

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT



AVAILABILITY AND UTILIZATION STUDY FINAL REPORT



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LEGAL FRAMEWORK

I. INTRODUCTION

This chapter discusses the state of the law applicable to public contracting affirmative action programs. Since the San Francisco Bay Area Rapid Transit District (BART) is a recipient of funds from the United States Department of Transportation (USDOT), specific reference is made to the case law affecting the USDOT Disadvantaged Business Enterprise regulations. Two United States Supreme Court decisions, *City of Richmond v. J.A. Croson Co.*¹ (*Croson*) and *Adarand v. Peña*² (*Adarand*), raised the standard by which federal courts review both local and federal government minority business enterprise and disadvantaged business enterprise contracting programs.

In *Croson*, which dealt with non-federally-funded programs, the Court announced that the programs that employ racial classification would be subject to “strict scrutiny,” the highest legal standard. Broad notions of equity or general allegations of historical and societal discrimination against minorities are insufficient to meet the requirements of strict scrutiny. Governments may adopt race-conscious programs only as a remedy for identified statistical findings of discrimination, and the remedy must impose a minimal burden upon unprotected classes.

Adarand, which the US Supreme Court decided in 1995, challenged the USDOT’s Disadvantaged Business Enterprise (DBE) Program as set forth in statute and regulations. The Court found a compelling interest for the USDOT DBE Program but ruled, after applying the strict scrutiny standard to this federal program, that the DBE Program was not narrowly tailored. In response, the USDOT amended its regulations in 1999 to include goals which can be met by race-neutral and race-specific means.

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

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



Following *Adarand* there were several other circuit court cases which challenged the constitutionality of the USDOT DBE regulations.³ However, until *Western States Paving Co. v. State of Washington Dept. of Transportation*⁴ (*Western States*) was decided in 2005 the challenges had been unsuccessful. *Western States* found that Washington State’s DBE Program was facially constitutional but determined the State’s application of the regulations invalid. This decision and its application to BART’s federally-funded program are discussed below.

This chapter also discusses the application of the constitutional amendment approved by the voters with the passage of Proposition 209 in 1996, to the *federally and non-federally-funded* BART affirmative action contracting program. After legal challenges were settled, the Proposition went into effect in 1997 and was codified in Article I, Section 31 of the California Constitution. Section 31 prohibits the State, local governments, districts, public universities, colleges, schools, and other governmental instrumentalities from discriminating against or giving preferential treatment on the basis of race, sex, color, ethnicity, or national origin to any individual or group in public employment, public education, or public contracting. Section (e) of Proposition 209 exempts actions which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.

There is also a discussion on Section 31 of the California Constitution and its legal challenges in Section III of this chapter.

A. Market Area

Croson did not speak directly to how the geographic market is to be determined. In *Coral Construction*, the Court of Appeals held that “an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction.”⁵ Conversely, in *Concrete Works of Colorado v. City and County of Denver (Concrete Works I)*, the Tenth Circuit Court of Appeals specifically approved the Denver MSA as the appropriate market area since 80 percent of the construction contracts were let there.⁶

³ *Sherbrooke Turf Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 969-73 (8th Cir. 2003); *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (2007); *Gross Seed Co. v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003).

⁴ *Western States Paving Co. v. State of Washington Dept. of Transportation*, 407 F. 3d 983 (9th Cir. 2005)

⁵ *Coral Construction*, 941 F.2d at 925.

⁶ *Concrete Works of Colorado v. City and County of Denver*, 823 F.Supp. 821, 835-836 (D.Colo. 1993); rev’d on other grounds, 36 F.3d 1513 (10th Cir. 1994).



Read together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. Since *Croson* and its progeny did not provide a bright line rule for local market area that determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.⁷ Extra-jurisdictional evidence may be permitted when it is reasonably related to where the jurisdiction contracts.⁸ See *Chapter 6: Market Area Analysis* for further discussion and the findings.

II. THE FEDERALLY-FUNDED PROGRAM

A. The Regulatory Scheme

The applicable DBE regulations are set forth in 49 CFR Part 26. BART contracts that are financed by USDOT funds are subject to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and Part 26 regulations. SAFETEA-LU was enacted to guarantee funding for highways, highway safety, and public transportation. While the Transportation Equity Act for the 21st Century (TEA-21) shaped the current highway program, SAFETEA-LU provided the needed funds and refined the programmatic framework for the investments needed to continue to maintain and grow the United States' transportation infrastructure.

Part 26 requires that a recipient set an annual overall goal for DBE participation pursuant to a two-step process. Section 26.45 of 49 CFR Part 26 addresses how recipients are to set overall goals. The recipient first determines a base figure for the relative availability of DBEs in the relevant local transportation market. The recipient must then examine all relevant evidence to determine what adjustment, if any, is needed to this base figure in order to arrive at an overall goal.⁹ The final, adjusted figure is the recipient's overall goal, and represents the proportion of federal transportation funding that the recipient is expected to allocate to DBEs during the forthcoming fiscal year. It is at this point in the process when the grantee

⁷ *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990); *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

⁸ There is a related question of which firms can participate in a remedial program. In *Coral Construction*, the Court held that the definition of "minority business" used in King County's MBE program was over-inclusive. The Court reasoned that the definition was overbroad because it included businesses other than those who were discriminated against in the King County business community. The program would have allowed, for instance, participation by MBEs who had no prior contact with the County. Hence, location within the geographic area is not enough. An MBE had to have shown that it previously sought business, or is currently doing business, in the market area.

⁹ As explained in § 26.51(d), there are many types of evidence that must be considered in determining whether the base availability figure should be adjusted. These types include the current capacity of DBEs to perform work on the recipients USDOT-assisted contracts, as measured by the volume of work performed by DBE's in recent years; evidence from disparity studies conducted anywhere within the recipient's jurisdiction; statistical disparities in the ability of DBE s to obtain financing, bonding, and insurance; and data on employment, self-employment, education, and training to the extent the data relate to the ability of DBEs to perform the recipient's work. *Id.*



must consider the portion of the overall goal which could be achieved using a race-neutral goal.

If a recipient projects that it can meet its overall goal with race-neutral measures, then it must use only those measures. On the other hand, if the recipient determines it cannot achieve the entire overall goal using only race-neutral measures, it must establish “contract goals” for individual contracts, (i.e., race/gender-conscious participation goals for DBE subcontractors) to satisfy the portion of the overall goal which the recipient projects it cannot meet with race-neutral means.¹⁰ Where contract goals are set, the prime contractor is required to either meet the goal or demonstrate that it used good faith efforts to achieve the goal.¹¹ A recipient may not set rigid DBE quotas.¹² Unless the recipient failed to administer its program in good faith it cannot be penalized or deemed to be in non-compliance if the goal is not achieved.¹³

B. The Impact of Western States

As mentioned above, *Western States* found that Washington State’s DBE Program met the first prong of the test and was held facially constitutional. However, it did not pass the second prong, because the State’s application of the DBE regulations was not narrowly tailored to a finding of underutilization of the respective minority groups.

With respect to showing a compelling interest, the court found that Washington State could rely on the compelling nationwide interest identified by Congress in remedying discrimination in the transportation industry, even if such discrimination did not exist in Washington State. However, the court held that Part 26, in so far as it requires race-based goals, is narrowly tailored, and therefore constitutional as applied only if its application is limited to those jurisdictions in which the effects of discrimination are actually present. In addition, even in those jurisdictions where discrimination is present, the program is narrowly tailored only if its application is limited to women and/or minority groups that actually suffered discrimination. The court held that absent such a showing, the program simply provided an impermissible windfall to minority contractors solely on the basis of their race or sex.

The court determined that Washington State had not made the requisite showing of discrimination. Defects found by the court included:

- Washington State DOT had not conducted a statistical study that demonstrated a statistically significant underutilization of willing and capable DBEs by specific races and gender in the transportation industry in the state.

¹⁰ 49 CFR Part 26, §26.51(f)(1), §26.51(d)

¹¹ 49 CFR Part 26, §26.53(a)

¹² 49 CFR Part 26, §26.43(a)

¹³ 49 CFR Part 26, §26.47(a)



- Washington State DOT's calculation of the capacity of DBEs to do the work was flawed because it failed to take into account the effects of past race-conscious programs on current DBE participation.
- The disparity between DBE participation on contracts with and without affirmative action components did not provide any evidence of discrimination.
- Small disparities between the portion of DBE firms in the state and the percentage of funds awarded to DBEs in race-neutral contracts were entitled to little weight because they did not account for other factors that may affect the relative capacity of DBEs to perform the work.
- Washington State did not present any anecdotal evidence of discrimination.

In response to *Western States*, the USDOT issued a memorandum in 2005 recommending a disparity study as an appropriate method for USDOT recipients in the Ninth Circuit to formulate narrowly tailored DBE goals. (It should be noted that the USDOT regulations, as promulgated in 1992, recommend the use of a disparity study among other availability sources for setting the DBE goals.)

Performing a disparity study can overcome some of the State of Washington's evidentiary deficiencies by determining whether underutilization of the respective ethnic groups exist. The Disparity Study meets the Step One base figure determination by enumerating ready, willing, and able M/WBEs by ethnic group and gender relative to ready, willing, and able non-M/WBEs. And it provides data for the Step Two adjustment to the base figure a required step to reaching the overall DBE goal. The Study also determines the current DBE capacity as measured by participation in BART contracts in recent years and any statistically significant underutilization by ethnic group and gender. In addition, there is a determinate of the portion of the overall goal that should be reachable by race-neutral means. The starting point is prime contracts that DBEs won competitively and subcontracts they obtained where there were no contract goals. Statistically significant underutilization of available DBEs points to that portion of the overall goal that it would likely take race-conscious subcontracting goals to achieve. See *Chapter 3: DBE Program Review*, which reviews how BART operates its DBE program and lays out race-neutral measures that are to be used to the maximum feasible extent in pursuing the adjusted DBE goal.



III. THE NON-FEDERALLY-FUNDED PROGRAM

A. Proposition 209

The leading California cases concerning Proposition 209 are *Hi-Voltage v. City of San Jose*¹⁴ (*Hi-Voltage*) and *Ward Connerly v. State Personnel Board*¹⁵ (*Ward Connerly*). In *Hi-Voltage*, the California Supreme Court held that California Constitution Article 1, Section 31 prohibits the City from requiring construction contractors to document their efforts to solicit M/WBEs as subcontractors. The court noted two fatal flaws: (1) Contractors were required to request bids from at least four M/WBEs, which the court considered a preference in favor of M/WBEs; (2) The extent to which M/WBEs were chosen would be measured against the City's statistical expectation. *Ward Connerly*, a subsequent appellate court opinion, determined that Section 31 applied to the five California statutory programs before that court.¹⁶ However, neither *Hi-Voltage* nor *Ward Connerly* speak directly to what would happen should the findings of a local government's disparity study point to a race-conscious remedy.

In *Ward Connerly*, the California Court of Appeals stated the following:

Under equal protection principles, all state actions that rely upon suspect classifications must be tested under strict scrutiny, but those actions which can meet the rigid strict scrutiny test are constitutionally permissible. However, it does provide an exception for the federally-funded program.¹⁷

Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny. The Court in *Ward Connerly* states:

In this respect the distinction between what the federal Constitution permits and what it requires becomes particularly relevant. To the extent that the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, Proposition 209 precludes such action. In fact, Proposition 209 contains no compelling interest exception.¹⁸

¹⁴ 24 Cal. 4th 537 (Cal. 2000).

¹⁵ 92 Cal. App. 4th 16 (Cal. 2001).

¹⁶ State Lottery, Professional Bond Services, State Civil Service, Community Colleges, and State Contracting (reporting requirements).

¹⁷ See California Constitution Art. I §31(e)

¹⁸ *Ward Connerly*, 92 Cal. App. 4th at 42.



Had there been such an exception, there would have been no conflict between Proposition 209 and use of race, which is permissible under the Fourteenth Amendment. However, the *Croson* test has a second prong: the remedy has to be “narrowly tailored.” Note the following language in *Ward Connerly*:

The statutory scheme [re: professional bond services] does not arguably withstand strict scrutiny. No justification has been shown. There was no specific finding of identified prior discrimination in the contracting for professional bond services. There was no effort to limit recovery to those who actually suffered from prior discrimination. There was no showing that non-race-based and non-gender-based remedies would be inadequate or were even considered. The scheme is unlimited in duration. And, except for its limitation to citizens and lawfully admitted aliens, the scheme is unlimited in reach.¹⁹

Hi-Voltage also refers to the impact of a remedy based on a disparity study. The California Supreme Court wrote: “. . .if it were determined the City had violated federal constitutional or statutory law, the supremacy clause as well as the express terms of Proposition 209 would dictate federal law prevails. . .”²⁰ Crucially, it went on: “The disparity study is not part of the record in this case. Without it, the court has no basis for measuring the fit between the Program and the goal of eliminating a disparity in the amount of contract dollars awarded MBEs in comparison to non-MBEs.”²¹ Therefore, it is unclear whether the inclusion of a disparity study in this case may have permitted a race-conscious remedy despite Proposition 209.

Moreover, federal courts still have to decide whether Proposition 209 conflicts with the Equal Protection Clause of the Fourteenth Amendment. *Croson* stated that such race-conscious contracting remedies are appropriate. In accordance with the Supreme Court’s 1803 decision, *Marbury v. Madison*,²² the federal courts are granted the power to determine whether a remedy growing out of a disparity study process sanctioned by the Court in *Croson* is narrowly tailored. This question is one for the federal courts and therefore not intended to be answered by the State of California.

¹⁹ *Ward Connerly*, 92 Cal. App. 4th at 54.

²⁰ *Hi-Voltage*, 24 Cal. 4th 537 at 569.

²¹ *Id.*

²² 5 U.S. 137 (1803).



B. Title VI of the 1964 Civil Rights Act

Title VI of the Civil Rights Act of 1964 established nondiscrimination requirements on recipients of federal funds in their non-federally-funded programs.²³ In *Coral Construction v. San Francisco*,²⁴ the California Superior Court determined that Proposition 209 barred San Francisco's race-conscious program.²⁵ On April 18, 2007, the First District Court of Appeals affirmed that judgment but remanded the case for a determination of whether the defendant's evidence met the majority opinion's test that the discrimination was intentional.²⁶

The application of Title VI to the Sacramento Municipal Utility District was also raised in *C&C Construction v. Sacramento Municipal Utility District*.²⁷ The majority Court of Appeals' opinion began with the point that race-neutral programs are the only ones Proposition 209 permits in California, but also acknowledged that its provisions were subject to federal law. The Court viewed the regulations of the U.S. Departments of Energy, Defense, and Transportation as not *requiring* recipients of federal funds to use race-conscious remedial programs for identified discrimination. Moreover, its interpretation of the regulations was that the Sacramento Municipal Utility District's (SMUD's) actions had to be consistent with Proposition 209.²⁸ Also, both SMUD's 1993 disparity study and its 1998 update found *Crososn*-level discrimination against MBEs, but the study did not look at whether race-neutral remedies would suffice to meet federal nondiscrimination obligations.²⁹ Indeed, the majority observed that the disparity study update was specifically instructed not to consider this factor. Finally, the Court found that SMUD, under its reading of the federal regulations, had a burden to show that it would *lose* funds without having the race-conscious program in place.

Citing *S.J. Groves & Sons v. Fulton County*,³⁰ the dissent's view of the regulations was that, properly read, a race-conscious program is not an option where a race-neutral one will

²³ The 1987 Civil Rights Restoration Act reversed court decisions that restricted its reach.

²⁴ *Coral Construction, Inc. v. City & County of San Francisco*, See 116 Cal. App. 4th 6 (2004).

²⁵ The Court is also challenging the procedural propriety of the lower court granting plaintiff summary judgment because the factual record did not support one.

²⁶ 149 Cal.App.4th 1218 (2007). The City's appeal is pending in the California Supreme Court.

²⁷ 122 Cal. App. 4th 284 (Cal. App. 2004).

²⁸ "SMUD offers no argument or authority that the Department of Energy requires race-based discrimination [a violation of Proposition 209] either in general or specifically in SMUD's case, as an 'appropriate remedial step.' It would appear that the Department of Energy, by using the general term 'appropriate,' meant for the funding recipient to consider the state laws and regulations relevant to that recipient when determining what action to take. In SMUD's case, such consideration includes the limitations of [Proposition 209]." The opinion interpreted the Department of Transportation's regulations as also not *requiring* race-conscious responses.

²⁹ By implication, we note, if SMUD had, it could have moved to a race-conscious program.

³⁰ 920 F.2d 752 (11th Cir. 1991).



suffice. The required “affirmative action” did not refer only to race-neutral programs, it also included race-conscious programs.³¹ The Department Secretary determined whether SMUD was in compliance. What the majority did in affirming the trial court decision to enjoin the use of race interfered with that authority and SMUD’s obligation to comply with the regulations. As such, SMUD violated the Supremacy Clause. However, the majority held that what could be seen as a cogent argument was raised too late to be considered during the appeal.

The dissent summarized its position as follows:

Since the requirement of “affirmative action” includes both race-neutral and race-conscious action, and the undisputed evidence establishes that SMUD has attempted to use race-neutral outreach and other methods and concluded in good faith that they were not sufficient to remedy the statistical underutilization reflected in the disparity studies, SMUD was left with no other alternative but to adopt a race-conscious remedial plan to eliminate the effects of its own discriminatory practices.³²

IV. CONCLUSION

The decisions of the U.S. Supreme Court in the *Croson* and *Adarand* cases changed the legal landscape for local and federally-funded business affirmative action programs. This chapter has examined what *Croson*, *Adarand*, and their progeny require for a local government to institute a constitutional public contracting race-conscious program.

In the Ninth Circuit since *Western States*, a disparity study must serve as legal justification for any race (and gender)-conscious affirmative action contracting program BART may enact for its contracts funded by federal dollars. In addition, consideration has also been given in this chapter to Proposition 209's effect on the remedies available for BART for programs funded by both federal and non-federal dollars.

An expanded Legal Analysis can be found in the Appendix.



³¹ The applicable regulation “condone[s], and in some cases *require[s]*, race-conscious regulations and/or action”. (*italics added*), *S.J. Groves*, 920 F.2d at 764-765.

³² 122 Cal. App. 4th 284 at 324.

2

CONTRACTING AND PROCUREMENT ANALYSIS

I. INTRODUCTION

Mason Tillman was commissioned by the San Francisco Bay Area Rapid Transit (BART) to conduct an Availability and Utilization Study to determine the effectiveness of BART's Disadvantaged Business Enterprise Program in the areas of public works construction, purchase contracts, personal services for architectural and engineering services, and personal services for non-architectural and engineering services. This chapter reviews BART's contracting and procurement manual during the July 1, 2002 to June 30, 2007 study period.

A. Governing Laws and Regulations

The laws and regulations that govern BART's procurement procedures conform to standards and limitations established by State and Federal law and BART rules and policies which include:

- State Law
 - i. California Public Contract Code
 - ii. California Statutory and Case Law
- BART Policy
 - i. Board of Directors' Resolutions and Board Rules
 - ii. BART Procurement Manual



- Federal Laws and Regulations
 - i. Federal Transit Act as amended, through June 1992, 49 USC Sec. 1601 et seq.
 - ii. United States Department of Transportation, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 49 CFR Part 18
 - iii. Federal Transit Administration Master and FTA Circular 5200.1A Full Funding Grant Agreement, December 2002
 - iv. Federal Transit Administration Circular 4220.1E, Third Party Contracting Guidelines, June 19, 2003
 - v. Federal Transit Administration Circular 5010.1C, Grant Management Guidelines, 1998
 - vi. United States Department of Transportation Disadvantaged Business Program, 49 CFR Part 26, amended March 1999

II. DEFINITIONS

Goods and services procured by BART are classified within four industries.

Public Works Construction is defined as new construction, remodeling, renovation, maintenance, and repair. For purposes of this report, this industry will be defined as construction services.

Purchase Contracts are defined as supplies, materials, commodities, and equipment. For purposes of this report, this industry will be defined as goods.

Professional Services for Architectural and Engineering Services are defined as professional services of an architectural or engineering nature associated with research, development, design, construction, alteration, repair of real property, or such other professional services which require performance by a registered or licensed architect or engineer. These services include landscape architectural, engineering, environmental, land surveying, and construction project management. For purposes of this report, this industry will be defined as architectural and engineering services.

Professional Services for Non-Architectural and Engineering Services are defined as those services other than the architectural and engineering services included under Personal



Services for Architectural and Engineering Services. For purposes of this report, this industry will be defined as non-architectural and engineering services.

III. OVERVIEW OF THE PROCUREMENT PROCESS

As set forth in BART's Procurement Manual,¹ covering the majority of the July 1, 2002 to June 30, 2007 study period, the procurement methods used are small purchases, micro-purchases, commercial purchase card, sealed bids, competitive negotiations, and noncompetitive procurements such as immediate remedial measures and sole source purchases.

BART has adopted procurement procedures with the intention to avoid restricting or eliminating competition. Specifically, BART's procurement procedures are intended to avoid practices that would place unreasonable requirements on firms in order for them to qualify to do business. The procurement of construction services, goods, architecture and engineering services and professional services are subject to different advertisement, solicitation, and approval requirements. The requirements are determined by the industry and value of the purchase.

Informal procurements are purchases valued less than \$40,000² for goods, less than \$10,000 for construction services, and less than \$50,000 for architecture and engineering services and non-architectural and engineering services. Informal procurements are not subject to advertising requirements. Formal procurements must be advertised and procured through a competitive process.

For each procurement method, Table 2.01 summarizes the requirements by industry which are described in Section IV.

¹ Revision 5, December 1998.

² Revised January 2007 to less than \$100,000,



Table 2.01 BART Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
Goods (Purchase Contracts)	Contracts valued at \$2,500 or less	None	No solicitation required Purchases can be procured with the commercial purchase card.	Department Manager
	Contracts valued between \$2,500 to \$40,000	None	A minimum of three quotes, either written or oral is required, must be solicited to permit price and term comparisons. Quotes are solicited from sources known to provide such services.	Department Manager up to \$5,000 Department Manager of Procurement over \$5,000

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
	Contracts valued at more than \$40,000 ³	<p>Advertisements are published in local news papers of general circulation. The advertisement must be published for at least 10 calendar days prior to bid opening date.</p> <p>Notices are mailed to the number of prospective bidders deemed practicable and as many as necessary to encourage open and free competition. Notices are also placed on the BART website.</p>	Sealed Bids	<p>Department Manager of Procurement for contracts valued up to \$100,000</p> <p>Board of Directors for contracts valued at more than \$100,000</p>
Construction Services	Contracts valued at \$2,000 or less	None	None	Department Manager of Procurement

³ Revised January 2007 to less than \$100,000,

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
	Contracts valued from \$2,001 to \$10,000	None	<p>A minimum of three quotes, written or oral, must be solicited to permit price and term comparisons.</p> <p>Quotes are solicited from sources known to project sponsors, CUCP list and BART vendors list.</p>	Department Manager of Procurement, Executive Manager, Transit System Development, or Chief Engineer
	Contracts valued at more than \$10,000	<p>Advertisements are published in a newspaper of general circulation at least ten calendar days prior to the bid opening date.</p> <p>Copies of Invitation for Bids are sent to the plan rooms and minority assistance organizations.</p> <p>Notices are sent to prospective bidders on BART's mailing list. Notices are also posted on BART's website.</p>	Sealed Bids	<p>Department Manager of Procurement for contracts from \$2,001 to \$100,000</p> <p>Board of Directors for contracts valued at more than \$100,000</p>

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
Architectural and Engineering Services	Contracts valued at less than \$50,000	Advertisement not required	A minimum of three written or oral quotes is encouraged	Department Manager of Procurement
	Contracts valued at \$50,000 or more	Advertisement not required; however, published in San Francisco Bay Area daily newspapers and as appropriate, in other newspapers, nationally circulated engineering publications, and BART's website.	Request for Proposals	General Manager for contracts valued from \$50,000 to \$100,000 Board of Directors for contracts over \$100,000
Non-Architectural and Engineering Services	Contracts valued at less than \$50,000	No advertisement required; however, they may be posted on BART's website	A minimum of three written or oral quotes is encouraged	Department Manager of Procurement
	Contracts valued at more than \$50,000	Advertisement not required; however, published in San Francisco Bay Area newspapers. May also be published in trade publications and placed on BART's website.	Request for Proposals	General Manager for contracts valued from \$50,001 to \$100,000 Board of Directors for contracts over \$100,000

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
<i>Non-Competitive Procurement</i>				
Public Calamity-Emergency	None	None	None	Board of Directors
Immediate Remedial Measures	Contracts valued up to \$2,500,000	None	A minimum of three written or oral quotes is encouraged	General Manager
Sole Source	None	None	None	Board of Directors

IV. STANDARDS FOR PROCURING BART CONTRACTS

A. Informal Solicitations

Informal procurements are designed to promote efficiency and economy in contracting as well as to avoid unnecessary burdens for BART and its contractors. The informal procurement method is also considered a standard to reduce administrative costs and improve opportunities for small and disadvantaged business concerns to obtain a fair proportion of BART contracts. No advertisement is required to solicit quotations. Departments that participate in the purchase card program or procure small purchases are encouraged to support the Procurement Department and the Office of Civil Rights to increase DBE, MBE, and WBE participation in the micro-purchase and small purchase program including participation in outreach programs such as vendor fairs, training sessions and other events organized by these two departments.

1. Purchases of Goods Valued at \$2,500 or Less

Purchases of goods valued at \$2,500 or less may be procured without solicitation requirements. The BART commercial purchase card may be used to secure what is called, micro-purchases.

2. Purchases of Goods Valued at \$40,000 or Less

A minimum of three quotes are required to meet the standard for adequate competition for small purchases of goods valued at \$40,000 or less⁴. Quotes are solicited from sources known to provide such services. Offers may be evaluated based on price alone or price and other price related factors such as past performance or quality.

3. Purchases of Construction Services Valued at \$2,000 or Less

Purchases of construction services valued at \$2,000 or less may be procured without solicitation requirements.

4. Purchases of Construction Services Valued from \$2,001 to \$10,000

A minimum of three quotes are required to meet the standard for adequate competition for construction services valued from \$2,001 to \$10,000. Quotes are solicited from sources known to provide such services. Quotations will be evaluated based on price and the award will be made to the lowest responsible and responsive bidder.

⁴ Revised January 2007 to less than \$100,000



5. Purchases of Architectural and Engineering Services Valued at Less than \$50,000

Quotations from at least three proposers are encouraged to meet the standard for adequate competition for the procurement of architectural and engineering services valued at less than \$50,000. Offers are evaluated based on qualifications alone without consideration of price.

6. Purchases of Non-Architectural and Engineering Services Valued at Less than \$50,000

Quotations from at least three proposers are encouraged to meet the standard for adequate competition for purchases of professional services valued at less than \$50,000. Offers may be evaluated based on price alone or price and other related factors such as past performance or technical qualifications.

B. Formal Solicitations

Formal solicitations can be either sealed bid or competitively negotiated.

i) Sealed Bids

The criteria for sealed bidding includes the following conditions:

- A complete, adequate, and sufficiently generic specification must be developed
- Adequate competition must be available in the marketplace
- The procurement must lend itself to a firm-fixed-price contract.

1. Purchases of Goods Valued Over \$40,000

Purchases of goods valued over \$40,000⁵ must be publicly advertised. These solicitations are also listed on BART's website. The advertisement must be published for at least 10 calendar days prior to the bid opening date. BART's Office of The District Secretary is responsible for conducting a public bid opening for sealed bids. The Office of Civil Rights reviews the bids (excluding Invitation for Bids) for compliance with DBE goals or Non-Discrimination Program⁶ availability percentages, as applicable and conducts investigations on hearings as appropriate. The bids are evaluated for overall responsiveness by Contract Administration with support of BART's Office of the General Counsel and for technical

⁵ Revised January 2007 to less than \$100,000

⁶ A description of BART's Non-Discrimination Program is discussed in Section VII below.



responsiveness by the Project Manager of the User Department. A price analysis is performed by the User Department with assistance by the Procurement Department.

2. Purchases of Construction Services Valued Over \$10,000

Purchases of construction services valued over \$10,000 are publicly advertised and distributed to public plan rooms, as appropriate. These solicitations are also listed on BART's website. Notices are mailed to prospective bidders who have expressed their interest in BART projects by submitting contact information to encourage open and free competition. After receipt of the bids, the following process takes place:

- BART's Office of the District Secretary is responsible for conducting a public bid opening for sealed bids
- The Office of Civil Rights reviews the bids for compliance with the DBE Program or Non-Discrimination Program availability percentages as applicable and conducts investigations or hearings, as appropriate
- The bids are evaluated for overall responsiveness by Contract Administration with the support of BART's Office of the General Counsel and for technical responsiveness by the Project Manager of the User Department
- A price analysis is performed by the User Department with assistance by the Procurement Department

ii) Competitively Negotiated Contracts

Competitive negotiation is the solicitation method used for architectural and engineering services, non-architectural and engineering and technical services. For non-architectural and engineering and technical services the award can be made to the offeror whose proposal is determined to be the most advantageous to BART considering all factors may not be limited to just cost. For architecture and engineering services, price cannot be considered and the selection must be made based on qualifications alone.

1. Purchases of Contracts for Architectural and Engineering Services Valued at \$50,000 or More

Solicitations for architectural and engineering services valued at \$50,000 or more are advertised once in a newspaper of general circulation published in the San Francisco Bay Area. As appropriate, the solicitation may also be advertised once in other designated publications. The solicitations are also listed on BART's website.



Proposals must be evaluated on the basis of qualifications of the proposers only, since price cannot be considered in making a recommendation for award. The criteria, other than price, upon which proposals may be evaluated, may include the following:

- Professional qualifications necessary for satisfactory performance of the required services
- Specialized experience and technical competence in the type of work required
- Capacity to accomplish the work in the required time
- Past performance on contracts with BART, other government agencies, and the private industry in terms of cost control, quality of work and compliance with performance schedules
- Knowledge of the locality of the project provided that application of this criterion leaves an appropriate number of qualified firms in the competition
- Acceptability under other appropriate evaluation criteria as specified in the Request for Proposal

The review process for the purchase of architectural and engineering services valued at \$50,000 or more must adhere to the following steps:

- The Office of Civil Rights is sent a copy of the Request for Proposal to determine DBE participation, or the applicability of M/WBE availability percentages, if appropriate
- The Contract Administration Division includes the Office of Civil Rights' determination in the solicitation documents
- Upon completion of the negotiations, the Office of Civil Rights receives the final cost proposal to ensure that it is reflective of the stated requirements relative to DBE or M/WBE consideration
- The User Department with assistance by the Contract Administration Division obtains approval of the award recommendation and the Department Manager of Procurement or designee executes the contract

2. Purchases of Non-Architectural and Engineering Services Valued at \$50,000 or more

Solicitation for non-architectural and engineering service contracts valued at \$50,000 or more are advertised once in a newspaper of general circulation published in the San Francisco Bay Area. As appropriate, the solicitation may also be advertised once in other designated



publications. These solicitations are also listed on BART's website. The advertisements must be published at least 10 calendar days prior to the date for submission of the proposals.

Proposals are evaluated solely on the factors specified in the solicitation. Cost or price evaluations are performed by the Contract Administrator, a representative of the Office of Civil Rights and other participants as appropriate.

The review process for purchases of professional services valued at \$50,000 or more must adhere to the following steps

- The Office of Civil Rights is sent a copy of the Request for Proposal to determine DBE participation or the applicability of M/WBE availability percentages, if appropriate
- The Contract Administration Division includes the Office of Civil Rights' determination in the solicitation documents
- Upon completion of the negotiations, the Office of Civil Rights receives the final cost proposal to ensure that it is reflective of the stated requirements relative to DBE or M/WBE consideration
- The User Department with assistance by the Contract Administration Division obtains approval of the award recommendation and the Department Manager of Procurement or designee executes the contract

V. EXEMPTIONS FROM BART'S PROCUREMENT PROCESS

Certain procurements are exempt from BART's competitive procurement process. A determination must be made that the resulting price for the procurement is fair and reasonable.

The three exemptions are described below:

A. Public Calamity - Emergency

In cases of public calamity, such as any natural disaster, the Board of Directors may by two-thirds vote determine that the public interest requires the immediate award of a contract to safeguard life, health, or property. In such cases, the Board will enter into the contract needed to address the emergency without requiring competitive bidding.



B. Immediate Remedial Measures

In case of a situation where immediate remedial measures are needed to avert or alleviate damage to property or to repair or restore damaged BART property, the General Manager may authorize the expenditure of money for the direct purchase of goods or services. Under these circumstances the competitive bidding requirement is waived in order to ensure that the facilities of BART are available to serve the general public's transportation needs. The expenditure cannot exceed \$2.5 million, as stipulated by Board Resolution 2649.

C. Sole Source

Upon a finding of a two-thirds vote by the Board of Directors, the competitive bidding requirements can be waived for the sole purpose of duplicating or replacing supplies, equipment, or material when it is determined that there is only one source for the supplies, equipment, or material authorizing the purchase from a single source.

VI. DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

It is the policy of BART to promote the utilization of Disadvantaged Business Enterprises (DBEs) to the maximum extent feasible in all aspects of BART's contracting processes pursuant to 49 CFR Part 26. To meet the objectives of the DBE policy solicitations are forwarded to the Office of Civil Rights for the establishment of DBE goals. The review by the Office of Civil Rights is conducted prior to release of the Request for Proposal or advertisement of the contract, if appropriate. A detailed description of BART's DBE program is discussed in *Chapter 3: Disadvantaged Business Enterprise Program*.

VII. NON-DISCRIMINATION PROGRAM

Under the auspices of the Office of Civil Rights, the Non-Discrimination Program was established on November 21, 1997 to ensure that BART's prime contractors do not discriminate or give a preference in the award of subcontracts on the basis of race, national origin, color, ethnicity, or gender. The Non-Discrimination Program only applies to BART's non-federally-funded construction, goods and professional services contracts.

For BART contracts valued at \$50,000 or more (excluding Invitation for Bids), solely funded by non-federal funds, the Office of Civil Rights determines the availability of MBE and WBE contractors in the pool of all subcontractors available to perform the subcontract work.

If work is subcontracted, bidders must submit Non-Discrimination Program documentation. BART will determine whether the bidder listed subcontracts in dollar amounts that reflect



the availability of MBEs and WBEs (the result that would be expected in the absence of discrimination). The bidder must provide information to BART which establishes that the bidder did not discriminate. A bidder cannot be found non-responsive because it did not select subcontractors in a manner which reflects MBE and WBE availability. However, if the bidder fails to submit its non-discrimination documentation, the bidder will be found to be non-responsive to the contract requirements.

Bidders are not required to subcontract work and if the work is not subcontracted the Non-Discrimination Program does not apply. If bids list MBE and WBE subcontractors, the bidder must provide BART at the time of its bid submission with the following information:

- The dollar amount of each MBE and WBE subcontract and a statement of the scope of work to be performed under the subcontract
- The MBE and WBE subcontractors' name, address, and telephone number





3

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM REVIEW

I. INTRODUCTION

Mason Tillman Associates, Ltd. (Mason Tillman) has undertaken the review of the San Francisco Bay Area Rapid Transit District's (BART) Disadvantaged Business Enterprise Program (DBE Program) manual revised November 2006. This chapter provides a summary of the DBE Program's elements that have been undertaken by the District. The requirements described in this chapter are specific to United States Department of Transportation Federal Transit Administration-funded contracts.

It is the policy of the Federal Transit Administration (FTA) that Disadvantaged Business Enterprises (DBEs) be given an opportunity to participate in federally assisted programs. The FTA requires recipients of \$250,000 or more in planning, capital, and/or operating assistance in a federal fiscal year to have an approved DBE Program. In addition, recipients of \$1,000,000 or more must appoint a Liaison Officer to administer the DBE Program.

BART, as a recipient of FTA funds, has established a DBE Program. BART's DBE Program conforms to the rules set forth in 49 Code of Federal Regulations (CFR) Part 26, as enacted by the U.S. Department of Transportation (USDOT) on January 8, 1999, and revised October 1, 2006.

The Office of Civil Rights was established to administer the DBE Program. The Office of Civil Rights is managed by the "Department Manager," who is the DBE Liaison Officer. The General Manager, who has the responsibility to ensure the DBE Program policies are implemented throughout BART, designates the "Department Manager."



II. POLICY

In accordance with 49 Code of Federal Regulations Part 26, BART's current DBE Program was established in 1999. It is BART's policy to ensure that there is no discrimination in the award of federally-funded contracts. The Policy is also intended to create a level playing field in order that DBEs might compete fairly, without barriers in obtaining federally-funded contracts. In addition, the DBE Program is intended to assist in the development of firms and to make them competitive in the marketplace outside of the DBE Program. The development of communication programs and procedures effectuate open communication between DBEs and BART regarding contract procedures, activities, and requirements, feedback on existing barriers to participation, and feedback on how to eliminate those barriers is within the Policy.

III. OUTREACH

The DBE Office facilitates at least two vendor fairs for small businesses per year. The fairs are forums for a company to meet procurement project management and staff. The Department Manager explains how to do business with BART, best management practices, and DBE certification and program requirements.

The Department Manager is also responsible for maintaining a website containing information on DBE certification, the DBE Program and procedures, and a link to a database of DBE firms. The DBE Directory identifies all firms that are eligible to participate as DBEs in the DBE Program, and includes information about the firm, such as name, address, telephone number, and type of work. The DBE Directory is maintained and updated by the California Unified Certification Program (CUCP).

The DBE Program outreach efforts undertaken by the District may include:

- a. Arranging solicitations, times for presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business participation**
- b. Providing assistance in overcoming limitations such as inability to obtain bonding or financing**
- c. Providing information and communication programs on contracting and business procedures**
- d. Implementing a supportive service program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses**



- e. **Providing services to help improve long term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency**
- f. **Establishing a program to assist new, start-up firms, particularly in fields in which participation by small businesses firms has been historically low**
- g. **Ensuring distribution of BART's DBE database through print and electronic means to the widest feasible range of potential prime contractors**
- h. **Assisting to develop capability to utilize emerging technology and conduct business through electronic media**
- i. **Unbundling large contracts, when feasible, into a series of manageable projects to facilitate participation by small businesses**
- j. **Conducting internal training seminars to facilitate better understanding among project managers and engineers regarding the DBE Program objectives**

In the revised November 2006 version of the DBE Program policy, BART adds to the DBE Program a Contractor Informational Program to assist small businesses and DBEs by providing information or referring businesses to recognized outside resources for instruction and training in all aspects of BART's bid and contracting process.

IV. DBE PROGRAM CERTIFICATION

Standards which determine whether a firm is eligible to meet the participation requirements of the DBE Program are articulated under 49 Code of Federal Regulations Part 26. A firm must demonstrate that it is at least 51 percent owned by one or more socially and economically disadvantaged individuals. Socially and economically disadvantaged individuals are: Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, women, and other individuals found to be socially and economically disadvantaged by the Small Business Administration (SBA) pursuant to Section (8)a of the SBA Act are also eligible. An individual whose ownership and control are relied on for certification cannot have a personal net worth of more than \$750,000. An individual's personal net worth does not include ownership in the applicant DBE firm or the owner's residence.

BART is a party to the California Unified Certification Program (CUCP); however, BART performs certifications on behalf of the CUCP. Information on certification and applications



for certification can be found on BART's website. CUCP will not process a new certification for a company with its principal place of business outside of California, unless the firm has already been certified outside of the state. Where a business has been certified by the Small Business Association (SBA), CUCP can either accept the certification subject to on-site reviews or accept the SBA application in lieu of CUCP's application and perform on-site reviews and make its own decision as to the certification. CUCP's initial certification procedures follow the standards set forth in 49 CFR Part 26, Subpart D.

When CUCP denies a request for certification, it provides a written explanation of the grounds for the denial specifically referring to the evidence in the record. The firm must then wait a full calendar year before reapplying. The firm does have the option of making an administrative appeal through the U.S. Department of Transportation pursuant to 49 CFR Section 26.89. There is no hearing proceeding with CUCP for the denial of DBE certification.

When CUCP decertifies a previously certified DBE, the remedy is different. In the event CUCP has cause to believe a change in circumstance has arisen, it must notify the firm and list the reasons for the proposed termination. A hearing facilitated by the selected hearing officer may be initiated where CUCP has the burden of showing by a preponderance of the evidence that the firm does not meet certification standards, and subsequently produce a notice of decision. The firm may appeal through the U.S. Department of Transportation.

Certification as a DBE is effective for at least three years unless certification has been removed, with annual updated information required from the DBE firm. As long as circumstances do not change that would disqualify the firm, the firm need not reapply within the three-year period.

V. ADMINISTRATIVE REQUIREMENTS

A. DBE Financial Institutions

It is the policy of BART to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, thus qualifying as DBEs, to make reasonable efforts to use these institutions, and to encourage prime contractors to make use of these institutions.

B. Overconcentration

The Department Manager is tasked with determining whether there is overconcentration of DBE participation in certain types of work or contracting opportunities, which unduly burden the participation of non-DBEs. The Department Manager is likewise tasked with the



development of appropriate measures to address the overconcentration and seeking FTA approval for such measures.

C. Transit Vehicle Certification

BART reserves the option to require transit vehicle manufacturer certification, with FTA approval. In the event that BART does not have a project-specific DBE goal for the procurement of transit vehicles, it will require the manufacturer to have an established annual DBE goal approved by the FTA. The policy states that FTA assistance used in transit vehicle procurements is not included in the base amount from which the overall annual goal for federally-funded contracting opportunities is established by BART.

D. DBE Program Review, Severability, and Expiration

A review of the DBE Program is required every five years to ensure that the DBE Program is narrowly tailored to address any existing discrimination and that the Program does not disproportionately impact any particular group. In the event that a portion of the DBE program is found to be illegal or invalid by the courts, the remaining parts of the policy will remain intact and in effect. The DBE Program will expire on August 31, 2009 unless prior to that date, the Board of Directors find that discrimination within BART's contracting activities remain and that the Program is necessary to alleviate it.

VI. PROGRAM PARTICIPATION ANNUAL GOAL

1. Overall/Annual Goal

BART sets an overall DBE goal participation on an annual basis. BART follows the two-step process set forth in 49 Code of Federal Regulations Part 26.

- a. A base figure is determined for the relative availability in the market area of DBEs that are ready, willing, and able to participate in BART's USDOT-assisted contract program.**
- b. The base figure is adjusted to account for other evidence related to DBE availability in the market area.**

2. Meeting Goal through Race-Neutral Measures

Step Two in the goal setting process is determining the projected portions of the overall goal that will be achieved by race-neutral means. BART intends to meet the maximum feasible



portion of its overall goal by using race-neutral means. Race-neutral means of contract awards is defined in 49 CFR 26.51(a) as:

... contracts a DBE prime contractor wins through customary competitive procurement procedures, or a subcontractor is awarded on a prime contract that does not carry a DBE goal.

BART can adjust the estimated breakout of race-neutral and race-conscious participation throughout the year to reflect actual DBE participation per 49 CFR 26.51(f). If BART's entire overall goal for a given year can be met through race-neutral means, then BART must reduce or eliminate the use of DBE goals. However, if actual race-neutral participation falls short of projected race-neutral participation, BART can increase its usage of race-conscious means equal to the percentage not reached by race-neutral means, as well as the projected percentage that is not anticipated to be met through race-neutral means.

In establishing its annual goal, BART consults with various minority and non-minority business organizations to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses. BART also consults a variety of sources such as the U.S. Census, business databases, and disparity studies for information regarding DBE availability. BART also seeks to determine the effects of discrimination on opportunities for DBEs. A notice of the proposed DBE goal is published to inform the public that BART and the USDOT will accept comments on the goal for 45 days from the date of notice. The goal is revised annually and is subject to approval by the USDOT.

VII. CONTRACT-SPECIFIC GOALS

BART uses contract-specific DBE goals on contracts containing subcontracting opportunities to meet the portion of the overall goal that is not met through race-neutral methods.¹ The goal applies to the percentage participation of DBEs in the total contract work. Contracts selected for goal setting and the percentage goal are determined by examining the following considerations:

- a. The projected portion of the overall annual goal that will be met by establishing contract-specific goals**
- b. The progress toward achieving the annual overall goal**
- c. The full range of activities in the proposed contract**

¹ Since May 2006, BART has implemented a 100 percent race-neutral DBE program by using only race-neutral means to achieve the overall DBE goal.



- d. **The availability of certified DBEs to perform the types of work involved in the proposed contract**
- e. **Any other relevant criteria**

To meet the DBE goals, bidders must submit written documentation listing the specific name, work description, and dollar amount of participation committed on the contract. Written confirmation from each participating DBE must also be submitted. Bids that do not include written assurance that the DBE contract goal will be met or evidence of good-faith to meet the goal, are considered non-responsive.

VIII. GOOD FAITH EFFORT STANDARD

Contractors who fail to meet the DBE contract goal may comply with the DBE Program by demonstrating a Good Faith Effort. Good Faith Effort is defined as necessary and reasonable steps taken by the bidder to achieve the DBE goal, even if they were not fully successful. The Department Manager determines the sufficiency of a contractor's Good Faith Effort.

The following criteria are used to determine a good faith effort:

- a. **Attendance at the pre-bid meeting**
- b. **Advertisements soliciting DBEs for three or more days in paid general circulation, trade, and minority and white women-focused media, placed no less than 21 days prior to bid opening or a reasonable time if 21 days are not available, and describe only the work for that bid**
- c. **Distribution of certified letters to a reasonable number of certified or certifiable DBEs clearly soliciting bids for specific items of work, offering assistance with bonding and insurance, and making plans and specifications available for viewing**
- d. **Use of the CUCP Database from BART's website as a source of DBE solicitation**
- e. **Follow-up of initial solicitations with adequate documentation of the people and contact information of those contacted**
- f. **Records of responses from interested DBEs and documented evaluation of the DBE and reasoning for non-selection**
- g. **Other efforts made**



The Department Manager must provide a written notice if it is determined that the goal was not met. The bidder may appear before an independent hearing officer, however, in the event the determination is upheld, the decision is not appealable.

