Office	Design Build, Construction, Environmental, Civil, Geology, Remediation, Abatement, Asbestos, Lead, Mold, Demolition, AST, UST, HTRW, Security, Fencing, Anti-Terrorist, Force Protection, Safety	jmorales@j2-eng.com 813-888-8861	Hispanic American
Velton Hanks Professional	Detail and Car Wash	vhanks@cox.net 850-433-8329	Black American
American Contractor And Technology, Inc.	Building, Heavy and Marine Construction, Metal Building, Demolition, Design-Build, Dredging, Levee, Rehabilitation, Historical Preservation/ Restoration, Rock Placement, Roofs, Bridges, Concrete, Diving, Electrical, Fences, Mechanical, Masonry, Pile driving, Airport Runways	info@actcorp.us 850-932-9775	Native American
Sunset Marine, LLC (Of DE)	Dredging, heavy construction, levee protection, hauling & grubbing, debris removal	ssetmarinede@aol.com 850-969-0372	Black American
Parongao, John		zrb@msn.com 801-309-0286	Asian Pacific American

Vendor Name	Products/ Services	Contact	Ethnic Group
Phoenix Construction Solutions, LLC	Phoenix Construction Solutions is a drywall installation contractor	tpant@phoenixgroupflorida.com 850-554-8714	Black American
Polu Kai Services, LLC		sjensen@polukaiservices.com 703-533-0039	Native American
Craig Technical Consulting, Inc. - Craig Technologies		carol.craig@craigtechinc.com 309-647-8508	Hispanic American
Performance Towing Of Pensacola LLC		hotwire7@excite.com 850-474-6312	Asian Pacific American
International Fire And Emergency Services Training Academy, LLC - IFESTA	Standard of Response Coverage Development, Fire Safety Consulting, Contract Fire Protection Services, Emergency Management, Hazardous Materials Protocols, Fire Protection Engineering, Fire Extinguisher Maintenance, Translation Services	ifesta_llc@yahoo.com 305-293-2200	Black American
Five J's, Inc.	Site preparation, geological material relocation, erosion control, dirt pit, hauling, trucking, geological manager.	jeffamyates@yahoo.com 850-712-8798	Native American
Epoch Software Systems, Inc.	Software/ Systems: Software and systems engineering specializing in command and control Logistical/Engineering Services: Support for various military operational systems. NAICS - 541511, 541512, 541330, 541513, 541614	renee_delacruz@epochsoftware.com 850-916-3201	Hispanic American
Breeze South, LLC - Breeze South		breezesouth@hotmail.com 850-456-6261	Asian Pacific American
MJB Business Development, Inc.	Provide full-service business development and general management consulting services to small privately-held companies. Provide cash flow, cost control, supply chain management, distribution, contract and employee recruiting services to client companies	garivas@cox.net 850-497-0362	Hispanic American