IX. SUBSTITUTIONS

BART requires its prime contractors to notify the District immediately if a DBE is unable or unwilling to perform the work it had contracted to perform, substantiated by documentation. The prime contractor must obtain approval from BART on the substitution, and replace the substituted DBE with another DBE or document their good faith effort to do so.

If the prime contractor fails to comply with the substitution requirements listed above, BART will impose sanctions for non-compliance including withholding payments, liquidated damages, and termination of the contract in whole or in part.

X. COMPLIANCE MONITORING AND REPORTING

A. Counting and Tracking

Only work that is actually performed by a DBE or the cost of materials obtained from the DBE are counted as participation. The DBE must perform a commercially useful function, meaning it is responsible for execution of the work on the contract and is carrying out its responsibilities by actually performing, managing, or supervising the work involved. Materials and supplies are counted as 100 percent of the cost where the DBE is a manufacturer and 60 percent where the DBE is a supplier.

The sanctions for non-compliance are dictated by 49 CFR Part 26 and related federal guidelines, such as the FTA Circular 4716.1 A. BART reserves the right to impose any sanction authorized by the federal, state, and local regulations, as well as its own contract specifications as described above, including withholding payments, liquidated damages, and termination of the contract in whole or in part.

B. Reporting DBE Participation

BART maintains a bidder's list of all firms bidding on prime contracts or subcontracts funded by USDOT. The information on the bidders list consists of the firm name, address, DBE or non-DBE status, age of the firm, and annual gross receipts. BART reports DBE participation to the FTA and maintains the prescribed statistical data to support the DBE program.



BART tracks the amount awarded and paid to the DBEs as stated by the prime contractors and requires the prime contractors to report DBE participation on their awarded federally-funded contracts.

XI. REQUIRED CONTRACT PROVISIONS

BART requires prime contractors to provide assurances of non-discrimination and prompt payment in its federally-funded contracts. The contract contains a statement assuring that the contractor, subrecipient, or subcontractor will not discriminate on the basis of race, color, national origin, or sex in the performance of the contract.

In addition, the prime contractor is also required to promptly pay any and all subcontractors when the contractor is paid. When the contractor is paid incrementally, the contractor also agrees to pay subcontractors who have completed their work within 30 days of receipt of payment from BART.





4

PRIME CONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

As set forth in *Western States Paving*,¹ a finding of disparity, which must be ethnic group-specific, is required in order to set race-based goals in accordance with the overall goal setting requirements of 49 CFR Part 26. *Croson* set the standard for the determination of disparity. The first step in a disparity study is the analysis of expenditures to document minority contracting history in the jurisdiction under review. Therefore, the objective of the prime utilization analysis is to determine the level of minority and woman-owned business enterprise (M/WBE) prime contractor utilization by ethnic group compared to non-M/WBE prime contractor utilization.

This chapter documents the San Francisco Bay Area Rapid Transit District's (BART's) utilization of minority prime contractors (by ethnic group) and women prime contractors from July 1, 2002 to June 30, 2007. BART's expenditures during the study period were classified into three industries for purposes of the analysis. The industries are construction, professional services, and goods and other services. Construction included public work for new construction, remodeling, renovation, maintenance, demolition and repair of any public structure or building, and other public improvements. Professional Services included architecture, engineering, and other professional services of an architectural and engineering nature; consulting and personal, professional, and technical services; research planning; development; surveying and mapping; and comprehensive planning. Construction management services were also included in this category. Goods and Other Services included materials, as well as supplies, equipment, and non-professional services. Construction maintenance was also included in this category.



¹ *Western States Paving v. Washington State Department of Transportation*, 407 F.3d 893 (9th Cir 2005)

The data in the Study is disaggregated into nine ethnic and gender groups. The nine groups are listed below in Table 4.01.

Table 4.01 Business Ethnic and Gender Groups

Ethnicity and Gender Category	Definition
African American Businesses	Businesses owned by male and female African Americans
Asian American Businesses	Businesses owned by male and female Asian-Pacific and Subcontinent Asian Americans
Hispanic American Businesses	Businesses owned by male and female Hispanic Americans
Native American Businesses	Businesses owned by male and female Native Americans
Caucasian Female Business Enterprises	Businesses owned by Caucasian females
Minority Male Business Enterprises	Businesses owned by African American, Asian American, Hispanic American, and Native American males
Female Business Enterprises	Businesses owned by Minority and Caucasian females
Minority Male and Female Business Enterprises	Businesses owned by Minority males, Minority females, and Caucasian females
Caucasian Male Business Enterprises	Businesses owned by Caucasian males

II. CONTRACT DATA SOURCES

The prime contractor expenditures were determined by the payments BART issued during the five-year study period. Payment records were the most comprehensive data available and the most accurate depiction of BART's expenditures during the study period.

The unique agreements against which payments were made were determined by the contract number and if it was not available the payment records were grouped by purchase order (PO) number. These unique agreements are referred to as contracts.



The payment records were extracted from GEAC, BART's financial system. The payment records had to be cleaned before they could be grouped by either contract number or purchase order number. As part of the data cleaning process, Mason Tillman conferred with BART to define the contract classification system and complete records with missing or incorrect information. The industry classifications were made by Mason Tillman and approved by BART. Using a combination of the line item descriptions provided with the payment data, and the PO numbering legend each contract was either classified into one of the three industry categories – construction, professional services, and goods and other services – or marked for exclusion. Non-profits were excluded from the analysis, in addition to contracts with government agencies, banks, airlines, and payments for legal settlements, employee reimbursements, subscriptions, and seminars.

The next phase of the data cleaning process was the determination of the ethnicity and gender of the prime contractors. Incomplete ethnicity and gender information is a common condition characterizing data received from government agencies for availability and utilization studies. Since ethnicity and gender information is critical to the prime contractor utilization analysis, research was conducted to secure ethnicity and gender information for each prime contractor.

The ethnicity and gender of the utilized prime contractors was determined through a combination of research techniques. Company names were cross-referenced with certification lists, chambers of commerce and trade organization membership directories, business listings, and websites. A survey was also conducted to collect the ethnicity and gender information not found using the directories and the Internet.



III. PRIME CONTRACTOR UTILIZATION THRESHOLDS

Contracts within each of the three industries were analyzed at three dollar levels. One category included all contracts regardless of size. A second size category included all contracts under \$500,000. This was the level where there was a demonstrated capacity within the pool of willing M/WBEs to perform BART’s contracts. The third size category included the informal contracts which did not require advertising. As seen in Table 4.02, for construction the level was under \$10,000; for professional services the level was under \$50,000; and for goods and other services the level was under \$40,000.

Table 4.02 Informal Contract Thresholds for BART Departments

Industry	Informal Contract Threshold
Construction	\$10,000
Professional Services	\$50,000
Goods and Other Services	\$40,000



IV. PRIME CONTRACTOR UTILIZATION

A. All Prime Contractors

As depicted in Table 4.03 below, BART issued 12,807 unique payment transactions during the July 1, 2002 to June 30, 2007 study period. These transactions are referred to as contracts in this study. The 12,807 contracts included 231 for construction, 553 for professional services, and 12,023 for goods and other services.

The payments made by BART during the study period totaled \$791,130,196 for the 12,807 contracts. These expenditures included \$65,929,076 for construction, \$238,193,605 for professional services, and \$487,007,515 for goods and other services.

Table 4.03 Total Contracts and Dollars Expended: All Industries, July 1, 2002 to June 30, 2007

Industry	Total Number of Contracts	Total Dollars Expended
Construction	231	\$65,929,076
Professional Services	553	\$238,193,605
Goods and Other Services	12,023	\$487,007,515
Total Expenditures	12,807	\$791,130,196

B. Highly Used Prime Contractors

As depicted in Table 4.04 below, the 12,807 BART contracts were received by 2,171 vendors.

Table 4.04 Total Contracts, Utilized Vendors, and Dollars Expended: All Industries, July 1, 2002 to June 30, 2007

Total Contracts	12,807
Total Utilized Vendors	2,171
Total Expenditures	\$791,130,196



The majority of the 12,807 contracts were received by relatively few of the 2,171 utilized vendors. BART issued 80 percent of the contract dollars during the July 1, 2002 to June 30, 2007 study period to three percent of the 2,171 utilized vendors. As depicted in Table 4.05 below, 66 of the 2,171 utilized vendors received 80 percent or \$634,136,029 of the total contract dollars. Seven vendors received 50 percent of the contract dollars.

Table 4.05 Distribution of All Contracts by Number of Vendors

Vendors	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
3 Vendors Received	\$309,144,921	39%	675	5.27%
7 Vendors Received	\$395,036,130	50%	709	5.54%
14 Vendors Received	\$483,152,300	61%	735	5.74%
66 Vendors Received	\$634,136,029	80%	1,916	14.96%
2,105 Vendors Received	\$156,994,167	20%	10,891	85.04%
2,171 Vendors Received	\$791,130,196	100%	12,807	100%

The seven vendors that received \$395,036,130 represented 0.32 percent of all vendors utilized during the study period. Table 4.06 below presents the ethnic and gender profile of the 66 most highly used prime contractors. The overwhelming majority of the highly used prime contractors were Caucasian Male businesses.

Table 4.06 Top Sixty-Six Highly Used Prime Contractors by Ethnicity and Gender

Ethnicity/Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
African Americans	\$2,305,963	0.36%	1	0.05%
Asian Americans	\$18,345,041	2.89%	8	0.42%
Hispanic Americans	\$2,236,784	0.35%	22	1.15%
Native Americans	\$0	0%	0	0%
Caucasian Females	\$5,626,775	0.89%	3	0.16%
Caucasian Males	\$605,621,466	95.50%	1,882	98.23%
Total	\$634,136,029	100%	1,916	100%



C. All Contracts, by Industry

1. Construction Contract Utilization: All Contracts

Table 4.07 summarizes all contract dollars expended by BART on construction contracts. Minority Male Business Enterprises received 10.23 percent of the construction contract dollars; Female Business Enterprises received 3.44 percent; and Caucasian Male Business Enterprises received 86.34 percent. These ethnic and gender groups are defined in Table 4.01 of this chapter.

African American Businesses received none of the construction contracts during the study period.

Asian American Businesses received 51 or 22.08 percent of the construction contracts during the study period, representing \$5,079,789 or 7.7 percent of the contract dollars.

Hispanic American Businesses received 6 or 2.6 percent of the construction contracts during the study period, representing \$2,023,151 or 3.07 percent of the contract dollars.

Native American Businesses received none of the construction contracts during the study period.

Caucasian Female Business Enterprises received 24 or 10.39 percent of the construction contracts during the study period, representing \$1,904,428 or 2.89 percent of the contract dollars

Minority Male Business Enterprises received 56 or 24.24 percent of the construction contracts during the study period, representing \$6,741,776 or 10.23 percent of the contract dollars.

Female Business Enterprises received 25 or 10.82 percent of the construction contracts during the study period, representing \$2,265,591 or 3.44 percent of the contract dollars.

Minority Male and Female Business Enterprises received 81 or 35.06 percent of the construction contracts during the study period, representing \$9,007,368 or 13.66 percent of the contract dollars.

Caucasian Male Business Enterprises received 150 or 64.94 percent of the construction contracts during the study period, representing \$56,921,709 or 86.34 percent of the contract dollars.



Table 4.07 Construction Contract Utilization: Total Contract Payments, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Americans	51	22.08%	\$5,079,789	7.70%
Hispanic Americans	6	2.60%	\$2,023,151	3.07%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	24	10.39%	\$1,904,428	2.89%
Caucasian Males	150	64.94%	\$56,921,709	86.34%
TOTAL	231	100.00%	\$65,929,076	100.00%
Prime Contractor Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	51	22.08%	\$5,079,789	7.70%
Hispanic American Females	1	0.43%	\$361,163	0.55%
Hispanic American Males	5	2.16%	\$1,661,988	2.52%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	24	10.39%	\$1,904,428	2.89%
Caucasian Males	150	64.94%	\$56,921,709	86.34%
TOTAL	231	100.00%	\$65,929,076	100.00%
Prime Contractor Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	1	0.43%	\$361,163	0.55%
Minority Males	56	24.24%	\$6,741,776	10.23%
Caucasian Females	24	10.39%	\$1,904,428	2.89%
Caucasian Males	150	64.94%	\$56,921,709	86.34%
TOTAL	231	100.00%	\$65,929,076	100.00%
Prime Contractor Minority and Females	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	56	24.24%	\$6,741,776	10.23%
Female Business Enterprises	25	10.82%	\$2,265,591	3.44%
Minority Male and Female Business Enterprises	81	35.06%	\$9,007,368	13.66%
Caucasian Male Business Enterprises	150	64.94%	\$56,921,709	86.34%
TOTAL	231	100.00%	\$65,929,076	100.00%



2. Professional Services Contract Utilization: All Contracts

Table 4.08 summarizes all contract dollars expended by BART on professional services contracts. Minority Male Business Enterprises received 7.26 percent of the professional services contract dollars; Female Business Enterprises received 5.06 percent; and Caucasian Male Business Enterprises received 87.69 percent.

African American Businesses received 11 or 1.99 percent of the professional services contracts during the study period, representing \$3,606,496 or 1.51 percent of the contract dollars.

Asian American Businesses received 27 or 4.88 percent of the professional services contracts during the study period, representing \$16,947,709 or 7.12 percent of the contract dollars.

Hispanic American Businesses received 7 or 1.27 percent of the professional services contracts during the study period, representing \$189,551 or 0.08 percent of the contract dollars.

Native American Businesses received none of the professional services contracts during the study period.

Caucasian Female Business Enterprises received 115 or 20.8 percent of the professional services contracts during the study period, representing \$8,584,208 or 3.6 percent of the contract dollars.

Minority Male Business Enterprises received 35 or 6.33 percent of the professional services contracts during the study period, representing \$17,283,175 or 7.26 percent of the contract dollars.

Female Business Enterprises received 125 or 22.6 percent of the professional services contracts during the study period, representing \$12,044,789 or 5.06 percent of the contract dollars.

Minority Male and Female Business Enterprises received 160 or 28.93 percent of the professional services contracts during the study period, representing \$29,327,964 or 12.31 percent of the contract dollars.

Caucasian Male Business Enterprises received 393 or 71.07 percent of the professional services contracts during the study period, representing \$208,865,641 or 87.69 percent of the contract dollars.



**Table 4.08 Professional Services Contract Utilization: Total
Contract Payments, July 1, 2002 to June 30, 2007**

Prime Contractor Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	11	1.99%	\$3,606,496	1.51%
Asian Americans	27	4.88%	\$16,947,709	7.12%
Hispanic Americans	7	1.27%	\$189,551	0.08%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	115	20.80%	\$8,584,208	3.60%
Caucasian Males	393	71.07%	\$208,865,641	87.69%
TOTAL	553	100.00%	\$238,193,605	100.00%
Prime Contractor Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	4	0.72%	\$3,218,566	1.35%
African American Males	7	1.27%	\$387,930	0.16%
Asian American Females	5	0.90%	\$240,015	0.10%
Asian American Males	22	3.98%	\$16,707,694	7.01%
Hispanic American Females	1	0.18%	\$2,000	0.00%
Hispanic American Males	6	1.08%	\$187,551	0.08%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	115	20.80%	\$8,584,208	3.60%
Caucasian Males	393	71.07%	\$208,865,641	87.69%
TOTAL	553	100.00%	\$238,193,605	100.00%
Prime Contractor Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	10	1.81%	\$3,460,580	1.45%
Minority Males	35	6.33%	\$17,283,175	7.26%
Caucasian Females	115	20.80%	\$8,584,208	3.60%
Caucasian Males	393	71.07%	\$208,865,641	87.69%
TOTAL	553	100.00%	\$238,193,605	100.00%
Prime Contractor Minority and Females	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	35	6.33%	\$17,283,175	7.26%
Female Business Enterprises	125	22.60%	\$12,044,789	5.06%
Minority Male and Female Business Enterprises	160	28.93%	\$29,327,964	12.31%
Caucasian Male Business Enterprises	393	71.07%	\$208,865,641	87.69%
TOTAL	553	100.00%	\$238,193,605	100.00%



3. Goods and Other Services Contract Utilization: All Contracts

Table 4.09 summarizes all contract dollars expended by BART on goods and other services contracts. Minority Male Business Enterprises received 1.47 percent of the goods and other services contract dollars; Female Business Enterprises received 1.29 percent; and Caucasian Male Business Enterprises received 97.24 percent.

African American Businesses received 114 or 0.95 percent of the goods and other services contracts during the study period, representing \$986,358 or 0.2 percent of the contract dollars.

Asian American Businesses received 375 or 3.12 percent of the goods and other services contracts during the study period, representing \$2,399,279 or 0.49 percent of the contract dollars.

Hispanic American Businesses received 224 or 1.86 percent of the goods and other services contracts during the study period, representing \$6,200,571 or 1.27 percent of the contract dollars.

Native American Businesses received 1 or 0.01 percent of the goods and other services contracts during the study period, representing \$22,150 or 0 percent of the contract dollars.

Caucasian Female Business Enterprises received 392 or 3.26 percent of the goods and other services contracts during the study period, representing \$3,840,404 or 0.79 percent of the contract dollars.

Minority Male Business Enterprises received 358 or 2.98 percent of the goods and other services contracts during the study period, representing \$7,164,896 or 1.47 percent of the contract dollars.

Female Business Enterprises received 748 or 6.22 percent of the goods and other services contracts during the study period, representing \$6,283,867 or 1.29 percent of the contract dollars.

Minority Male and Female Business Enterprises received 1,106 or 9.2 percent of the goods and other services contracts during the study period, representing \$13,448,762 or 2.76 percent of the contract dollars.

Caucasian Male Business Enterprises received 10,917 or 90.8 percent of the goods and other services contracts during the study period, representing \$473,558,752 or 97.24 percent of the contract dollars.



**Table 4.09 Goods and Other Services Contract Utilization:
Total Contract Payments, July 1, 2002 to June 30, 2007**

Prime Contractor Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	114	0.95%	\$986,358	0.20%
Asian Americans	375	3.12%	\$2,399,279	0.49%
Hispanic Americans	224	1.86%	\$6,200,571	1.27%
Native Americans	1	0.01%	\$22,150	0.00%
Caucasian Females	392	3.26%	\$3,840,404	0.79%
Caucasian Males	10,917	90.80%	\$473,558,752	97.24%
TOTAL	12,023	100.00%	\$487,007,515	100.00%
Prime Contractor Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	71	0.59%	\$434,331	0.09%
African American Males	43	0.36%	\$552,027	0.11%
Asian American Females	215	1.79%	\$1,236,349	0.25%
Asian American Males	160	1.33%	\$1,162,930	0.24%
Hispanic American Females	70	0.58%	\$772,783	0.16%
Hispanic American Males	154	1.28%	\$5,427,788	1.11%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	1	0.01%	\$22,150	0.00%
Caucasian Females	392	3.26%	\$3,840,404	0.79%
Caucasian Males	10,917	90.80%	\$473,558,752	97.24%
TOTAL	12,023	100.00%	\$487,007,515	100.00%
Prime Contractor Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	356	2.96%	\$2,443,463	0.50%
Minority Males	358	2.98%	\$7,164,896	1.47%
Caucasian Females	392	3.26%	\$3,840,404	0.79%
Caucasian Males	10,917	90.80%	\$473,558,752	97.24%
TOTAL	12,023	100.00%	\$487,007,515	100.00%
Prime Contractor Minority and Females	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	358	2.98%	\$7,164,896	1.47%
Female Business Enterprises	748	6.22%	\$6,283,867	1.29%
Minority Male and Female Business Enterprises	1,106	9.20%	\$13,448,762	2.76%
Caucasian Male Business Enterprises	10,917	90.80%	\$473,558,752	97.24%
TOTAL	12,023	100.00%	\$487,007,515	100.00%



D. Contracts under \$500,000, by Industry

1. Construction Contract Utilization: Contracts under \$500,000

Table 4.10 summarizes all contract dollars expended by BART on construction contracts under \$500,000. Minority Male Business Enterprises received 17.07 percent of the contract dollars; Female Business Enterprises received 15.08 percent; and Caucasian Male Business Enterprises received 67.86 percent.

African American Businesses received none of the construction contracts under \$500,000 during the study period.

Asian American Businesses received 49 or 23.56 percent of the construction contracts under \$500,000 during the study period, representing \$1,782,501 or 15.88 percent of the contract dollars.

Hispanic American Businesses received 4 or 1.92 percent of the construction contracts under \$500,000 during the study period, representing \$494,106 or 4.4 percent of the contract dollars.

Native American Businesses received none of the construction contracts under \$500,000 during the study period.

Caucasian Female Business Enterprises received 23 or 11.06 percent of the construction contracts under \$500,000 during the study period, representing \$1,331,103 or 11.86 percent of the contract dollars.

Minority Male Business Enterprises received 52 or 25 percent of the construction contracts under \$500,000 during the study period, representing \$1,915,444 or 17.07 percent of the contract dollars.

Female Business Enterprises received 24 or 11.54 percent of the construction contracts under \$500,000 during the study period, representing \$1,692,266 or 15.08 percent of the contract dollars.

Minority Male and Female Business Enterprises received 76 or 36.54 percent of the construction contracts under \$500,000 during the study period, representing \$3,607,710 or 32.14 percent of the contract dollars.

Caucasian Male Business Enterprises received 132 or 63.46 percent of the construction contracts under \$500,000 during the study period, representing \$7,616,179 or 67.86 percent of the contract dollars.



Table 4.10 Construction Contract Utilization: Total Contract Payments under \$500,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Americans	49	23.56%	\$1,782,501	15.88%
Hispanic Americans	4	1.92%	\$494,106	4.40%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	23	11.06%	\$1,331,103	11.86%
Caucasian Males	132	63.46%	\$7,616,179	67.86%
TOTAL	208	100.00%	\$11,223,889	100.00%
Prime Contractor Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	49	23.56%	\$1,782,501	15.88%
Hispanic American Females	1	0.48%	\$361,163	3.22%
Hispanic American Males	3	1.44%	\$132,943	1.18%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	23	11.06%	\$1,331,103	11.86%
Caucasian Males	132	63.46%	\$7,616,179	67.86%
TOTAL	208	100.00%	\$11,223,889	100.00%
Prime Contractor Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	1	0.48%	\$361,163	3.22%
Minority Males	52	25.00%	\$1,915,444	17.07%
Caucasian Females	23	11.06%	\$1,331,103	11.86%
Caucasian Males	132	63.46%	\$7,616,179	67.86%
TOTAL	208	100.00%	\$11,223,889	100.00%
Prime Contractor Minority and Females	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	52	25.00%	\$1,915,444	17.07%
Female Business Enterprises	24	11.54%	\$1,692,266	15.08%
Minority Male and Female Business Enterprises	76	36.54%	\$3,607,710	32.14%
Caucasian Male Business Enterprises	132	63.46%	\$7,616,179	67.86%
TOTAL	208	100.00%	\$11,223,889	100.00%



2. Professional Services Contract Utilization: Contracts under \$500,000

Table 4.11 summarizes all contract dollars expended by BART on professional services contracts under \$500,000. Minority Male Business Enterprises received 7.75 percent of the professional services contract dollars; Female Business Enterprises received 15.15 percent; and Caucasian Male Business Enterprises received 77.11 percent.

African American Businesses received 10 or 1.93 percent of the professional services contracts under \$500,000 during the study period, representing \$1,300,533 or 4.65 percent of the contract dollars.

Asian American Businesses received 24 or 4.62 percent of the professional services contracts under \$500,000 during the study period, representing \$1,829,249 or 6.55 percent of the contract dollars.

Hispanic American Businesses received 7 or 1.35 percent of the professional services contracts under \$500,000 during the study period, representing \$189,551 or 0.68 percent of the contract dollars.

Native American Businesses received none of the professional services contracts under \$500,000 during the study period.

Caucasian Female Business Enterprises received 113 or 21.77 percent of the professional services contracts under \$500,000 during the study period, representing \$3,077,642 or 11.01 percent of the contract dollars

Minority Male Business Enterprises received 32 or 6.17 percent of the professional services contracts under \$500,000 during the study period, representing \$2,164,715 or 7.75 percent of the contract dollars.

Female Business Enterprises received 122 or 23.51 percent of the professional services contracts under \$500,000 during the study period, representing \$4,232,260 or 15.15 percent of the contract dollars.

Minority Male and Female Business Enterprises received 154 or 29.67 percent of the professional services contracts under \$500,000 during the study period, representing \$6,396,975 or 22.89 percent of the contract dollars.

Caucasian Male Business Enterprises received 365 or 70.33 percent of the professional services contracts under \$500,000 during the study period, representing \$21,545,487 or 77.11 percent of the contract dollars.



Table 4.11 Professional Services Contract Utilization: Total Contract Payments under \$500,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	10	1.93%	\$1,300,533	4.65%
Asian Americans	24	4.62%	\$1,829,249	6.55%
Hispanic Americans	7	1.35%	\$189,551	0.68%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	113	21.77%	\$3,077,642	11.01%
Caucasian Males	365	70.33%	\$21,545,487	77.11%
TOTAL	519	100.00%	\$27,942,462	100.00%
Prime Contractor Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	3	0.58%	\$912,603	3.27%
African American Males	7	1.35%	\$387,930	1.39%
Asian American Females	5	0.96%	\$240,015	0.86%
Asian American Males	19	3.66%	\$1,589,234	5.69%
Hispanic American Females	1	0.19%	\$2,000	0.01%
Hispanic American Males	6	1.16%	\$187,551	0.67%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	113	21.77%	\$3,077,642	11.01%
Caucasian Males	365	70.33%	\$21,545,487	77.11%
TOTAL	519	100.00%	\$27,942,462	100.00%
Prime Contractor Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	9	1.73%	\$1,154,618	4.13%
Minority Males	32	6.17%	\$2,164,715	7.75%
Caucasian Females	113	21.77%	\$3,077,642	11.01%
Caucasian Males	365	70.33%	\$21,545,487	77.11%
TOTAL	519	100.00%	\$27,942,462	100.00%
Prime Contractor Minority and Females	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	32	6.17%	\$2,164,715	7.75%
Female Business Enterprises	122	23.51%	\$4,232,260	15.15%
Minority Male and Female Business Enterprises	154	29.67%	\$6,396,975	22.89%
Caucasian Male Business Enterprises	365	70.33%	\$21,545,487	77.11%
TOTAL	519	100.00%	\$27,942,462	100.00%



3. Goods and Other Services Contract Utilization: Contracts under \$500,000

Table 4.12 summarizes all contract dollars expended by BART on goods and other services contracts under \$500,000. Minority Male Business Enterprises received 3.27 percent of the goods and other services contract dollars; Female Business Enterprises received 4.17 percent; and Caucasian Male Business Enterprises received 92.56 percent.

African American Businesses received 114 or 0.95 percent of the goods and other services contracts under \$500,000 during the study period, representing \$986,358 or 0.72 percent of the contract dollars.

Asian American Businesses received 375 or 3.14 percent of the goods and other services contracts under \$500,000 during the study period, representing \$2,399,279 or 1.74 percent of the contract dollars.

Hispanic American Businesses received 220 or 1.84 percent of the goods and other services contracts under \$500,000 during the study period, representing \$2,990,030 or 2.17 percent of the contract dollars.

Native American Businesses received 1 or 0.01 percent of the goods and other services contracts under \$500,000 during the study period, representing \$22,150 or 0.02 percent of the contract dollars.

Caucasian Female Business Enterprises received 392 or 3.28 percent of the goods and other services contracts under \$500,000 during the study period, representing \$3,840,404 or 2.79 percent of the contract dollars.

Minority Male Business Enterprises received 355 or 2.97 percent of the goods and other services contracts under \$500,000 during the study period, representing \$4,503,167 or 3.27 percent of the contract dollars.

Female Business Enterprises received 747 or 6.25 percent of the goods and other services contracts under \$500,000 during the study period, representing \$5,735,054 or 4.17 percent of the contract dollars.

Minority Male and Female Business Enterprises received 1,102 or 9.22 percent of the goods and other services contracts under \$500,000 during the study period, representing \$10,238,221 or 7.44 percent of the contract dollars.

Caucasian Male Business Enterprises received 10,851 or 90.78 percent of the goods and other services contracts under \$500,000 during the study period, representing \$127,449,523 or 92.56 percent of the contract dollars.



**Table 4.12 Goods and Other Services Contract Utilization:
Total Contract Payments under \$500,000, July 1, 2002 to June
30, 2007**

Prime Contractor Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	114	0.95%	\$986,358	0.72%
Asian Americans	375	3.14%	\$2,399,279	1.74%
Hispanic Americans	220	1.84%	\$2,990,030	2.17%
Native Americans	1	0.01%	\$22,150	0.02%
Caucasian Females	392	3.28%	\$3,840,404	2.79%
Caucasian Males	10,851	90.78%	\$127,449,523	92.56%
TOTAL	11,953	100.00%	\$137,687,744	100.00%
Prime Contractor Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	71	0.59%	\$434,331	0.32%
African American Males	43	0.36%	\$552,027	0.40%
Asian American Females	215	1.80%	\$1,236,349	0.90%
Asian American Males	160	1.34%	\$1,162,930	0.84%
Hispanic American Females	69	0.58%	\$223,970	0.16%
Hispanic American Males	151	1.26%	\$2,766,060	2.01%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	1	0.01%	\$22,150	0.02%
Caucasian Females	392	3.28%	\$3,840,404	2.79%
Caucasian Males	10,851	90.78%	\$127,449,523	92.56%
TOTAL	11,953	100.00%	\$137,687,744	100.00%
Prime Contractor Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	355	2.97%	\$1,894,650	1.38%
Minority Males	355	2.97%	\$4,503,167	3.27%
Caucasian Females	392	3.28%	\$3,840,404	2.79%
Caucasian Males	10,851	90.78%	\$127,449,523	92.56%
TOTAL	11,953	100.00%	\$137,687,744	100.00%
Prime Contractor Minority and Females	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	355	2.97%	\$4,503,167	3.27%
Female Business Enterprises	747	6.25%	\$5,735,054	4.17%
Minority Male and Female Business Enterprises	1,102	9.22%	\$10,238,221	7.44%
Caucasian Male Business Enterprises	10,851	90.78%	\$127,449,523	92.56%
TOTAL	11,953	100.00%	\$137,687,744	100.00%



E. Informal Contracts under \$10,000, \$40,000, or \$50,000, by Industry

1. Construction Contract Utilization: Contracts under \$10,000

Table 4.13 summarizes all contract dollars expended by BART on construction contracts under \$10,000. Minority Male Business Enterprises received 28.97 percent of the construction contract dollars; Female Business Enterprises received 13.51 percent; and Caucasian Male Business Enterprises received 57.52 percent.

African American Businesses received none of the construction contracts under \$10,000 during the study period.

Asian American Businesses received 29 or 34.52 percent of the construction contracts under \$10,000 during the study period, representing \$115,322 or 26.66 percent of the contract dollars.

Hispanic American Businesses received 1 or 1.19 percent of the construction contracts under \$10,000 during the study period, representing \$9,995 or 2.31 percent of the contract dollars.

Native American Businesses received none of the construction contracts under \$10,000 during the study period.

Caucasian Female Business Enterprises received 11 or 13.1 percent of the construction contracts under \$10,000 during the study period, representing \$58,426 or 13.51 percent of the contract dollars.

Minority Male Business Enterprises received 30 or 35.71 percent of the construction contracts under \$10,000 during the study period, representing \$125,317 or 28.97 percent of the contract dollars.

Female Business Enterprises received 11 or 13.1 percent of the construction contracts under \$10,000 during the study period, representing \$58,426 or 13.51 percent of the contract dollars.

Minority Male and Female Business Enterprises received 41 or 48.81 percent of the construction contracts under \$10,000 during the study period, representing \$183,743 or 42.48 percent of the contract dollars.

Caucasian Male Business Enterprises received 43 or 51.19 percent of the construction contracts under \$10,000 during the study period, representing \$248,842 or 57.52 percent of the contract dollars.



Table 4.13 Construction Contract Utilization: Total Contract Payments under \$10,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Americans	29	34.52%	\$115,322	26.66%
Hispanic Americans	1	1.19%	\$9,995	2.31%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	11	13.10%	\$58,426	13.51%
Caucasian Males	43	51.19%	\$248,842	57.52%
TOTAL	84	100.00%	\$432,584	100.00%
Prime Contractor Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	29	34.52%	\$115,322	26.66%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	1	1.19%	\$9,995	2.31%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	11	13.10%	\$58,426	13.51%
Caucasian Males	43	51.19%	\$248,842	57.52%
TOTAL	84	100.00%	\$432,584	100.00%
Prime Contractor Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	0	0.00%	\$0	0.00%
Minority Males	30	35.71%	\$125,317	28.97%
Caucasian Females	11	13.10%	\$58,426	13.51%
Caucasian Males	43	51.19%	\$248,842	57.52%
TOTAL	84	100.00%	\$432,584	100.00%
Prime Contractor Minority and Females	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	30	35.71%	\$125,317	28.97%
Female Business Enterprises	11	13.10%	\$58,426	13.51%
Minority Male and Female Business Enterprises	41	48.81%	\$183,743	42.48%
Caucasian Male Business Enterprises	43	51.19%	\$248,842	57.52%
TOTAL	84	100.00%	\$432,584	100.00%



2. Professional Services Contract Utilization: Contracts under \$50,000

Table 4.14 summarizes all contract dollars expended by BART on professional services contracts under \$50,000. Minority Male Business Enterprises received 4.45 percent of the professional services contract dollars; Female Business Enterprises received 20.02 percent; and Caucasian Male Business Enterprises received 75.53 percent.

African American Businesses received 6 or 1.52 percent of the professional services contracts under \$50,000 during the study period, representing \$27,462 or 0.46 percent of the contract dollars.

Asian American Businesses received 14 or 3.54 percent of the professional services contracts under \$50,000 during the study period, representing \$223,643 or 3.72 percent of the contract dollars.

Hispanic American Businesses received 6 or 1.52 percent of the professional services contracts under \$50,000 during the study period, representing \$96,071 or 1.6 percent of the contract dollars.

Native American Businesses received none of the professional services contracts under \$50,000 during the study period.

Caucasian Female Business Enterprises received 93 or 23.54 percent of the professional services contracts under \$50,000 during the study period, representing \$1,124,278 or 18.7 percent of the contract dollars

Minority Male Business Enterprises received 20 or 5.06 percent of the professional services contracts under \$50,000 during the study period, representing \$267,673 or 4.55 percent of the contract dollars.

Female Business Enterprises received 99 or 25.06 percent of the professional services contracts under \$50,000 during the study period, representing \$1,203,780 or 20.02 percent of the contract dollars.

Minority Male and Female Business Enterprises received 119 or 30.13 percent of the professional services contracts under \$50,000 during the study period, representing \$1,471,454 or 24.47 percent of the contract dollars.

Caucasian Male Business Enterprises received 276 or 69.87 percent of the professional services contracts under \$50,000 during the study period, representing \$4,541,786 or 75.53 percent of the contract dollars.



Table 4.14 Professional Services Contract Utilization: Total Contract Payments under \$50,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	6	1.52%	\$27,462	0.46%
Asian Americans	14	3.54%	\$223,643	3.72%
Hispanic Americans	6	1.52%	\$96,071	1.60%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	93	23.54%	\$1,124,278	18.70%
Caucasian Males	276	69.87%	\$4,541,786	75.53%
TOTAL	395	100.00%	\$6,013,240	100.00%
Prime Contractor Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	1	0.25%	\$2,503	0.04%
African American Males	5	1.27%	\$24,960	0.42%
Asian American Females	4	1.01%	\$75,000	1.25%
Asian American Males	10	2.53%	\$148,643	2.47%
Hispanic American Females	1	0.25%	\$2,000	0.03%
Hispanic American Males	5	1.27%	\$94,071	1.56%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	93	23.54%	\$1,124,278	18.70%
Caucasian Males	276	69.87%	\$4,541,786	75.53%
TOTAL	395	100.00%	\$6,013,240	100.00%
Prime Contractor Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	6	1.52%	\$79,503	1.32%
Minority Males	20	5.06%	\$267,673	4.45%
Caucasian Females	93	23.54%	\$1,124,278	18.70%
Caucasian Males	276	69.87%	\$4,541,786	75.53%
TOTAL	395	100.00%	\$6,013,240	100.00%
Prime Contractor Minority and Females	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	20	5.06%	\$267,673	4.45%
Female Business Enterprises	99	25.06%	\$1,203,780	20.02%
Minority Male and Female Business Enterprises	119	30.13%	\$1,471,454	24.47%
Caucasian Male Business Enterprises	276	69.87%	\$4,541,786	75.53%
TOTAL	395	100.00%	\$6,013,240	100.00%



3. Goods and Other Services Contract Utilization: Contracts under \$40,000

Table 4.15 summarizes all contract dollars expended by BART on goods and other services contracts under \$40,000. Minority Male Business Enterprises received 3.09 percent of the goods and other services contract dollars; Female Business Enterprises received 5.16 percent; and Caucasian Male Business Enterprises received 91.75 percent.

African American Businesses received 108 or 0.95 percent of the goods and other services contracts under \$40,000 during the study period, representing \$318,498 or 0.42 percent of the contract dollars.

Asian American Businesses received 366 or 3.21 percent of the good other services contracts under \$40,000 during the study period, representing \$1,792,075 or 2.34 percent of the contract dollars.

Hispanic American Businesses received 205 or 1.8 percent of the goods and other services contracts under \$40,000 during the study period, representing \$1,557,667 or 2.03 percent of the contract dollars.

Native American Businesses received 1 or 0.01 percent of the goods and other services contracts under \$40,000 during the study period, representing \$22,150 or 0.03 percent of the contract dollars.

Caucasian Female Business Enterprises received 374 or 3.28 percent of the goods and other services contracts under \$40,000 during the study period, representing \$2,631,796 or 3.43 percent of the contract dollars.

Minority Male Business Enterprises received 333 or 2.92 percent of the goods and other services contracts under \$40,000 during the study period, representing \$2,366,206 or 3.09 percent of the contract dollars.

Female Business Enterprises received 721 or 6.33 percent of the goods and other services contracts under \$40,000 during the study period, representing \$3,955,980 or 5.16 percent of the contract dollars.

Minority Male and Female Business Enterprises received 1,054 or 9.26 percent of the goods and other services contracts under \$40,000 during the study period, representing \$6,322,187 or 8.25 percent of the contract dollars.

Caucasian Male Business Enterprises received 10,332 or 90.74 percent of the goods and other services contracts under \$40,000 during the study period, representing \$70,343,275 or 91.75 percent of the contract dollars.



**Table 4.15 Goods and Other Services Contract Utilization:
Total Contract Payments under \$40,000, July 1, 2002 to June
30, 2007**

Prime Contractor Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	108	0.95%	\$318,498	0.42%
Asian Americans	366	3.21%	\$1,792,075	2.34%
Hispanic Americans	205	1.80%	\$1,557,667	2.03%
Native Americans	1	0.01%	\$22,150	0.03%
Caucasian Females	374	3.28%	\$2,631,796	3.43%
Caucasian Males	10,332	90.74%	\$70,343,275	91.75%
TOTAL	11,386	100.00%	\$76,665,461	100.00%
Prime Contractor Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	68	0.60%	\$153,603	0.20%
African American Males	40	0.35%	\$164,895	0.22%
Asian American Females	211	1.85%	\$993,126	1.30%
Asian American Males	155	1.36%	\$798,949	1.04%
Hispanic American Females	68	0.60%	\$177,455	0.23%
Hispanic American Males	137	1.20%	\$1,380,212	1.80%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	1	0.01%	\$22,150	0.03%
Caucasian Females	374	3.28%	\$2,631,796	3.43%
Caucasian Males	10,332	90.74%	\$70,343,275	91.75%
TOTAL	11,386	100.00%	\$76,665,461	100.00%
Prime Contractor Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	347	3.05%	\$1,324,184	1.73%
Minority Males	333	2.92%	\$2,366,206	3.09%
Caucasian Females	374	3.28%	\$2,631,796	3.43%
Caucasian Males	10,332	90.74%	\$70,343,275	91.75%
TOTAL	11,386	100.00%	\$76,665,461	100.00%
Prime Contractor Minority and Females	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	333	2.92%	\$2,366,206	3.09%
Female Business Enterprises	721	6.33%	\$3,955,980	5.16%
Minority Male and Female Business Enterprises	1,054	9.26%	\$6,322,187	8.25%
Caucasian Male Business Enterprises	10,332	90.74%	\$70,343,275	91.75%
TOTAL	11,386	100.00%	\$76,665,461	100.00%



V. SUMMARY

BART's prime contractor utilization analysis examined the \$791,130,196 expended on 12,807 contracts issued between July 1, 2002 to June 30, 2007. The \$791,130,196 expended included \$65,929,076 for construction, \$238,193,605 for professional services, and \$487,007,515 for goods and other services. A total of 12,807 contracts were analyzed, which included 231 for construction, 553 for professional services, and 12,023 for goods and other services.

The utilization analysis was performed separately for informal and formal contracts. The informal levels included contracts under \$10,000 for construction, contracts under \$50,000 for professional services, and contracts under \$40,000 for goods and other services. The analysis of formal contracts was limited to contracts under \$500,000 for each industry. *Chapter 8: Prime Contractor Disparity Analysis* presents the statistical analysis of disparity in each of the three industries.





5

SUBCONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

*Western States Paving*¹ held that in order to set race-based goals in accordance with the overall goal setting requirements of 49 CFR Part 26, there has to be findings of statistically significant disparity for each ethnic group covered by those goals. Race-based goals therefore do not apply to groups for which there are not supporting statistical findings. *Croson* set the standard for the determination of disparity. The first step in a disparity study is the analysis of expenditures to document the contracting history in the jurisdiction under review. Therefore the objective of the subcontractor utilization analysis is to determine the level of minority and woman-owned business enterprise (M/WBE) subcontractor utilization by ethnic group compared to non-M/WBE subcontractor utilization.

The subcontractor utilization data was compiled for a seven year period. Within the seven years, two distinct DBE programs were implemented by the San Francisco Bay Area Rapid Transit District (BART). During the first five years of the study period, BART used race-conscious and race-neutral means to achieve the overall DBE goal. Effective May 2006, BART modified its DBE program to remove the requirement to set race-conscious goals for its contracts and continued with a race-neutral program. These two distinct DBE Programs were operated under different standards and had different utilization patterns when M/WBE subcontractors were compared to non-M/WBE subcontractors. BART's utilization of minority, women, and Caucasian male subcontractors during the period of the two different DBE programs is documented in this chapter.



¹ *Western States Paving v. Washington State Department of Transportation*, 407 F.3d 893 (9th Cir 2005)

II. SUBCONTRACTOR UTILIZATION DATA SOURCES

Extensive efforts were undertaken to obtain subcontract records for BART's construction, and professional services contracts. Goods and other services contracts were not included in the analysis.

Multiple sources were used to determine subcontractor utilization on construction and professional services contracts valued at \$50,000 or more because BART did not have a comprehensive database of all subcontracts. The first subcontract records Mason Tillman received were provided by BART's Office of Civil Rights and were compiled for various prime contracts and derived from a variety of different sources. These sources included payment applications, project managers' records, DBE subcontractor participation forms, and Non-Discrimination Program reports. After this initial data set was reviewed, BART confirmed it could not deliver a comprehensive file of subcontracts as it had been anticipated. Upon review, these initial subcontract records were deemed to be incomplete. Thereafter, a series of extensive efforts were undertaken to reconstruct the subcontract awards and payments. BART's conformed contracts files were reviewed for information identifying subcontractors. The type of documents stored in the conformed contract file included pre-bid meeting attendance records and various forms. These forms included Project Consultant Team Attachment D, Designation of Subcontractors, Designation of Subcontractors and M/WBE Participation, Designation of Subcontractors and DBEs, and Summary of Bids. These documents were not all found in each conformed contract file. After reviewing the documents stored in the conformed contract files, BART's project managers were consulted. They were asked to retrieve subcontractors for the projects under their supervision. BART's project managers assisted in the data collection by reviewing their project files for the subcontracts on the contracts they managed. The project managers identified a number of subcontractors and suppliers not recorded in the conformed contract files or provided by the Office of Civil Rights. The Office of Civil Rights also provided the subcontract data for the contracts awarded during the Race-Neutral DBE Program Phase.

Prime contractors and subcontractors were also surveyed. Prime contractors were surveyed by Mason Tillman to provide the name, award, and payment amounts for each subcontractor used on their BART contract. The subcontractors surveyed were asked to verify the payment for each prime contract on which they were listed. BART staff encouraged the prime contractors and subcontractors to respond to each survey.

III. SUBCONTRACT DATA RECONSTRUCTION

The subcontract data reconstruction for the Race-Conscious DBE Program required an extraordinary effort on the part of Mason Tillman and BART and extended over seven months. The subcontract data for the Race-Neutral DBE Program Phase was collected within 30 days because BART had maintained comprehensive subcontract records for this later time period. Through the



combined effort of BART and Mason Tillman, a total of 234 subcontracts for 41 prime contracts valued at \$50,000 or greater were reconstructed and used in the analysis of the Race-Conscious DBE Program Phase which extended from July 1, 2002 to June 30, 2006. For the Race-Neutral DBE Program Phase, July 1, 2006 to December 31, 2008, Mason Tillman analyzed 322 subcontracts for 53 prime contracts valued at \$50,000 or greater. The assistance of BART staff from all departments was invaluable and without staff cooperation, the reconstruction of BART's subcontract records would not have been possible.

IV. SUBCONTRACTOR UTILIZATION ANALYSIS - RACE-CONSCIOUS DBE PROGRAM PHASE

As depicted in Table 5.01 below, the 234 subcontracts analyzed during the Race-Conscious DBE Program Phase included 178 construction subcontracts and 56 professional services subcontracts. On the subcontracts identified, \$27,074,021 total dollars were expended of which \$17,265,777 were for construction subcontracts and \$9,808,244 for professional services subcontracts.

Table 5.01 Total Subcontract Dollars: All Industries, July 1, 2002 to June 30, 2006

Industry	Total Number of Subcontracts	Total Dollars Expended
Construction	178	\$17,265,777
Professional Services	56	\$9,808,244
Total	234	\$27,074,021



A. Construction Utilization: All Subcontracts, July 1, 2002 to June 30, 2006

Table 5.02 depicts construction subcontracts awarded by prime contractors. Minority Male Business Enterprises received 9.66 percent of the construction subcontract dollars; Female Business Enterprises received 12.02 percent; and Caucasian Male Business Enterprises received 78.32 percent. These ethnic and gender groups are defined in Table 4.01 on page 4-2 of *Chapter 4: Prime Contractor Utilization Analysis*.

African American Businesses received 8 or 4.49 percent of the construction subcontracts during the study period, representing \$303,365 or 1.76 percent of the subcontract dollars.

Asian American Businesses received 7 or 3.93 percent of the construction subcontracts during the study period, representing \$459,094 or 2.66 percent of the subcontract dollars.

Hispanic American Businesses received 16 or 8.99 percent of the construction subcontracts during the study period, representing \$1,046,302 or 6.06 percent of the subcontract dollars.

Native American Businesses received none of the construction subcontracts during the study period.

Caucasian Female Business Enterprises received 22 or 12.36 percent of the construction subcontracts during the study period, representing \$1,935,041 or 11.21 percent of the subcontract dollars.

Minority Male Business Enterprises received 28 or 15.73 percent of the construction subcontracts during the study period, representing \$1,668,214 or 9.66 percent of the subcontract dollars.

Female Business Enterprises received 25 or 14.04 percent of the construction subcontracts during the study period, representing \$2,075,588 or 12.02 percent of the subcontract dollars.

Minority Male and Female Business Enterprises received 53 or 29.78 percent of the construction subcontracts during the study period, representing \$3,743,803 or 21.68 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 125 or 70.22 percent of the construction subcontracts during the study period, representing \$13,521,974 or 78.32 percent of the subcontract dollars.



**Table 5.02 Construction Utilization: All Subcontracts, July 1,
2002 to June 30, 2006**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	8	4.49%	\$303,365	1.76%
Asian Americans	7	3.93%	\$459,094	2.66%
Hispanic Americans	16	8.99%	\$1,046,302	6.06%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	22	12.36%	\$1,935,041	11.21%
Caucasian Males	125	70.22%	\$13,521,974	78.32%
TOTAL	178	100.00%	\$17,265,777	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	1	0.56%	\$80,000	0.46%
African American Males	7	3.93%	\$223,365	1.29%
Asian American Females	2	1.12%	\$60,547	0.35%
Asian American Males	5	2.81%	\$398,547	2.31%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	16	8.99%	\$1,046,302	6.06%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	22	12.36%	\$1,935,041	11.21%
Caucasian Males	125	70.22%	\$13,521,974	78.32%
TOTAL	178	100.00%	17,265,777	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	3	1.69%	\$140,547	0.81%
Minority Males	28	15.73%	\$1,668,214	9.66%
Caucasian Females	22	12.36%	\$1,935,041	11.21%
Caucasian Males	125	70.22%	\$13,521,974	78.32%
TOTAL	178	100.00%	\$17,265,777	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	28	15.73%	\$1,668,214	9.66%
Female Business Enterprises	25	14.04%	\$2,075,588	12.02%
Minority Male and Female Business Enterprises	53	29.78%	\$3,743,803	21.68%
Caucasian Male Business Enterprises	125	70.22%	\$13,521,974	78.32%
TOTAL	178	100.00%	\$17,265,777	100.00%



B. Professional Services Utilization: All Subcontracts, July 1, 2002 to June 30, 2006

Table 5.03 depicts professional services subcontracts awarded by prime contractors. Minority Male Business Enterprises received 22.73 percent of the professional services subcontract dollars; Female Business Enterprises received 21.26 percent; and Caucasian Male Business Enterprises received 56.02 percent.

African American Businesses received 2 or 3.57 percent of the professional services subcontracts during the study period, representing \$1,337,401 or 13.64 percent of the subcontracting dollars.

Asian American Businesses received 4 or 7.14 percent of the professional services subcontracts during the study period, representing \$1,208,548 or 12.32 percent of the subcontracting dollars.

Hispanic American Businesses received 5 or 8.93 percent of the professional services subcontracts during the study period, representing \$533,118 or 5.44 percent of the subcontracting dollars.

Native American Businesses received none of the professional services subcontracts during the study period.

Caucasian Female Business Enterprises received 5 or 8.93 percent of the professional services subcontracts during the study period, representing \$1,234,858 or 12.59 percent of the subcontract dollars.

Minority Male Business Enterprises received 10 or 17.86 percent of the professional services subcontracts during the study period, representing \$2,229,067 or 22.73 percent of the subcontract dollars.

Female Business Enterprises received 6 or 10.71 percent of the professional services subcontracts during the study period, representing \$2,084,858 or 21.26 percent of the subcontract dollars.

Minority Male and Female Business Enterprises received 16 or 28.57 percent of the professional services subcontracts during the study period, representing \$4,313,925 or 43.98 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 40 or 71.43 percent of the professional services subcontracts during the study period, representing \$5,494,319 or 56.02 percent of the subcontract dollars.



**Table 5.03 Professional Services Utilization: All Subcontracts,
July 1, 2002 to June 30, 2006**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	2	3.57%	\$1,337,401	13.64%
Asian Americans	4	7.14%	\$1,208,548	12.32%
Hispanic Americans	5	8.93%	\$533,118	5.44%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	5	8.93%	\$1,234,858	12.59%
Caucasian Males	40	71.43%	\$5,494,319	56.02%
TOTAL	56	100.00%	\$9,808,244	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	1	1.79%	\$850,000	8.67%
African American Males	1	1.79%	\$487,401	4.97%
Asian American Females	0	0.00%	\$0	0.00%
Asian American Males	4	7.14%	\$1,208,548	12.32%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	5	8.93%	\$533,118	5.44%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	5	8.93%	\$1,234,858	12.59%
Caucasian Males	40	71.43%	\$5,494,319	56.02%
TOTAL	56	100.00%	9,808,244	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	1	1.79%	\$850,000	8.67%
Minority Males	10	17.86%	\$2,229,067	22.73%
Caucasian Females	5	8.93%	\$1,234,858	12.59%
Caucasian Males	40	71.43%	\$5,494,319	56.02%
TOTAL	56	100.00%	\$9,808,244	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	10	17.86%	\$2,229,067	22.73%
Female Business Enterprises	6	10.71%	\$2,084,858	21.26%
Minority Male and Female Business Enterprises	16	28.57%	\$4,313,925	43.98%
Caucasian Male Business Enterprises	40	71.43%	\$5,494,319	56.02%
TOTAL	56	100.00%	\$9,808,244	100.00%



V. SUBCONTRACTOR UTILIZATION ANALYSIS - RACE-NEUTRAL DBE PROGRAM PHASE

As depicted in Table 5.04 below, the 322 subcontracts analyzed during the Race-Neutral DBE Program Phase included 165 construction subcontracts and 157 professional services subcontracts. On the subcontracts identified, \$96,613,720 total dollars were expended of which \$48,133,626 were for construction subcontracts and \$48,480,094 for professional services subcontracts.

Table 5.04 Total Subcontract Dollars: All Industries, July 1, 2006 to December 31, 2008

Industry	Total Number of Subcontracts	Total Dollars Expended
Construction	165	\$48,133,626
Professional Services	157	\$48,480,094
Total	322	\$96,613,720



A. Construction Utilization: All Subcontracts, July 1, 2006 to December 31, 2008

Table 5.05 depicts construction subcontracts awarded by prime contractors. Minority Male Business Enterprises received 1.34 percent of the construction subcontract dollars; Female Business Enterprises received 3.34 percent; and Caucasian Male Business Enterprises received 95.32 percent.

African American Businesses received 5 or 3.03 percent of the construction subcontracts during the study period, representing \$230,906 or 0.48 percent of the subcontract dollars.

Asian American Businesses received 4 or 2.42 percent of the construction subcontracts during the study period, representing \$144,653 or 0.3 percent of the subcontract dollars.

Hispanic American Businesses received 8 or 4.85 percent of the construction subcontracts during the study period, representing \$379,933 or 0.79 percent of the subcontract dollars.

Native American Businesses received none of the construction subcontracts during the study period.

Caucasian Female Business Enterprises received 10 or 6.06 percent of the construction subcontracts during the study period, representing \$1,497,648 or 3.11 percent of the subcontract dollars.

Minority Male Business Enterprises received 14 or 8.48 percent of the construction subcontracts during the study period, representing \$644,299 or 1.34 percent of the subcontract dollars.

Female Business Enterprises received 13 or 7.88 percent of the construction subcontracts during the study period, representing \$1,608,841 or 3.34 percent of the subcontract dollars.

Minority Male and Female Business Enterprises received 27 or 16.36 percent of the construction subcontracts during the study period, representing \$2,253,140 or 4.68 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 138 or 83.64 percent of the construction subcontracts during the study period, representing \$45,880,486 or 95.32 percent of the subcontract dollars.



**Table 5.05 Construction Utilization: All Subcontracts, July 1,
2006 to December 31, 2008**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	5	3.03%	\$230,906	0.48%
Asian Americans	4	2.42%	\$144,653	0.30%
Hispanic Americans	8	4.85%	\$379,933	0.79%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	10	6.06%	\$1,497,648	3.11%
Caucasian Males	138	83.64%	\$45,880,486	95.32%
TOTAL	165	100.00%	\$48,133,626	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	5	3.03%	\$230,906	0.48%
Asian American Females	2	1.21%	\$84,193	0.17%
Asian American Males	2	1.21%	\$60,460	0.13%
Hispanic American Females	1	0.61%	\$27,000	0.06%
Hispanic American Males	7	4.24%	\$352,933	0.73%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	10	6.06%	\$1,497,648	3.11%
Caucasian Males	138	83.64%	\$45,880,486	95.32%
TOTAL	165	100.00%	48,133,626	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	3	1.82%	\$111,193	0.23%
Minority Males	14	8.48%	\$644,299	1.34%
Caucasian Females	10	6.06%	\$1,497,648	3.11%
Caucasian Males	138	83.64%	\$45,880,486	95.32%
TOTAL	165	100.00%	\$48,133,626	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	14	8.48%	\$644,299	1.34%
Female Business Enterprises	13	7.88%	\$1,608,841	3.34%
Minority Male and Female Business Enterprises	27	16.36%	\$2,253,140	4.68%
Caucasian Male Business Enterprises	138	83.64%	\$45,880,486	95.32%
TOTAL	165	100.00%	\$48,133,626	100.00%



B. Professional Services Utilization: All Subcontracts, July 1, 2006 to December 31, 2008

Table 5.06 depicts professional services subcontracts awarded by prime contractors. Minority Male Business Enterprises received 22 percent of the professional services subcontract dollars; Female Business Enterprises received 9.15 percent; and Caucasian Male Business Enterprises received 68.85 percent.

African American Businesses received 12 or 7.64 percent of the professional services subcontracts during the study period, representing \$1,113,396 or 2.3 percent of the subcontracting dollars.

Asian American Businesses received 28 or 17.83 percent of the professional services subcontracts during the study period, representing \$6,762,544 or 13.95 percent of the subcontracting dollars.

Hispanic American Businesses received 8 or 5.1 percent of the professional services subcontracts during the study period, representing \$3,570,968 or 7.37 percent of the subcontracting dollars.

Native American Businesses received none of the professional services subcontracts during the study period.

Caucasian Female Business Enterprises received 23 or 14.65 percent of the professional services subcontracts during the study period, representing \$3,654,990 or 7.54 percent of the subcontract dollars.

Minority Male Business Enterprises received 44 or 28.03 percent of the professional services subcontracts during the study period, representing \$10,666,730 or 22 percent of the subcontract dollars.

Female Business Enterprises received 27 or 17.2 percent of the professional services subcontracts during the study period, representing \$4,435,167 or 9.15 percent of the subcontract dollars.

Minority Male and Female Business Enterprises received 71 or 45.22 percent of the professional services subcontracts during the study period, representing \$15,101,898 or 31.15 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 86 or 54.78 percent of the professional services subcontracts during the study period, representing \$33,378,196 or 68.85 percent of the subcontract dollars.



Table 5.06 Professional Services Utilization: All Subcontracts, July 1, 2006 to December 31, 2008

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	12	7.64%	\$1,113,396	2.30%
Asian Americans	28	17.83%	\$6,762,544	13.95%
Hispanic Americans	8	5.10%	\$3,570,968	7.37%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	23	14.65%	\$3,654,990	7.54%
Caucasian Males	86	54.78%	\$33,378,196	68.85%
TOTAL	157	100.00%	\$48,480,094	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	2	1.27%	\$260,000	0.54%
African American Males	10	6.37%	\$853,396	1.76%
Asian American Females	2	1.27%	\$520,178	1.07%
Asian American Males	26	16.56%	\$6,242,367	12.88%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	8	5.10%	\$3,570,968	7.37%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	23	14.65%	\$3,654,990	7.54%
Caucasian Males	86	54.78%	\$33,378,196	68.85%
TOTAL	157	100.00%	48,480,094	100.00%
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	4	2.55%	\$780,178	1.61%
Minority Males	44	28.03%	\$10,666,730	22.00%
Caucasian Females	23	14.65%	\$3,654,990	7.54%
Caucasian Males	86	54.78%	\$33,378,196	68.85%
TOTAL	157	100.00%	\$48,480,094	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Male Business Enterprises	44	28.03%	\$10,666,730	22.00%
Female Business Enterprises	27	17.20%	\$4,435,167	9.15%
Minority Male and Female Business Enterprises	71	45.22%	\$15,101,898	31.15%
Caucasian Male Business Enterprises	86	54.78%	\$33,378,196	68.85%
TOTAL	157	100.00%	\$48,480,094	100.00%



6

MARKET AREA ANALYSIS

I. MARKET AREA DEFINITION

A. Legal Criteria for Geographic Market Area

The Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*¹ held that programs established by local governments to set goals for the participation of minority and woman-owned firms, must be supported by evidence of past discrimination in the awarding of their contracts.

Prior to the *Croson* decision, many agencies and jurisdictions implementing race-conscious programs did so without developing a detailed public record to document discrimination in their awarding of contracts. Instead, they relied upon common knowledge and what was viewed as widely-recognized patterns of discrimination, both local and national.²

Croson established that a local government could not rely on society-wide discrimination as the basis for a race-based program, but, instead was required to identify discrimination within its own jurisdiction.³ In *Croson*, the Court found the City of Richmond's Minority Business Enterprise (MBE) construction program to be unconstitutional because there was insufficient evidence of discrimination in the *local construction market*.

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

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

² *United Steelworkers v. Weber*, 433 U.S. 193, 198, n. 1 (1979).

³ *Croson*, 488 U.S. at 497 (1989).



B. Application of the Croson Standard

While *Croson* emphasized the importance of the local market area, it provided little assistance in defining its parameters.⁴ It, however, is informative to review the Court’s definition of the City of Richmond’s market area. In discussing the scope of the constitutional violation that must be investigated, the Court interchangeably used the terms “relevant market,”⁵ “Richmond construction industry,”⁶ and “city’s construction industry”⁷ to define the proper scope of the examination of the existence of discrimination within the City. This interchangeable use of terms lends support to a definition of market area that coincides with the boundaries of a jurisdiction.

In analyzing the cases following *Croson*, a pattern emerges that provides additional guidance. The body of cases examining market area support a definition of market area that is reasonable.⁸ In *Cone Corporation v. Hillsborough County*,⁹ the Eleventh Circuit Court of Appeals considered a study in support of Florida’s Hillsborough County MBE program, which used minority contractors located in the County as the measure of available firms. The program was found to be constitutional under the compelling governmental interest element of the strict scrutiny standard.

Hillsborough County’s program was based on statistics indicating that specific discrimination existed in the construction contracts awarded by the County, not in the construction industry in general. Hillsborough County had extracted data from within its own jurisdictional boundaries and assessed the percentage of minority businesses available in Hillsborough County. The court stated that the study was properly conducted within the “local construction industry.”¹⁰

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII)*,¹¹ the Ninth Circuit Court of Appeals found the City and County of San Francisco’s MBE program to have the factual predicate necessary to survive strict scrutiny. The San Francisco MBE program was supported by a study that assessed the number of available MBE contractors within the City

⁴ *Adarand*, which extended *Croson*’s strict scrutiny standard to federal programs, did not change *Croson*’s approach to market area where federal funds are involved.

⁵ *Croson*, 488 U.S. at 471 (1989).

⁶ *Id.* at 500.

⁷ *Id.* at 470.

⁸ See e.g., *Concrete Works of Colorado v. City of Denver, Colorado*, 36 F.3d 1513, 1528 (10th Cir. 1994).

⁹ *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

¹⁰ *Id.* at 915.

¹¹ *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991).



and County of San Francisco. The court found it appropriate to use the City and County as the relevant market area within which to conduct a disparity study.¹²

In *Coral Construction v. King County*, the Ninth Circuit Court of Appeals held that “a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program.”¹³ In support of its MBE program, the State of Washington’s King County offered studies compiled by other jurisdictions, including entities completely within the County or coterminous with the boundaries of the County, as well as a separate jurisdiction completely outside of the County. The plaintiffs contended that *Croson* required King County to compile its own data and cited *Croson* as prohibiting data sharing.

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

Concerning data gathered by a neighboring county, the court concluded that this data could not be used to support King County’s MBE program. The court noted, “It is vital that a race-conscious program align itself as closely to the scope of the problem legitimately sought to be rectified by the governmental entity. To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries.”¹⁴ However, the court did note that the “world of contracting does not conform itself neatly to jurisdictional boundaries.”¹⁵

There are other situations where courts have approved a definition of market area that extends beyond a jurisdiction’s geographic boundaries. In *Concrete Works v. City and County of Denver*,¹⁶ the Tenth Circuit Court of Appeals directly addressed the issue of whether extra-jurisdictional evidence of discrimination can be used to determine “local market area” for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA) to support its MBE program. Plaintiffs argued that the federal constitution prohibited consideration of evidence beyond jurisdictional boundaries. The Court of Appeals disagreed.

¹² *Id.* at 1415.

¹³ *Coral Construction v. King County*, 941 F.2d 910, (9th Cir.1991), cert. denied, 502 U.S. 1033, 112 S.Ct. 875, 116 L.Ed.2d 780 (1992).

¹⁴ *Id.* at 917.

¹⁵ *Id.*

¹⁶ *Concrete Works of Colo., Inc. v. Denver*, 36 F.3d 1513, 1528 (10th Cir. 1994), cert. denied, 514 U.S. 1004 (1995).



Critical to the court’s acceptance of the Denver MSA as the relevant local market, was the finding that more than 80 percent of construction and design contracts awarded by Denver were awarded to contractors within the MSA. Another consideration was that Denver’s analysis was based on U.S. Census data, which was available for the Denver MSA but not for the city itself. There was no undue burden placed on nonculpable parties, as Denver had conducted a majority of its construction contracts within the area defined as the local market. Citing *AGCCII*,¹⁷ the court noted, “that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions that the city has taken in the past have visited racial discrimination on such individuals.”¹⁸

Similarly, New York State conducted a disparity study in which the geographic market consisted of New York State and eight counties in northern New Jersey. The geographic market was defined as the area encompassing the location of businesses which received more than 90 percent of the dollar value of all contracts awarded by the agency.¹⁹

State and local governments must pay special attention to the geographical scope of their disparity studies. *Croson* determined that the statistical analysis should focus on the number of qualified minority individuals or qualified minority business owners in the government’s marketplace.²⁰ The text of *Croson* itself suggests that the geographical boundaries of the government entity comprise an appropriate market area, and other courts have agreed with this finding. In addition, other cases have approved the use of a percentage of the dollars spent by an agency on contracting.

It follows then that an entity may limit consideration of evidence of discrimination to discrimination occurring within its own jurisdiction. Under certain circumstances, extra-jurisdictional evidence can be used if the percentage of governmental dollars supports such boundaries. Taken collectively, the cases support a definition of market area that is reasonable rather than dictating a specific or unreasonably rigid formula. In other words, since *Croson* and its progeny did not provide a bright line rule for local market area, that determination should be fact-based and case-specific.

¹⁷ *AGCCII*, 950 F.2d 1401 (9th Cir. 1991).

¹⁸ *Concrete Works*, 36 F.3d at 1528 (10th Cir. 1994).

¹⁹ *Opportunity Denied! New York State’s Study*, 26 *Urban Lawyer* No. 3, Summer 1994.

²⁰ *Croson*, 488 U.S. at 501 (1989).



II. MARKET AREA ANALYSIS

Although *Croson* and its progeny do not provide a bright line rule for the delineation of the local market area, taken collectively, the case law supports a definition of market area as within the jurisdiction's own boundaries. It is within the market area where an entity may limit consideration of evidence of discrimination. A review of the contracts awarded by the San Francisco Bay Area Rapid Transit District (BART) shows that most of its 12,807 contract awards and the majority of the contract dollars were awarded to Alameda, Contra Costa, San Francisco, and San Mateo County businesses. Additionally, the distribution of contracts and dollars awarded within each of the three industries shows a pattern of contracting with businesses from Alameda, Contra Costa, San Francisco, and San Mateo counties. A review of the contracts and dollars awarded to businesses in these four counties is depicted below:

1. Distribution of All Contracts

BART awarded 12,807 contracts and \$791,130,196 during the July 1, 2002 to June 30, 2007 study period. 48.17 percent of these contracts and 70.5 percent, of the dollars were awarded to Alameda, Contra Costa, San Francisco, and San Mateo-based firms. The distribution of the contracts and dollars awarded is depicted in Table 6.01.

Table 6.01 Distribution of All Contracts Awarded July 1, 2002 to June 30, 2007

County	Number of Contracts	Percent of Total Contracts	Amount of Dollars	Percent of Total Dollars
Alameda	3,564	27.83%	\$310,082,209	39.19%
San Francisco	1,017	7.94%	\$187,950,531	23.76%
Out of State - IL	1,353	10.56%	\$110,213,289	13.93%
Contra Costa	1,077	8.41%	\$42,549,454	5.38%
San Mateo	511	3.99%	\$17,143,294	2.17%
Out of State - OH	145	1.13%	\$14,290,937	1.81%
Los Angeles	620	4.84%	\$14,020,492	1.77%
Santa Clara	620	4.84%	\$10,065,983	1.27%
Remaining *	3,900	30.45%	\$84,814,006	10.72%
Total	12,807	100.00%	\$791,130,196	100.00%

* Remaining includes Other Counties, Out of State, and Out of Country



2. Distribution of Construction Contracts

BART awarded 231 construction contracts valued at \$65,929,076 during the July 1, 2002 to June 30, 2007 study period. 88.74 percent of the construction contracts and 91.49 percent of the dollars were awarded to Alameda, Contra Costa, San Francisco, and San Mateo- based firms.

The distribution of the contracts and dollars awarded to firms within and outside of Alameda, Contra Costa, San Francisco, and San Mateo counties is depicted in Table 6.02.

**Table 6.02 Distribution of Construction Contracts Awarded
July 1, 2002 to June 30, 2007**

County	Number of Contracts	Percent of Total Contracts	Amount of Dollars	Percent of Total Dollars
Alameda	124	53.68%	\$41,125,816	62.38%
Contra Costa	19	8.23%	\$11,783,116	17.87%
San Francisco	55	23.81%	\$5,258,723	7.98%
San Mateo	7	3.03%	\$2,151,594	3.26%
Solano	5	2.16%	\$1,670,459	2.53%
Marin	1	0.43%	\$1,333,958	2.02%
Santa Clara	5	2.16%	\$734,403	1.11%
Los Angeles	3	1.30%	\$689,773	1.05%
Remaining *	12	5.19%	\$1,181,234	1.79%
Total	231	100.00%	\$65,929,076	100.00%

* Remaining includes Other Counties, Out of State, and Out of Country



3. Distribution of Professional Services Contracts

BART awarded 553 professional services contracts valued at \$238,193,605 during the July 1, 2002 to June 30, 2007 study period. 58.59 percent of the professional services contracts and 90.22 percent of the dollars were awarded to Alameda, Contra Costa, San Francisco, and San Mateo-based firms.

The distribution of the contracts awarded to firms within and outside of Alameda, Contra Costa, San Francisco, and San Mateo counties is depicted in Table 6.03.

**Table 6.03 Distribution of Professional Services Contracts
Awarded July 1, 2002 to June 30, 2007**

County	Number of Contracts	Percent of Total Contracts	Amount of Dollars	Percent of Total Dollars
San Francisco	106	19.17%	\$155,319,651	65.21%
Alameda	145	26.22%	\$39,308,767	16.50%
Contra Costa	54	9.76%	\$18,087,489	7.59%
Out of State - VA	4	0.72%	\$7,506,392	3.15%
Out of State - OH	1	0.18%	\$2,942,492	1.24%
Los Angeles	14	2.53%	\$2,797,418	1.17%
San Mateo	19	3.44%	\$2,190,201	0.92%
Remaining *	210	37.97%	\$10,041,193	4.22%
Total	553	100.00%	\$238,193,605	100.00%

* Remaining includes Other Counties, Out of State, and Out of Country



4. Distribution of Goods and Other Services Contracts

BART awarded 12,023 goods and other services contracts valued at \$487,007,515 dollars during the July 1, 2002 to June 30, 2007 study period. 46.91 percent of the goods and other services contracts and 58.01 percent of the dollars were awarded to Alameda, Contra Costa, San Francisco, and San Mateo-based firms.

The distribution of the contracts awarded to firms within and outside of Alameda, Contra Costa, San Francisco, and San Mateo counties is depicted in Table 6.04.

Table 6.04 Distribution of Goods and Other Services Contracts Awarded July 1, 2002 to June 30, 2007

County	Number of Contracts	Percent of Total Contracts	Amount of Dollars	Percent of Total Dollars
Alameda	3,295	27.41%	\$229,647,626	47.15%
Out of State - IL	1,344	11.18%	\$110,089,304	22.61%
San Francisco	856	7.12%	\$27,372,156	5.62%
San Mateo	485	4.03%	\$12,801,498	2.63%
Contra Costa	1,004	8.35%	\$12,678,849	2.60%
Out of State - OH	144	1.20%	\$11,348,445	2.33%
Los Angeles	603	5.02%	\$10,533,301	2.16%
Santa Clara	595	4.95%	\$8,511,731	1.75%
Remaining *	3,697	30.75%	\$64,024,604	13.15%
Total	12,023	100.00%	\$487,007,515	100.00%

* Remaining includes Other Counties, Out of State, and Out of Country

More than 48 percent of BART's contracts and 70 percent of dollars were awarded to businesses located in Alameda, Contra Costa, San Francisco, and San Mateo counties. Given the geographical distribution of the contracts awarded by BART and the requirements set forth in the applicable case law, the study's market area is determined to be Alameda, Contra Costa, San Francisco, and San Mateo counties.



III. BART'S MARKET AREA

The following table depicts the overall number of construction, professional services, and goods and other services contracts awarded by BART between July 1, 2002 to June 30, 2007.

BART awarded 12,807 construction, professional services, and goods and other services contracts valued at \$791,130,196 during the study period of July 1, 2002 to June 30, 2007. A total of 48.17 percent of the contracts and 70.5 percent of the dollars were awarded to businesses in the market area of Alameda, Contra Costa, San Francisco, and San Mateo counties. The analysis of discrimination has been limited to that occurring within this market area.

Table 6.05 depicts the overall number of construction, professional services, and goods and other services contracts and the dollar value of those contracts awarded by BART between July 1, 2002 to June 30, 2007. Of the 12,807 contracts awarded by BART during the study period, 6,169 or 48.17 percent were awarded to market area businesses. The dollar value of contracts awarded to market area businesses was \$557,725,488 or 70.5 percent of all contract dollars awarded.

The breakdown of contracts awarded to market area businesses is as follows:

Construction Contracts: 205 or 88.74 percent of these contracts were awarded to market area businesses. The dollar value of those contracts was \$60,319,250 or 91.49 percent of the total construction dollars.

Professional Services Contracts: 324 or 58.59 percent of these contracts were awarded to market area businesses. The dollar value of those contracts was \$214,906,109 or 90.22 percent of the total professional services dollars.

Goods and Other Services Contracts: 5,640 or 46.91 percent were awarded to market area businesses. The dollar value of those contracts was \$282,500,129 or 58.01 percent of the total goods and other services dollars.²¹

²¹ 34.9 percent of the total goods and other services dollars were awarded to businesses outside California including 22.61 percent in Illinois.



Table 6.05 BART Market Area: July 1, 2002 to June 30, 2007

Market Area	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Combined Types of Work				
Market Area	6,169	48.17%	\$557,725,488	70.50%
Outside Market Area	6,638	51.83%	\$233,404,708	29.50%
Total	12,807	100.00%	\$791,130,196	100.00%
Construction				
Market Area	205	88.74%	\$60,319,250	91.49%
Outside Market Area	26	11.26%	\$5,609,826	8.51%
Total	231	100.00%	\$65,929,076	100.00%
Professional Services				
Market Area	324	58.59%	\$214,906,109	90.22%
Outside Market Area	229	41.41%	\$23,287,496	9.78%
Total	553	100.00%	\$238,193,605	100.00%
Procurement of Goods and Other Services				
Market Area	5,640	46.91%	\$282,500,129	58.01%
Outside Market Area	6,383	53.09%	\$204,507,385	41.99%
Total	12,023	100.00%	\$487,007,515	100.00%



7

AVAILABILITY ANALYSIS

I. INTRODUCTION

Availability according to 49CFR Part 23 can be determined using any one of a number of sources including a disparity study. Since a disparity study is required to comply with *Western States Paving*¹, the *Croson* standard is being applied in determining availability for this analysis. The *Croson* standard for conducting a disparity study defines availability as the number of businesses in the jurisdiction’s market area that are willing and able to provide goods or services.² Therefore to determine availability, minority and woman-owned business enterprises (M/WBEs) and non-M/WBEs within the jurisdiction’s market area that are willing and able to provide the goods and services need to be enumerated. The analysis presented in *Chapter 6: Market Area Analysis* defined Alameda, Contra Costa, San Francisco, and San Mateo counties as the market area for this Study. This determination was made because most of the contracts and the majority of the contract dollars were received by businesses domiciled in these four counties.

When considering sources for determining the number of willing and able M/WBEs and non-M/WBEs, the selection must be based on whether two significant aspects about the population in question can be gauged from the sources. A business’ interest in doing business with the jurisdiction, as implied by the term “willing,” and its ability or capacity to provide a service or good, as implied by the term “able,” must be discerned.

The compiled list of available businesses includes minority, Caucasian female, and Caucasian male-owned businesses in the areas of construction, professional services, and goods and other services. San Francisco Bay Area Rapid Transit District (BART) records, government certification records, business association membership listings, and an outreach campaign were used to compile the documents used as sources for available market area businesses. Separate availability lists were



¹ *Western States Paving v. Washington State Department of Transportation*, 407 F.3d 893 (9th Cir 2005)
² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

compiled for prime contractors and subcontractors within the three industries. The distribution of available businesses by ethnicity and gender and industry are presented in this chapter.

II. PRIME CONTRACTOR AVAILABILITY DATA SOURCES

A. Identification of Willing Businesses Within the Market Area

Mason Tillman identified businesses in the four county market area that provided goods and services that BART procures using four sources. The sources are BART records, government certification lists, business outreach, and business association membership lists. Only businesses that were determined to be willing were added to the availability list. All businesses identified as willing from more than one source were counted only once. The base document in the availability list was BART's utilized vendors. To this list was added BART's unsuccessful bidders, businesses identified through government certification lists, attendees at the BART business community meeting, and the willing businesses identified from the business association membership lists. To compile the unique list of willing businesses, the four sources were ranked with the highest ranking assigned to the utilized vendors, the second highest ranking assigned to government certification lists, the third highest ranking assigned to attendees at the BART business community meeting, and the last ranking assigned to willing businesses identified from the business association membership lists.

The utilized vendors and unsuccessful bidders were secured from BART's records. The certified lists were collected from local agencies which certify businesses as local small, minority and woman-owned. The list of DBEs maintained by the California Unified Certification Program was also collected.

Extensive outreach to business associations in Alameda, Contra Costa, San Francisco, and San Mateo Counties was performed to identify additional businesses willing to contract with BART. The primary strategies used in the outreach campaign were a Study website and print, electronic, and digital media. These strategies were used to promote a business community meeting. Written and telephone contact with organizations and local governments was used to collect membership lists. From the combined effort 34,184 market area businesses were identified.

An account of the willing businesses derived by source are listed below:



1. BART Records

All BART utilized vendors and unsuccessful bidders were determined to be willing. There were 4,557 utilized and unsuccessful businesses. To the availability list, 3,314 unique businesses were added.

2. Government Certification Lists

Certification lists from state and government agencies were collected. There were 12,737 certified businesses compiled from the 11 agencies and all were determined to be willing. There were 6,106 unique businesses added to the availability list.

3. Business Meeting Outreach Campaign

There were 247 pre-registrants and 159 attendees at the April 2, 2008 business community meeting. There were also 84 attendees at BART's April 3, 2008 Outreach Meeting for upcoming construction contracts. The total number of unique businesses added to the availability list was 67.

4. Identification of Business Association Membership Lists

Mason Tillman identified 96 lists of businesses within the market area. Membership lists were obtained from 27 entities. From the 27 business association membership lists, 16,643 businesses were identified. Of the 16,643 businesses, there were 13,647 unique businesses that offered the goods and services BART procures. The unique list was queried and businesses without a telephone number were excluded. There were 10,586 businesses with telephone numbers. These businesses were surveyed to determine their willingness to contract with BART. There were 1,094 unique businesses added to the availability list.

B. Prime Contractor Sources

Table 7.01 lists the governmental and business association sources from which the willing businesses were compiled.

Table 7.01 Prime Contractor Availability Data Sources

Source	Type of Information
BART Records	
BART Utilized Vendors	M/WBEs and non-M/WBEs
BART Unsuccessful Bidders	M/WBEs and non-M/WBEs
Community Meeting Outreach List	M/WBEs and non-M/WBEs



Source	Type of Information
Government Certification Lists	
Alameda County Transportation Improvement Authority Certification List	LBEs and S/LBEs ³
San Francisco Human Rights Commission Disadvantaged Business Enterprise Certification List	DBEs ⁴
San Francisco Human Rights Commission M/WBE Certification List	M/WBEs
Alameda County Small Local Emerging Business Program	LBEs and S/LEBs ⁵
California Unified Certification List	DBEs
East Bay Municipal Utility District Certification List	SBEs
City of Oakland Small Local Business Enterprise Certification List	LBEs and S/LBEs
Port of Oakland Certification List	LBABEs, LIABEs, SBEs, and VSBEs ⁶
Contra Costa County Certification List	M/WBEs, DBEs, SBEs, and non-M/WBEs
Department of General Services Small Business Certification List	SBEs
United States Small Business Administration: Procurement Marketing and Access Network	M/WBEs and non-M/WBEs
Business Association Membership/Licensing Board Lists	
Alameda County Chamber of Commerce	M/WBEs and non-M/WBEs
Associated Builders and Contractors - Golden Gate Chapter	M/WBEs and non-M/WBEs
Associated General Contractors - Bay Area Chapter	M/WBEs and non-M/WBEs
Bay Area Black Yellow Pages	M/WBEs
Builders Exchange of Alameda County	M/WBEs and non-M/WBEs
Burlingame Chamber of Commerce	M/WBEs and non-M/WBEs
California Contractors State License Board	M/WBEs and non-M/WBEs

³ LBEs: Local Business Enterprises; S/LBEs: Small Local Business Enterprises

⁴ DBEs: Disadvantaged Business Enterprises

⁵ S/LEBs: Small Local Emerging Businesses

⁶ LBABEs: Local Business Area Business Enterprises; LIABEs: Local Impact Area Business Enterprises; VSBEs: Very Small Business Enterprises



Source	Type of Information
Danville Area Chamber of Commerce	M/WBEs and non-M/WBEs
Dublin Chamber of Commerce	M/WBEs and non-M/WBEs
East Bay Asian Design Professionals	M/WBEs and non-M/WBEs
Fremont Chamber of Commerce	M/WBEs and non-M/WBEs
Hayward Chamber of Commerce	M/WBEs and non-M/WBEs
Hercules Chamber of Commerce	M/WBEs and non-M/WBEs
Hispanic Chamber of Commerce of Alameda County	M/WBEs
Lafayette Chamber of Commerce	M/WBEs and non-M/WBEs
Millbrae Chamber of Commerce	M/WBEs and non-M/WBEs
Minority Business & Professional Directory	M/WBEs and non-M/WBEs
National Association of Women Business Owners	WBEs
Oakland African American Chamber of Commerce	M/WBEs
Oakland Metropolitan Chamber of Commerce	M/WBEs and non-M/WBEs
Oakland Chinatown Chamber of Commerce	M/WBEs and non-M/WBEs
Oakland Hispanic Business List	M/WBEs
OneSource Information Services List	M/WBEs and non-M/WBEs
Pittsburg Chamber of Commerce	M/WBEs and non-M/WBEs
San Carlos Chamber of Commerce	M/WBEs and non-M/WBEs
San Francisco Chamber of Commerce	M/WBEs and non-M/WBEs
Walnut Creek Chamber of Commerce	M/WBEs and non-M/WBEs

C. Determination of Willingness

All businesses used in the availability analysis were determined to be willing to contract with BART. Willingness is defined in *Croson* and its progeny as a business' interest in doing government contracting. This term is discussed in detail in *Chapter 1: Legal Analysis* of this report. Businesses identified from the 41 sources listed in Table 7.01 have demonstrated their willingness to perform on public contracts. To be classified as willing the business either had bid on a BART contract, secured government certification, responded to the outreach campaign conducted in conjunction with this Study, or was listed on a business



organization membership list and affirmed its interest in contracting with BART through the survey. It was presumed that companies that sought government contracts or certification were willing to contract with BART.



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

Tables 5.02 through 5.06 present the distribution of willing prime contractors by the source. The 41 sources listed in Table 7.01 are ranked. The highest ranked source was the prime contractors utilized by BART. Each ranked business is *counted only once*. For example, a utilized prime contractor counted once in the prime contractor utilization source will not be counted a second time as a bidder, as a certified business, or as a company identified during outreach.

As noted in Table 7.02, 90.06 percent of the businesses on the unique list of available prime contractors were obtained from BART’s records of utilized contractors, unsuccessful bidders, and government certification lists. Companies identified through business outreach and the business association membership lists represent 9.94 percent of the willing businesses.

Table 7.02 Distribution of Prime Contractor Availability Data Sources, All Industries

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Utilized Prime Contractors	6.25%	10.80%	9.56%
Unsuccessful Bidders	9.47%	26.68%	21.99%
Government Certification Lists	71.83%	53.52%	58.51%
Subtotal	87.54%	91.00%	90.06%
Community Meeting Attendees	0.21%	0.79%	0.63%
Business Association Membership Lists	12.25%	8.21%	9.31%
Subtotal	12.46%	9.00%	9.94%
Grand Total*	100.00%	100.00%	100.00%

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



The distribution of available businesses by source was performed for each industry. As noted in Table 7.03, 85.7 percent of the construction companies identified were derived from BART's records and government certification lists. Companies identified through business outreach and the business association membership lists represent 14.3 percent of the willing businesses.

Table 7.03 Distribution of Prime Contractor Availability Data Sources, Construction

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Utilized Prime Contractors	4.99%	6.48%	5.97%
Unsuccessful Bidders	15.13%	20.51%	18.66%
Government Certification Lists	69.89%	56.44%	61.08%
Subtotal	90.02%	83.43%	85.70%
Community Meeting Attendees	0.16%	0.57%	0.43%
Business Association Membership Lists	9.83%	16.00%	13.87%
Subtotal	9.98%	16.57%	14.30%
Grand Total*	100.00%	100.00%	100.00%

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



Table 7.04 depicts the data sources for available professional services prime contractors. As noted, 82.65 percent of the professional services prime contractors were obtained from BART's records and government certification lists. Companies identified through business outreach and the business association membership lists represent 17.35 percent of the willing businesses.

Table 7.04 Distribution of Prime Contractor Availability Data Sources, Professional Services

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Utilized Prime Contractors	5.82%	7.06%	6.62%
Unsuccessful Bidders	11.84%	13.17%	12.70%
Government Certification Lists	64.68%	62.60%	63.34%
Subtotal	82.34%	82.82%	82.65%
Community Meeting Attendees	0.35%	1.53%	1.11%
Business Association Membership Lists	17.31%	15.65%	16.24%
Subtotal	17.66%	17.18%	17.35%
Grand Total*	100.00%	100.00%	100.00%

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



Table 7.05 depicts the data sources for available goods and other services prime contractors. As noted, 98.34 percent of the goods and other services prime contractors were obtained from BART's records and government certification lists. Companies identified through business outreach and the business association membership lists represent 1.66 percent of the willing businesses.

Table 7.05 Distribution of Prime Contractor Availability Data Sources, Goods and Other Services

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Utilized Prime Contractors	9.72%	15.90%	14.54%
Unsuccessful Bidders	9.23%	36.43%	30.44%
Government Certification Lists	77.45%	46.56%	53.36%
Subtotal	96.41%	98.89%	98.34%
Community Meeting Attendees	0.33%	0.51%	0.47%
Business Association Membership Lists	3.27%	0.60%	1.19%
Subtotal	3.59%	1.11%	1.66%
Grand Total*	100.00%	100.00%	100.00%

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



III. CAPACITY

The second component of the availability requirement set forth in *Croson* is a business' capacity or ability to work on the contracts awarded by the jurisdiction.⁷ However, capacity requirements are not delineated in *Croson*. In fact, a standard for capacity has only been addressed in a few subsequent cases. Each case where capacity has been considered has involved large, competitively bid construction prime contracts. Nevertheless, the capacity of willing market area businesses to do business with BART was assessed using four approaches.

- The size of all prime contracts awarded by BART was analyzed to determine the capacity needed to perform the average awarded contract.
- The largest contracts awarded to M/WBEs were identified to determine demonstrated ability to win large, competitively bid contracts.
- The certification process was assessed to determine if it meets the standard set in *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)*,⁸ which found the USDOT certification to measure capacity.
- The disparity analysis was restricted to an examination of the prime contract awards in the amount of \$500,000 or less to limit the capacity required to perform the contracts subjected to the statistical analysis.

A. Size of Contracts Analyzed

In *Associated General Contractors of California v. City of Columbus* and *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade City*, the courts were concerned with the capacity analysis of available businesses to bid on large, competitively bid contracts. It should also be noted that the focus in both cases was on the bidding company's size and ability to perform on large, competitively bid construction contracts.⁹

BART's construction, professional services, and goods and other services contracts were analyzed to determine the size of awarded contracts and, therefore, the capacity required to perform on BART's contracts. The size distribution illustrates the fact that the majority of BART-awarded contracts were under \$25,000. This distribution illustrates that limited capacity is needed to perform the overwhelming majority of BART's contracts.

⁷ *Croson*, 488 U.S. 469.

⁸ *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), on remand, 893 F. Supp. 419 (E.D. Penn. 1995), aff'd, 91 F.3d 586 (3d Cir. 1996).

⁹ *Associated General Contractors of California v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996), and *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade City*, 943 F. Supp. 1546 (S.D. Fla. 1996), aff'd 122 F.3d 895 (11th Cir. 1997).



BART's contracts were grouped into eight dollar ranges.¹⁰ Each award was analyzed to determine the number and percentage of contracts that fall within each of the eight size categories. The size distribution of contracts awarded to Caucasian Males was then compared to the size distribution of contracts awarded to Caucasian Females, Minority Females, and Minority Males.

The analysis in Table 7.06, which combines all industries, demonstrates that 85.76 percent of BART's contracts were less than \$25,000, 96.81 percent were less than \$100,000, and 99.01 percent were less than \$500,000. Only 0.99 percent of BART's contracts were \$500,000 or more.

1. Construction Contracts by Size

Table 7.07 depicts BART's construction contracts awarded within nine dollar ranges. 36.36 percent of construction contracts valued at less than \$10,000; 55.41 percent were less than \$25,000; 74.46 percent were less than \$100,000; and 90.04 percent were less than \$500,000. The less than \$10,000 dollar range was added based on the \$10,000 threshold for advertising construction contracts.

2. Professional Services Contracts by Size

Table 7.08 depicts professional services contracts within the eight dollar ranges. 56.96 percent of professional services contracts were valued at less than \$25,000; 72.33 percent were less than \$50,000; 84.27 percent were less than \$100,000; and 93.85 percent were less than \$500,000.

3. Goods and Other Services Contracts by Size

Table 7.09 depicts goods and other services contracts within the eight dollar ranges. 87.67 percent of goods and other services contracts were valued at less than \$25,000; 95.68 percent were less than \$50,000; 97.81 percent were less than \$100,000; and 99.42 percent were less than \$500,000.

¹⁰ The eight dollar ranges are \$1 to \$24,999, \$25,000 to \$49,999, \$50,000 to \$99,999, \$100,000 to \$249,999, \$250,000 to \$499,999, \$500,000 to \$999,999, \$1,000,000 to \$2,999,999, and \$3,000,000 and greater



Table 7.06 Contracts by Size: All Industries, July 1, 2002 to June 30, 2007

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males			
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
\$1 - \$24,999	433	81.54%	9,855	85.99%	343	93.46%	352	78.40%	10,983	85.76%
\$25,000 - \$49,999	56	10.55%	956	8.34%	12	3.27%	52	11.58%	1,076	8.40%
\$50,000 - \$99,999	31	5.84%	282	2.46%	6	1.63%	20	4.45%	339	2.65%
\$100,000 - \$249,999	6	1.13%	198	1.73%	2	0.54%	11	2.45%	217	1.69%
\$250,000 - \$499,999	2	0.38%	57	0.50%	2	0.54%	4	0.89%	65	0.51%
\$500,000 - \$999,999	1	0.19%	41	0.36%	1	0.27%	5	1.11%	48	0.37%
\$1,000,000 - \$2,999,999	1	0.19%	51	0.45%	1	0.27%	3	0.67%	56	0.44%
\$3,000,000 and greater	1	0.19%	20	0.17%	0	0.00%	2	0.45%	23	0.18%
Total	531	100.00%	11460	100.00%	367	100.00%	449	100.00%	12807	100.00%

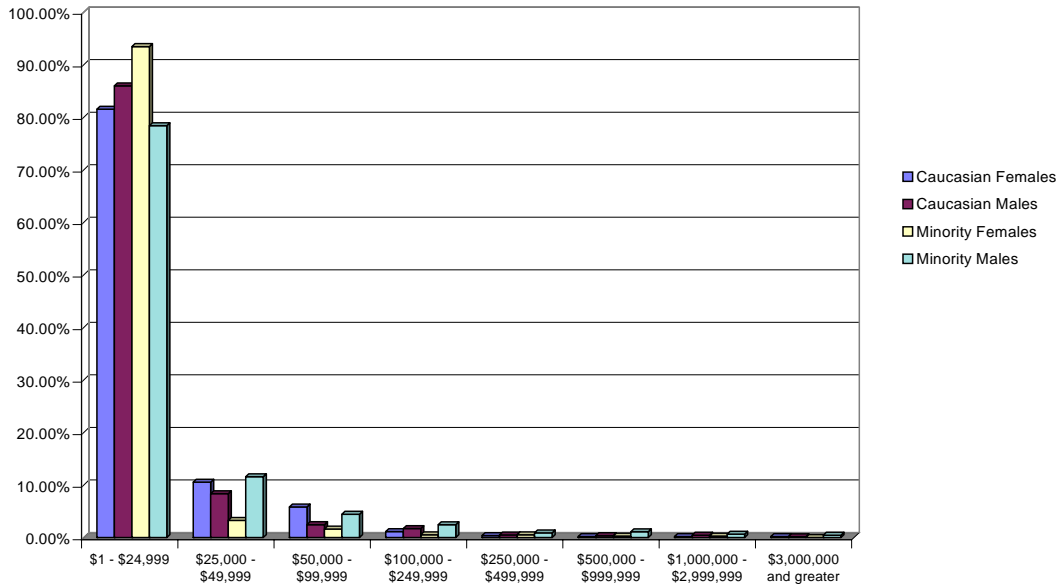
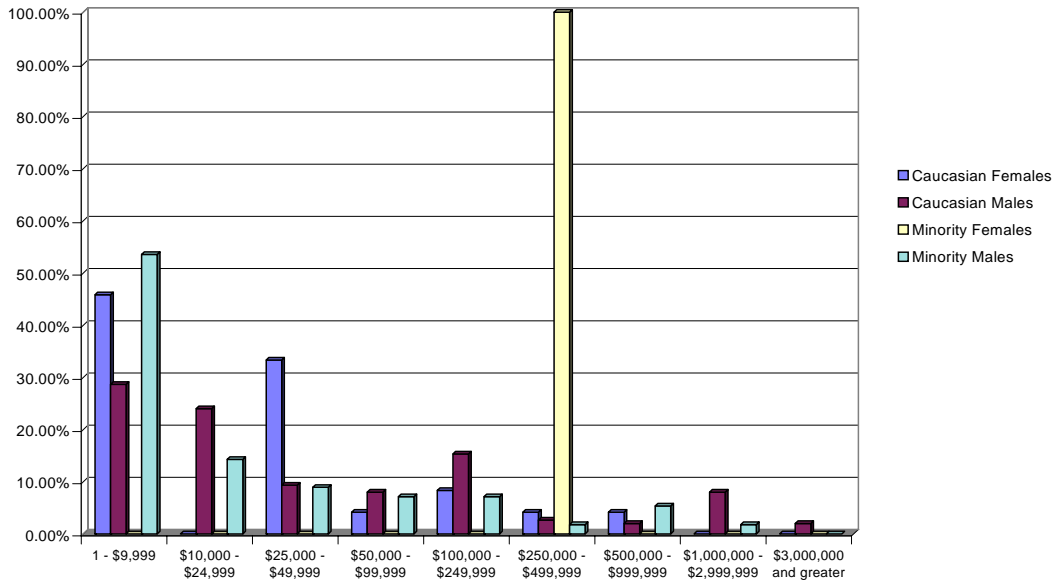


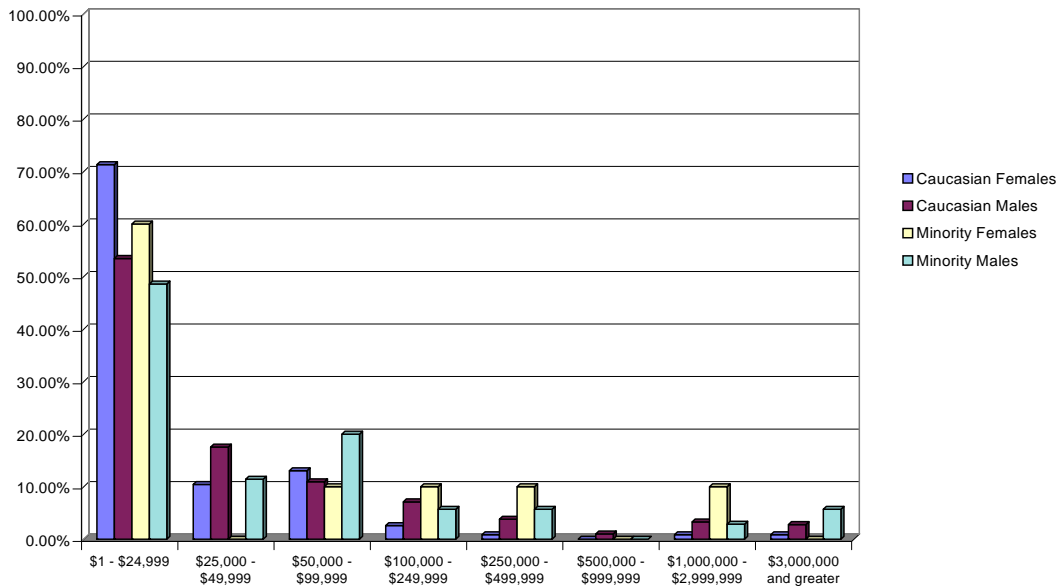
Table 7.07 Construction Contracts by Size: July 1, 2002 to June 30, 2007

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
1 - \$9,999	11	45.83%	43	28.67%	0	0.00%	30	53.57%	84	36.36%
\$10,000 - \$24,999	0	0.00%	36	24.00%	0	0.00%	8	14.29%	44	19.05%
\$25,000 - \$49,999	8	33.33%	14	9.33%	0	0.00%	5	8.93%	27	11.69%
\$50,000 - \$99,999	1	4.17%	12	8.00%	0	0.00%	4	7.14%	17	7.36%
\$100,000 - \$249,999	2	8.33%	23	15.33%	0	0.00%	4	7.14%	29	12.55%
\$250,000 - \$499,999	1	4.17%	4	2.67%	1	100.00%	1	1.79%	7	3.03%
\$500,000 - \$999,999	1	4.17%	3	2.00%	0	0.00%	3	5.36%	7	3.03%
\$1,000,000 - \$2,999,999	0	0.00%	12	8.00%	0	0.00%	1	1.79%	13	5.63%
\$3,000,000 and greater	0	0.00%	3	2.00%	0	0.00%	0	0.00%	3	1.30%
Total	24	100.00%	150	100.00%	1	100.00%	56	100.00%	231	100.00%



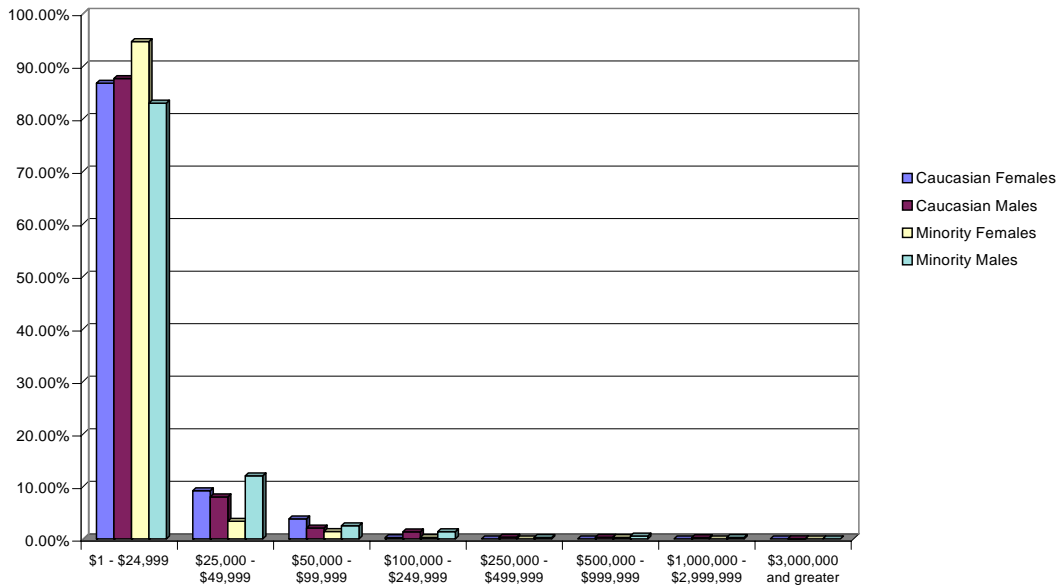
**Table 7.08 Professional Services Contracts by Size:
July 1, 2002 to June 30, 2007**

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$24,999	82	71.30%	210	53.44%	6	60.00%	17	48.57%	315	56.96%
\$25,000 - \$49,999	12	10.43%	69	17.56%	0	0.00%	4	11.43%	85	15.37%
\$50,000 - \$99,999	15	13.04%	43	10.94%	1	10.00%	7	20.00%	66	11.93%
\$100,000 - \$249,999	3	2.61%	28	7.12%	1	10.00%	2	5.71%	34	6.15%
\$250,000 - \$499,999	1	0.87%	15	3.82%	1	10.00%	2	5.71%	19	3.44%
\$500,000 - \$999,999	0	0.00%	4	1.02%	0	0.00%	0	0.00%	4	0.72%
\$1,000,000 - \$2,999,999	1	0.87%	13	3.31%	1	10.00%	1	2.86%	16	2.89%
\$3,000,000 and greater	1	0.87%	11	2.80%	0	0.00%	2	5.71%	14	2.53%
Total	115	100.00%	393	100.00%	10	100.00%	35	100.00%	553	100.00%



**Table 7.09 Goods and Other Services Contracts by Size:
July 1, 2002 to June 30, 2007**

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males			
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
\$1 - \$24,999	340	86.73%	9,566	87.62%	337	94.66%	297	82.96%	10,540	87.67%
\$25,000 - \$49,999	36	9.18%	873	8.00%	12	3.37%	43	12.01%	964	8.02%
\$50,000 - \$99,999	15	3.83%	227	2.08%	5	1.40%	9	2.51%	256	2.13%
\$100,000 - \$249,999	1	0.26%	147	1.35%	1	0.28%	5	1.40%	154	1.28%
\$250,000 - \$499,999	0	0.00%	38	0.35%	0	0.00%	1	0.28%	39	0.32%
\$500,000 - \$999,999	0	0.00%	34	0.31%	1	0.28%	2	0.56%	37	0.31%
\$1,000,000 - \$2,999,999	0	0.00%	26	0.24%	0	0.00%	1	0.28%	27	0.22%
\$3,000,000 and greater	0	0.00%	6	0.05%	0	0.00%	0	0.00%	6	0.05%
Total	392	100.00%	10917	100.00%	356	100.00%	358	100.00%	12023	100.00%



B. Largest M/WBE Contract Awards by Industry

M/WBEs were awarded large contracts in every industry. The distribution of the largest M/WBE contracts awarded is depicted below in Table 7.10. In each industry, M/WBEs were awarded very large, competitively bid contracts. The utilization analysis shows that M/WBEs demonstrated the capacity to successfully compete for contracts as large as \$2.7 million in construction, \$8 million in professional services, and \$1.4 million in goods and other services.

Table 7.10 Largest M/WBE Contract Awards by Industry

Largest Contract Value			
Ethnic Group	Construction	Professional Services	Goods and Other Services
MBEs	\$2,676,341	\$7,992,380	\$1,369,401
Caucasian Females	\$573,325	\$3,044,438	\$113,046

C. BART Certification Standards

Philadelphia is the appellate court decision which addressed the merits of certification as a measure of capacity.¹¹ The court found that a certification program which was based on USDOT standards satisfied the determination of a business' capability. Thus, a certification program like BART's, which adheres to the standards set forth in the USDOT regulations, 49 Code of Federal Regulations Part 26, is documentation of an M/WBE's capacity.

¹¹ *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), on remand, 893 F. Supp. 419 (E.D. Penn. 1995), affd, 91 F.3d 586 (3d Cir. 1996).



IV. PRIME CONTRACTOR AVAILABILITY ANALYSIS

The size of BART's contracts demonstrates that the majority of the contracts are small, thus requiring limited capacity to perform. Furthermore, the awards BART has made to M/WBE businesses demonstrate that the capacity of the available businesses is considerably greater than the capacity needed to bid on the majority of the contracts awarded in the three industries studied.

The prime contractor availability findings for Alameda, Contra Costa, San Francisco, and San Mateo counties market area, are summarized below:



A. Construction Prime Contractor Availability

The distribution of available construction prime contractors is summarized in Table 7.11 below. These ethnic and gender groups are defined in Table 4.01 on page 4-2 of *Chapter 4: Prime Contractor Utilization Analysis*.

African American Businesses account for 8.12 percent of the construction businesses in BART's market area.

Asian American Businesses account for 11.18 percent of the construction businesses in BART's market area.

Hispanic American Businesses account for 8.23 percent of the construction businesses in BART's market area.

Native American Businesses account for 0.43 percent of the construction businesses in BART's market area.

Caucasian Female Enterprises account for 6.51 percent of the construction businesses in BART's market area.

Minority Male Business Enterprises account for 23.28 percent of the construction businesses in BART's market area.

Female Business Enterprises account for 11.18 percent of the construction businesses in BART's market area.

Minority Male and Female Business Enterprises account for 34.46 percent of the construction businesses in BART's market area.

Caucasian Male Business Enterprises account for 65.54 percent of the construction businesses in BART's market area.



Table 7.11 Available Construction Prime Contractors

Prime Contractor Ethnicity	Percent of Businesses
African Americans	8.12%
Asian Americans	11.18%
Hispanic Americans	8.23%
Native Americans	0.43%
Caucasian Females	6.51%
Caucasian Males	65.54%
TOTAL	100.00%
Prime Contractor Ethnicity and Gender	Percent of Businesses
African American Females	1.56%
African American Males	6.56%
Asian American Females	1.72%
Asian American Males	9.46%
Hispanic American Females	1.34%
Hispanic American Males	6.88%
Native American Females	0.05%
Native American Males	0.38%
Caucasian Females	6.51%
Caucasian Males	65.54%
TOTAL	100.00%
Prime Contractor Minority and Gender	Percent of Businesses
Minority Females	4.68%
Minority Males	23.28%
Caucasian Females	6.51%
Caucasian Males	65.54%
TOTAL	100.00%
Prime Contractor Minority and Females	Percent of Businesses
Minority Male Business Enterprises	23.28%
Female Business Enterprises	11.18%
Minority Male and Female Business Enterprises	34.46%
Caucasian Male Business Enterprises	65.54%
TOTAL	100.00%



B. Professional Services Prime Contractor Availability

The distribution of available professional services prime contractors is summarized in Table 7.12 below:

African American Businesses account for 7.7 percent of the professional services businesses in BART's market area.

Asian American Businesses account for 11.05 percent of the professional services businesses in BART's market area.

Hispanic American Businesses account for 3.47 percent of the professional services businesses in BART's market area.

Native American Businesses account for 0.22 percent of the professional services businesses in BART's market area.

Caucasian Female Business Enterprises account for 13.09 percent of the professional services businesses in BART's market area.

Minority Male Business Enterprises account for 15.63 percent of the professional services businesses in BART's market area.

Female Business Enterprises account for 19.91 percent of the professional services businesses in BART's market area.

Minority Male and Female Business Enterprises account for 35.53 percent of the professional services businesses in BART's market area.

Caucasian Male Business Enterprises account for 64.47 percent of the professional services businesses in BART's market area.



Table 7.12 Available Professional Services Prime Contractors

Prime Contractor Ethnicity	Percent of Businesses
African Americans	7.70%
Asian Americans	11.05%
Hispanic Americans	3.47%
Native Americans	0.22%
Caucasian Females	13.09%
Caucasian Males	64.47%
TOTAL	100.00%
Prime Contractor Ethnicity and Gender	Percent of Businesses
African American Females	2.56%
African American Males	5.14%
Asian American Females	3.35%
Asian American Males	7.70%
Hispanic American Females	0.81%
Hispanic American Males	2.66%
Native American Females	0.10%
Native American Males	0.12%
Caucasian Females	13.09%
Caucasian Males	64.47%
TOTAL	100.00%
Prime Contractor Minority and Gender	Percent of Businesses
Minority Females	6.82%
Minority Males	15.63%
Caucasian Females	13.09%
Caucasian Males	64.47%
TOTAL	100.00%
Prime Contractor Minority and Females	Percent of Businesses
Minority Male Business Enterprises	15.63%
Female Business Enterprises	19.91%
Minority Male and Female Business Enterprises	35.53%
Caucasian Male Business Enterprises	64.47%
TOTAL	100.00%



C. Goods and Other Services Prime Contractor Availability

The distribution of available goods and other services prime contractors is summarized in Table 7.13.

African American Businesses account for 4.97 percent of the goods and other services businesses in BART's market area.

Asian American Businesses account for 6.75 percent of the goods and other services businesses in BART's market area.

Hispanic American Businesses account for 2.9 percent of the goods and other services businesses in BART's market area.

Native American Businesses account for 0.22 percent of the goods and other services other businesses in BART's market area.

Caucasian Female Business Enterprises account for 7.2 percent of the goods and other services businesses in BART's market area.

Minority Male Business Enterprises account for 10.44 percent of the goods and other services businesses in BART's market area.

Female Business Enterprises account for 11.59 percent of the goods and other services businesses in BART's market area.

Minority Male and Female Business Enterprises account for 22.02 percent of the goods and other services businesses in BART's market area.

Caucasian Male Business Enterprises account for 77.98 percent of the goods and other services businesses in BART's market area.



Table 7.13 Available Goods and Other Services Prime Contractors

Prime Contractor Ethnicity	Percent of Businesses
African Americans	4.97%
Asian Americans	6.75%
Hispanic Americans	2.90%
Native Americans	0.22%
Caucasian Females	7.20%
Caucasian Males	77.98%
TOTAL	100.00%
Prime Contractor Ethnicity and Gender	Percent of Businesses
African American Females	1.30%
African American Males	3.67%
Asian American Females	2.16%
Asian American Males	4.59%
Hispanic American Females	0.83%
Hispanic American Males	2.07%
Native American Females	0.11%
Native American Males	0.11%
Caucasian Females	7.20%
Caucasian Males	77.98%
TOTAL	100.00%
Prime Contractor Minority and Gender	Percent of Businesses
Minority Females	4.39%
Minority Males	10.44%
Caucasian Females	7.20%
Caucasian Males	77.98%
TOTAL	100.00%
Prime Contractor Minority and Females	Percent of Businesses
Minority Male Business Enterprises	10.44%
Female Business Enterprises	11.59%
Minority Male and Female Business Enterprises	22.02%
Caucasian Male Business Enterprises	77.98%
TOTAL	100.00%



V. SUBCONTRACTOR AVAILABILITY ANALYSIS

A. Sources of Potentially Willing and Able Subcontractors and Availability

All available prime contractors were included in the calculation of subcontractor availability. Additional subcontractors in BART's market area were identified using sources in Table 7.14.

Table 7.14 Unique Subcontractor Availability Data Sources

Type Record	Type Information
<ul style="list-style-type: none">Subcontracting records provided by BART	<ul style="list-style-type: none">M/WBEs and non-M/WBEs
<ul style="list-style-type: none">Prime contractor survey which identified subcontractors utilized by BART	<ul style="list-style-type: none">M/WBEs and non-M/WBEs

B. Determination of Subcontractor Willingness and Capacity

Subcontractor availability was limited to businesses determined to be willing and able to perform as prime contractors and businesses utilized as subcontractors; therefore, the determination of willingness was achieved. It is notable that using this method to identify subcontractors verifies the capacity of the available businesses, although *Croson* does not require a measure of subcontractor capacity.

C. Size of Subcontracts Analyzed

BART's construction and professional services subcontracts were analyzed to determine the size of awarded contracts and, therefore, the capacity required to perform on BART's subcontracts.

BART's subcontracts were analyzed during two study periods: the Race-Conscious DBE Program Phase from July 1, 2002 to June 30, 2006 and the Race-Neutral DBE Program Phase from July 1, 2006 to December 31, 2008.



The size distribution during both DBE Program Phases illustrates the fact that the majority of BART's subcontracts were under \$100,000. This distribution illustrates that limited capacity is needed to perform the overwhelming majority of BART's subcontracts.

BART's subcontracts were grouped into eight dollar ranges.¹² Each award was analyzed to determine the number and percentage of subcontracts that fall within each of the eight size categories. The size distribution of subcontracts awarded to Caucasian Males was then compared to the size distribution of contracts awarded to Caucasian Females, Minority Females, and Minority Males.

1. Race-Conscious DBE Program Phase Size Analysis: July 1, 2002 to June 30, 2006

The analysis in Table 7.15, which combines the construction and professional services industries, demonstrates that 46.15 percent of BART's subcontracts were less than \$25,000, 76.5 percent were less than \$100,000, and 94.02 percent were less than \$500,000. Only 5.98 percent of BART's subcontracts were \$500,000 or more.

a. Construction Subcontracts by Size

Table 7.16 depicts BART's construction subcontracts awarded within the eight dollar ranges. 52.28 percent of construction subcontracts were valued at less than \$25,000; 81.74 percent were less than \$100,000; and 96.27 percent were less than \$500,000.

b. Professional Services Subcontracts by Size

Table 7.17 depicts professional services subcontracts within the eight dollar ranges. 42.86 percent of professional services subcontracts were valued at less than \$25,000; 71.43 percent were less than \$100,000; and 91.07 percent were less than \$500,000.

¹² The eight dollar ranges are \$1 to \$24,999, \$25,000 to \$49,999, \$50,000 to \$99,999, \$100,000 to \$249,999, \$250,000 to \$499,999, \$500,000 to \$999,999, \$1,000,000 to \$2,999,999, and \$3,000,000 and greater



Table 7.15 Subcontracts by Size: Construction and Professional Services, July 1, 2002 to June 30, 2006

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males			
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
\$1 - \$24,999	11	40.74%	79	47.88%	1	25.00%	17	44.74%	108	46.15%
\$25,000 - \$49,999	5	18.52%	21	12.73%	0	0.00%	8	21.05%	34	14.53%
\$50,000 - \$99,999	5	18.52%	24	14.55%	2	50.00%	6	15.79%	37	15.81%
\$100,000 - \$249,999	3	11.11%	19	11.52%	0	0.00%	3	7.89%	25	10.68%
\$250,000 - \$499,999	1	3.70%	12	7.27%	0	0.00%	3	7.89%	16	6.84%
\$500,000 - \$999,999	2	7.41%	6	3.64%	1	25.00%	0	0.00%	9	3.85%
\$1,000,000 - \$2,999,999	0	0.00%	4	2.42%	0	0.00%	1	2.63%	5	2.14%
\$3,000,000 and greater	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Total	27	100.00%	165	100.00%	4	100.00%	38	100.00%	234	100.00%

P-Value > 0.05

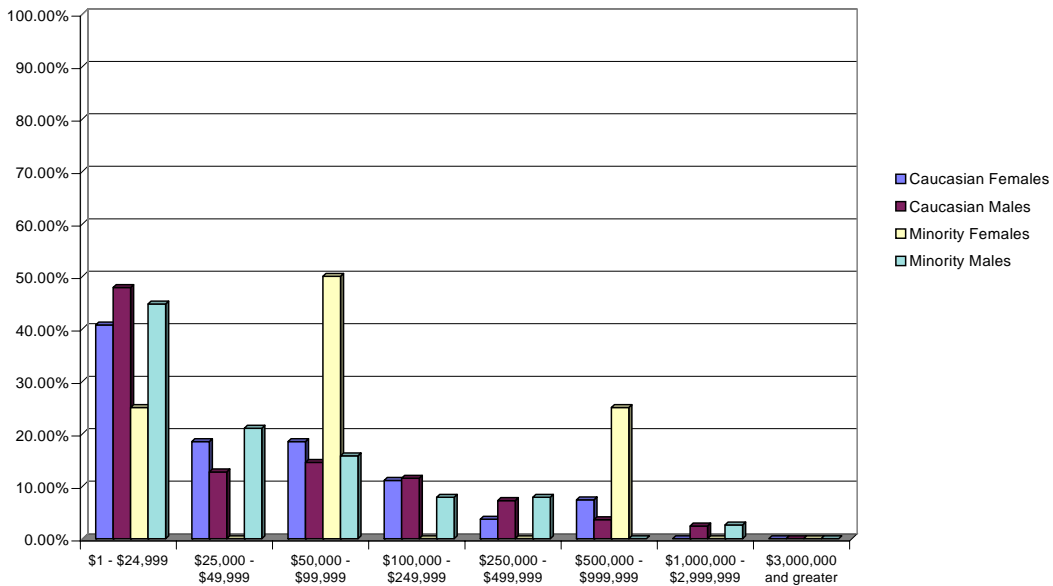


Table 7.16 Construction Subcontracts by Size: July 1, 2002 to June 30, 2006

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$24,999	16	55.17%	91	52.00%	2	50.00%	17	51.52%	126	52.28%
\$25,000 - \$49,999	5	17.24%	25	14.29%	0	0.00%	6	18.18%	36	14.94%
\$50,000 - \$99,999	4	13.79%	24	13.71%	2	50.00%	5	15.15%	35	14.52%
\$100,000 - \$249,999	2	6.90%	20	11.43%	0	0.00%	3	9.09%	25	10.37%
\$250,000 - \$499,999	1	3.45%	7	4.00%	0	0.00%	2	6.06%	10	4.15%
\$500,000 - \$999,999	1	3.45%	6	3.43%	0	0.00%	0	0.00%	7	2.90%
\$1,000,000 - \$2,999,999	0	0.00%	2	1.14%	0	0.00%	0	0.00%	2	0.83%
\$3,000,000 and greater	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Total	29	100.00%	175	100.00%	4	100.00%	33	100.00%	241	100.00%

Insufficient Data

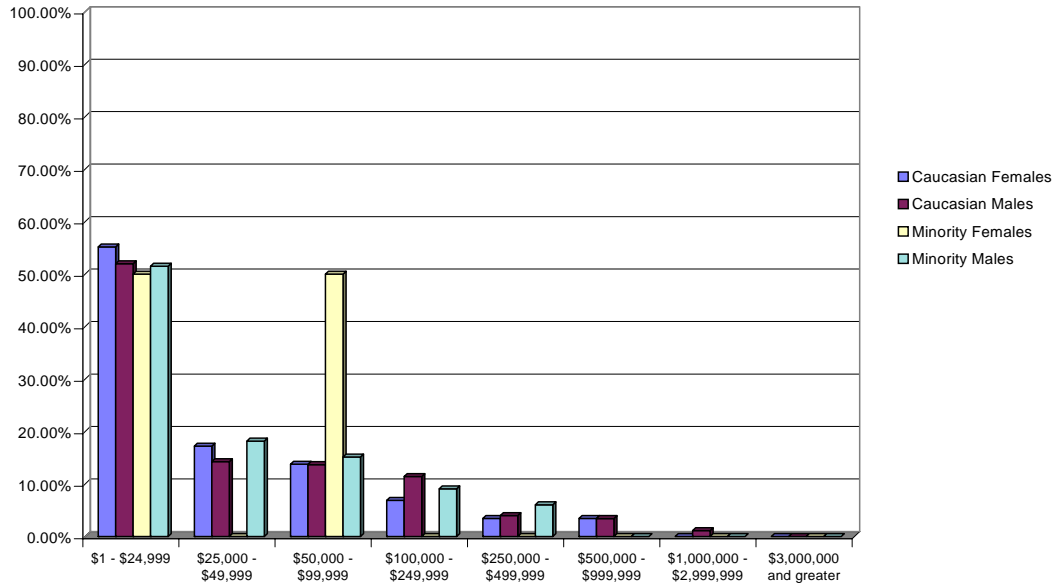
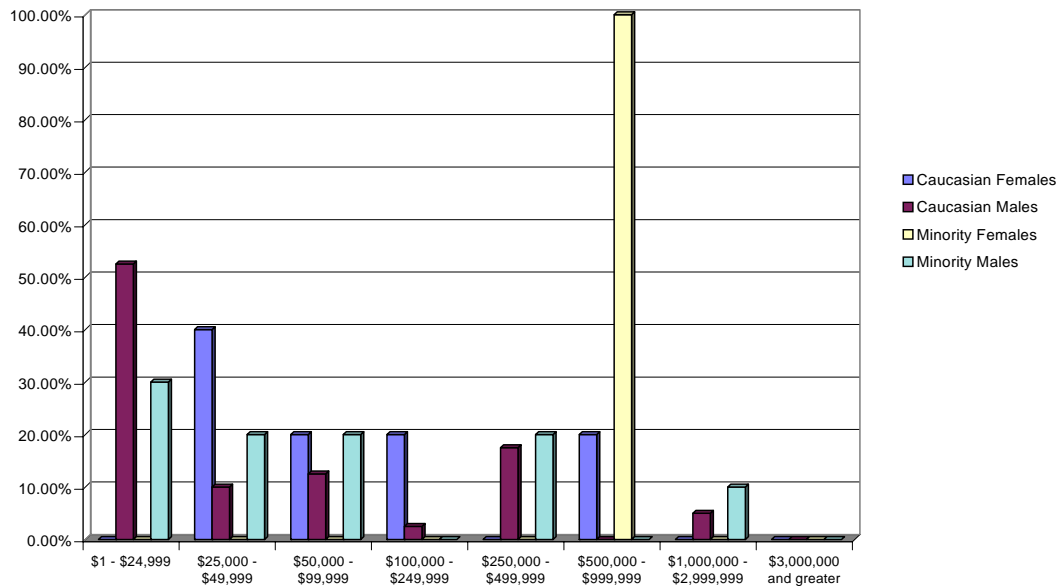


Table 7.17 Professional Services Subcontracts by Size: July 1, 2002 to June 30, 2006

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$24,999	0	0.00%	21	52.50%	0	0.00%	3	30.00%	24	42.86%
\$25,000 - \$49,999	2	40.00%	4	10.00%	0	0.00%	2	20.00%	8	14.29%
\$50,000 - \$99,999	1	20.00%	5	12.50%	0	0.00%	2	20.00%	8	14.29%
\$100,000 - \$249,999	1	20.00%	1	2.50%	0	0.00%	0	0.00%	2	3.57%
\$250,000 - \$499,999	0	0.00%	7	17.50%	0	0.00%	2	20.00%	9	16.07%
\$500,000 - \$999,999	1	20.00%	0	0.00%	1	100.00%	0	0.00%	2	3.57%
\$1,000,000 - \$2,999,999	0	0.00%	2	5.00%	0	0.00%	1	10.00%	3	5.36%
\$3,000,000 and greater	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Total	5	100.00%	40	100.00%	1	100.00%	10	100.00%	56	100.00%

Insufficient Data



2. Race-Neutral DBE Program Phase Size Analysis: July 1, 2006 to December 31, 2008

The analysis in Table 7.18, which combines the construction and professional services industries, demonstrates that 25.78 percent of BART's subcontracts were less than \$25,000, 53.11 percent were less than \$100,000, and 84.78 percent were less than \$500,000. Only 15.22 percent of BART's subcontracts were \$500,000 or more.

a. Construction Subcontracts by Size

Table 7.19 depicts BART's construction subcontracts awarded within the eight dollar ranges. 32.12 percent of construction subcontracts were valued at less than \$25,000; 60 percent were less than \$100,000; and 86.67 percent were less than \$500,000.

b. Professional Services Subcontracts by Size

Table 7.20 depicts professional services subcontracts within the eight dollar ranges. 19.11 percent of professional services subcontracts were valued at less than \$25,000; 45.86 percent were less than \$100,000; and 82.8 percent were less than \$500,000.



Table 7.18 Subcontracts by Size: Construction and Professional Services, July 1, 2006 to December 31, 2008

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$24,999	11	33.33%	54	24.22%	2	28.57%	16	27.12%	83	25.78%
\$25,000 - \$49,999	4	12.12%	22	9.87%	1	14.29%	9	15.25%	36	11.18%
\$50,000 - \$99,999	7	21.21%	35	15.70%	2	28.57%	8	13.56%	52	16.15%
\$100,000 - \$249,999	5	15.15%	40	17.94%	1	14.29%	12	20.34%	58	18.01%
\$250,000 - \$499,999	3	9.09%	32	14.35%	0	0.00%	9	15.25%	44	13.66%
\$500,000 - \$999,999	2	6.06%	21	9.42%	1	14.29%	3	5.08%	27	8.39%
\$1,000,000 - \$2,999,999	1	3.03%	14	6.28%	0	0.00%	2	3.39%	17	5.28%
\$3,000,000 and greater	0	0.00%	5	2.24%	0	0.00%	0	0.00%	5	1.55%
Total	33	100.00%	223	100.00%	7	100.00%	59	100.00%	322	100.00%

P-Value > 0.05

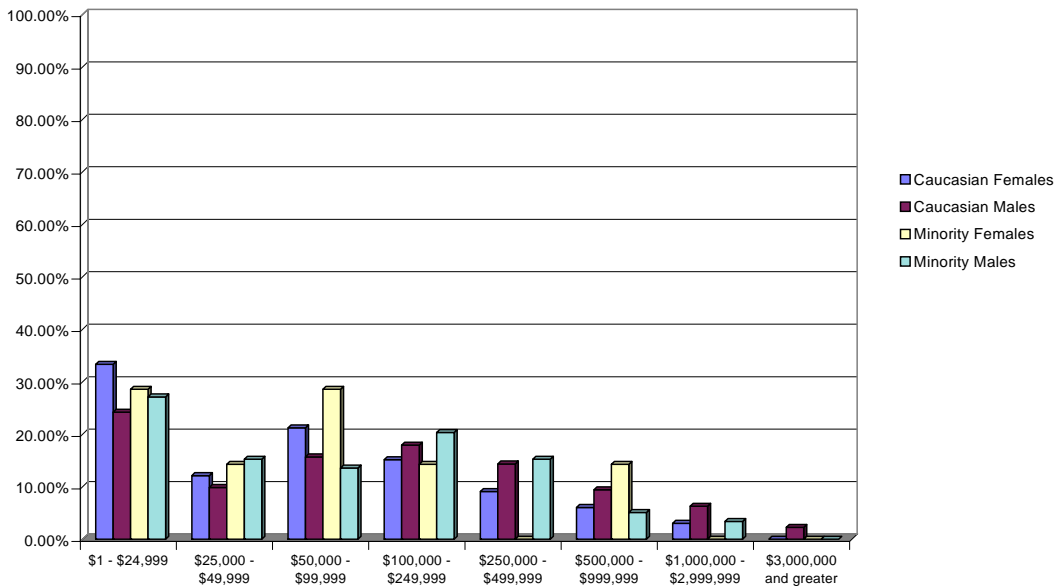


Table 7.19 Construction Subcontracts by Size: July 1, 2006 to December 31, 2008

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$24,999	6	60.00%	39	28.26%	1	33.33%	7	50.00%	53	32.12%
\$25,000 - \$49,999	0	0.00%	17	12.32%	1	33.33%	4	28.57%	22	13.33%
\$50,000 - \$99,999	1	10.00%	22	15.94%	1	33.33%	0	0.00%	24	14.55%
\$100,000 - \$249,999	2	20.00%	20	14.49%	0	0.00%	3	21.43%	25	15.15%
\$250,000 - \$499,999	0	0.00%	19	13.77%	0	0.00%	0	0.00%	19	11.52%
\$500,000 - \$999,999	1	10.00%	11	7.97%	0	0.00%	0	0.00%	12	7.27%
\$1,000,000 - \$2,999,999	0	0.00%	7	5.07%	0	0.00%	0	0.00%	7	4.24%
\$3,000,000 and greater	0	0.00%	3	2.17%	0	0.00%	0	0.00%	3	1.82%
Total	10	100.00%	138	100.00%	3	100.00%	14	100.00%	165	100.00%

Insufficient Data

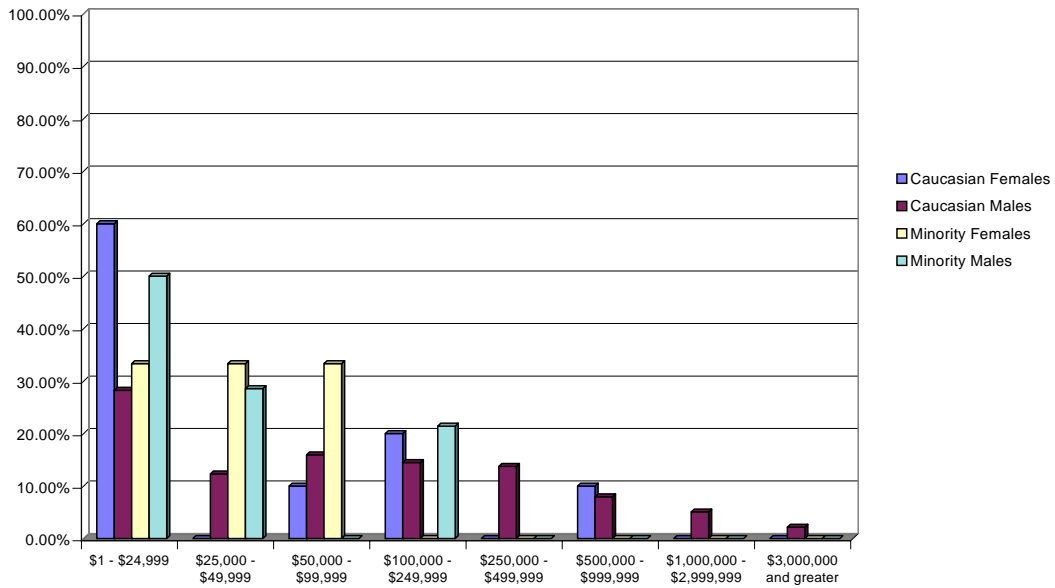
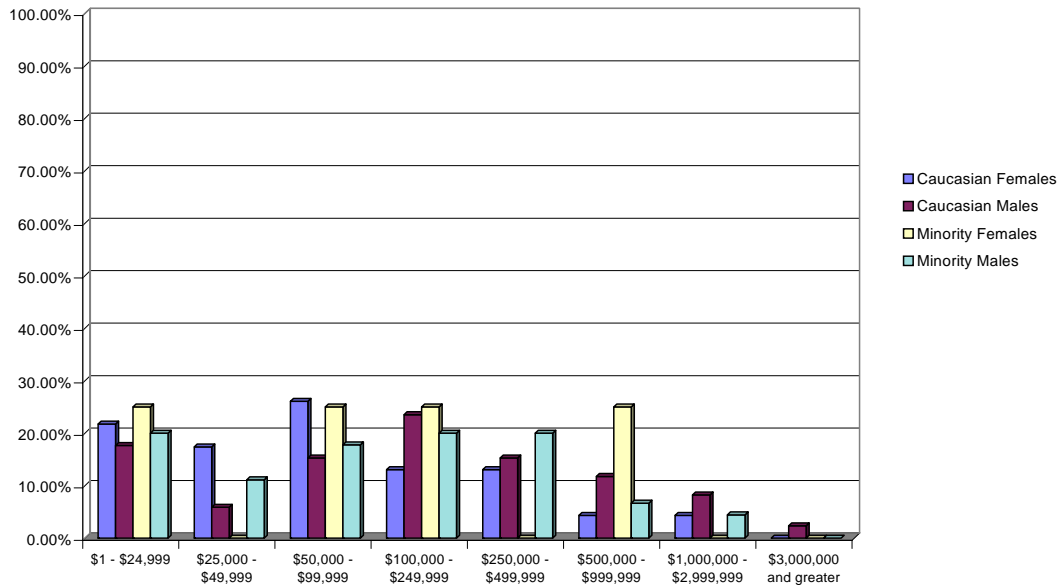


Table 7.20 Professional Services Subcontracts by Size: July 1, 2006 to December 31, 2008

Size	Caucasian				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$24,999	5	21.74%	15	17.65%	1	25.00%	9	20.00%	30	19.11%
\$25,000 - \$49,999	4	17.39%	5	5.88%	0	0.00%	5	11.11%	14	8.92%
\$50,000 - \$99,999	6	26.09%	13	15.29%	1	25.00%	8	17.78%	28	17.83%
\$100,000 - \$249,999	3	13.04%	20	23.53%	1	25.00%	9	20.00%	33	21.02%
\$250,000 - \$499,999	3	13.04%	13	15.29%	0	0.00%	9	20.00%	25	15.92%
\$500,000 - \$999,999	1	4.35%	10	11.76%	1	25.00%	3	6.67%	15	9.55%
\$1,000,000 - \$2,999,999	1	4.35%	7	8.24%	0	0.00%	2	4.44%	10	6.37%
\$3,000,000 and greater	0	0.00%	2	2.35%	0	0.00%	0	0.00%	2	1.27%
Total	23	100.00%	85	100.00%	4	100.00%	45	100.00%	157	100.00%

P-Value > 0.05



D. Construction Subcontractor Availability

The distribution of available construction subcontractors is summarized in Table 7.21.

African American Businesses account for 8.01 percent of the construction firms in BART's market area.

Asian American Businesses account for 10.98 percent of the construction firms in BART's market area.

Hispanic American Businesses account for 8.01 percent of the construction firms in BART's market area.

Native American Businesses account for 0.42 percent of the construction firms in BART's market area.

Caucasian Female Business Enterprises account for 6.87 percent of the construction firms in BART's market area.

Minority Male Business Enterprises account for 22.79 percent of the construction firms in BART's market area.

Female Business Enterprises account for 11.5 percent of the construction firms in BART's market area.

Minority Male and Female Business Enterprises account for 34.29 percent of the construction firms in BART's market area.

Caucasian Male Business Enterprises account for 65.71 percent of the construction firms in BART's market area.



Table 7.21 Available Construction Subcontractors

Ethnicity	Percent of Businesses
African Americans	8.01%
Asian Americans	10.98%
Hispanic Americans	8.01%
Native Americans	0.42%
Caucasian Females	6.87%
Caucasian Males	65.71%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	1.56%
African American Males	6.45%
Asian American Females	1.77%
Asian American Males	9.21%
Hispanic American Females	1.25%
Hispanic American Males	6.76%
Native American Females	0.05%
Native American Males	0.36%
Caucasian Females	6.87%
Caucasian Males	65.71%
TOTAL	100.00%
Minority and Gender	Percent of Businesses
Minority Females	4.63%
Minority Males	22.79%
Caucasian Females	6.87%
Caucasian Males	65.71%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Male Business Enterprises	22.79%
Female Business Enterprises	11.50%
Minority Male and Female Business Enterprises	34.29%
Caucasian Male Business Enterprises	65.71%
TOTAL	100.00%



E. Professional Services Subcontractor Availability

The distribution of available professional services subcontractors is summarized in Table 7.22.

African American Businesses account for 7.56 percent of the professional services firms in BART's market area.

Asian American Businesses account for 10.9 percent of the professional services firms in BART's market area.

Hispanic American Businesses account for 3.54 percent of the professional services firms in BART's market area.

Native American Businesses account for 0.24 percent of the professional services firms in BART's market area.

Caucasian Female Business Enterprises account for 12.97 percent of the professional services in BART's market area.

Minority Male Business Enterprises account for 22.23 percent of the professional services firms in BART's market area.

Female Business Enterprises account for 12.97 percent of the professional services in BART's market area.

Minority Male and Female Business Enterprises account for 35.2 percent of the professional services firms in BART's market area.

Caucasian Male Business Enterprises account for 64.8 percent of the professional services firms in BART's market area.



Table 7.22 Available Professional Services Subcontractors

Ethnicity	Percent of Businesses
African Americans	7.56%
Asian Americans	10.90%
Hispanic Americans	3.54%
Native Americans	0.24%
Caucasian Females	12.97%
Caucasian Males	64.80%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	2.48%
African American Males	5.08%
Asian American Females	3.22%
Asian American Males	7.68%
Hispanic American Females	0.79%
Hispanic American Males	2.74%
Native American Females	0.10%
Native American Males	0.14%
Caucasian Females	12.97%
Caucasian Males	64.80%
TOTAL	100.00%
Minority and Gender	Percent of Businesses
Minority Females	6.59%
Minority Males	15.64%
Caucasian Females	12.97%
Caucasian Males	64.80%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Male Business Enterprises	15.64%
Female Business Enterprises	19.56%
Minority Male and Female Business Enterprises	35.20%
Caucasian Male Business Enterprises	64.80%
TOTAL	100.00%



8

PRIME CONTRACTOR DISPARITY ANALYSIS

I. INTRODUCTION

The objective of the disparity analysis is to determine the level minority and woman-owned business enterprises (M/WBEs) were utilized on the San Francisco Bay Area Rapid Transit District (BART) contracts. Minority business enterprises are analyzed according to ethnic group. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to M/WBEs would be approximate to the proportion of available M/WBEs¹ in the relevant market area. A statistical test is conducted to determine if the available M/WBE businesses are underutilized due to random chance or something else.² According to *Crosby*, if the statistical test is significant, then prima facie an inference of discrimination can be made.

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

A disparity ratio of less than 0.80 indicates a relevant degree of disparity. This disparity may be detected using a parametric analysis,³ where the number of contracts is sufficiently large and the variation of the contract amount is not too large. When the standard deviation in the contract dollar amounts is high, which generally is the result of a few very large contracts,

¹ Availability is defined as the number of willing and able firms. The methodology for determining willing and able firms is detailed in *Chapter 7: Availability Analysis*.

² The study does not test statistically the overutilization of M/WBEs or the utilization of Caucasian Males.

³ Parametric analysis is a statistical examination based on the actual values of the variable. In this case, the parametric analysis consists of the actual dollar values of the contracts.



a disparity may not be detectable. Under the condition when the variation in contract dollar amounts is high, a non-parametric analysis⁴ would be employed to analyze the contracts ranked by dollar amount. Using the non-parametric analysis lowers the variance, because it reduces the effect of the outliers in the analysis.

In order to assess whether the difference in contract values is attributable to chance, a P-value⁵ is calculated. The P-value takes into account the number of contracts, amount of contract dollars, and variation in contract dollars. If the difference between the actual and expected number of contracts and total contract dollars has a P-value of less than 0.05, the difference is statistically significant.⁶

There are two critical constraints in performing statistical tests of significance. First, the size of the population affects the power of the statistical results. In other words, a relatively small population size, whether in terms of the total number of contracts or the total number of available businesses, decreases the power of the statistical results. Second, although an inference of discrimination cannot be found if statistical significance is not obtained from the test, one cannot conclude from the results that there was no discrimination. Thus, the results of the statistical disparity analysis are necessarily influenced by the size of the population in each industry and ethnic and gender category. Where the results are not statistically significant, the existence of discrimination **cannot** be ruled out. Given these limitations, the anecdotal data has an especially important role in explaining the conditions of discrimination that might exist in the market area.

The analysis of the value of contract dollars for each ethnic and gender group incorporates the number of contracts awarded. Hence, the disparity analysis for the value of contract dollars awarded reflects an analysis of both the number of contracts awarded and the value of the contract dollars received by each ethnic and gender group.⁷

It is important to note that the findings of statistical significance may be counterintuitive. It is not infrequent that the same disparity ratio, or the same difference between the utilization percentage and the availability percentage, is statistically significant in one industry and not statistically significant in another.

The test of statistical significance determines whether the difference between the actual dollars and the expected dollars exceeds two standard deviations. However, the standard deviation is calculated separately by industry for each ethnic and gender group. For each

⁴ Non-parametric analysis is a method to make data more suitable for statistical testing by allowing one variable to be replaced with a new variable that maintains the essential characteristics of the original one. In this case, the contracts are ranked from the smallest to the largest. The dollar value of each contract is replaced with its rank order number.

⁵ P-value is a measure of statistical significance.

⁶ The study does not test statistically the overutilization of M/WBEs or the utilization of Caucasian Males.

⁷ The number of contracts awarded can be found in *Chapter 4 Prime Contractor Utilization Analysis*.



industry studied the calculation of the standard deviation is based on the total number of contracts and dollars analyzed in the Study and each ethnic and gender groups, respective percentage of availability. Therefore, the findings of statistical significance are influenced by the percentage of availability for each ethnic and gender group in the industry. In effect across the industries, similar utilization patterns with different availability patterns could yield different findings of statistical significance.

II. DISPARITY ANALYSIS

A disparity analysis was performed on construction, professional services, and goods and other services contracts awarded between July 1, 2002 and June 30, 2007.

As demonstrated in *Chapter 7: Availability Analysis*, the majority of BART's contracts were small with 85.76 percent under \$25,000 and 96.81 percent under \$100,000. The fact that the majority of BART's contracts were small suggests that many contractors could perform most of the contracts analyzed during the study period. There is also evidence that a notable number of willing firms had the capacity to perform contracts in excess of \$500,000. Therefore, a threshold of \$500,000 was set for the prime contractor disparity analysis to ensure that there were willing firms with the capacity to perform contracts included in the analysis. The prime contractor disparity findings in the three industries under consideration for contracts under \$500,000 and at each industry's informal level are summarized below.



A. Disparity Analysis: All Contracts under \$500,000, by Industry

1. Construction Contracts under \$500,000

The disparity analysis of all construction contracts under \$500,000 is depicted in Table 8.01 and Chart 8.01. These ethnic and gender groups are defined in Table 4.01 on page 4-2 of *Chapter 4: Prime Contractor Utilization Analysis*.

African American Businesses represent 8.12 percent of the available construction firms and received none of the dollars for construction contracts under \$500,000. This underutilization is statistically significant.

Asian American Businesses represent 11.18 percent of the available construction firms and received 15.88 percent of the dollars for construction contracts under \$500,000. This study does not test statistically the overutilization of minority groups.

Hispanic American Businesses represent 8.23 percent of the available construction firms and received 4.4 percent of the dollars for construction contracts under \$500,000. This underutilization is statistically significant.

Native American Businesses represent 0.43 percent of the available construction firms and received none of the dollars for construction contracts under \$500,000. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 6.51 percent of the available construction firms and received 11.86 percent of the dollars for construction contracts under \$500,000. This study does not test statistically the overutilization of female business groups

Minority Male Business Enterprises represent 23.28 percent of the available construction firms and received 17.07 percent of the dollars for construction contracts under \$500,000. This underutilization is not statistically significant.

Female Business Enterprises represent 11.18 percent of the available construction firms and received 15.08 percent of the dollars for construction contracts under \$500,000. This study does not test statistically the overutilization of female business groups.

Minority Male and Female Business Enterprises represent 34.46 percent of available construction firms and received 32.14 percent of the dollars for construction contracts under \$500,000. This underutilization is not statistically significant.



Caucasian Male Business Enterprises represent 65.54 percent of the available construction firms and received 67.86 percent of the dollars for construction contracts under \$500,000. This study does not test statistically the utilization of Caucasian Males.

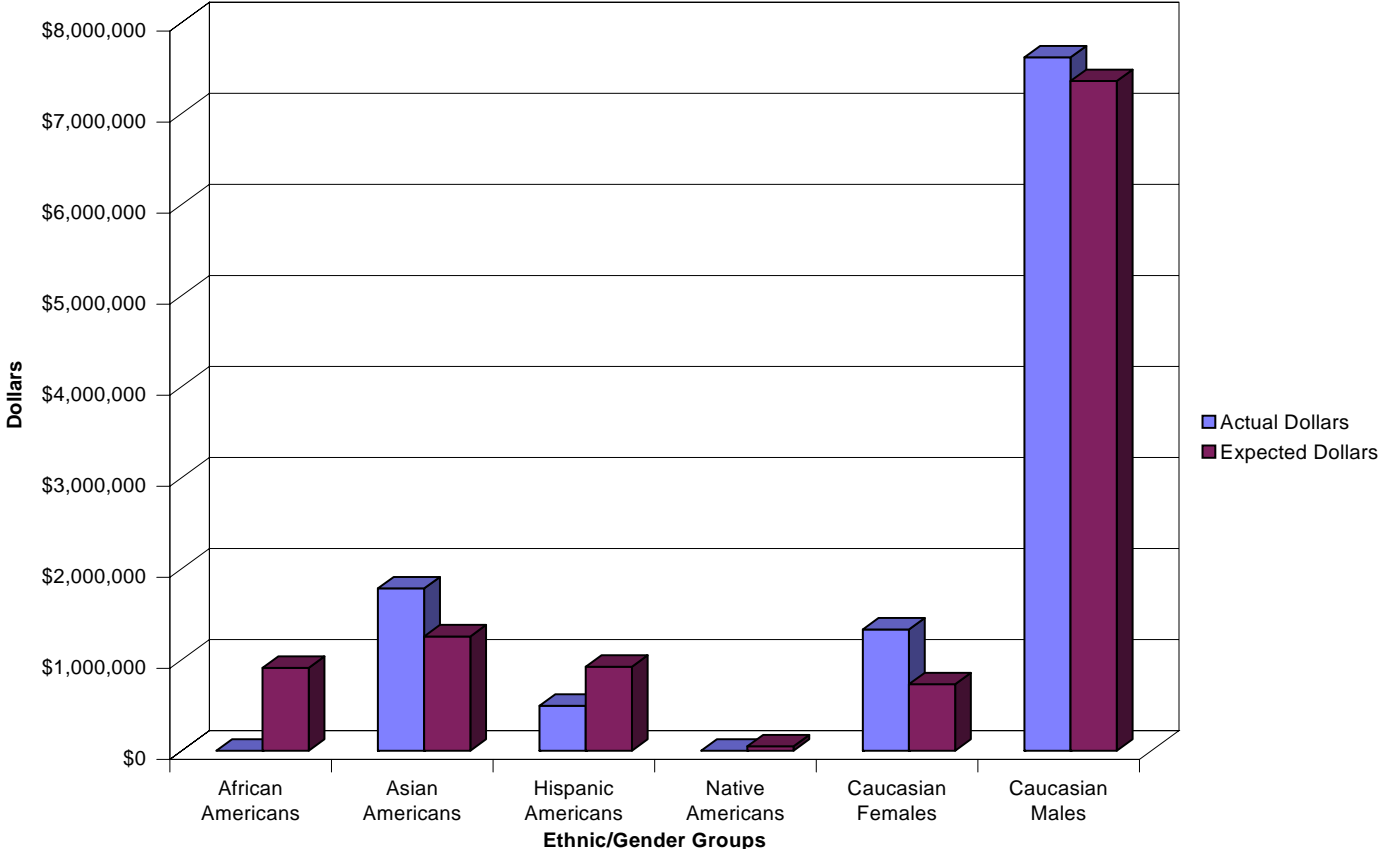


Table 8.01 Disparity Analysis: Construction Contracts under \$500,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$0	0.00%	8.12%	\$911,187	-\$911,187	0.00	< .05 *
Asian Americans	\$1,782,501	15.88%	11.18%	\$1,255,145	\$527,356	1.42	**
Hispanic Americans	\$494,106	4.40%	8.23%	\$923,255	-\$429,149	0.54	< .05 *
Native Americans	\$0	0.00%	0.43%	\$48,275	-\$48,275	0.00	----
Caucasian Females	\$1,331,103	11.86%	6.51%	\$730,156	\$600,947	1.82	**
Caucasian Males	\$7,616,179	67.86%	65.54%	\$7,355,871	\$260,308	1.04	***
TOTAL	\$11,223,889	100.00%	100.00%	\$11,223,889			
Prime Contractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	1.56%	\$174,996	-\$174,996	0.00	>.05†
African American Males	\$0	0.00%	6.56%	\$736,191	-\$736,191	0.00	< .05 *
Asian American Females	\$0	0.00%	1.72%	\$193,099	-\$193,099	0.00	< .05 *
Asian American Males	\$1,782,501	15.88%	9.46%	\$1,062,045	\$720,456	1.68	**
Hispanic American Females	\$361,163	3.22%	1.34%	\$150,859	\$210,304	2.39	**
Hispanic American Males	\$132,943	1.18%	6.88%	\$772,397	-\$639,454	0.17	< .05 *
Native American Females	\$0	0.00%	0.05%	\$6,034	-\$6,034	0.00	----
Native American Males	\$0	0.00%	0.38%	\$42,240	-\$42,240	0.00	----
Caucasian Females	\$1,331,103	11.86%	6.51%	\$730,156	\$600,947	1.82	**
Caucasian Males	\$7,616,179	67.86%	65.54%	\$7,355,871	\$260,308	1.04	***
TOTAL	\$11,223,889	100.00%	100.00%	\$11,223,889			
Prime Contractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$361,163	3.22%	4.68%	\$524,988	-\$163,825	0.69	< .05 *
Minority Males	\$1,915,444	17.07%	23.28%	\$2,612,873	-\$697,429	0.73	>.05†
Caucasian Females	\$1,331,103	11.86%	6.51%	\$730,156	\$600,947	1.82	**
Caucasian Males	\$7,616,179	67.86%	65.54%	\$7,355,871	\$260,308	1.04	***
TOTAL	\$11,223,889	100.00%	100.00%	\$11,223,889			
Prime Contractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$1,915,444	17.07%	23.28%	\$2,612,873	-\$697,429	0.73	>.05†
Female Business Enterprises	\$1,692,266	15.08%	11.18%	\$1,255,145	\$437,122	1.35	**
Minority Male and Female Business Enterprises	\$3,607,710	32.14%	34.46%	\$3,868,018	-\$260,308	0.93	>.05†
Caucasian Male Business Enterprises	\$7,616,179	67.86%	65.54%	\$7,355,871	\$260,308	1.04	***

(*) denotes a statistically significant underutilization.
 (†) denotes no statistically significant underutilization.
 (**) denotes Minority and Female overutilization is not tested statistically.
 (***) denotes Caucasian Male utilization is not tested statistically.
 (----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 8.01 Disparity Analysis: Construction Contracts under \$500,000, July 1, 2002 to June 30, 2007



2. Professional Services Contracts under \$500,000

The disparity analysis of all professional services contracts under \$500,000 is depicted in Table 8.02 and Chart 8.02.

African American Businesses represent 7.7 percent of the available professional services firms and received 4.65 percent of the dollars for professional services contracts under \$500,000. This underutilization is statistically significant.

Asian American Businesses represent 11.05 percent of the available professional services firms and received 6.55 percent of the dollars for professional services contracts under \$500,000. This underutilization is statistically significant.

Hispanic American Businesses represent 3.47 percent of the available professional services firms and received 0.68 percent of the dollars for professional services contracts under \$500,000. This underutilization is statistically significant.

Native American Businesses represent 0.22 percent of the available professional services firms and received none of the dollars for professional services contracts under \$500,000. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 13.09 percent of the available professional services firms and received 11.01 percent of the dollars for professional services contracts under \$500,000. This underutilization is not statistically significant.

Minority Male Business Enterprises represent 15.63 percent of the available professional services firms and received 7.75 percent of the dollars for professional services contracts under \$500,000. This underutilization is statistically significant.

Female Business Enterprises represent 19.91 percent of the available professional services firms and received 15.15 percent of the dollars for professional services contracts under \$500,000. This underutilization is not statistically significant.

Minority Male and Female Business Enterprises represent 35.53 percent of the available professional services firms and received 22.89 percent of the dollars for professional services contracts under \$500,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 64.47 percent of the available professional services firms and received 77.11 percent of the dollars for professional services contracts under \$500,000. This study does not test statistically the utilization of Caucasian Males.

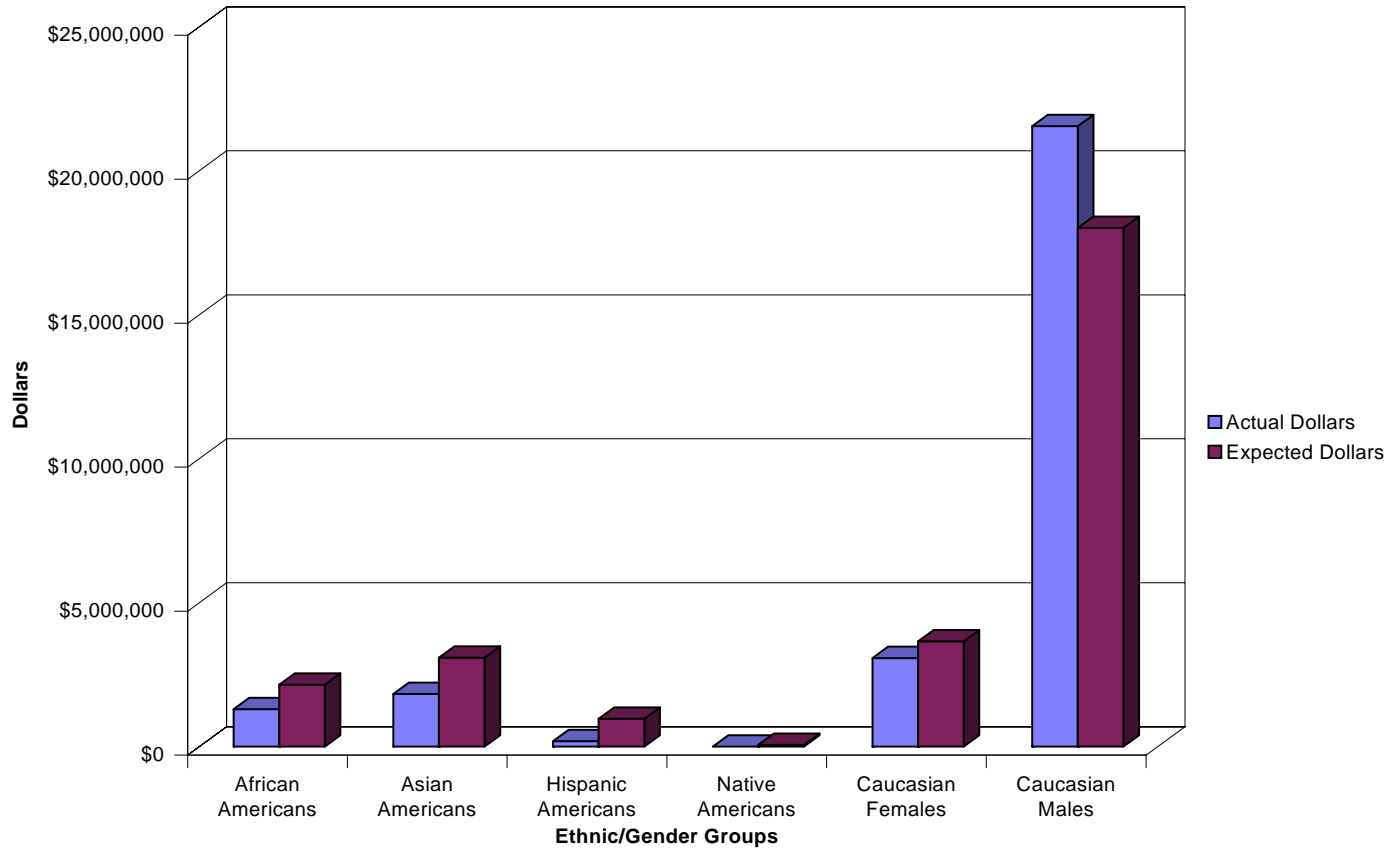


Table 8.02 Disparity Analysis: Professional Services Contracts under \$500,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$1,300,533	4.65%	7.70%	\$2,152,065	-\$851,532	0.60	< .05 *
Asian Americans	\$1,829,249	6.55%	11.05%	\$3,087,147	-\$1,257,898	0.59	< .05 *
Hispanic Americans	\$189,551	0.68%	3.47%	\$969,460	-\$779,910	0.20	< .05 *
Native Americans	\$0	0.00%	0.22%	\$61,880	-\$61,880	0.00	----
Caucasian Females	\$3,077,642	11.01%	13.09%	\$3,657,822	-\$580,180	0.84	>.05†
Caucasian Males	\$21,545,487	77.11%	64.47%	\$18,014,087	\$3,531,400	1.20	***
TOTAL	\$27,942,462	100.00%	100.00%	\$27,942,462			
Prime Contractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$912,603	3.27%	2.56%	\$715,063	\$197,540	1.28	**
African American Males	\$387,930	1.39%	5.14%	\$1,437,002	-\$1,049,072	0.27	< .05 *
Asian American Females	\$240,015	0.86%	3.35%	\$935,082	-\$695,068	0.26	< .05 *
Asian American Males	\$1,589,234	5.69%	7.70%	\$2,152,065	-\$562,831	0.74	< .05 *
Hispanic American Females	\$2,000	0.01%	0.81%	\$226,895	-\$224,895	0.01	----
Hispanic American Males	\$187,551	0.67%	2.66%	\$742,565	-\$555,015	0.25	< .05 *
Native American Females	\$0	0.00%	0.10%	\$27,502	-\$27,502	0.00	----
Native American Males	\$0	0.00%	0.12%	\$34,378	-\$34,378	0.00	----
Caucasian Females	\$3,077,642	11.01%	13.09%	\$3,657,822	-\$580,180	0.84	>.05†
Caucasian Males	\$21,545,487	77.11%	64.47%	\$18,014,087	\$3,531,400	1.20	***
TOTAL	\$27,942,462	100.00%	100.00%	\$27,942,462			
Prime Contractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$1,154,618	4.13%	6.82%	\$1,904,543	-\$749,925	0.61	< .05 *
Minority Males	\$2,164,715	7.75%	15.63%	\$4,366,010	-\$2,201,295	0.50	< .05 *
Caucasian Females	\$3,077,642	11.01%	13.09%	\$3,657,822	-\$580,180	0.84	>.05†
Caucasian Males	\$21,545,487	77.11%	64.47%	\$18,014,087	\$3,531,400	1.20	***
TOTAL	\$27,942,462	100.00%	100.00%	\$27,942,462			
Prime Contractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$2,164,715	7.75%	15.63%	\$4,366,010	-\$2,201,295	0.50	< .05 *
Female Business Enterprises	\$4,232,260	15.15%	19.91%	\$5,562,365	-\$1,330,105	0.76	>.05†
Minority Male and Female Business Enterprises	\$6,396,975	22.89%	35.53%	\$9,928,375	-\$3,531,400	0.64	< .05 *
Caucasian Male Business Enterprises	\$21,545,487	77.11%	64.47%	\$18,014,087	\$3,531,400	1.20	***

- (*) denotes a statistically significant underutilization.
- (†) denotes no statistically significant underutilization.
- (**) denotes Minority and Female overutilization is not tested statistically.
- (***) denotes Caucasian Male utilization is not tested statistically.
- (----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 8.02 Disparity Analysis: Professional Services Contracts under \$500,000, July 1, 2002 to June 30, 2007



3. Goods and Other Services Contracts under \$500,000

The disparity analysis of all goods and other services contracts under \$500,000 is depicted in Table 8.03 and Chart 8.03.

African American Businesses represent 4.97 percent of the available goods and other services firms and received 0.72 percent of the dollars for goods and other services contracts under \$500,000. This underutilization is statistically significant.

Asian American Businesses represent 6.75 percent of the available goods and other services firms and received 1.74 percent of the dollars for goods and other services contracts under \$500,000. This underutilization is statistically significant.

Hispanic American Businesses represent 2.9 percent of the available goods and other services firms and received 2.17 percent of the dollars for goods and other services contracts under \$500,000. This underutilization is statistically significant.

Native American Businesses represent 0.22 percent of the available goods and other services firms and received 0.02 percent of the dollars for goods and other services contracts under \$500,000. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 7.2 percent of the available goods and other services firms and received 2.79 percent of the dollars for goods and other services contracts under \$500,000. This underutilization is statistically significant.

Minority Male Business Enterprises represent 10.44 percent of the available goods and other services firms and received 3.27 percent of the dollars for goods and other services contracts under \$500,000. This underutilization is statistically significant.

Female Business Enterprises represent 11.59 percent of the available goods and other services firms and received 4.17 percent of the dollars for goods and other services contracts under \$500,000. This underutilization is statistically significant.

Minority Male and Female Business Enterprises represent 22.02 percent of the available goods and other services firms and received 7.44 percent of the dollars for goods and other services contracts under \$500,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 77.98 percent of the available goods and other services firms and received 92.56 percent of the dollars for goods and other services contracts under \$500,000. This study does not test statistically the utilization of Caucasian Males.



Table 8.03 Disparity Analysis: Goods and Other Services Contracts under \$500,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$986,358	0.72%	4.97%	\$6,837,319	-\$5,850,960	0.14	< .05 *
Asian Americans	\$2,399,279	1.74%	6.75%	\$9,289,835	-\$6,890,556	0.26	< .05 *
Hispanic Americans	\$2,990,030	2.17%	2.90%	\$3,988,436	-\$998,406	0.75	< .05 *
Native Americans	\$22,150	0.02%	0.22%	\$297,275	-\$275,125	0.07	----
Caucasian Females	\$3,840,404	2.79%	7.20%	\$9,909,158	-\$6,068,754	0.39	< .05 *
Caucasian Males	\$127,449,523	92.56%	77.98%	\$107,365,722	\$20,083,801	1.19	***
TOTAL	\$137,687,744	100.00%	100.00%	\$137,687,744			
Prime Contractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$434,331	0.32%	1.30%	\$1,783,648	-\$1,349,318	0.24	< .05 *
African American Males	\$552,027	0.40%	3.67%	\$5,053,670	-\$4,501,643	0.11	< .05 *
Asian American Females	\$1,236,349	0.90%	2.16%	\$2,972,747	-\$1,736,398	0.42	< .05 *
Asian American Males	\$1,162,930	0.84%	4.59%	\$6,317,088	-\$5,154,158	0.18	< .05 *
Hispanic American Females	\$223,970	0.16%	0.83%	\$1,139,553	-\$915,583	0.20	----
Hispanic American Males	\$2,766,060	2.01%	2.07%	\$2,848,883	-\$82,823	0.97	>.05†
Native American Females	\$0	0.00%	0.11%	\$148,637	-\$148,637	0.00	----
Native American Males	\$22,150	0.02%	0.11%	\$148,637	-\$126,487	0.15	----
Caucasian Females	\$3,840,404	2.79%	7.20%	\$9,909,158	-\$6,068,754	0.39	< .05 *
Caucasian Males	\$127,449,523	92.56%	77.98%	\$107,365,722	\$20,083,801	1.19	***
TOTAL	\$137,687,744	100.00%	100.00%	\$137,687,744			
Prime Contractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$1,894,650	1.38%	4.39%	\$6,044,586	-\$4,149,936	0.31	< .05 *
Minority Males	\$4,503,167	3.27%	10.44%	\$14,368,278	-\$9,865,111	0.31	< .05 *
Caucasian Females	\$3,840,404	2.79%	7.20%	\$9,909,158	-\$6,068,754	0.39	< .05 *
Caucasian Males	\$127,449,523	92.56%	77.98%	\$107,365,722	\$20,083,801	1.19	***
TOTAL	\$137,687,744	100.00%	100.00%	\$137,687,744			
Prime Contractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$4,503,167	3.27%	10.44%	\$14,368,278	-\$9,865,111	0.31	< .05 *
Female Business Enterprises	\$5,735,054	4.17%	11.59%	\$15,953,744	-\$10,218,690	0.36	< .05 *
Minority Male and Female Business Enterprises	\$10,238,221	7.44%	22.02%	\$30,322,022	-\$20,083,801	0.34	< .05 *
Caucasian Male Business Enterprises	\$127,449,523	92.56%	77.98%	\$107,365,722	\$20,083,801	1.19	***

(*) denotes a statistically significant underutilization.

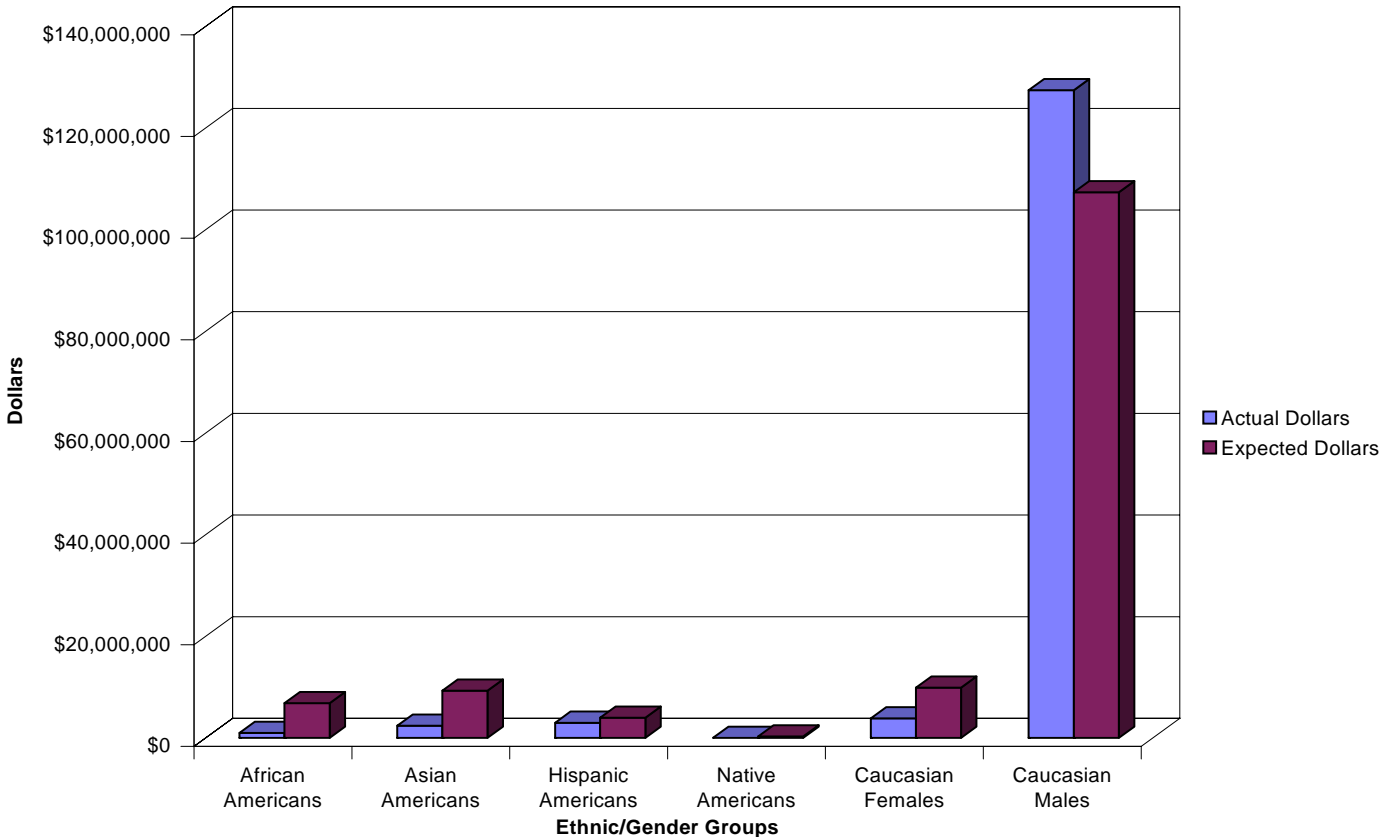
(†) denotes no statistically significant underutilization.

(**) denotes Minority and Female overutilization is not tested statistically.

(***) denotes Caucasian Male utilization is not tested statistically.

(----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 8.03 Disparity Analysis: Goods and Other Services Contracts under \$500,000, July 1, 2002 to June 30, 2007



B. Disparity Analysis: All Contracts under \$10,000, \$40,000, or \$50,000, by Industry

1. Construction Contracts under \$10,000

The disparity analysis of all construction contracts under \$10,000 is depicted in Table 8.04 and Chart 8.04.

African American Businesses represent 8.12 percent of the available construction firms and received none of the dollars for construction contracts under \$10,000. This underutilization is statistically significant.

Asian American Businesses represent 11.18 percent of the available construction firms and received 26.66 percent of the dollars for construction contracts under \$10,000. This study does not test statistically the overutilization of minority groups.

Hispanic American Businesses represent 8.23 percent of the available construction firms and received 2.31 of the dollars for construction contracts under \$10,000. This underutilization is statistically significant.

Native American Businesses represent 0.43 percent of the available construction firms and received none of the dollars for construction contracts under \$10,000. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 6.51 percent of the available construction firms and received 13.51 percent of the dollars for construction contracts under \$10,000. This study does not test statistically the overutilization of female business groups.

Minority Male Business Enterprises represent 23.28 percent of the available construction firms and received 28.97 percent of the dollars for construction contracts under \$10,000. This study does not test statistically the overutilization of minority groups.

Female Business Enterprises represent 11.18 percent of the available construction firms and received 13.51 percent of the dollars for construction contracts under \$10,000. This study does not test statistically the overutilization of female business groups.

Minority Male and Female Business Enterprises represent 34.46 percent of the available construction firms and received 42.48 percent of the dollars for construction contracts under \$10,000. This study does not test statistically the overutilization of minority or female business groups.



Caucasian Male Business Enterprises represent 65.54 percent of the available construction firms and received 57.52 percent of the dollars for construction contracts under \$10,000. This study does not test statistically the utilization of Caucasian Males.

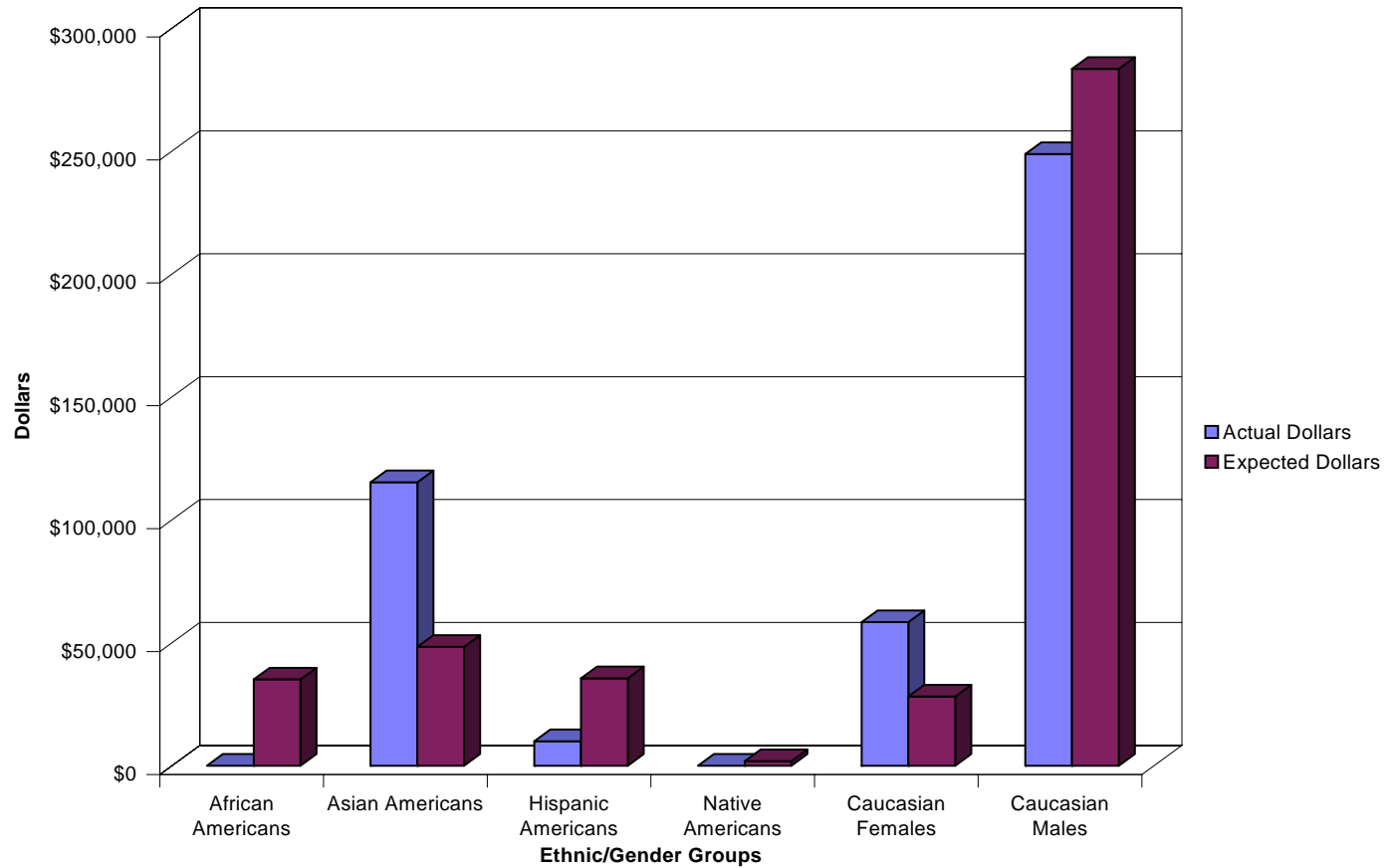


Table 8.04 Disparity Analysis: Construction Contracts under \$10,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$0	0.00%	8.12%	\$35,118	-\$35,118	0.00	< .05 *
Asian Americans	\$115,322	26.66%	11.18%	\$48,375	\$66,947	2.38	**
Hispanic Americans	\$9,995	2.31%	8.23%	\$35,584	-\$25,589	0.28	< .05 *
Native Americans	\$0	0.00%	0.43%	\$1,861	-\$1,861	0.00	----
Caucasian Females	\$58,426	13.51%	6.51%	\$28,141	\$30,285	2.08	**
Caucasian Males	\$248,842	57.52%	65.54%	\$283,505	-\$34,664	0.88	***
TOTAL	\$432,584	100.00%	100.00%	\$432,584			
Prime Contractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	1.56%	\$6,745	-\$6,745	0.00	>.05†
African American Males	\$0	0.00%	6.56%	\$28,374	-\$28,374	0.00	< .05 *
Asian American Females	\$0	0.00%	1.72%	\$7,442	-\$7,442	0.00	>.05†
Asian American Males	\$115,322	26.66%	9.46%	\$40,933	\$74,389	2.82	**
Hispanic American Females	\$0	0.00%	1.34%	\$5,814	-\$5,814	0.00	>.05†
Hispanic American Males	\$9,995	2.31%	6.88%	\$29,769	-\$19,774	0.34	>.05†
Native American Females	\$0	0.00%	0.05%	\$233	-\$233	0.00	----
Native American Males	\$0	0.00%	0.38%	\$1,628	-\$1,628	0.00	----
Caucasian Females	\$58,426	13.51%	6.51%	\$28,141	\$30,285	2.08	**
Caucasian Males	\$248,842	57.52%	65.54%	\$283,505	-\$34,664	0.88	***
TOTAL	\$432,584	100.00%	100.00%	\$432,584			
Prime Contractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$0	0.00%	4.68%	\$20,234	-\$20,234	0.00	< .05 *
Minority Males	\$125,317	28.97%	23.28%	\$100,704	\$24,613	1.24	**
Caucasian Females	\$58,426	13.51%	6.51%	\$28,141	\$30,285	2.08	**
Caucasian Males	\$248,842	57.52%	65.54%	\$283,505	-\$34,664	0.88	***
TOTAL	\$432,584	100.00%	100.00%	\$432,584			
Prime Contractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$125,317	28.97%	23.28%	\$100,704	\$24,613	1.24	**
Female Business Enterprises	\$58,426	13.51%	11.18%	\$48,375	\$10,051	1.21	**
Minority Male and Female Business Enterprises	\$183,743	42.48%	34.46%	\$149,079	\$34,664	1.23	**
Caucasian Male Business Enterprises	\$248,842	57.52%	65.54%	\$283,505	-\$34,664	0.88	***

(*) denotes a statistically significant underutilization.
 (†) denotes no statistically significant underutilization.
 (**) denotes Minority and Female overutilization is not tested statistically.
 (***) denotes Caucasian Male utilization is not tested statistically.
 (----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 8.04 Disparity Analysis: Construction Contracts under \$10,000, July 1, 2002 to June 30, 2007



2. Professional Services Contracts under \$50,000

The disparity analysis of all professional services contracts under \$50,000 is depicted in Table 8.05 and Chart 8.05.

African American Businesses represent 7.7 percent of the available professional services firms and received 0.46 percent of the dollars for professional services contracts under \$50,000. This underutilization is statistically significant.

Asian American Businesses represent 11.05 percent of the available professional services firms and received 3.72 percent of the dollars for professional services contracts under \$50,000. This underutilization is statistically significant.

Hispanic American Businesses represent 3.47 percent of the available professional services firms and received 1.6 percent of the dollars for professional services contracts under \$50,000. This underutilization is statistically significant.

Native American Businesses represent 0.22 percent of the available professional services firms and received none of the dollars for professional services contracts under \$50,000. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 13.09 percent of the available professional services firms and received 18.7 percent of the dollars for professional services contracts under \$50,000. This study does not test statistically the overutilization of female business groups.

Minority Male Business Enterprises represent 15.63 percent of the available professional services firms and received 4.45 percent of the dollars for professional services contracts under \$50,000. This underutilization is statistically significant.

Female Business Enterprises represent 19.91 percent of the available professional services firms and received 20.02 percent of the dollars for professional services contracts under \$50,000. This study does not test statistically the overutilization of female business groups.

Minority Male and Female Business Enterprises represent 35.53 percent of the available professional services firms and received 24.47 percent of the dollars for professional services contracts under \$50,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 64.47 percent of the available professional services firms and received 75.53 percent of the dollars for professional services contracts under \$50,000. This study does not test statistically the utilization of Caucasian Males.

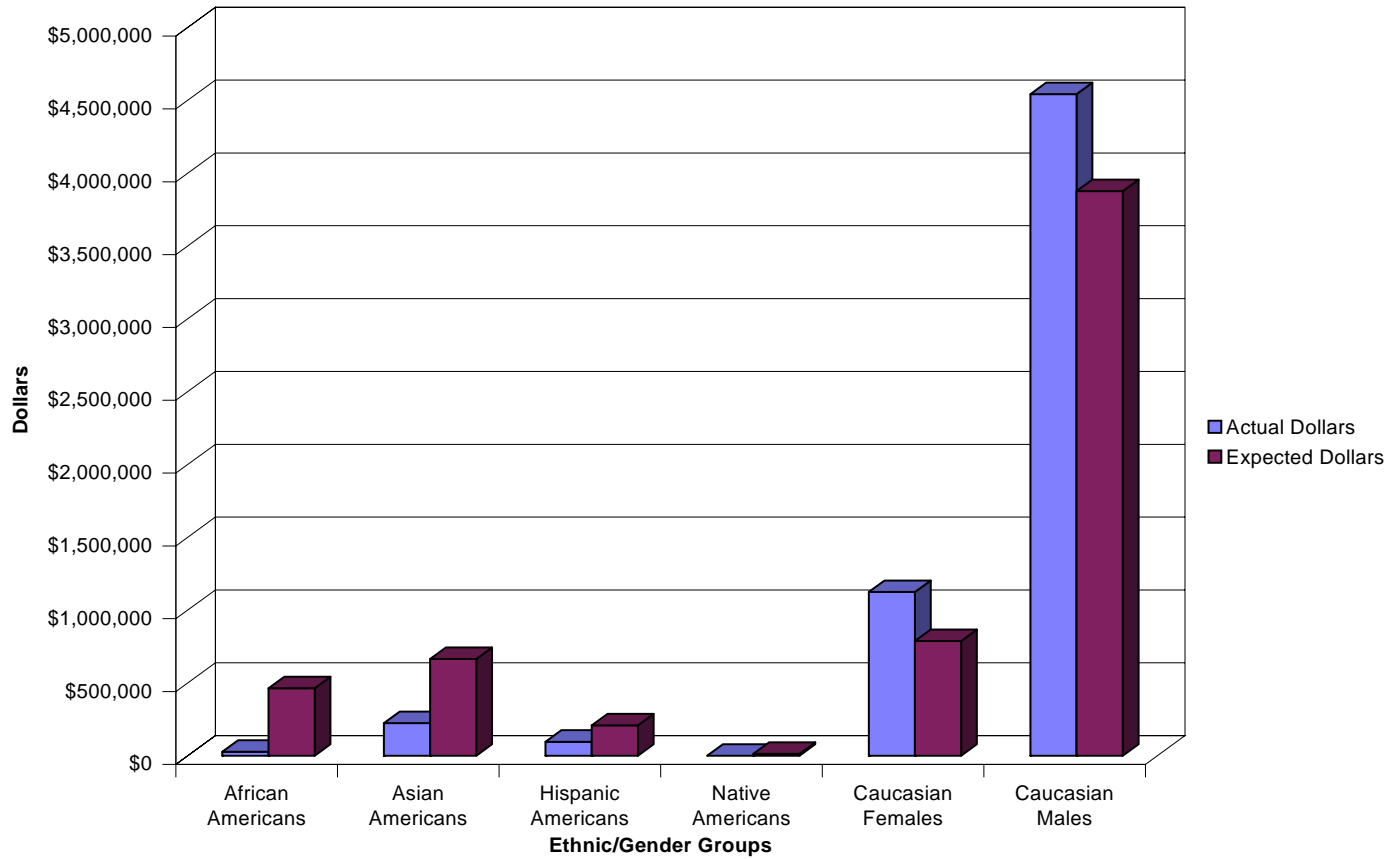


Table 8.05 Disparity Analysis: Professional Services Contracts under \$50,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$27,462	0.46%	7.70%	\$463,126	-\$435,664	0.06	< .05 *
Asian Americans	\$223,643	3.72%	11.05%	\$664,356	-\$440,714	0.34	< .05 *
Hispanic Americans	\$96,071	1.60%	3.47%	\$208,629	-\$112,558	0.46	< .05 *
Native Americans	\$0	0.00%	0.22%	\$13,317	-\$13,317	0.00	----
Caucasian Females	\$1,124,278	18.70%	13.09%	\$787,166	\$337,112	1.43	**
Caucasian Males	\$4,541,786	75.53%	64.47%	\$3,876,646	\$665,140	1.17	***
TOTAL	\$6,013,240	100.00%	100.00%	\$6,013,240			
Prime Contractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$2,503	0.04%	2.56%	\$153,882	-\$151,380	0.02	< .05 *
African American Males	\$24,960	0.42%	5.14%	\$309,244	-\$284,284	0.08	< .05 *
Asian American Females	\$75,000	1.25%	3.35%	\$201,230	-\$126,230	0.37	< .05 *
Asian American Males	\$148,643	2.47%	7.70%	\$463,126	-\$314,483	0.32	< .05 *
Hispanic American Females	\$2,000	0.03%	0.81%	\$48,828	-\$46,828	0.04	----
Hispanic American Males	\$94,071	1.56%	2.66%	\$159,801	-\$65,730	0.59	>.05†
Native American Females	\$0	0.00%	0.10%	\$5,919	-\$5,919	0.00	----
Native American Males	\$0	0.00%	0.12%	\$7,398	-\$7,398	0.00	----
Caucasian Females	\$1,124,278	18.70%	13.09%	\$787,166	\$337,112	1.43	**
Caucasian Males	\$4,541,786	75.53%	64.47%	\$3,876,646	\$665,140	1.17	***
TOTAL	\$6,013,240	100.00%	100.00%	\$6,013,240			
Prime Contractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$79,503	1.32%	6.82%	\$409,859	-\$330,357	0.19	< .05 *
Minority Males	\$267,673	4.45%	15.63%	\$939,569	-\$671,895	0.28	< .05 *
Caucasian Females	\$1,124,278	18.70%	13.09%	\$787,166	\$337,112	1.43	**
Caucasian Males	\$4,541,786	75.53%	64.47%	\$3,876,646	\$665,140	1.17	***
TOTAL	\$6,013,240	100.00%	100.00%	\$6,013,240			
Prime Contractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$267,673	4.45%	15.63%	\$939,569	-\$671,895	0.28	< .05 *
Female Business Enterprises	\$1,203,780	20.02%	19.91%	\$1,197,025	\$6,755	1.01	**
Minority Male and Female Business Enterprises	\$1,471,454	24.47%	35.53%	\$2,136,594	-\$665,140	0.69	< .05 *
Caucasian Male Business Enterprises	\$4,541,786	75.53%	64.47%	\$3,876,646	\$665,140	1.17	***

(*) denotes a statistically significant underutilization.
 (†) denotes no statistically significant underutilization.
 (**) denotes Minority and Female overutilization is not tested statistically.
 (***) denotes Caucasian Male utilization is not tested statistically.
 (----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 8.05 Disparity Analysis: Professional Services Contracts under \$50,000, July 1, 2002 to June 30, 2007



3. Goods and Other Services Contracts under \$40,000

The disparity analysis of all goods and other services contracts under \$40,000 is depicted in Table 8.06 and Chart 8.06.

African American Businesses represent 4.97 percent of the available goods and other services firms and received 0.42 percent of the dollars for goods and other services contracts under \$40,000. This underutilization is statistically significant.

Asian American Businesses represent 6.75 percent of the available goods and other services firms and received 2.34 percent of the dollars for goods and other services contracts under \$40,000. This underutilization is statistically significant.

Hispanic American Businesses represent 2.9 percent of the available goods and other services firms and received 2.03 of the dollars for goods and other services contracts under \$40,000. This underutilization is statistically significant.

Native American Businesses represent 0.22 percent of the available goods and other services firms and received 0.03 percent of the dollars for goods and other services contracts under \$40,000. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 7.2 percent of the available goods and other services firms and received 3.43 percent of the dollars for goods and other services contracts under \$40,000. This underutilization is statistically significant.

Minority Male Business Enterprises represent 10.44 percent of the available goods and other services firms and received 3.09 percent of the dollars for goods and other services contracts under \$40,000. This underutilization is statistically significant.

Female Business Enterprises represent 11.59 percent of the available goods and other services firms and received 5.16 percent of the dollars for goods and other services contracts under \$40,000. This underutilization is statistically significant.

Minority Male and Female Business Enterprises represent 22.02 percent of the available goods and other services firms and received 8.25 percent of the dollars for goods and other services contracts under \$40,000. This underutilization is statistically significant.

Caucasian Male Business Enterprises represent 77.98 percent of the available goods and other services firms and received 91.75 percent of the dollars for goods and other services contracts under \$40,000. This study does not test statistically the utilization of Caucasian Males.

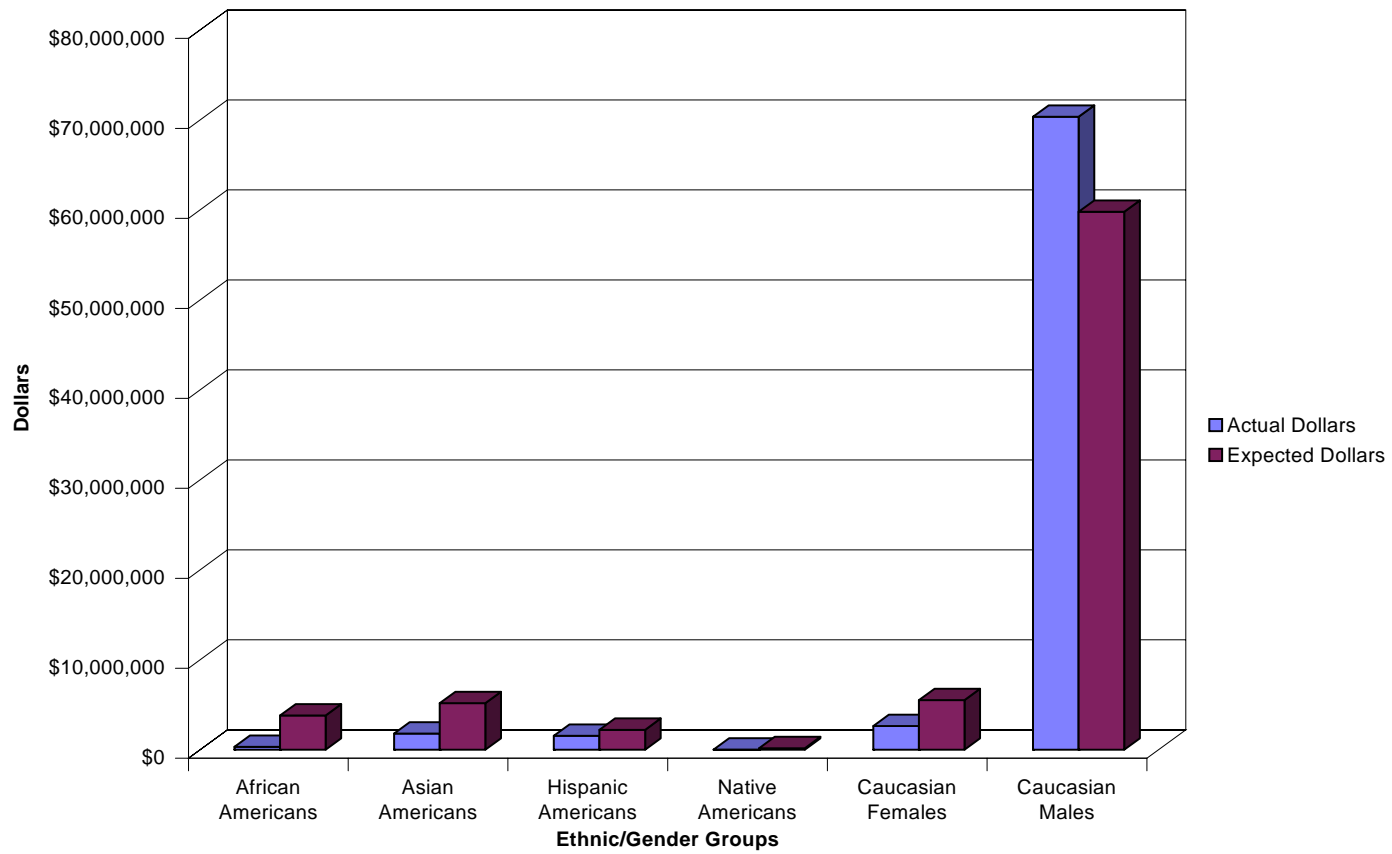


Table 8.06 Disparity Analysis: Goods and Other Services Contracts under \$40,000, July 1, 2002 to June 30, 2007

Prime Contractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$318,498	0.42%	4.97%	\$3,807,065	-\$3,488,567	0.08	< .05 *
Asian Americans	\$1,792,075	2.34%	6.75%	\$5,172,643	-\$3,380,567	0.35	< .05 *
Hispanic Americans	\$1,557,667	2.03%	2.90%	\$2,220,788	-\$663,121	0.70	< .05 *
Native Americans	\$22,150	0.03%	0.22%	\$165,525	-\$143,375	0.13	----
Caucasian Females	\$2,631,796	3.43%	7.20%	\$5,517,486	-\$2,885,690	0.48	< .05 *
Caucasian Males	\$70,343,275	91.75%	77.98%	\$59,781,956	\$10,561,319	1.18	***
TOTAL	\$76,665,461	100.00%	100.00%	\$76,665,461			
Prime Contractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$153,603	0.20%	1.30%	\$993,147	-\$839,544	0.15	< .05 *
African American Males	\$164,895	0.22%	3.67%	\$2,813,918	-\$2,649,023	0.06	< .05 *
Asian American Females	\$993,126	1.30%	2.16%	\$1,655,246	-\$662,120	0.60	< .05 *
Asian American Males	\$798,949	1.04%	4.59%	\$3,517,397	-\$2,718,448	0.23	< .05 *
Hispanic American Females	\$177,455	0.23%	0.83%	\$634,511	-\$457,056	0.28	----
Hispanic American Males	\$1,380,212	1.80%	2.07%	\$1,586,277	-\$206,065	0.87	> .05 †
Native American Females	\$0	0.00%	0.11%	\$82,762	-\$82,762	0.00	----
Native American Males	\$22,150	0.03%	0.11%	\$82,762	-\$60,612	0.27	----
Caucasian Females	\$2,631,796	3.43%	7.20%	\$5,517,486	-\$2,885,690	0.48	< .05 *
Caucasian Males	\$70,343,275	91.75%	77.98%	\$59,781,956	\$10,561,319	1.18	***
TOTAL	\$76,665,461	100.00%	100.00%	\$76,665,461			
Prime Contractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$1,324,184	1.73%	4.39%	\$3,365,666	-\$2,041,482	0.39	< .05 *
Minority Males	\$2,366,206	3.09%	10.44%	\$8,000,354	-\$5,634,148	0.30	< .05 *
Caucasian Females	\$2,631,796	3.43%	7.20%	\$5,517,486	-\$2,885,690	0.48	< .05 *
Caucasian Males	\$70,343,275	91.75%	77.98%	\$59,781,956	\$10,561,319	1.18	***
TOTAL	\$76,665,461	100.00%	100.00%	\$76,665,461			
Prime Contractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$2,366,206	3.09%	10.44%	\$8,000,354	-\$5,634,148	0.30	< .05 *
Female Business Enterprises	\$3,955,980	5.16%	11.59%	\$8,883,152	-\$4,927,172	0.45	< .05 *
Minority Male and Female Business Enterprises	\$6,322,187	8.25%	22.02%	\$16,883,506	-\$10,561,319	0.37	< .05 *
Caucasian Male Business Enterprises	\$70,343,275	91.75%	77.98%	\$59,781,956	\$10,561,319	1.18	***

(*) denotes a statistically significant underutilization.
 (†) denotes no statistically significant underutilization.
 (**) denotes Minority and Female overutilization is not tested statistically.
 (***) denotes Caucasian Male utilization is not tested statistically.
 (----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 8.06 Disparity Analysis: Goods and Other Services Contracts under \$40,000, July 1, 2002 to June 30, 2007



III. SUMMARY

A. Construction Contracts

As indicated in Table 8.07, African American and Hispanic American construction contractors were determined to be underutilized at both the informal and formal contract levels.

Table 8.07 Disparity Summary: Construction Contract Dollars, July 1, 2002 to June 30, 2007

Ethnicity/Gender	Construction	
	Contracts under \$500,000	Contracts under \$10,000
African American Businesses	Yes	Yes
Asian American Businesses	No	No
Hispanic American Businesses	Yes	Yes
Native American Businesses	---	---
Caucasian Female Business Enterprises	No	No
Minority Male Business Enterprises	No	No
Female Business Enterprises	No	No
Minority Male and Female Business Enterprises	No	No

Yes = Statistically significant disparity was found.

No = Statistically significant disparity was not found.

--- = There were insufficient records to determine statistical disparity.



B. Professional Services Contracts

As indicated in Table 8.08, African American, Asian American, and Hispanic American professional services contractors were determined to be underutilized at both the informal and formal contract levels.

**Table 8.08 Disparity Summary: Professional Services
Contract Dollars, July 1, 2002 to June 30, 2007**

Ethnicity/Gender	Professional Services	
	Contracts under \$500,000	Contracts under \$50,000
African American Businesses	Yes	Yes
Asian American Businesses	Yes	Yes
Hispanic American Businesses	Yes	Yes
Native American Businesses	---	---
Caucasian Female Business Enterprises	No	No
Minority Male Business Enterprises	Yes	Yes
Female Business Enterprises	No	No
Minority Male and Female Business Enterprises	Yes	Yes

Yes = Statistically significant disparity was found.
 No = Statistically significant disparity was not found.
 --- = There were insufficient records to determine statistical disparity.



C. Goods and Other Services Contracts

As indicated in Table 8.09, African American, Asian American, Hispanic American, and Native American goods and other services contractors were determined to be underutilized at both the informal and formal contract levels. Caucasian Female and Female Business Enterprises were also underutilized at both the informal and formal contract levels.

**Table 8.09 Disparity Summary: Goods and Other Services
Contract Dollars, July 1, 2002 to June 30, 2007**

Ethnicity/Gender	Goods and Other Services	
	Contracts under \$500,000	Contracts under \$40,000
African American Businesses	Yes	Yes
Asian American Businesses	Yes	Yes
Hispanic American Businesses	Yes	Yes
Native American Businesses	---	---
Caucasian Female Business Enterprises	Yes	Yes
Minority Male Business Enterprises	Yes	Yes
Female Business Enterprises	Yes	Yes
Minority Male and Female Business Enterprises	Yes	Yes

Yes = Statistically significant disparity was found.

No = Statistically significant disparity was not found.

--- = There were insufficient records to determine statistical disparity.





9

SUBCONTRACTOR DISPARITY ANALYSIS

I. INTRODUCTION

The objective of this analysis is to determine if minority and woman-owned business enterprise (M/WBE) subcontractors were underutilized at a statistically significant level. A detailed discussion of the statistical procedures for conducting a disparity analysis is set forth in *Chapter 8: Prime Contractor Disparity Analysis*. The same analytical procedures were used to perform the subcontractor disparity analysis. Under a fair and equitable system of awarding subcontracts, the proportion of subcontracts and subcontract dollars awarded to M/WBEs should be approximate to the proportion of available M/WBEs in the relevant market area. If the proportions are not approximate and a disparity exists between these proportions, the probability that the disparity is due to chance can be determined using a statistical test. If there is a low probability that the disparity is due to chance, *Croson* states that an inference of discrimination can be made.¹

II. DISPARITY ANALYSIS OVERVIEW

As detailed in *Chapter 5: Subcontractor Utilization Analysis*, extensive efforts were undertaken to obtain subcontracting records for BART's construction and professional services contracts. BART was able to provide information on construction and professional services subcontracts. The goods and other services industry was not included in the subcontractor analysis because these contracts traditionally do not include significant subcontracting activity.

¹ When conducting statistical tests, a level of confidence must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by the courts as an acceptable level in determining whether an inference of discrimination can be made. Thus the data analyzed here was done within the 95 percent confidence level.



Subcontract records were compiled for the three industries within two study periods relating to the two distinct DBE Programs in effect during the July 1, 2002 to December 31, 2008 study period. As detailed in *Chapter 5: Subcontractor Utilization Analysis*, in May 2006 BART modified its DBE Program suspending its race-conscious goals and implementing a 100 percent race-neutral DBE program by using only race-neutral means to achieve the overall DBE goal. Prior to May 2006, BART implemented a race-conscious DBE program using race-conscious and race-neutral means to achieve the overall DBE goal. M/WBE subcontractor utilization compared to non-M/WBE utilization patterns were different during each of the two DBE Programs. Therefore, the subcontractor disparity analysis is presented separately for the July 1, 2002 to June 30, 2006 Race-Conscious DBE Program and the July 1, 2006 to December 31, 2008 Race-Neutral DBE Program.

III. DISPARITY ANALYSIS - RACE-CONSCIOUS DBE PROGRAM PHASE

A. Construction Subcontractor Disparity Analysis: July 1, 2002 to June 30, 2006

The disparity analysis of construction subcontract dollars is depicted in Table 9.01 and Chart 9.01. These ethnic and gender groups are defined in Table 4.01 on page 4-2 of *Chapter 4: Prime Contractor Utilization Analysis*.

African American Businesses represent 8.01 percent of the available construction firms and received 1.76 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Asian American Businesses represent 10.98 percent of the available construction firms and received 2.66 percent of the construction subcontract dollars. This underutilization is statistically significant.

Hispanic American Businesses represent 8.01 percent of the available construction firms and received 6.06 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Native American Businesses represent 0.42 percent of the available construction firms and received none of the construction subcontract dollars. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 6.87 percent of the available construction firms and received 11.21 percent of the construction subcontract dollars. This study does not test statistically the overutilization of female business groups.



Minority Male Business Enterprises represent 22.79 percent of the available construction firms and received 9.66 percent of the construction subcontract dollars. This underutilization is statistically significant.

Female Business Enterprises represent 11.5 percent of the available construction firms and received 12.02 percent of the construction subcontract dollars. This study does not test statistically the overutilization of female business groups.

Minority Male and Female Business Enterprises represent 34.29 percent of the available construction firms and received 21.68 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Caucasian Male Business Enterprises represent 65.71 percent of the available construction firms and received 78.32 percent of the construction subcontract dollars. This study does not test statistically the utilization of Caucasian Males.



Table 9.01 Disparity Analysis: Construction Subcontracts, July 1, 2002 to June 30, 2006

Subcontractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$303,365	1.76%	8.01%	\$1,383,418	-\$1,080,053	0.22	>.05†
Asian Americans	\$459,094	2.66%	10.98%	\$1,895,462	-\$1,436,368	0.24	< .05 *
Hispanic Americans	\$1,046,302	6.06%	8.01%	\$1,383,418	-\$337,116	0.76	>.05†
Native Americans	\$0	0.00%	0.42%	\$71,866	-\$71,866	0.00	----
Caucasian Females	\$1,935,041	11.21%	6.87%	\$1,185,787	\$749,254	1.63	**
Caucasian Males	\$13,521,974	78.32%	65.71%	\$11,345,825	\$2,176,149	1.19	***
TOTAL	\$17,265,777	100.00%	100.00%	\$17,265,777			
Subcontractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$80,000	0.46%	1.56%	\$269,497	-\$189,497	0.30	>.05†
African American Males	\$223,365	1.29%	6.45%	\$1,113,921	-\$890,556	0.20	>.05†
Asian American Females	\$60,547	0.35%	1.77%	\$305,430	-\$244,883	0.20	>.05†
Asian American Males	\$398,547	2.31%	9.21%	\$1,590,033	-\$1,191,486	0.25	< .05 *
Hispanic American Females	\$0	0.00%	1.25%	\$215,598	-\$215,598	0.00	>.05†
Hispanic American Males	\$1,046,302	6.06%	6.76%	\$1,167,820	-\$121,518	0.90	>.05†
Native American Females	\$0	0.00%	0.05%	\$8,983	-\$8,983	0.00	----
Native American Males	\$0	0.00%	0.36%	\$62,883	-\$62,883	0.00	----
Caucasian Females	\$1,935,041	11.21%	6.87%	\$1,185,787	\$749,254	1.63	**
Caucasian Males	\$13,521,974	78.32%	65.71%	\$11,345,825	\$2,176,149	1.19	***
TOTAL	\$17,265,777	100.00%	100.00%	\$17,265,777			
Subcontractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$140,547	0.81%	4.63%	\$799,508	-\$658,961	0.18	>.05†
Minority Males	\$1,668,214	9.66%	22.79%	\$3,934,657	-\$2,266,442	0.42	< .05 *
Caucasian Females	\$1,935,041	11.21%	6.87%	\$1,185,787	\$749,254	1.63	**
Caucasian Males	\$13,521,974	78.32%	65.71%	\$11,345,825	\$2,176,149	1.19	***
TOTAL	\$17,265,777	100.00%	100.00%	\$17,265,777			
Subcontractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$1,668,214	9.66%	22.79%	\$3,934,657	-\$2,266,442	0.42	< .05 *
Female Business Enterprises	\$2,075,588	12.02%	11.50%	\$1,985,295	\$90,293	1.05	**
Minority Male and Female Business Enterprises	\$3,743,803	21.68%	34.29%	\$5,919,952	-\$2,176,149	0.63	>.05†
Caucasian Male Business Enterprises	\$13,521,974	78.32%	65.71%	\$11,345,825	\$2,176,149	1.19	***

(*) denotes a statistically significant underutilization.

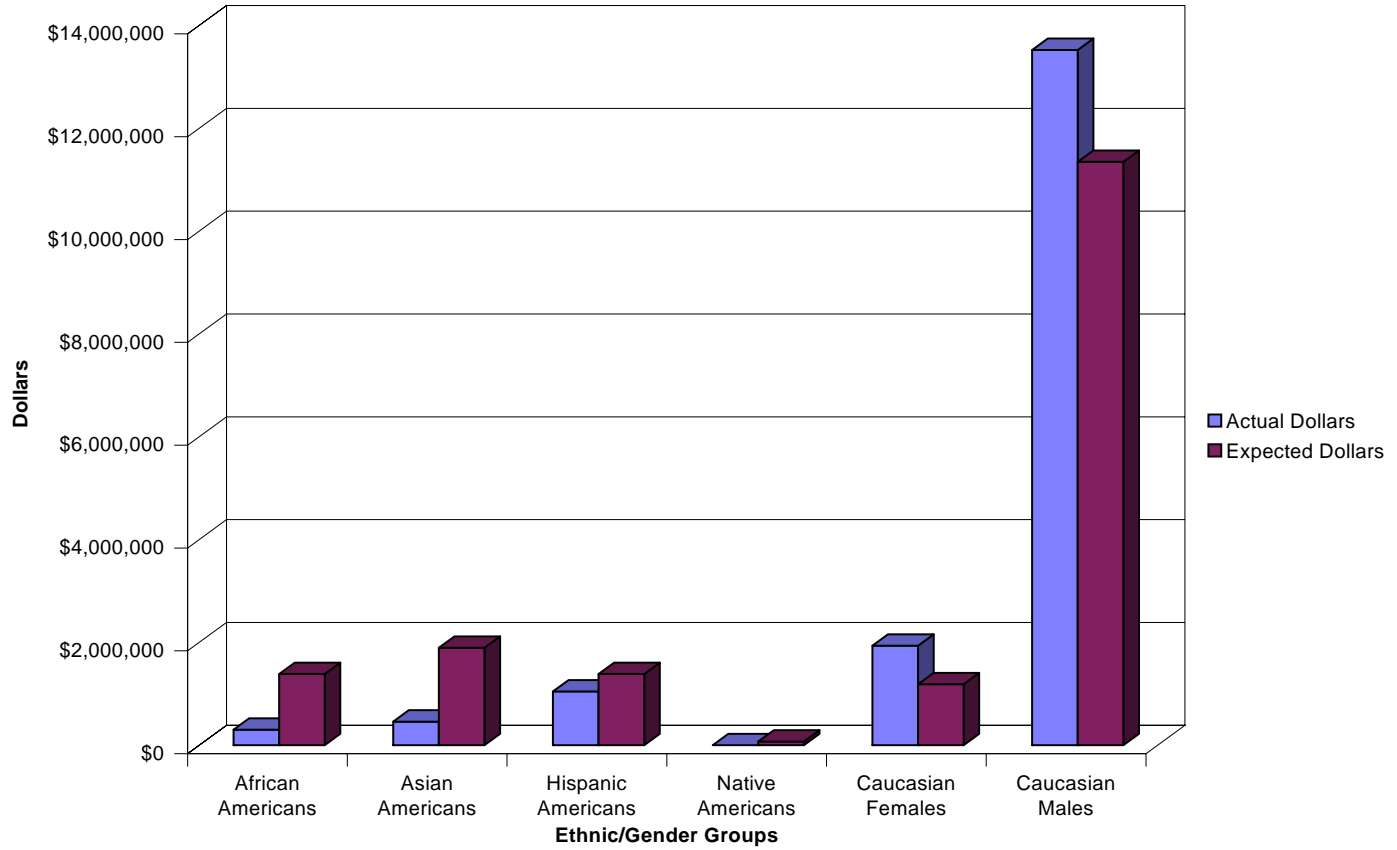
(†) denotes no statistically significant underutilization.

(**) denotes Minority and Female overutilization is not tested statistically.

(***) denotes Caucasian Male utilization is not tested statistically.

(----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 9.01 Disparity Analysis: Construction Subcontracts, July 1, 2002 to June 30, 2006



B. Professional Services Subcontractor Analysis: July 1, 2002 to June 30, 2006

The disparity analysis of professional services subcontract dollars is depicted in Table 9.02 and Chart 9.02.

African American Businesses represent 7.56 percent of the available professional services firms and received 13.64 percent of the professional services subcontract dollars. This study does not test statistically the overutilization of minority business groups.

Asian American Businesses represent 10.9 percent of the available professional services firms and received 12.32 percent of the professional services subcontract dollars. This study does not test statistically the overutilization of minority business groups.

Hispanic American Businesses represent 3.54 percent of the available professional services firms and received 5.44 percent of the professional services subcontract dollars. This study does not test statistically the overutilization of minority business groups.

Native American Businesses represent 0.24 percent of the available professional services firms and received none of the professional services subcontract dollars. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 12.97 percent of the available professional services firms and received 12.59 percent of the professional services subcontract dollars. This underutilization is not statistically significant.

Minority Male Business Enterprises represent 15.64 percent of the available professional services firms and received 22.73 percent of the professional services subcontract dollars. This study does not test statistically the overutilization of minority business groups.

Female Business Enterprises represent 19.56 percent of the available professional services firms and received 21.26 percent of the professional services subcontract dollars. This study does not test statistically the overutilization of female business groups.

Minority Male and Female Business Enterprises represent 35.2 percent of the available professional services firms and received 43.98 percent of the professional services subcontract dollars. This study does not test statistically the overutilization of minority or female business groups.

Caucasian Male Business Enterprises represent 64.8 percent of the available professional services firms and received 56.02 percent of the professional services subcontract dollars. This study does not test statistically the utilization of Caucasian Males.

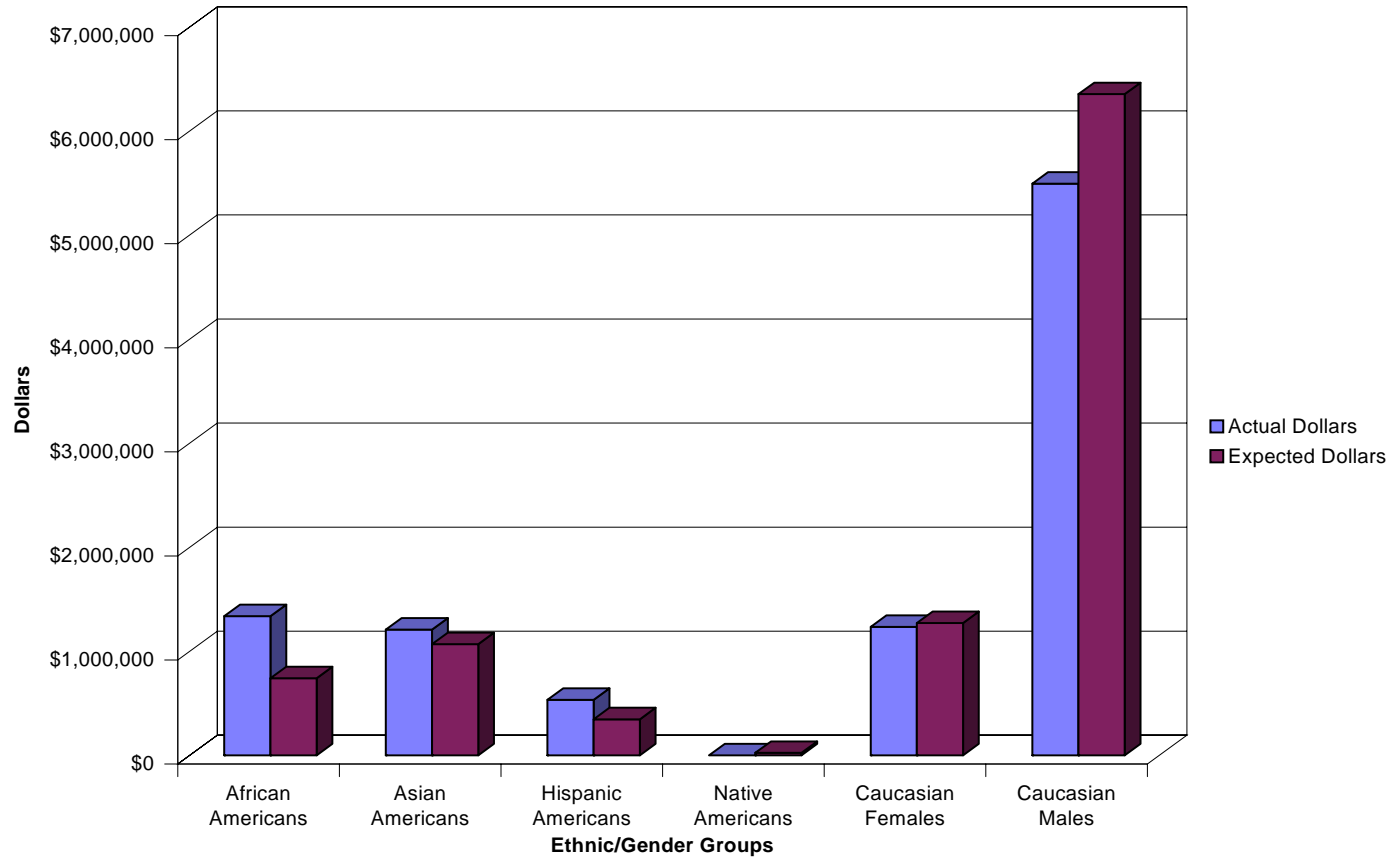


Table 9.02 Disparity Analysis: Professional Services Subcontracts, July 1, 2002 to June 30, 2006

Subcontractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$1,337,401	13.64%	7.56%	\$741,046	\$596,355	1.80	**
Asian Americans	\$1,208,548	12.32%	10.90%	\$1,069,089	\$139,459	1.13	**
Hispanic Americans	\$533,118	5.44%	3.54%	\$346,923	\$186,195	1.54	**
Native Americans	\$0	0.00%	0.24%	\$23,600	-\$23,600	0.00	----
Caucasian Females	\$1,234,858	12.59%	12.97%	\$1,272,051	-\$37,193	0.97	>.05†
Caucasian Males	\$5,494,319	56.02%	64.80%	\$6,355,534	-\$861,216	0.86	***
TOTAL	\$9,808,244	100.00%	100.00%	\$9,808,244			
Subcontractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$850,000	8.67%	2.48%	\$243,082	\$606,918	3.50	**
African American Males	\$487,401	4.97%	5.08%	\$497,964	-\$10,563	0.98	>.05†
Asian American Females	\$0	0.00%	3.22%	\$316,243	-\$316,243	0.00	>.05†
Asian American Males	\$1,208,548	12.32%	7.68%	\$752,846	\$455,701	1.61	**
Hispanic American Females	\$0	0.00%	0.79%	\$77,881	-\$77,881	0.00	----
Hispanic American Males	\$533,118	5.44%	2.74%	\$269,042	\$264,076	1.98	**
Native American Females	\$0	0.00%	0.10%	\$9,440	-\$9,440	0.00	----
Native American Males	\$0	0.00%	0.14%	\$14,160	-\$14,160	0.00	----
Caucasian Females	\$1,234,858	12.59%	12.97%	\$1,272,051	-\$37,193	0.97	>.05†
Caucasian Males	\$5,494,319	56.02%	64.80%	\$6,355,534	-\$861,216	0.86	***
TOTAL	\$9,808,244	100.00%	100.00%	\$9,808,244			
Subcontractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$850,000	8.67%	6.59%	\$646,646	\$203,354	1.31	**
Minority Males	\$2,229,067	22.73%	15.64%	\$1,534,013	\$695,054	1.45	**
Caucasian Females	\$1,234,858	12.59%	12.97%	\$1,272,051	-\$37,193	0.97	>.05†
Caucasian Males	\$5,494,319	56.02%	64.80%	\$6,355,534	-\$861,216	0.86	***
TOTAL	\$9,808,244	100.00%	100.00%	\$9,808,244			
Subcontractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$2,229,067	22.73%	15.64%	\$1,534,013	\$695,054	1.45	**
Female Business Enterprises	\$2,084,858	21.26%	19.56%	\$1,918,696	\$166,162	1.09	**
Minority Male and Female Business Enterprises	\$4,313,925	43.98%	35.20%	\$3,452,709	\$861,216	1.25	**
Caucasian Male Business Enterprises	\$5,494,319	56.02%	64.80%	\$6,355,534	-\$861,216	0.86	***

(*) denotes a statistically significant underutilization.
 (†) denotes no statistically significant underutilization.
 (**) denotes Minority and Female overutilization is not tested statistically.
 (***) denotes Caucasian Male utilization is not tested statistically.
 (----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 9.02 Disparity Analysis: Professional Services Subcontracts, July 1, 2002 to June 30, 2006



IV. DISPARITY ANALYSIS - RACE-NEUTRAL DBE PROGRAM PHASE

A. Construction Subcontractor Disparity Analysis: July 1, 2006 to December 31, 2008

The disparity analysis of construction subcontract dollars is depicted in Table 9.03 and Chart 9.03.

African American Businesses represent 8.01 percent of the available construction firms and received 0.48 percent of the construction subcontract dollars. This underutilization is statistically significant.

Asian American Businesses represent 10.98 percent of the available construction firms and received 0.3 percent of the construction subcontract dollars. This underutilization is statistically significant.

Hispanic American Businesses represent 8.01 percent of the available construction firms and received 0.79 percent of the construction subcontract dollars. This underutilization is statistically significant.

Native American Businesses represent 0.42 percent of the available construction firms and received none of the construction subcontract dollars. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 6.87 percent of the available construction firms and received 3.11 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Minority Male Business Enterprises represent 22.79 percent of the available construction firms and received 1.34 percent of the construction subcontract dollars. This underutilization is statistically significant.

Female Business Enterprises represent 11.5 percent of the available construction firms and received 3.34 percent of the construction subcontract dollars. This underutilization is not statistically significant.

Minority Male and Female Business Enterprises represent 34.29 percent of the available construction firms and received 4.68 percent of the construction subcontract dollars. This underutilization is statistically significant.



Caucasian Male Business Enterprises represent 65.71 percent of the available construction firms and received 95.32 percent of the construction subcontract dollars. This study does not test statistically the utilization of Caucasian Males.

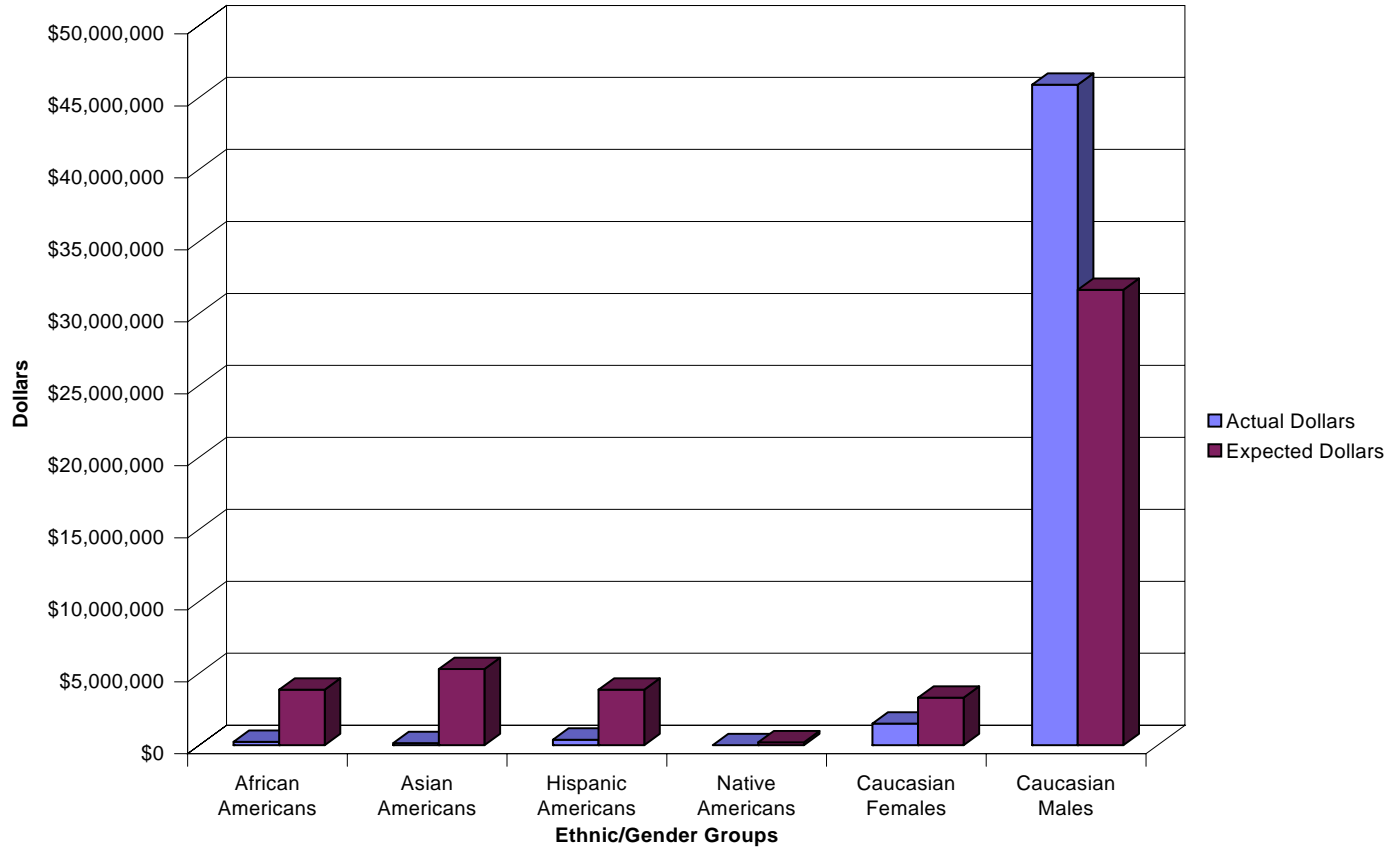


Table 9.03 Disparity Analysis: Construction Subcontracts, July 1, 2006 to December 31, 2008

Subcontractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$230,906	0.48%	8.01%	\$3,856,700	-\$3,625,794	0.06	< .05 *
Asian Americans	\$144,653	0.30%	10.98%	\$5,284,181	-\$5,139,528	0.03	< .05 *
Hispanic Americans	\$379,933	0.79%	8.01%	\$3,856,700	-\$3,476,767	0.10	< .05 *
Native Americans	\$0	0.00%	0.42%	\$200,348	-\$200,348	0.00	----
Caucasian Females	\$1,497,648	3.11%	6.87%	\$3,305,743	-\$1,808,095	0.45	>.05†
Caucasian Males	\$45,880,486	95.32%	65.71%	\$31,629,953	\$14,250,533	1.45	***
TOTAL	\$48,133,626	100.00%	100.00%	\$48,133,626			
Subcontractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	1.56%	\$751,305	-\$751,305	0.00	>.05†
African American Males	\$230,906	0.48%	6.45%	\$3,105,395	-\$2,874,489	0.07	< .05 *
Asian American Females	\$84,193	0.17%	1.77%	\$851,479	-\$767,287	0.10	>.05†
Asian American Males	\$60,460	0.13%	9.21%	\$4,432,701	-\$4,372,241	0.01	< .05 *
Hispanic American Females	\$27,000	0.06%	1.25%	\$601,044	-\$574,044	0.04	>.05†
Hispanic American Males	\$352,933	0.73%	6.76%	\$3,255,656	-\$2,902,723	0.11	< .05 *
Native American Females	\$0	0.00%	0.05%	\$25,044	-\$25,044	0.00	----
Native American Males	\$0	0.00%	0.36%	\$175,305	-\$175,305	0.00	----
Caucasian Females	\$1,497,648	3.11%	6.87%	\$3,305,743	-\$1,808,095	0.45	>.05†
Caucasian Males	\$45,880,486	95.32%	65.71%	\$31,629,953	\$14,250,533	1.45	***
TOTAL	\$48,133,626	100.00%	100.00%	\$48,133,626			
Subcontractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$111,193	0.23%	4.63%	\$2,228,872	-\$2,117,680	0.05	< .05 *
Minority Males	\$644,299	1.34%	22.79%	\$10,969,057	-\$10,324,758	0.06	< .05 *
Caucasian Females	\$1,497,648	3.11%	6.87%	\$3,305,743	-\$1,808,095	0.45	>.05†
Caucasian Males	\$45,880,486	95.32%	65.71%	\$31,629,953	\$14,250,533	1.45	***
TOTAL	\$48,133,626	100.00%	100.00%	\$48,133,626			
Subcontractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$644,299	1.34%	22.79%	\$10,969,057	-\$10,324,758	0.06	< .05 *
Female Business Enterprises	\$1,608,841	3.34%	11.50%	\$5,534,616	-\$3,925,775	0.29	>.05†
Minority Male and Female Business Enterprises	\$2,253,140	4.68%	34.29%	\$16,503,673	-\$14,250,533	0.14	< .05 *
Caucasian Male Business Enterprises	\$45,880,486	95.32%	65.71%	\$31,629,953	\$14,250,533	1.45	***

(*) denotes a statistically significant underutilization.
 (†) denotes no statistically significant underutilization.
 (**) denotes Minority and Female overutilization is not tested statistically.
 (***) denotes Caucasian Male utilization is not tested statistically.
 (----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 9.03 Disparity Analysis: Construction Subcontracts, July 1, 2006 to December 31, 2008



B. Professional Services Subcontractor Analysis: July 1, 2006 to December 31, 2008

The disparity analysis of professional services subcontract dollars is depicted in Table 9.04 and Chart 9.04.

African American Businesses represent 7.56 percent of the available professional services firms and received 2.3 percent of the professional services subcontract dollars. This underutilization is not statistically significant.

Asian American Businesses represent 10.9 percent of the available professional services firms and received 13.95 percent of the professional services subcontract dollars. This study does not test statistically the overutilization of minority business groups.

Hispanic American Businesses represent 3.54 percent of the available professional services firms and received 7.37 percent of the professional services subcontract dollars. This study does not test statistically the overutilization of minority business groups.

Native American Businesses represent 0.24 percent of the available professional services firms and received none of the professional services subcontract dollars. This group was underutilized, but there were too few available firms to determine statistical significance.

Caucasian Female Business Enterprises represent 12.97 percent of the available professional services firms and received 7.54 percent of the professional services subcontract dollars. This underutilization is not statistically significant.

Minority Male Business Enterprises represent 15.64 percent of the available professional services firms and received 22 percent of the professional services subcontract dollars. This study does not test statistically the overutilization of minority business groups.

Female Business Enterprises represent 19.56 percent of the available professional services firms and received 9.15 percent of the professional services subcontract dollars. This underutilization is not statistically significant.

Minority Male and Female Business Enterprises represent 35.2 percent of the available professional services firms and received 31.15 percent of the professional services subcontract dollars. This underutilization is not statistically significant.

Caucasian Male Business Enterprises represent 64.8 percent of the available professional services firms and received 68.85 percent of the professional services subcontract dollars. This study does not test statistically the utilization of Caucasian Males.



Table 9.04 Disparity Analysis: Professional Services Subcontracts, July 1, 2006 to December 31, 2008

Subcontractor Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$1,113,396	2.30%	7.56%	\$3,662,837	-\$2,549,441	0.30	>.05†
Asian Americans	\$6,762,544	13.95%	10.90%	\$5,284,284	\$1,478,261	1.28	**
Hispanic Americans	\$3,570,968	7.37%	3.54%	\$1,714,768	\$1,856,200	2.08	**
Native Americans	\$0	0.00%	0.24%	\$116,651	-\$116,651	0.00	----
Caucasian Females	\$3,654,990	7.54%	12.97%	\$6,287,481	-\$2,632,491	0.58	>.05†
Caucasian Males	\$33,378,196	68.85%	64.80%	\$31,414,074	\$1,964,122	1.06	***
TOTAL	\$48,480,094	100.00%	100.00%	\$48,480,094			
Subcontractor Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$260,000	0.54%	2.48%	\$1,201,504	-\$941,504	0.22	>.05†
African American Males	\$853,396	1.76%	5.08%	\$2,461,333	-\$1,607,937	0.35	>.05†
Asian American Females	\$520,178	1.07%	3.22%	\$1,563,121	-\$1,042,944	0.33	>.05†
Asian American Males	\$6,242,367	12.88%	7.68%	\$3,721,162	\$2,521,205	1.68	**
Hispanic American Females	\$0	0.00%	0.79%	\$384,948	-\$384,948	0.00	----
Hispanic American Males	\$3,570,968	7.37%	2.74%	\$1,329,820	\$2,241,148	2.69	**
Native American Females	\$0	0.00%	0.10%	\$46,660	-\$46,660	0.00	----
Native American Males	\$0	0.00%	0.14%	\$69,991	-\$69,991	0.00	----
Caucasian Females	\$3,654,990	7.54%	12.97%	\$6,287,481	-\$2,632,491	0.58	>.05†
Caucasian Males	\$33,378,196	68.85%	64.80%	\$31,414,074	\$1,964,122	1.06	***
TOTAL	\$48,480,094	100.00%	100.00%	\$48,480,094			
Subcontractor Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$780,178	1.61%	6.59%	\$3,196,233	-\$2,416,056	0.24	>.05†
Minority Males	\$10,666,730	22.00%	15.64%	\$7,582,305	\$3,084,425	1.41	**
Caucasian Females	\$3,654,990	7.54%	12.97%	\$6,287,481	-\$2,632,491	0.58	>.05†
Caucasian Males	\$33,378,196	68.85%	64.80%	\$31,414,074	\$1,964,122	1.06	***
TOTAL	\$48,480,094	100.00%	100.00%	\$48,480,094			
Subcontractor Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Male Business Enterprises	\$10,666,730	22.00%	15.64%	\$7,582,305	\$3,084,425	1.41	**
Female Business Enterprises	\$4,435,167	9.15%	19.56%	\$9,483,714	-\$5,048,547	0.47	>.05†
Minority Male and Female Business Enterprises	\$15,101,898	31.15%	35.20%	\$17,066,019	-\$1,964,122	0.88	>.05†
Caucasian Male Business Enterprises	\$33,378,196	68.85%	64.80%	\$31,414,074	\$1,964,122	1.06	***

(*) denotes a statistically significant underutilization.

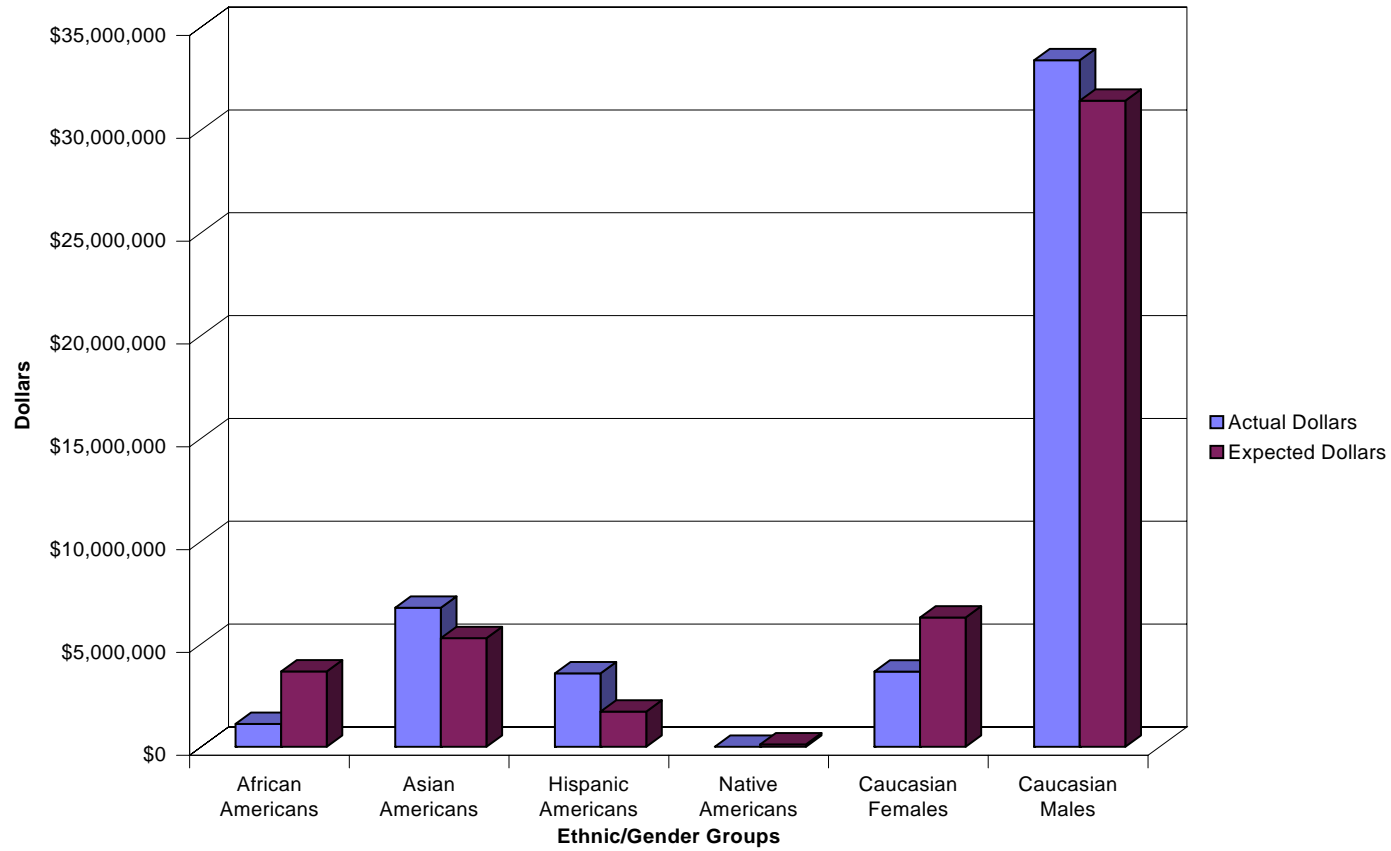
(†) denotes no statistically significant underutilization.

(**) denotes Minority and Female overutilization is not tested statistically.

(***) denotes Caucasian Male utilization is not tested statistically.

(----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 9.04 Disparity Analysis: Professional Services Subcontracts, July 1, 2006 to December 31, 2008



V. SUBCONTRACTOR DISPARITY SUMMARY

A. Race-Conscious DBE Program Phase Disparity Findings

The subcontractor disparity findings the Race-Conscious DBE Program Phase are summarized in Table 9.05 below. During this phase BART contracts were awarded with DBE goals.

As indicated in Table 9.05, construction subcontracts had a statistically significant disparity for Asian Americans and Minority Male Business Enterprises but not for other minority or female business groups. African American and Hispanic Americans were underutilized but not at a statistically significant level. Statistically significant disparity was not found in professional services subcontracts for any minority or female business group.

Table 9.05 Subcontractor Disparity Summary, July 1, 2002 to June 30, 2006

Ethnicity / Gender	Construction	Professional Services
African American Businesses	No	No
Asian American Businesses	Yes	No
Hispanic American Businesses	No	No
Native American Businesses	---	---
Caucasian Female Business Enterprises	No	No
Minority Male Business Enterprises	Yes	No
Female Business Enterprises	No	No
Minority Male and Female Business Enterprises	No	No

Yes = Statistically significant disparity was found.

No = Statistically significant disparity was not found.

--- = There were insufficient records to determine statistical disparity.



B. Race-Neutral DBE Program Phase Disparity Findings

The subcontractor disparity findings for the Race-Neutral DBE Program Phase are summarized in Table 9.06 below. During this phase, BART did not advertise any contracts with goals.

As indicated in Table 9.06, construction subcontracts had a statistically significant disparity for African Americans, Asian Americans, and Hispanic Americans. Caucasian Female and Female Business Enterprises were underutilized but not at a statistically significant level. No statistically significant disparity was found in professional services subcontracts for any minority or female business group. However, there was significant underutilization for African Americans, Caucasian Females, and Female Business Enterprises including Caucasian Females, African American Females, Hispanic American Females, Asian American Females, and Native American Females, but not at a statistically significant level.

Table 9.06 Subcontractor Disparity Summary, July 1, 2006 to December 31, 2008

Ethnicity / Gender	Construction	Professional Services
African American Businesses	Yes	No
Asian American Businesses	Yes	No
Hispanic American Businesses	Yes	No
Native American Businesses	---	---
Caucasian Female Business Enterprises	No	No
Minority Male Business Enterprises	Yes	No
Female Business Enterprises	No	No
Minority Male and Female Business Enterprises	Yes	No

Yes = Statistically significant disparity was found.

No = Statistically significant disparity was not found.

--- = There were insufficient records to determine statistical disparity.



10

ANECDOTAL ANALYSIS

I. INTRODUCTION

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

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

A. Anecdotal Evidence of Active or Passive Participation

Croson authorizes anecdotal inquiries along two lines. The first approach investigates active government discrimination or formal acts of exclusion that are undertaken by representatives of the governmental entity. The purpose of this examination is to determine whether the government has committed acts that bar minority and women business owners from contracting opportunities.

¹ *Croson*, 488 U.S. at 509



The second line of inquiry examines the government’s “passive” support of exclusionary practices that occur in the market area into which its funds are infused. “Passive” exclusion results from government officials knowingly using public monies to contract with companies that discriminate against M/WBEs or fail to take positive steps to prevent discrimination by contractors who receive public funds.²

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

This chapter presents anecdotal accounts from interviews with businesses domiciled in the San Francisco Bay Area Rapid Transit District’s (BART’s) market area, which consists of Alameda, Contra Costa, San Francisco, and San Mateo counties located in the State of California. The anecdotes provide accounts of both active and passive discrimination.

B. Anecdotal Methodology

The method of gathering anecdotal testimony was through oral history interviews. Oral history is defined by the *American Heritage Dictionary* as “historical information obtained in tape-recorded interviews with individuals having firsthand knowledge.” In-depth interviews have been determined by Mason Tillman Associates to be superior to the other forms of gathering anecdotal evidence—mail, telephone survey, or public hearing testimony. It affords the researcher a greater opportunity to garner in-depth accounts of testimony to assess the effects of exclusionary practices on M/WBEs and disadvantaged business enterprises (DBEs) and the means by which these practices occur. The in-depth interviews are also structured in a manner that affords M/WBEs and DBEs a process in which their anonymity can be preserved.

² *Croson*, 488 U.S. at 491-93, 509.

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

⁴ 488 U.S. at 509.



By allowing interviewees to describe in their own words the barriers they have experienced in conducting business, information can be completed to explain how barriers occur, who creates them, and their effect on the development of M/WBEs and DBEs. Thus, the information obtained sheds light on BART and offers vital insights on future program needs and changes.

Interviewees were identified from contract and certification records and business surveys. Potential interviewees were pre-screened to determine if they operated within the market area and were willing to commit to the interview process.

Generally, the interviews lasted one hour. A set of probes were designed to cover all aspects of business development from start-up to growth issues and both public and private sector experiences. Completed interviews were transcribed and analyzed for barriers M/WBE and DBE businesses encountered. From the analysis, the anecdotal report was completed. The anecdotal report describes general market conditions, prime contractor barriers, and the range of experiences encountered by interviewees attempting to do business with BART.

C. Anecdotal Interviewee Profile

Table 10.01 presents a profile of the business owners interviewed for this Study.

Table 10.01 Anecdotal Interviewee Profile

Ethnicity	Number
African American	9
Hispanic American	4
Native American	0
Asian American	14
Caucasian American	15
Total	42

Gender	Number
Male	31
Female	11
Total	42



Table 10.01 Anecdotal Interviewee Profile

Industry	Number
Construction	13
Professional Services	17
Goods and Other Services	12
Total	42

II. BARRIERS CREATED BY THE BUSINESS COMMUNITY

A. Difficulty Breaking Into the Contracting Community

It is essential for small and minority business owners to create networking relationships with established majority-owned companies to develop possible subcontracting opportunities. However, minority business owners complained that they are excluded from business networks with these business owners regardless of their attempts to break into the contracting community.

A minority male owner of a professional services firm believes that networking opportunities for African Americans are difficult to obtain:

I think [networking] is a problem not only in my industry, but in all industries when it comes to people of color, and particularly when it comes to Black people. Unless you have a real specific and special relationship. You need a great relationship with someone on the inside who knows the [upcoming] opportunities [otherwise] it's going to be very difficult. People tend to do business with people who they know and who they feel comfortable with. And that is why Blacks have been shut out of many opportunities over the years. The only way I have found to really make some headway in getting projects, whether it is public or private, is to really go the extra mile and create relationships within these organizations or entities.



A minority male owner of a professional services firm reported that oftentimes the teams for large design projects are formed two to three years before the proposal is released:

We have problems with the big design projects. The project teams are already put together two or three years before the proposal comes out. So that's been our problem. It is hard to break into teams without prior design knowledge of the projects.

So, when the proposal comes out, it's just too late because the teams have already been formed. The most competitive teams already know about the project before the proposal hits the street.

A minority male owner of a professional services company also reported that oftentimes a contract has been awarded before he learns of the contracting opportunity:

I tried to get in touch with BART, but the problem was that when we get the [bid] information the project had already been awarded. BART really [should be more] sincere in giving out more projects to small businesses. For example with BART, we attend their seminars and events but nothing happens and so we came to a point where we did not want to attend any more of those events. And, I have noticed that not all projects are being published.

Another minority male owner of a professional services firm explained that he has difficulty getting on teams to obtain work from BART:

We try to get on teams if possible. But a lot of times, the larger firms already have the DBE firms or the other firms they want to team with. And, when we try to get on their team, they tell us we have our team in place. Usually the so called preferred firms already have their team in place.

This minority male owner of a professional services firm reported that BART's design contracts are given to a select number of contractors that are part of a team of on-call architects:

BART dictates which team gets the work. For instance we are on the [prime contractor name withheld] on-call team and there are four architects. So, each of us has a piece of it and sometimes it may be that one of them gets a piece of it or not. It's up to BART on who they want to [work with]. They are comfortable with us but BART [works with] very large engineering firms. BART has the mentality [where they like] working with big firms. We were instrumental in the past of having some of the very large projects



broken into the smaller ones but they still went to large companies [that had] smaller companies on their teams.

This minority male owner of a construction-related company reported on a statement he heard regarding minority contractors:

I was told that [Government name withheld] would prefer to pay a fine than to work with a minority company.

This minority male owner of a construction-related company reported that he attends the mandatory pre-bid conferences to seek subcontracting opportunities from prime contractors. However, he stated that oftentimes the projects are awarded to prime contractors that did not attend the mandatory pre-bid conference:

They have pre-bid meetings and I try to make all of them. They say that you must attend the meetings or you can't bid. Well, that is just a lot of "BS," because I have gone there and some prime contractors are awarded bids who were not at the pre-bid meetings, which he's supposed to.

They [claim that] on government jobs if you're certified, they have to use you. But that is not really what happens. They seem to seek whoever they want to. I have gone to some of these meetings, and it's the norm that most of the electrical or cement contractors [complain about] the same situations where they never get the jobs. Sometimes, they just fall out because it's very discouraging. There is no parity.

A Caucasian male owner of a goods and other services company believes that BART prefers to utilize the same contractors:

They [have] certain people that they like dealing with [because they do not want to] upset the apple cart. [So] life is easy for them. All I can say is from . . . the responses from the department heads, it's like a closed door. I do not know who in BART's department buys certain [services] and that bothers me. They need to have more outreach to get more people that provide [services] that BART might use or want. It would be more beneficial if they did better outreach.



A Caucasian male owner of a construction-related company believes that a personal relationship with an agency manager is needed to secure work with BART:

Trying to get . . . into the system [is difficult]. If you don't have a contact, you really can't get in. Networking with BART and other government entities is the game. I think it's really helpful to have a specific person to deal with. You need a buyer's name so you can go to them.

A minority male owner of a goods and other services firm believes that many prime contractors are reluctant to build new subcontracting relationships:

What I have seen is [prime contractors] have [subcontracting] relationships. And we make ourselves available to them at their networking events. They do not call us because they already have relationships built with other [subcontractors].

A minority male owner of a construction company also believes that some prime contractors prefer to work with the same subcontractors:

Because of friendships with other companies, certain [prime contractors] do not want to deal with new people. They want to work with the same [contractors] that they had on [previous jobs].

A minority male owner of a construction-related company explained that even though he is certified as a DBE with BART he is not aware of any networking events sponsored by BART where subcontractors can meet prime contractors:

I am not aware of any network within the BART structure for subcontractors to meet with general [contractors]. And if there is such an organization, how do we get that information? We are certified with BART. But [if there is such a service] it's a pretty well kept secret.

A minority male owner of a construction-related company explained why he stopped attending networking events:

I used to attend those meetings but I didn't really benefit from going so I stopped. I figured it was just a waste of a regional meeting. I felt like I didn't get anything out of it because once a job came up for bid, I was not included and [I did not receive] any participation on the project once it was awarded.



A representative of a Caucasian female-owned professional services firm reported that he has been unable to obtain work from BART as either a prime contractor or a subcontractor:

We have not had any success in doing solicitations with BART.
We have tried as a [subcontractor] as well as [a prime contractor].

A Caucasian female owner of a professional services firm explained what she believes to be her biggest challenge breaking into the contracting network:

The challenge of marketing to the government is knowing who the buyers are. It would be a wonderful thing if there were a directory of purchasing officers in the Bay Area. But somehow, we are supposed to know who these people are and where to find them. And, there are very few opportunities to network with government purchasing officers. Right now, there don't seem to be many opportunities like that.

A minority female owner of a professional services firm reported that the cost to network outweighs the benefits she receives from networking events:

I have requested that they confirm if I'm on the vendor list and [the answer] usually is 'no.' response. The price [to network] is not worth it because I'm primarily going there for networking but other events happening which really do not help me. I would rather just pay for the networking and not have to pay for the whole conference. That would be a lot more beneficial. It's getting better but, we would love [to attend] more networking opportunities to meet with the right people like procurement managers.

This minority male owner of a professional services firm reported that his company has sought work from BART and other local agencies for a long time without success:

I have been knocking on the doors of Muni for a long time, but we have not got any orders or inquiries. BART is the same. I have attended seminars and small business workshops. You name it, I think I have attended all of them at least 95 percent of them. For example, for the last one and a half years I have attended over 150 pre-bid conferences. Because I know the importance of pre-bid conferences.



A minority male owner of a construction company believes BART could do more to introduce their prime contractors to smaller firms:

I was at the [symposium] but they didn't [introduce] the prime contractors. They did not name names, they just encouraged everybody to show up at the job fair. I wished the prime contractors names were [made available] so we could send our information to them or set up appointments [to meet with them].

A minority male owner of a professional services company reported that he has attended numerous open houses sponsored by BART and still has not been able to secure work:

My experience with BART is first of all they do not have a very clear process as to where to go and get information regarding jobs from them. And when they have these open houses, there is no follow through, so we don't know how to become a vendor. We signed up back in 2000 [to become a DBE], and we have never heard from them. About two months ago, we went back to one of those open houses that they have, and they promised somebody would get back to us but no one has gotten back to us. Maybe there is no clear cut direction for the employees to deal with people who want to do business. There is a [another] company that has been trying to [obtain work] from BART, they are located in Oakland where BART is, and they too also have had a heck of a time trying to [secure work].

This same business owner reported that some bid requirements are a deterrent to his company submitting a bid response:

The small [companies] are supposed to get some of the pie, but unfortunately we are not. There are some agencies that have bid requirements where a significant amount of experience [is needed]. We cannot qualify for those so we don't look at them.

B. Good Old Boys Network

Historically, the good old boys networks have impeded minority businesses from fairly competing on public and private sector projects. Many government agencies revised their procurement practices and implemented certain procedures to breakdown the well-established good old boys networks. However, many of the interviewees reported that the networks still exist.

A minority male owner of a construction-related company reported the good old boys network is a barrier for minority businesses seeking public sector work:



[Things] really have not changed, because there is still the good old boys. It's still going on and it's hard to break into the good old boy [network]. There are some businesses that have been around a long time and they have done work for BART. And BART feels very comfortable with that.

This minority male owner of a construction company believes that it is typical for government agencies to prefer working with the same contractors:

I don't know how [to get access to opportunities], because a lot of the time it has to do with friendships with other companies. A lot of [agencies] don't want to deal with new people, they want to [work] with the same people that they had before.

A Caucasian female owner of a professional services firm described what she believes to be the good old boys network:

There still is the old-boys' network, and I'll just give one example. Over the last five years, I have been marketing to a large multinational engineering company headquartered in San Francisco. And finally after numerous attempts, we finally ended up being on a half-dozen proposals [with that firm] during the last two years. But, we still have not yet started our tasks on these projects.

A minority male owner of a professional services firm explained what he believes the impact Proposition 209 had on minority companies:

After 209 there were no more minority programs. The big firms started picking up all the work they used to have anyway. They elbowed us out of the medium-sized and smaller projects that we used to have. So what has happened is the big firms have gotten bigger. They have gotten to where they used to be before we had a minority program in San Francisco.

C. Barriers Created by Agency Managers

Government agencies' managers are charged with the responsibility of ensuring that the policies and objectives concerning fair and equivocal procurements are implemented and not hindered. However, there were several reports where BART managers and inspectors were involved in practices that created barriers for DBEs:

A minority male owner of a professional services firm described BART's interview process as a barrier for small and new companies seeking work:



All of my dealings with BART's personnel have been cordial, and it appears that they are trying to be noble where possible. But, the areas where they could improve is during the interview process. Sometimes they have what is called a case study. The case study is where one of our engineers is given a question or problem to solve. The [engineer] is given a plan and specification and sent out of the room to solve the problem and then come back and present the solution or response after probably fifteen minutes.

The rest of the [proposal team] and the interview panel continues with the interview. However, if I'm currently working directly with the resident engineers at BART who [most likely] prepared the case studies, the question could come up as to what case study they are going to [present during the interview] while having a beer or dinner. Now they will know the question in advance unlike a firm like mine that is not currently on the inside of BART. So they will give all the correct responses that BART is looking for in that case study, because they had the opportunity of knowing the question well in advance. During a debriefing, we were told that another firm had done much better than we did on the case study. And the firm happened to be one of the firms that was working for BART. So we thought it was the old boys network type of situation. It's real subtle.

A Caucasian female owner of a professional services firm believes that some selection committees are biased during the interview process:

The difficulty I have with the selection process is the make-up questions. The questions they [ask during] our interviews aren't necessarily the same questions that are being [asked] for someone else's interview. I feel very suspicious because I don't know what their criteria are. Somehow, it changed after the proposal and there is someone else they are looking for. How do I know that we are being rated fairly?

A minority male owner of a professional services firm reported that the make-up of selection panels can determine who wins contracts from BART:

Unless you have a panel that is representative of the population in that particular city, we are not going to get any business. A seasoned smart agency that has a minority staff can teach or counsel a selection panel to make them sensitive and help them with the scoring. If you have a panel that is full of White men, we can forget it. You need to have some Asians, Blacks, and



Hispanics on the panel. The panel is really crucial to your success of winning a contract.

A Caucasian male owner of a construction-related company was surprised that a purchasing manager was unable to answer his general procurement inquiries:

I was told that they did not know what department handles recyclables. And the department head for purchasing was right there. That is kind of stupid. It [seemed] very evasive to me.

A Caucasian male owner of a construction-related company reported that two BART representatives gave proprietary information about his company to one of his competitors:

BART sent out an engineer and their QC guy. They came into the shop and looked at our parts, and the QC people were talking to each other as to how our procedure went and how well we were doing. Unfortunately, the part engineer and the QC person from BART gave all my proprietary information to my competitor, who then came back and cut me off. They gave all that information to another shop that produces the same parts. Now I can't get the part because they have my information. We had spent a lot of time in research and development which was for naught. So, as a result, we lost our competitive edge, because BART gave them all our information.

This same business owner also provided an example where he believes his bid was used by BART managers to get a lower bid from another contractor:

There have been situations where I [submitted] eight or ten quotes where I have missed by pennies. The quotes were [sent] to BART's fax machine. And I literally missed out by less than a dollar on quantities that were 100 to 500 pieces. Not to be suspicious, but I think collusion [was happening]. I think someone saw my quote at \$3.95 and said okay, we will go in at \$3.85. I do not [want to] push it further because I am [still] seeking work.

A minority male owner of a construction-related company reported that BART's project managers and engineers acted in a manner that prevented his company from performing up to their full potential:

When we first met the project managers they talked to us like we did not know what we were doing. And the engineers ran in circles and when we tried to get answers they basically tried to delay the job or hit [us] with liquidated damages down the road.



One of my employees told me that one of their superintendents told him, “Hey, it’s about time that we got someone who spoke English.” I think that they automatically assume minority or woman-owned firms aren’t qualified to do the work.

A Caucasian female owner of a professional services firm believes that the pre-qualification process is not clearly understood by agency staff:

I think that there is a misunderstanding among agency staff regarding pre-qualification as to when to use it and when not to use it. In other words, we have submitted pre-qualification proposals. They are not really proposals because you don’t have a bid attachment.

Prior to May 2006, BART’s federally-funded contracts had DBE subcontracting goals that bidders had to meet or fulfill good faith effort requirements. However, contractors report that even though procedures are in place to monitor DBE participation, prime contractors still try to avoid the DBE requirements.

A minority male owner of a construction-related company described a situation where a prime contractor avoided the DBE requirements after the award of the prime contract. He also reported that he learned his colleagues have been dealing with similar obstacles for at least 30 years.

The prime contractor that I put my bid in with was awarded the contract. I figured, well at least they got the job. When I called he said, oh by the way you were not the low [bidder], there was somebody that beat your bid. I have talked to a lot of old timers, especially minority subcontractors, and they say this has been going on for years and it hasn’t changed. We are still [dealing with] the same obstacles that we did 30 years ago.

I speak my peace, and they will come to me and tell me about their stories about how things have changed. I realize that the big money guys now know to work the system. They can work the system and make it feel that everybody had a fair share, but they really didn’t.

D. Higher Standards of Review

All contractors are required to be subjected to the same standards and expectations while working as prime contractors or subcontractors on public projects. However, several minority business owners believed that their work was held to a higher standard than their Caucasian male counterparts.



A minority male owner of a professional services company believes that minority contractors are subjected to higher standards than their counterparts. He justified his position through the following illustration:

I used to work at a utility [company] more than twenty-seven years ago and was told the joke, “Did you hear about this minority vendor who provided pencils?” And they said, “No what happened?” “They put the erasers on the wrong end.” But this really told me the expectation. You can’t screw up. Because what happens in organizations like BART more often than not, you will find a minority contract manager who wants very much to help you, but at the same time, they are afraid [because] they won’t be able to carry the [weight] for you.

Unless you come through as a superstar, they are reluctant to take a chance, because they know that the spotlight will be shining on them. Since we want to be successful, we overlook a lot of things. It is tragic but that is what goes on out there.

A minority male owner of a professional services firm reported an incident where his company received a complaint from a BART inspector that was not warranted:

I remember we had a complaint that we were not working fast enough on one of our BART projects. This was a [project name] and they complained to BART’s Office of Civil Rights. They [Office of Civil Rights] did their research and found that there was no basis for the complaint from one of BART’s engineers. They [engineers] did not think that Blacks could really do [this highly technical work]. It was great that they had the Office of Civil Rights.

III. DIFFICULTIES IN THE CONTRACTING PROCESS

A. Navigating Through the Bid Process

The inability to obtain information on upcoming contracting opportunities from public agencies can severely limit small and minority businesses’ opportunities to bid. Many interviewees reported that they were unable to obtain bid notices from BART even though they are certified DBEs. Other business owners spoke about the hours and expense their firms expended preparing bid and proposal responses. Other interviewees complained of the structure and design of BART’s RFQs.



A Caucasian male owner of a construction company reported that BART's RFQ specifications are not clearly written:

One thing that went totally awry and really upset us greatly were the very stringent requirements [in the RFQ]. They just said, "Well, this is what we need and these are the numbers that we need to get to. You come up with numbers, and whatever procedure that is appropriate for the job."

[Clearly written specifications] depends on who is on [vacation] or which engineer is working on a particular piece of the project. As a matter of fact, I just quoted one and there was an issue on some of the parts as to why the parts were there. When my engineers started to look at the job itself and say, why is this here? It did not make sense. I called the engineers and all the engineers were on vacation. So, I called the buyer and the buyer informed me that I should have asked that before they went on vacation. If I had known they [were going to be on vacation], I would have. As a result, I had to pad my quote because I was not sure about that particular issue. They do not always clearly stipulate exactly what it is that they have. A lot of times, it is because BART doesn't really know what they have.

A Caucasian female owner of a professional services firm also complained that BART's RFPs and RFQs are not adequately designed:

I think there is a lot of confusion about professional services and [buying] widgets as well as bids versus proposals. There is a difference in selection on qualifications, as opposed to the price of your widgets. This is a constant difficulty because we frequently find that the staff who produce the RFQs or RFPs have little experience. And, we frequently see RFPs that are not designed for the particular project that is being offered. Therefore, we spend a lot of time reviewing the RFPs and putting together our list of questions.

So, when we get the RFP, we read it immediately. And one of two things happens. If there's a proposal conference, we take our questions to the proposal conference. If there is no proposal conference, then you hunt through the RFP to see if you can find any mail address to contact somebody, so you can put the question in writing. Generally, we identify issues that relate to the pricing of our services, the schedule, and the scope of what is being requested. It is totally unfair and unreasonable to leave us hanging



until hours before the proposal is due to get the answers that we need. I would suggest that time clocks start when all the questions are answered. Then give us our two weeks.

A minority male owner of a professional services company explained why he believes the description of the scope of work in the RFP is a deterrent to certain businesses:

I think a lot of people tend to shy away from some projects because of the way the scope of work is written. It can be written in such a technical way that one might feel that they are unable to do it. But, actually all one needs is just simple guidance. And if they want to bring in other companies to broaden their base, they need to say we know that you have capabilities and we'd like to give you work and provide specific training.

This same business owner reported that his company has never received upcoming bid information from BART:

The problem is that I was never notified [of bidding opportunities]. I mean I was never sent anything in the mail or via email, and I never got a phone call.

A representative of a Caucasian female-owned goods and other services firm reported that obtaining bid information on redevelopment projects has been a challenge:

Our problem is [obtaining bid information for] redevelopment programs. We have called [BART] and asked to be put on their email [list] to get the information.

A minority male owner of a professional services firm reported that despite his efforts to get on BART's bidder's list since 2002, he has not succeeded:

I requested from BART to receive an RFP whenever they went out to bid. I never received an RFP directly. Sometimes another firm will inform me and ask me to submit a response to them. I have contacted various people at BART since 2002 off and on to get on their bid list [via] written correspondence and telephone calls to various people.

A minority male owner of a construction company expressed his frustration in trying to obtain information concerning BART's upcoming bidding opportunities:

I think one of the frustrating things is that we are not privy to all the work that is going on within BART. That is one of the reasons



we chose to get involved with this [study]. We know there are opportunities out there, it's just we don't have the knowledge on how to find out what is going on and what we are capable or qualified to bid on. I guess the jobs go to the bigger firms, and they kind of parcel out or arrange subcontracts. So, it is hard for us to get involved with some of the BART work. When I went to the symposium, it seemed like there were a lot of individual companies like myself wanting to know how they could do business with BART. And it seemed like every answer was, "Go to the symposiums, go in to prime contractors." I wish it could be a little more easier to get to these folks.

A Caucasian male-owned professional services firm reported that he has been unable to obtain access to the correct person to answer his general procurement questions:

They do not give you easy access to someone if you have a general question. If you do have a general question [no one] gets back to you. I would say this is a fairly frequent situation.

A Caucasian male owner of a construction-related company reported that even though he attended a meeting regarding an upcoming BART project, he still did not receive complete bid information concerning the project:

I attended the meeting that they had in Oakland earlier this year and was given a phone number to call to find out about [bid] information. But, when I called and [left a] message they did not call me back.

During the meeting they were kind of wishy-washy as to what number to contact. They really skated over a lot of the issues that were brought up on the floor. [The made replies such as], "Oh, I don't know how we handle that." I mean, you have been in business for how long? But it's kind of puzzling when you do not have an answer to something that you deal with every day. I thought BART would be more on the ball. They have been in business for long enough. It should be more professionally run. It was disappointing. Also, I did not receive the mailing from the seminar that they said they were going to put out.

This minority male owner of a construction-related company described the great costs required to his small business in preparing to submit a bid:

You have to go and buy a set of the prints and what we call the [type of plan]. It's a big plan so you have to take it to another



place so they will make it smaller so we can send it to our suppliers so they can go through it. I would say probably the cost of paperwork is over a hundred bucks or more.

This minority male owner of a professional services company questioned why BART charges \$40 to obtain a proposal if the company is unable to get it off their website:

If we cannot get it on the computer, then it costs \$40 [to get the proposal]. I'm not sure of the purpose of charging the \$40, [maybe] cutting more trees to make copies?

A minority male owner of a professional services firm reported that his employees had expended approximately 100 hours preparing for a BART proposal:

I guess on average it takes about 100 hours to prepare one of their proposals. For other projects sometimes it was a problem because they were not as well organized as BART and it would take sometimes 130 to 150 hours to do a typical architectural proposal.

B. Inadequate Lead Time

Sufficient time to respond to a bid or proposal request is critical for a small business that has a limited staff and resources. There were several reports from the business owners who complained that BART, as well as certain prime contractors provided them with inadequate lead time to adequately respond to a request for bid or proposal.

A Caucasian female owner of a professional services company reported that oftentimes she does not receive answers to her questions regarding a BART RFP before the proposal due date:

I would say more often than not, we do not get the correct answers to our questions before the proposal is due. And I am thinking of some very complicated proposals that we looked at within the last year. The answers that we got back were basically, "If we see something we like in your proposal, then we will know what we want." And that answer was consistently given to a dozen different questions that we posed. They're saying, give us a fee proposal based on what you think we need and we'll decide if it's what we want. Now the problem for consultants is we are not being treated fairly in that situation. The reviewers are not comparing apples to apples, they are comparing apples to bananas. How are you going to make a fee-based decision involving fees based on multiple scopes? It's not a fair process. So, this problem continues to persist and annoy me. Small firms do not have the



dedicated marketing staff. So once a week I scan the various sources that I have to look for opportunities. Oftentimes, agencies have great intentions and they write their RFP, but it doesn't get posted to the site with sufficient lead time before the pre-proposal meeting.

We had to pass on proposals that we would have done an excellent job on because of inadequate lead time. So that is one way that we have been impacted. It's just the turnaround time was insufficient. If you have a dedicated marketing staff, then they can pull something off in a week. But, when it's a small firm and the work needs to be done outside of the humble hours of meetings and other business pressures, that gets done during the night and evenings. Talking with other firms, this is a common problem with other small firms.

This same business owner reported that she also receives inadequate lead time from prime contractors:

I would say about once a month, I get contacted by a prime [contractor] who gives me insufficient [lead time], typically after they have attended the pre-proposal conference and wants us to join their team. So again, we are not provided with sufficient information in a timely manner in order to help us decide if it's worth submitting on the proposal.

A Caucasian male owner of a construction company believes that inadequate lead time is intentionally given when the agency already has decided who they want to work with before the proposal is let:

They give a short period of time [to respond] when they already know who they want on the job. So they put it out there in the public for a week, but we see it and "ABC" gets the job because they were the only ones that really were in on it.

A minority female owner of a professional services firm also believes that oftentimes inadequate lead time is intentionally given:

Most of the time when [we get short notice] because they have already written the RFP for someone they had in mind. So we do not waste our time.



A minority male owner of a construction-related company reported that some prime contractors only allow one day to submit a quote:

I have contractors call me asking if we want to bid a job. And I'll ask, "When [do I have to] submit the bid? Oh, it's due tomorrow." I can't put a bid [together] and be fair to myself and the contractor in one day. I have to put in all this energy to get the bid [including] paying for the plans, calling people, and waiting around until they call me back for the cost of equipment or plans and things like this. So it's not a fair deal for the subcontractor sometimes.

This same business owner reported that he discussed this issue at a business community meeting, but his complaint was not taken seriously:

I went to a meeting and I brought this [issue] up. And there was a lady there who I think was either a councilwoman or she worked for the City of Oakland. She said, well, [name withheld] if you would of had your bid made up, you could just give them the bid. If she knew what we have to go through to get a bid and figure out our labor cost and everything she would not say that.

A minority male owner of a professional services firm made a formal complaint regarding a RFP that did not provide adequate time to meet the good faith effort requirements:

A bid was advertised by the [department name withheld] where the pre-proposal conference was on the 10th and the bid was due to close on the 17th. And they said that we have to show a good faith effort. I told them, there is a minimum period of ten days to show good faith effort. Which means, ten days prior to the closing of the bid, all prospective bidders must have shown good faith effort by advertising for subcontractors. I sent a letter to them formally asking for an extension of the bid due date and they promptly canceled the bid and re-advertised it.

This minority male owner of a construction company reported that it can take up to a month to prepare a bid response:

It takes us at least three weeks to a month. The process can take a long time.



A minority female owner of a professional services firm reported that she often receives bid requests with inadequate lead time:

Some RFPs come with very [short] time-lines so, we have to let them go. It's too much stress to handle if I don't have the [staff] immediately available. This happens across the board. We barely [get] a week or 10 days to respond. Certainly [not enough] time for somebody to put a response together and find qualified candidates.

A representative of a Caucasian female-owned goods and other services company oftentimes does not respond to proposals that have inadequate lead time:

We get [inadequate lead time] where we choose not to put together a proposal. So, you have to pick and choose which ones you want to bid on because you cannot bid on everything.

However this Caucasian male-owned professional services firm reported that BART issues addendums when he and other bidders have the same questions regarding the agency's RFP:

There have been situations where we have had questions once we received the plans and specifications where we felt that there wasn't enough time to prepare [a response]. And those are usually addressed under an addendum notice because other people are addressing the same issues.

IV. FINANCIAL BARRIERS

A. Difficulty Obtaining Financing

Adequate financing is a vital component to the survival and the solvency of small, minority, and disadvantaged businesses. The inability to secure financing was reported by many business owners irrespective of the type of financial institution they utilized.

A Caucasian female owner of a professional services firm described her frustrations in trying to secure financing for her small business:

I went shopping for lines of credit, and it was an extremely frustrating experience because we were having cash flow difficulties. It was impacting my credit rating. It's like, you need money but you can't get money. It continues to be a problem and



the interest rate that is offered is not always wonderful for small firms.

A minority female owner of a professional services firm also reported that obtaining financing for her company is a major obstacle:

Financing has always been an obstacle for a small business like ours. We got financing but not as much as we wanted. They always ask for three years of taxes and financials. I am sure they do not ask for three years [of financial data] from other companies.

A minority female owner of a professional services firm explained why her company has been unable to obtain bonding:

We cannot get bonding because of the different criteria banks have regarding collecting collateral to obtain a bond.

A minority female owner of professional services firm described the hardships her small company has encountered because of her inability to obtain financing:

The banks will not give me a chance. I actually spent all of my earnings just to keep my [business] solvent. I had a certain amount of funds to get started, and I have been trying so hard to get funds from the government. I have got my phone cut off to pay my employees. It is hard when you are running your own business, and you can't get certain assets that other [businesses] can.

A representative of a Caucasian female-owned goods and other services company explained that the company has remained self-funded even though it has been in operation for a substantial length of time:

[Obtaining financing] is always a problem for small businesses. [We are] still self-funded even though I am probably the oldest [industry name withheld] in California or close to it because [we] have not put the company up on the block.

A minority male owner of a construction-related company reported that he was able to secure a line of credit when he was experiencing a rough time maintaining his business:

We established a line of credit, but we [still experienced] about four bad years. And, they limited the amount that they made available to us.



A minority female owner of a goods and other services firm has also been unable to secure financing for her small firm:

I have not gotten any help from financial institutions. Usually, it is because I don't meet their credit requirements. I have gone to many meetings where they are offering funds for small businesses and I go and apply. And then it's like, sorry, you don't qualify. I don't know if I'm being treated unfairly or if I don't meet their qualifications. But I have not had help from any institution. I had to get home financing to [keep] the business running. [Lack of financing] limits our ability to bid for larger projects, because you need the funds up front to be able to cover the cost of the materials and equipment to get the project going. So, we are caught in a catch-22. Since we can't bid for the bigger jobs, we take in the smaller jobs.

A minority male owner of a professional services company reported that he was denied financing for his small business despite numerous attempts:

We have applied for a line of credit with our bank, and they denied us several times. So, we attended the small business development workshop but financing is really a problem for small businesses like ours. The main problem is that the private banks are not too willing to lend us money unless we have about three to four years of experience with them. Also, we applied with [financial institution name withheld] and they denied us three times.

A minority male owner of a goods and other services company explained that his company also struggles with keeping his business solvent:

Financing has always been a struggle with our own financing. There is no clear cut direction, even though they these agencies are supposed to be helping to set up small businesses.

B. Late Payments from Prime Contractors

Late payments by prime contractors and government agencies can be devastating to small business owners who are struggling to keep their businesses solvent. Difficulty paying creditors and employees as well as other operating expenses, is a hurdle business owners face when they are paid late.



A Caucasian female owner of a professional services firm provided several reasons why she believes some prime contractors are late paying their subcontractors:

Some of the prime contractors that we work with will hold our invoice for a month before they submit it to the client which causes a hardship. Also, some prime contractors use their subcontractors to subsidize their own cash flow. They use our money to work with until they have to give it up. And oftentimes, they have the money but they don't pay us until we insist that they pay us.

A minority male owner of a construction-related company reported that a prime contractor tried to claim that his work was not up to standard in an effort to avoid paying him for his services:

I was a subcontractor . . . and they basically tried everything they could do to [claim that] we weren't doing our work correctly. But everything was passing inspection by the electrical department and they were just looking for ways to try to cheat us out of our money.

A minority male owner of a construction-related company reported that some of his colleagues were forced to mortgage their homes because of late payments:

I was at a meeting where some subcontractors reported that they had to mortgage their homes to get a loan to keep things going because they did not get paid.

A minority male owner of a professional services firm reported that it is common to be paid late in his industry:

We have had several late payments. For the construction industry anything beyond thirty days is late. But for our industry it is like seventy-five days. So, it takes us a long time to get paid. Some of our payments [have been] a year late. They said it was a computer glitch. So, we raised sand about that. Prime developers are known to not pay. Public agencies are slow, but they do pay. So it can be tough. You want these big projects, but you have to be able to carry these big projects.



C. Late Payments from BART

A Caucasian male owner of a construction-related company believes that bureaucracy is the major reason why agencies pay late:

If everything was equal, then it would be equal. But dealing with different counties and BART, everything is held up for periods of time. [Usually the issue behind the late payments] are bureaucratic paperwork. [The invoice] goes to this person, then to that person, and signed off [by another] person. Then finally you get paid.

A Caucasian male owner of a construction-related company reported that even though BART accepted the incentive his company offered for timely payments, he still was not paid on time:

On some larger BART [projects] we will give them a half of a percent [discount] deal for payments received within ten days. They will take the half percent [discount], but they won't necessarily pay by the 10th day. So, they took the half percent, but we won't see the payments for 30 to 60 days. It really depends on how thick the bureaucracy is. If the engineers are very far removed from purchasing, then it's difficult to get things done. If they work close together, then it's better.

A minority female owner of a professional services firm reported that BART has given her the run-around when she tries to receive payment:

BART will tell you your check should be in the mail on blah blah day, and you wait, call, and then you start being forwarded to voice mails. They say he is not in today, and he will get back to you.

This minority owner of a construction-related company reported that when BART makes purchases with a credit card it eliminates the invoice process which can result in late payments:

BART is great when it comes to their non-revenue equipment because it's [procured through] a credit card. This allows us to use their credit card as soon as we complete a project.

A Caucasian female owner of a professional services firm reported that on average she is paid 60 to 75 days after her invoice has been submitted:

Typically government agencies pay on average after 60 to 75 days. And, if you have new staff, suddenly you have this burgeoning



payroll. Sometimes my payroll was late, because the money was not there. And that created hardships for staff who had rent and car payments.

A representative of a Caucasian female-owned professional services company explained that payments from BART were routinely received late:

BART was horrible regarding payments. It is because of the paperwork path. The trail for [invoices] to be signed off [includes] dozens of people to authorize payment. I had terms that were net ten days, and they told me they didn't care what was in the contract. They didn't pay anything in less than 45 days. We [have heard] some people [say] that they would not do business with BART because it takes too long to get a payment.

A minority male owner of a professional services firm reported that he has waited over 150 days to receive payment:

Sometimes more than a hundred and fifty days [will elapse] before we receive payment. It happens quite often with government agencies.

And this minority male owner of a construction-related company reported that he no longer chooses to bid on BART projects because of its reputation for bankrupting small businesses:

We finished a job for them and I chose not to do any more work [with them]. Because BART is known to bankrupt small companies. I mean contractors talk and they know they can bankrupt you or put you out of business, especially if [you are] a small contractor.

A Caucasian male owner of a professional services firm explained that his company can withstand the impact of late payments, but his subcontractors are severely affected:

When the payment is late, we are waiting for the check because we have to pay our subcontractors, suppliers, and our staff. We might be able to bear it because we are a bigger company but, I think that it does have a trickle down effect to the little guy. For them [late payments] are a big deal.



A minority male owner of a professional services firm also explained the impact of late payments on his subcontractors:

By the time I get paid it is almost 30 to 50 days from [the date of the invoice]. And, I will get a time sheet from [a subcontractor] where I am supposed to pay them in the next two weeks. And that is a big [issue] for us because we don't have that kind of capital or money.

A representative of a Caucasian female-owned goods and other services company explained why he believes he is treated rudely when he attempts to recoup late payments:

When the invoice is 30 days past due, I will send it in again. Then it goes to 60 days [past due]. I will call someone [and will be told], "Oh, I put that in my in-box. It must still be there. I'll pull it out and get it paid for you." We get that kind of stuff, give me a break, that is just rude. They would not do that to their bank credit card [payment] because they would get a terrible credit rating.

However, a minority male owner of a professional services firm reported that BART's payment policies are beneficial to subcontractors:

BART has been very proactive. They put in their agreement that [prime contractors] have to pay within thirty days. So, they really got on top of things. But the other agencies are pretty slow, like the school district.

V. COMPARISON OF THE PUBLIC AND PRIVATE SECTOR CONTRACTING ENVIRONMENTS

The interviewees were also asked to compare their experiences seeking work in the public sector as compared to the private sectors.

This minority male owner of a construction-related company explained why he no longer submits bids on private sector jobs with out-of-state prime contractors:

It is very common that a [an out-of-state contractor] pick us from our website and ask if we want to bid the job. So we bid the job, and then they are awarded the job. But they start calling other local subcontractors to see if they can get a cheaper bid so they can make more money. This is very common with private sector



businesses. I won't bid a private sector business anymore from some guy out of town.

A Caucasian male owner of a construction-related company reported that the private sector firms pay in a more timely manner than public sector firms:

Twenty percent of my business is from the private sector. The rest are all other customers, could be [government] or whatever comes into our facility. Late payments happens a lot in the public sector but not in the private [sector]. And when it drags on for a long time, it can drive a small company out of business.

Oftentimes it is difficult for small businesses to meet the bonding requirements of most government agencies. However, a Caucasian male owner of a construction-related company reported that securing bonding in the private sector is not a major obstacle for small companies:

We probably do 80 percent of our work from the private sector. Normally, bonding is not an issue in the private sector. In the private sector, they believe you can do it and they do not have the lowest bid [requirement]. It's a question of what you can do, not necessarily how [connected] you are.

A minority male owner of a construction-related company explained why he no longer bids as a subcontractor on private sector projects. He also reported that public sector prevailing wage requirements makes the public sector work more attractive:

I do not bid private sector business from out of town [prime contractors], because once they get it, they will start shopping around and try to beat your bid. This is a common thing. They are big and national [companies], but they are trying to make as much money as they can. So they cut costs and get people to work for less. [On the other hand] if you work with municipalities or government jobs, they make the [prime contractors] pay the prevailing wage and [it's hard for them] to get around it.

This minority female owner of a professional services company reported that receiving late payments is more of an issue in the private sector:

Well, the commercial [industry] is a different story, because they pay you whenever they feel like it. And some businesses that we have experience dealing with are medium-sized business, and they are not mandated to pay small business on time. So they pretty much take their time paying you.



However, this same business owner explained why it is easier obtaining work in the private sector:

It is easy to do business with the private sector, because they have the need and they trust that you can do the job. So, they will hire you instantly. The proposal process does not take that long and you get the job right away. Whereas with the public, it's a [long] process that you have to go through.

A minority male owner of a professional services company believes that long term business relationships are needed to obtain work in the private sector:

I would say 95 percent of our work is with the public sector. We have confidence in the public sector as opposed to the private sector. The private sector does not necessarily change their service provider for price, they give more weight to long-term relationships with their existing service providers. We do not expect them to give us business. But our main thrust is to get some work from the public sector because we have confidence in the public sector.

This same business owner described a situation where he believes that he was unable to obtain work from a private company despite the discounted services that he offered:

For example, without naming names in the backyard of our company is a large general contractor that has been in the City close to 100 years. And we offered them very competitive prices, minus pickup and delivery charges which is a very substantial amount in our industry. But still, for the last one and a half years, we have not gotten anything from them. This is why I have more confidence in the public sector as opposed to the private sector.

A minority male owner of a professional services firm also believes that personal contacts are needed to obtain business in the private sector:

Our business suffered because we were not a regular American architectural business. We are a boutique minority firm that does public work. The private sector is more relationship driven. In the private industry they hire their buddies. You have to maintain that relationship with them, and you do not have the many checks and balances in the private sector [as in the public sector].



This Caucasian female owner of a professional services company provided several reasons why she prefers working in the public sector:

The reason why my company focuses more on the public sector is the size of contracts. Also the private sector clients want a low budget but they have a higher default [rate] on their payments.

A Caucasian male owner of a goods and other services company reported that the public sector is very bureaucratic; however, he also explained why he likes working in the public sector:

The [government] regulations can be tedious but when things are in place it's good. Also, what I like about the government is when I do [the work] I know I am going to get paid.

VI. COMMENTS ABOUT BART'S DBE PROGRAM

BART's DBE Program adheres to the standards set forth in the USDOT regulations, 49 Code of Federal Regulations Part 26. The interviewees provided candid responses regarding their experience with BART's DBE Program.

A Caucasian female owner of a professional services firm believes the true value of BART's DBE Program can be discerned from the results of its annual DBE Utilization Report:

I guess the true measure of whether [BART's DBE Program] is valuable is seeing the annual report on how many minority, disadvantaged, disabled, and woman-owned businesses are hired. And what percent of the revenue for consultants actually went to those firms. It troubles me that the goals are based on criteria I don't understand. Why can't there be umbrellas or limits for projects above \$5 million that will only go to large firms with teams with small firms?

A minority male owner of a professional services firm credits BART's DBE Program for providing minorities with the possibility of contracting possibilities:

I think the program provides opportunities for DBE firms that otherwise would not have the opportunity. I think it is positive that BART is willing to consider using DBE firms. Even though I have had difficulty in the past with getting work, I appreciate the fact that they have that consideration.



This minority male owner of a professional services firm believes that BART could do more to encourage their prime contractors to adhere to its subcontracting goals:

I believe that it would be really nice if BART not only [embraced] their subcontracting goals but also [required] their prime contractors to buy into that same concept.

This minority male owner of a construction-related company reported that he believes BART's DBE Program is not valuable because it is not being adequately monitored:

I don't see the value in the [DBE Program] to be honest with you. Because [to get] the certification we jump through hoops to provide them with our financial data and credit references. What is the DBE Program for? Who is it for? If you have a program that is not being monitored, what do we have to do to at least get our feet at the table.

And, a minority male owner of a construction-related company explained why he believes BART's DBE Outreach Meetings are not valuable:

I don't [think the DBE outreach meetings are valuable] because the presentation that I attended was not for small or disadvantaged businesses. They had these big proposals they rolled out, and unless you are a subcontractor for one of these major construction outfits, you are not going to be involved. I do not know what that meeting was for, it did not serve the purpose of [explaining] what opportunities were available for smaller companies.

I wanted to know how much work in their maintenance yards get farmed out to contractors. What items are available to bid on by BART. But, nobody really touched on it. A lot of things were put off, [and we were told] you have to call this person or they are going to send an email to everybody that attended [the meeting] and that never happened. My feeling is that they had the meeting because it was a requirement that they hold the meeting. I don't really think that it was for any other reason, except to show that they held the meeting because the federal government [provides] funds for certain projects and they wanted to continue to be funded by the federal government.



However, this same business owner believes BART's DBE Program is beneficial:

The DBE Program is very valuable. It's one of the best. If it were not for [the program], we would not have the business that we have with BART. They have seasoned people that have been around for a long time. They know what to look for, and they want our kind of firm. You know that they are professional people, and they have really great projects.

A representative of a Caucasian female-owned professional services company also values BART's DBE Program:

I think the [DBE Program] is valuable. There is a lot of effort on the part of BART to [operate] the DBE Program.

This minority male owner of a professional services company questions the value of BART's DBE Program:

I really do not know if the DBE Program is valuable. The problem is only a few are benefitting from it.

A minority male owner of a professional services company believes the proper implementation of BART's DBE Program determines its success:

The program is valuable if it's implemented properly. It is valuable because BART is constantly generating quite a bit of revenue. And there are always developments going on within BART whether it's construction, materials, or supplies. So, the program must be properly implemented and developed to a point to where it makes certain that minorities and Blacks in particular get a chance to get involved with some of their projects.

VII. EXEMPLARY BUSINESS PRACTICES

BART managers and staff from its Office of Civil Rights were lauded for their dedication and support to disadvantaged, minority, and woman-owned businesses.

A minority male owner of a professional services firm commended BART's Office of Civil Rights:

BART's Civil Rights Department is proactive, and they are a leader in the Bay Area in terms of getting procurement [opportunities] to the minority consultants like our firm. They make sure that prime



contractors pay their subcontractors. So BART looks out for us, and their Office of Civil Rights is great. Also, that office teaches the other people at BART to have sensitivity to minority firms. The managers at BART are professional.

Also, this minority male owner of a construction-related company was very impressed with BART's Office of Civil Rights:

He gave me his business card, and he is the Department Manager of the Office of Civil Rights. After a few inquiries, believe it or not, he contacted me before I had a chance to contact him. The system is very efficient and I appreciated his response. [They provide] opportunities for DBEs to grow.

This same business owner reported on a positive relationship he has with BART as one of its contractors:

BART is really great. And I'm not just saying this because I am [one of their contractors]. I think BART is a wonderful account. I know many of the people, and I have friends that work for BART.

A minority female owner of a professional services firm was complimentary of BART's engineering and design professionals:

They are very competent and many of the public agencies [that] we deal with are not. The client side [may] not led be led by an engineer or a design professional, so you may be dealing with somebody whose understanding of construction really [is limited] to remodeling their kitchen. So, it's easier for us to work with clients who are actually design professionals because they ask a question and the question is understood. And it's answered in a credible kind of way. I always feel like we learn things by working with them because they do have a very high skill level among their staff.

A minority female owner of a goods and other services firm credited BART for being instrumental in introducing her to prime contractors that have continuously used her firm on BART projects:

It's been great [working with BART]. We are working at a pretty high level when we work with the district architects. We have worked with probably a half dozen different people there directly and many more indirectly who are part of our team meetings. We value them as a client and want to provide them with good service.



They have introduced me to a lot of prime [contractors] that bid on major contracts with BART. [This has helped me] to be part of these prime contractors' subcontracting teams when the appropriate jobs come up. So they have been very helpful in making it possible for us to continue working with them on different projects.

A Caucasian male owner of a professional services firm spoke highly of BART's outreach program:

I think BART has a really good outreach program where they provide lists of people to contact for certain things and they definitely have a lot of meetings where you can get that information easily.

A Caucasian female owner of a professional services firm spoke highly of the opportunities that BART provides for DBEs:

I commend BART for having provided limited opportunities [for DBEs].

This Caucasian male owner of a construction-related company mentioned how helpful BART's employees have been to his company:

There are many employees from BART that are very helpful. They have been nothing but aces all along the way. I cannot say anything bad about many of the buyers that I have worked with through the years at BART. I can say that there is nobody in BART specifically trying to sabotage us or trying to do us wrong.

A minority male owner of a professional services firm reported that his experience with BART has been positive:

I have heard that there have been problems with some governmental entities. But, I haven't had any problem with BART.

A minority male owner of a professional services firm believes BART's mentoring program is very beneficial for small businesses:

I think that [one of] BART's best practices is their mentoring program. It develops small companies into medium-sized companies.



A minority male owner of a construction-related company reported on a BART employee who has been a great advocate for his business:

The person that we deal with at the BART [office] in Oakland has been a great advocate for us. His name is [name withheld], and he is a materials specialist there. We ran into a couple of difficulties with some employees, and he helped to resolve those problems. They are great, very easy to get along with and very responsive.

VIII. RECOMMENDATIONS FOR BART'S DBE PROGRAM

The interviewees provided recommendations that they believe will enhance BART's DBE Program. Some suggestions included stricter monitoring of subcontracting goals and incentives for prime contractors who partner with DBEs.

A minority male owner of a professional services company suggested more accountability on the part of BART's compliance officers concerning the attainment of DBE goals:

I am sure there is some sort of measurement for attaining the [DBE] goal. I believe there is not enough emphasis on attaining meaningful goals. There seems to be very little accountability. We need more than just merely empty statements. If they're going to say we want "X" amount of DBE percentage at the end of the year on new contracts, then they ought to put something in place that allows that to happen. What I see all too often is empty rhetoric. I would like to hear from the perspective of the contracting managers, why they are not making the goals. What is not being given to them in terms of tools in order to make the goals.

A Caucasian female owner of a professional services company provided several recommendations that she believes would improve opportunities for DBEs with BART:

I would suggest that the time clock for proposal submission starts after all the questions concerning the RFP are answered. And the challenge of marketing to the government is knowing who the buyers are. It would be wonderful if there was a directory that we could buy of purchasing officers in the Bay Area.

[I would recommend] forums where we could be at the table with government people to find out what they were offering. Right now, there does not seem to be many opportunities like that. Also, they



should train their project managers and purchasing officers so they can understand what consultants are up against in competing for work. As well as figure out your criteria and stick to it in the selection process, both for proposals and in interviews. Be consistent and professional. If they could do more to encourage networking between big firms and little firms [that] would also be a nice thing to do.

This same business owner recommended a clearinghouse that stores all of the upcoming bidding opportunities for Bay Area agencies:

It's a really fractured system in the Bay Area. If we were to list all the public agencies, City purchasing departments and the County purchasing departments, there would probably be 100 different entities out there. It would be great if there was a clearinghouse that could do marriages [between these agencies].

The same business further suggested:

Some agencies use the proposal conference as a true opportunity for networking. But most are doing it on a perfunctory basis. At the end of the proposal conference people have scheduled their time, and often the primes are out the door at the end of the meeting. So it works best when time is allowed for a little interaction at the beginning of the meeting. San Francisco Planning Department does a good job of having everybody go around the room when you get there and state the name of your firm and any short statement you might want to make about your specialties.

A minority male owner of a construction-related company recommended that BART implement a mobilization and loan program for subcontractors:

From my knowledge, I believe that government entities usually give prime contractors mobilization. But, mobilization should be given to subcontractors. It would also be helpful if they had their own micro [loan] program for small businesses.

A Caucasian male owner of a construction-related company recommends that BART's DBE Program be better organized and that the agency create a resource center for DBEs:

I thought BART would be more on the ball. They have been in business long enough, and it should be more professionally run. They could be more organized. If they had a resource center [that housed] a database [that stored] information on bids, more



professionals might participate in the program. A lot of people shy away from BART because they do not want to deal with all the headaches involved with BART.

A minority male owner of a construction-related company recommended that the bidders that ranked second and third be part of the public record:

I don't know who are the second or third bidders. That should be public record, since it is a competitive bid.

A minority male owner of a construction company recommended that BART list on their website the names of prime contractors for upcoming projects:

It would be helpful for small local businesses if on BART's website there was a list of prime contractors for a certain [project] that is going to be built in a certain area. If they were to put those prime contractors on their website and something is going to be built somewhere in San Francisco, we could send all of our information to that prime contractor if we wanted to bid on that package. We can look and see if they need 20 painters or 20 fabricators.

A minority male owner of a professional services company suggested that an incentive program be put in place for prime contractors that partner with minority subcontractors:

It would be nice if incentives were given to prime contractors who seek out a diverse group of vendors like myself to partner with.

This Caucasian male owner of a goods and other services company also suggested a resource center be created for DBEs:

More exposure and communication are needed. And, a place where DBEs can have access to BART's upcoming procurements.

A representative of a Caucasian female-owned professional services company recommended that BART inform DBEs in advance of upcoming contracting opportunities to allow them the opportunity to submit their names to be on the bidder's list:

I would like to see BART [disclose] what they expect to do during the next year, so if we have an interest we could give them our name so we can be on the bidder's list.



IX. SUMMARY

The majority of the business owners interviewed reported that trying to break into BART’s contracting community was a major obstacle. Many believed that BART prefers working with certain previously utilized contractors.

Securing financing to grow and maintain business solvency of their businesses was another major issue facing the disadvantaged business owners. In some instances the interviewees resorted to home loans to finance their small business.

Only a few interviewees reported that they had received bid opportunities directly from BART. Most business owners reported that they had never received bid notices, despite the fact that they believed they were on a bidders list.

Most of the interviewees described BART’s DBE Program as valuable. They credited the program with assisting them in obtaining work on BART projects. However, several business owners felt the DBE Program was ineffectual, because it lacked any enforcement in meeting DBE overall goals.

It should also be noted that some business owners described positive relationships that they have had with BART employees, especially in the Office of Civil Rights. Table 10.02 below summarizes the most frequent issues reported by the interviewees.

Table 10.02 Summary of Most Frequent Issues Reported by Interviewees

MOST FREQUENT ISSUES REPORTED BY INTERVIEWEES	
<i>Barriers Created by the Business Community</i>	<ul style="list-style-type: none"> • Difficulty Breaking Into the Contracting Community • Barriers Created by Agency Managers • Good Old Boys Network
<i>Difficulty in the Contracting Process</i>	<ul style="list-style-type: none"> • Difficulty Navigating the Bid Process • Inadequate Lead Time
<i>Financial Barriers</i>	<ul style="list-style-type: none"> • Difficulty Obtaining Financing • Late Payments by Prime Contractors • Late Payments by BART



A. Main Obstacles by Barrier

Presented below are the major obstacles reported by the interviewees according to barrier.

1) Difficulty Breaking Into the Contracting Community

- i) Teams for large design projects are formed two to three years before the proposal is released
- ii) Design contracts are given to a select number of contractors that are part of a team of on-call architects
- iii) Oftentimes projects are awarded to prime contractors that did not attend the mandatory pre-bid conference
- iv) Preference to utilize the same contractors
- v) No networking events sponsored by BART where subcontractors can meet prime contractors

2) Barriers Created by Agency Managers

- i) Interview process is a barrier for small and new businesses due to BART's case study requirement. This requirement can provide an advantage for current contractors that are given knowledge regarding the case study from BART managers.
- ii) Ethnic make-up of selection panels can determine who wins contracts
- iii) Pre-qualification process not clearly understood by agency staff
- iv) Prime contractors avoid DBE requirements

3) Higher Standards of Review

- i) Minority contractors are subjected to higher standards than their counterparts
- ii) Unwarranted complaints from BART inspectors

4) Navigating through the Bid Process

- i) BART's RFQ and RFP specifications not clearly written



- ii) Descriptions for scope of work are a deterrent because they are written in such a technical way that a small business owner might feel that they do not have the capacity to perform
- iii) Obtaining bid information on redevelopment projects are a challenge
- iv) Inability to get on BART's bidder's list

5) Inadequate Lead Time

- i) Some answers to inquiries regarding BART's RFPs are not received before the proposal due date

6) Difficulty Obtaining Financing

- i) Unable to obtain financing for small, minority, woman-owned businesses
- ii) Late payments by prime contractors and BART
- iii) Bureaucracy a major reason why BART pays late
- iv) BART accepts incentives offered by DBEs for timely payments, but still does not pay on time

7) BART DBE Program Comments

- i) More should be done to encourage prime contractors to adhere to subcontracting goals
- ii) DBE Program not being adequately monitored

8) Recommendations

- i) More accountability for compliance officers concerning the attainment of DBE goals
- ii) Time clock for proposal submission should start after all questions concerning the RFP are answered
- iii) Clearinghouse that stores all of the upcoming bidding opportunities for Bay Area agencies



- iv) Implement a mobilization and loan program for subcontractors
- v) Create a resource center for DBEs
- vi) Bidders that rank second and third should be part of the public record
- vii) Incentive program for prime contractors that partner with minority subcontractors



11

RECOMMENDATIONS

I. INTRODUCTION

This chapter provides race-specific and race-neutral recommendations for the Bay Area Rapid Transit District's (BART's) consideration. The recommendations offer strategies to maximize the use of DBEs and other small businesses in the award of BART's prime contracts and subcontracts. A statistical analysis of payments for construction, professional services, and goods and other services contracts issued during the July 1, 2002 through June 30, 2007 study period was considered in formulating the recommendations. The recommendations also derive information from a survey of BART managers, an analysis of BART's procurement and DBE Program manuals, and best management practices of other government agencies.

Payment records provided evidence of the utilization of minority and woman-owned business enterprises (M/WBEs) compared to their rate of availability in BART's market area. Information collected from BART managers, its DBE Program and procurement manuals, and standards formulated to comply with the regulatory provisions set forth in the Code of Federal Regulations chapter 49, Part 26 were evidence of BART's procurement practices and procedures. The best management practices were compiled from a national survey of USDOT grantees. The survey included 11 California transit agencies and 17 government agencies located outside of California. The best management practices gleaned from the procurement practices analysis and DBE program objectives of the 28 agencies are also incorporated in the recommendations. The recommendations contained in this chapter are intended to assist BART in meeting the objectives of the DBE Program as set forth in federal regulations, and where appropriate, to enhance its procurement procedures.

This chapter is organized into five sections. The first is an *Introduction*. The second section, *Disparity Findings*, presents a summary of the disparity analysis statistical results. Race and gender-conscious recommendations are provided in section three, *Race-Conscious Remedies*. Section four, *Race and Gender-Neutral Remedies*, presents recommendations to enhance the DBE Program objectives. Finally, *Administrative Recommendations* are contained in section five.



II. DISPARITY FINDINGS

*Western States*¹ instructs that USDOT-funded DBE programs in the Ninth Circuit must make ethnic group-specific findings of significant underutilization before setting DBE goals. The *Croson*² decision articulates a methodology for determining whether there is an underutilization of M/WBE participation in government contracting. The *Croson* standard is a measurement of a statistical finding derived from an analysis of local governments use of available M/WBEs.

BART's prime contractor utilization analysis examined the \$791,130,196 expended on 12,807 prime contracts issued from July 1, 2002 to June 30, 2007. The prime contractor utilization analysis covered the five-year study period. Subcontracts issued between July 1, 2002 and December 31, 2008 were also analyzed. The subcontract utilization analysis was analyzed in two study periods. The first period extended from July 1, 2002 to June 30, 2006, the first four years of the study period prior to the suspension of the DBE contract goals. The second period covered July 1, 2006 to December 31, 2008 during the two and one half years following the DBE Program suspension.

The \$791,130,196 expended on prime contracts from July 1, 2002 to June 30, 2007 included \$65,929,076 for construction, \$238,193,605 for professional services, and \$487,007,515 for goods and other services. The 12,807 contracts included 231 for construction, 553 for professional services, and 12,023 for goods and other services. These 12,807 contracts were received by 2,171 vendors, although the overwhelming majority of the dollars paid during the five year study period were received by less than one percent of the utilized vendors.

During the July 1, 2002 to June 30, 2007 study period BART issued 80 percent of the prime contract dollars to 3 percent or 66 of the 2,171 utilized vendors, while 61 percent of the contract dollars were received by 14 vendors, consisting of less than one percent of the 2,171 utilized vendors. Therefore, just 20 percent of the contract dollars were received by 97 percent or 2,105 vendors. The majority of the highly used prime contractors were Caucasian male businesses.

Contracts within each of the three industries – construction, professional services, and goods and other services – were analyzed at the formal and informal levels. The informal levels include construction contracts under \$10,000, professional services contracts under \$50,000, and goods and services contracts under \$40,000. All contracts over these thresholds are considered formal. The analysis of the formal contracts was restricted to contracts valued at \$500,000 and less, a level at which there was demonstrated capacity within the pool of willing M/WBEs.



¹ *Western States Paving Co. v. State of Washington Dept. of Transportation*, 407 F. 3d 983 (9th Cir. 2005)
² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

A. Prime Contractor Disparity Findings

The disparity analysis was limited to contracts \$500,000 and under because there was documented availability of willing and able M/WBEs. Since the majority of BART's contracts were small, this suggests that many contractors could perform most of the contracts analyzed during the study period. Table 11.01 presents a summary of the identified disparity in the award of formal prime contracts valued at under \$500,000 in the three industries studied.

Table 11.01 Summary of Disparity Findings for Formal Prime Contracts, July 1, 2002 to June 30, 2007

Ethnicity and Gender	Construction Services	Professional Services	Goods and Other Services
Formal Contracts - Under \$500,000			
African American Businesses	Yes	Yes	Yes
Asian American Businesses	No	Yes	Yes
Hispanic American Businesses	Yes	Yes	Yes
Native American Businesses	---	---	---
Caucasian Female Business Enterprises	No	No	Yes
Minority Male Business Enterprises	No	Yes	Yes
Female Business Enterprises	No	No	Yes
Minority Male and Female Business Enterprises	No	Yes	Yes

Yes = Statistically significant disparity was found.

No = Statistically significant disparity was not found.

--- = There were insufficient records to determine statistical disparity.

Informal contracts are the small purchases awarded without advertising or competitive bidding. The small purchases noted above range from \$10 to \$50,000, depending on the industry. Minority Business Enterprises received 35.71 percent of informal construction contracts, 6.58 percent of the informal professional services contracts, and 5.97 percent of the informal goods and other services contracts.

Many small contracts were awarded to large contractors. This practice was a limitation on M/WBEs' access to the contract opportunities which required limited capacity.



A summary of the disparities identified in the award of informal prime contracts, which are valued at under \$10,000 for construction services, under \$50,000 for professional services, and under \$40,000 for goods and other services, is presented in Table 11.02 below. The level of disparity in the award of informal contracts is a further indicator that there were barriers to M/WBEs' access to BART's small contract opportunities.

Table 11.02 Summary of Disparity Findings for Informal Prime Contracts, July 1, 2002 to June 30, 2007

Ethnicity and Gender	Construction Services	Professional Services	Goods and Other Services
	Informal Contracts - Under \$10,000	Informal Contracts - Under \$50,000	Informal Contracts - Under \$40,000
African American Businesses	Yes	Yes	Yes
Asian American Businesses	No	Yes	Yes
Hispanic American Businesses	Yes	Yes	Yes
Native American Businesses	---	---	---
Caucasian Female Business Enterprises	No	No	Yes
Minority Male Business Enterprises	No	Yes	Yes
Female Business Enterprises	No	No	Yes
Minority Male and Female Business Enterprises	No	Yes	Yes

Yes = Statistically significant disparity was found.

No = Statistically significant disparity was not found.

--- = There were insufficient records to determine statistical disparity.

B. Subcontractor Disparity Findings

In Mason Tillman's Availability and Utilization Study contract, BART stipulated that all construction and professional service subcontract records would be made available for the subcontract analysis. However, BART's effort to compile the records revealed that comprehensive construction and professional services subcontract records had not been maintained during the study period. An extensive effort was therefore undertaken to reconstruct the subcontract records which BART had not maintained. Goods and other



services contracts were not included in the analysis, because they traditionally do not include significant subcontracting activity.

BART did provide records for many contracts, including most subcontracts awarded to disadvantaged business enterprises. Through the combined effort of BART and Mason Tillman, 559 subcontracts were compiled. A total of 234 subcontracts from 41 prime contracts were included in the analysis of the period prior to the DBE Program's suspension. For the period after the DBE Program's suspension Mason Tillman analyzed 322 subcontracts from 53 prime contracts.

A summary of the statistically significant disparities identified in the subcontracts awarded for construction and professional services for each of the two study periods is presented in Tables 11.03 and 11.04 below.

Table 11.03 Summary of Subcontract Statistically Significant Disparity Findings During the DBE Race-Specific Period, July 1, 2002 to June 30, 2006

Ethnicity / Gender	Construction Services	Professional Services
African American Businesses	No	No
Asian American Businesses	Yes	No
Hispanic American Businesses	No	No
Native American Businesses	---	---
Caucasian Female Business Enterprises	No	No
Minority Male Business Enterprises	Yes	No
Female Business Enterprises	No	No
Minority Male and Female Business Enterprises	No	No

Yes = Statistically significant disparity was found.
 No = Statistically significant disparity was not found.
 --- = There were insufficient records to determine statistical disparity.



Table 11.04 Summary of Subcontract Statistically Significant Disparity Findings During the DBE Race-Neutral Period, July 1, 2006 to December 31, 2008

Ethnicity / Gender	Construction Services	Professional Services
African American Businesses	Yes	No
Asian American Businesses	Yes	No
Hispanic American Businesses	Yes	No
Native American Businesses	---	---
Caucasian Female Business Enterprises	No	No
Minority Male Business Enterprises	Yes	No
Female Business Enterprises	No	No
Minority Male and Female Business Enterprises	No	No

Yes = Statistically significant disparity was found.
 No = Statistically significant disparity was not found.
 --- = There were insufficient records to determine statistical disparity.

III. RACE AND GENDER-CONSCIOUS REMEDIES

A. Prime Contract Remedies

The recommendations apply only to those groups in each industry with identified disparity at the informal or formal level, where the award is not subject to the low bid provisions of the California Public Contract Code. It is critical that the race-specific remedies are limited to the ethnic and gender groups with documented statistically significant underutilization.



1. Formal Prime Contract Remedy

Professional Services Contracts - Incentive Credits

In the professional services industry contracts are not awarded based on the lowest bid. Instead, a firm is selected by evaluation points based upon its qualifications to perform the scope of work in the solicitation, albeit price may be a consideration.

There is underutilization at a statistically significant level in professional services contracts for African Americans, Asian Americans, and Hispanic Americans. Since the underutilization of businesses in these groups at the formal contract level constitutes disparity, the implementation of incentive credits is appropriate. 49 CFR Part 26 §26.21 requires that recipients of DOT-assisted funds "must have a DBE program meeting the requirements of this part." 49CFR Part 26 §26.45 authorizes disparity studies as a method of determining how the DOT recipient's program will operate. Western States, which applies in the Ninth Circuit, requires such studies to have an ethnic group-specific analysis to decide which groups can be included in a potential race-conscious remedy.

Incentive credits could be incorporated in the request for proposal and qualification evaluation process. Incentive credits could be given to prime contractors who are members of the statistically significant underutilized groups on professional services contracts, when these awards are based on qualifications and not on the lowest bid. Fifteen to 20 percent of the evaluation credits could be comprised of such incentive credits when the selection process includes a proposal or statement of qualifications. Including incentive credits in the evaluation criteria might counterbalance the competitive disadvantage experienced by these groups as indicated by the disparity findings. Offsetting this disadvantage could mitigate the disparity in these industries. These credits would be applied in the evaluation process for formal contracts under \$500,000.

2. Informal Prime Contract Remedy

Small Contracts Rotation Program

There are statistically significant findings of underutilization in the three industries, including African Americans and Hispanic Americans in informal prime construction contracts; African Americans, Asian Americans, and Hispanic Americans in informal prime professional services contracts; and African Americans, Asian Americans, Hispanic Americans, Caucasian Female Business Enterprises, and Female Business Enterprises in informal prime goods and other services contracts. These findings cannot be explained as simply the result of competitive bidding, because informal contracts are not advertised or awarded through a competitive process. Informal contracts do require the solicitation of at least three written or oral quotations, but the solicitation is not advertised.



A small contracts rotation program could be established for informal contracts in each of the three industries. Informal service contracts would be awarded under the small contracts rotation program. This program would limit competition to firms from the statistically significant underutilized groups and other disadvantaged businesses of comparable capacity. This program would ensure that quotations, proposals, or statements of quality for informal contracts are solicited from a diverse pool of small businesses on a rotating basis. Every four or five solicitations would be limited to competition between the groups with a statistical disparity. By awarding prime contracts to DBEs, this program is a means for building the capacity of the M/WBEs that have a finding of statistically significant underutilization and other similarly situated disadvantaged businesses.

The program would encompass three industries: construction, professional services, and goods and other services. The statistically significant underutilized group(s) would be presumed to be eligible. The eligibility of any other groups would be determined through a certification process. The certification process would determine whether the business was small, local, or disadvantaged.

Work orders in all industries would be assigned on a rotating basis, and no business in the rotation would be eligible to receive a second assignment until all other businesses on the list had been offered at least one assignment. BART managers would share responsibility for the achievement of the goals.

The existence of a small contracts rotation program should be widely advertised to the ethnic and gender groups in each industry with a statistical disparity and all other certified businesses. The list of pre-qualified vendors would be posted for public view on BART's website.

Financial support and technical assistance should also be made available to firms that participate in the program. Financial incentives could include such items as prompt payment, waived bonding requirements, reduced liability insurance requirement, and mobilization payments to offset start-up costs. Firms would graduate from the program once they reach a certain size threshold or after participating in the program for a specified time period.

B. Subcontractor Remedies

Establishing subcontracting goals for BART's prime contracts is a strategy for eliminating documented disparity in the prime contractors' award of subcontracts. In compliance with *Western States*, the DBE goal set by BART should only be applied to the ethnic and gender groups for which there was a documented disparity. In setting the DBE goal the availability of the significantly underutilized groups should be the statistic used in establishing the Step One baseline.³

³ See Chapter 3: DBE Program Analysis for a review of the goal setting methodology.



If the recipient, BART, projects that it can meet its overall goal of available DBEs with race-neutral measures, then it must use only those measures. §26.51(f)(1). On the other hand, if the recipient determines it cannot achieve the entire overall goal using only race-neutral measures, it must establish “contract goals” for individual contracts, (i.e., race/gender-conscious participation goals for DBE subcontractors) to satisfy the portion of the overall goal which the recipient projects it cannot meet with race-neutral means. § 26.51(d).

Western States amplifies this regulatory scheme. It requires in the Ninth Circuit⁴ for a DBE ethnic group to be included in that portion of the goal that is race-conscious, there must be a finding that it was significantly underutilized.

That overall availability number established in Step One would be decreased in Step Two by the percentage of competitively bid prime construction, professional services, and goods and services contracts under \$500,000 that those available firms received.

Table 11.05 highlights the ethnic and gender groups that were underutilized in their participation on BART subcontracts issued during the Race-Neutral DBE Program Phase. This was the phase when BART suspended its race-specific goals and was advertising all contracts with only race-neutral goals. The bold “Yes” denotes a statistically significant underutilization.



⁴ BART is located in the Ninth Circuit.

**Table 11.05 Subcontractor Underutilization Summary for the
Period of the Race-Neutral DBE Program, July 1, 2006 to
December 31, 2008**

Ethnicity / Gender	Construction Services	Professional Services
African American Businesses	Yes	Yes
Asian American Businesses	Yes	No
Hispanic American Businesses	Yes	No
Native American Businesses	Yes	Yes
Caucasian Female Business Enterprises	Yes	Yes
Minority Male Business Enterprises	Yes	No
Female Business Enterprises	Yes	Yes
Minority Male and Female Business Enterprises	Yes	Yes

Bold = statistically significant underutilization

As noted above in Table 11.05, African Americans, Asian Americans, and Hispanic Americans had a statistically significant underutilization on construction subcontracts. As a result, these groups can participate in race-conscious construction subcontracting DBE goals based on the disparity findings. Native Americans, whose utilization and availability were so low that the disparity could not be detected, should also be included in the construction goals.

Female Business Enterprises were significantly underutilized on both construction and professional services subcontracts, though not at a statistically significant level. They should also be included in the race-conscious DBE goals even though they did not have a statistically significant disparity. The legal standard for woman-owned businesses is not strict scrutiny. Strict scrutiny, the highest legal standard, was applied to race and not gender by the Court. Female Business Enterprises are only subject to intermediate scrutiny; therefore, they should also be included in the race-conscious subcontracting goals. The rationale for including Female Business Enterprises is presented below.



Inclusion of Caucasian Females and Female Business Enterprises in Construction Subcontracting Goals

Executive Order No. 4, issued in 1970 by President Richard M. Nixon, is the genesis of flexible goals for affirmative action programs. The Executive Order authorized the correction of the underutilization of minority businesses by federal contractors. In 1971, Order No. 4 was revised to include women business enterprises. President Jimmy Carter issued Executive Order 12138 in 1979, which created a National Women’s Business Enterprise Policy requiring federal agencies to take affirmative action to support women business enterprises. Since the Supreme Court’s 1989 decision in *City of Richmond v. J.A. Croson*⁵, *Co.*, the standard to which race-based affirmative action programs are subject has been strict scrutiny. However, women business enterprise programs have not been held to such a rigorous standard. The intermediate standard has continued to be applied to women business programs. The intermediate standard requires the governmental entity to demonstrate an “important governmental objective” and a method for achieving this objective which bears a fair and substantial relation to the goal.⁶

As recently as 2008, the U.S. Department of Commerce Small Business Administration identified intermediate or heightened scrutiny as the applicable standard to the Women’s Procurement Program created by Congress in 2000. The program authorized federal agencies to reserve certain contracts for bidding by woman-owned small businesses.

The U.S. Circuit Courts of Appeal have found that women business enterprise programs are subject only to intermediate scrutiny, rather than the more exacting strict scrutiny to which race-conscious programs are subject.⁷ In 1991, the Ninth Circuit concluded that gender-based affirmative action plans are subject to intermediate scrutiny. In *Coral Construction, Co. v. King County*, the court employed intermediate scrutiny when it reviewed King County’s woman-owned business enterprise program.⁸ Earlier, the Ninth Circuit in *Associated General Contractors of California v. City and County of San Francisco* (AGCC I) – applying “intermediate” rather than “strict” scrutiny – held that classifications based on gender require an “exceedingly persuasive justification.”⁹ The court in defining the application of intermediate

⁵ 488 U.S. 469 (1989).

⁶ *Craig v. Brown*, 429 U.S. at 198-99 (1976).

⁷ See e.g., *Philadelphia*, 91 F.3d 586 (3d Cir. 1996); *Engineering Contractors Association of South Florida Inc., et al. v. Metropolitan Dade County et al.*, 122 F.3d 895 (11th Cir. 1997). *Concrete Works II*, 321 F.3d at 959, is in accord. *Contractors Assn. of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1000-1001 (3rd Cir. 1993); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1579-1580 (11th Cir. 1994). *W.H. Scott Construction Co. v. City of Jackson*, 199 F.3d 206, 215, n.9 (5th Cir. 1999); see also, *Dallas Firefighters Assn. v. Dallas*, 150 F.3d 438, 441-442 (5th Cir. 1998).

⁸ 941 F.2d 910, 932 (9th Cir.1991).

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



scrutiny to WBE programs decided the justification is valid only if WBEs actually suffer a disadvantage related to the classification, and the classification does not reflect or reinforce archaic and stereotyped notions of the roles and abilities of women.¹⁰ Therefore, WBEs found to be overutilized would apparently not meet this requirement.

The utilization of Caucasian female businesses and female business enterprises in the Study is less than their availability. The utilization is less than the 0.80 level which has been used to measure adverse impact under Equal Employment Opportunity rules which are subject to intermediate scrutiny.¹¹

For any race, sex, or ethnic group which is less than four-fifths (4/5) or 80 percent of the rate for the group with the highest utilization will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, or disparity while a greater than four-fifths rate will generally not be regarded by federal enforcement agencies as evidence of disparity. The disparity could also be measured by comparing the underutilization of a group to its availability.

Given the case law, this Four-Fifths Rule seems to be a reasonable standard to measure the underutilization of female-owned businesses. Therefore, it is our recommendation to include female-owned construction and professional services businesses in the subcontracting goals program

Table 11.06 below depicts the availability of the subcontractors by ethnicity and gender. The availability documented below should be aggregated in establishing the Step One baseline.

¹⁰ Id. at 940.

¹¹ The Office of Federal Contract Compliance Programs' definition of disparity, which it refers to as "adverse impact" is set forth in Chapter XIV, Equal Employment Opportunity Commission, 29 CFR Section 1604.7(D), Adverse Impact and the Four-Fifths Rule:



Table 11.06 Subcontractor Availability

Underutilized Groups	Construction Availability Percentage	Professional Services Availability Percentage
African American Businesses	8.01%	---
Asian American Businesses	10.98%	---
Hispanic American Businesses	8.01%	---
Native American Businesses	0.42%	---
Caucasian Female Business Enterprises	6.87%	12.97%
Minority Female Business Enterprises	4.63%	6.59%
Female Business Enterprises	11.50%	19.56%

Contract-Specific M/WBE Subcontracting Goals

Contract-specific M/WBE subcontracting goals should be set on each construction contract. The four ethnic groups and Caucasian Female Business Enterprises should be included in the construction subcontracting goals. A subcontracting goal should be set on each professional services contract for Caucasian Female and Minority Female Business Enterprises. The goals should reflect the ethnic and gender groups availability. Moreover, setting contract-specific goals that are narrowly tailored to the availability of the businesses to perform the specific subcontracting opportunities is the most prudent method to remedy the disparity. A contract-specific goal setting method also ensures that DBE goals are reasonably attainable.

The goals should reflect the actual availability for each contract that is advertised. All the items of work in the contract – including trucking, equipment, materials, supplies, and the availability of M/WBEs to perform the work items – must be determined in order to set a contract-specific goal. In setting these goals, BART will need to maintain a current database with available M/WBE and non-M/WBE firms willing and able to perform on BART’s contracts.

IV. RACE AND GENDER-NEUTRAL RECOMMENDATIONS

BART’s DBE Program has specified nine objectives to achieve the requirements set forth in 49 CFR Part 26 §26.51(b). The nine objectives have been grouped according to the two stages of the procurement process – pre-contract award and post-contract award. The pre-contract award period refers to activities occurring from the definition of the project to the selection of a firm for award, but prior to the actual contract award. The post-contract award



period encompasses all activities following the award of the contract. Objectives 1.1 through 4.1 are discussed under pre-award recommendations, and objectives 5.1 through 9.1 are discussed under post-award recommendations.

Administrative recommendations have been offered to enhance businesses' access to DBE Program information. In addition there are recommendations to improve BART's capacity to track the utilization of the subcontractors that participate on its prime contracts.

The term subcontractor, as used throughout this section, is being applied in the broad sense. As appropriate to the industry, it refers to consultant, contractor, trucker, and supplier of materials and equipment.

A. Pre-Award Recommendations

1. Objective 1: Ensure Non-Discrimination in the Award and Administration of Federally-Funded Contracts

Section 26.51(b)(1) of 49 CFR Part 26 provides that recipients of federal assistance should arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules for bids in ways that facilitate DBE and other small business participation. This regulation provides for equal opportunity in the award and administration of federally-funded contracts.

- **Finding 1.1**

Through its various departments, BART routinely considers the potential for dividing large contracts into smaller ones to provide additional procurement opportunities for DBEs and small businesses. In particular, the Transit System Development (TSD) reviews each project to determine an optimum balance of contract size for both large and small procurements. While these measures to improve DBE participation are encouraging, BART continues to let contracts that are more than \$10 million in value.

- a. Recommendation 1.1.1: Continue Efforts to Unbundle Large Procurements into Smaller Contracts Where Feasible**

BART should continue to pursue unbundling large contracts to increase the number of businesses participating at both prime contract and subcontract levels. During the study period 80 percent of BART's construction, professional services, and goods and other services contracts were awarded to 66 firms and many were multi-year task order agreements. The multi-year price agreements need to be reviewed to determine how they can be unbundled. Unbundling larger procurements would have the effect of increasing the opportunities for DBEs and small businesses to compete for BART contracts, increasing the number of businesses awarded BART contracts, and spreading the resources among more businesses.



In determining whether projects can be unbundled, the following criteria should be considered:

- 1) Whether the project will be conducted in multiple locations
- 2) Size and complexity of the procurement
- 3) Similarity of the goods and services procured
- 4) Sequencing and delivery of the work
- 5) Public safety issues and convenience

b. Recommendation 1.1.2: Post Plan Holder Lists

BART should upload and make available on its website the plan holder lists for advertised contracts. Online posting reduces costs for BART while increasing the potential pool of DBEs that are available to be utilized by prime contractors for upcoming bids. The online posting should be updated at the specific time that is published in the request for bid.

2. Objective 2: Create a Level Playing Field on Which DBEs Can Compete Fairly for Federally-funded Contracts

As indicated in 49 CFR Part 26 §26.51(b)(2), federal recipients should actively seek to provide assistance to DBEs and other small businesses in overcoming contracting limitations such as the inability to obtain bonding or financing. Mitigating the effects of insurance, bonding and financing issues would aid in creating a level playing field enabling fair competition for DBEs on federally-funded contracts.

• Finding 2.1

A reduced insurance requirement program, the Owner Controlled Insurance Program (OCIP), is employed by BART's TSD department for certain types of contracts. The OCIP makes available to contractors certain types of insurance the business would normally secure from outside sources to meet BART's risk management requirements.

a. Recommendation 2.1.1: Expand the Owner Controlled Insurance Program

BART's OCIP is extremely progressive in assisting DBEs and other small businesses by eliminating differentiated costs for insurance. However, the OCIP is not available for all professional services and construction projects. BART should expand this program to have OCIP coverage available to DBEs on a wider range of projects, where feasible.

b. Recommendation 2.1.2: Form Partnerships with Lending Institutions

BART should leverage its current banking relationships with financial institutions to assist DBEs and other small businesses with project financing and start-up costs. It will be critically important to develop programs and incentives with lending institutions providing services to



BART that can be offered to DBEs and other small business that wish to do business with BART.

c. Recommendation 2.1.3: Continue to Pursue Efforts to Remove Brand Name Requirements in Solicitations

The specification of brand names in solicitations can reduce small and DBE firms' level of competitiveness, because many large firms receive reduced pricing from major suppliers while smaller firms do not. BART should continue to refrain from requiring specific brand name products in its solicitations.

d. Recommendation 2.1.4: Revise Insurance Requirements

Prohibitive insurance requirements serve as a significant disincentive to bidders, constitute a barrier to DBE and other small business participation, and ultimately increase BART's costs to procure construction services. Insurance requirements should be evaluated to ensure that smaller contracts do not carry a disproportionately high level of coverage. As a general practice, BART should implement standard provisions applicable to all of BART's contracts. The insurance requirements on small contracts should be set in relation to the actual contract liability amount. A revision of insurance requirements would attract more bidders and thereby increase competition and reduce costs. Any revisions to the insurance provisions must comply with statutory requirements.

BART implements standard provisions and minimum insurance requirements on all contracts in excess of \$50,000. These requirements are sometimes increased as a function of the work involved. Modifications or waivers may be requested. Letter agreements for under \$50,000 have lower minimum requirements and may also be subject to modification or waiver upon request. For contracts under \$1,000,000, BART should review the minimum requirements to tailor them to the risks involved in a particular procurement. The waiver provisions should be stipulated in the DBE Program and the steps to be followed in order to invoke the waiver should be clearly defined.

• **Finding 2.2**

BART does provide direct contracting for certain services which are routinely included in a general construction contract.

e. Recommendation 2.2.1: Increase the Use of Direct Contracting to Award Small Prime Contracts

Direct contracting occurs when separate contracts are awarded for specialty or non-license services which might otherwise be included as an item of work in a construction contract or within the scope of an architecture and engineering contract. The feasibility of direct



contracting should be examined in regard to each BART contract in order to increase prime contract opportunities for small firms.

Design services, which are not required to be performed by a licensed engineer, architect, or registered surveyor, could be awarded as direct contracts. Design services include planning, environmental assessment, ecological services, cultural resource services, and testing services. These professional services specialties could be separated out from the large design contracts and be awarded as prime contracts.

Additionally, incentives could be built into the Construction Manager (CM) contracts providing that a percentage of the CM's fee customarily paid for budget and schedule adherence be allocated for the attainment of a minimum level of DBE participation on the project. This incentive would facilitate the use of DBEs and other small businesses.

3. Objective 3: Help Remove Barriers to DBE Participation in the Bidding, Award, and Administration of District Contracts

Subsection 26.51(b)(3) of 49 CFR Part 26 encourages recipients of federal funds to offer technical assistance and other services to assist DBEs and small businesses in the procurement process so that their participation is increased. Eliminating barriers in the award, administration, and bidding processes would accomplish this goal and substantially increase DBE participation.

- **Finding 3.1**

In an effort to provide technical assistance and distribute information to DBEs, BART engages in contract forecasting. BART prepares and posts upcoming forecasts for contracting opportunities. However, construction contracts under \$10,000 and procurement contracts under \$100,000 are not routinely advertised on BART's website. Providing advanced notice of contracting information for all contract opportunities would assist DBEs and other small businesses in seeking contracting opportunities with BART.

- a. Recommendation 3.1.1: E-mail Informal Contracts**

The threshold for informal contracts should be e-mailed to DBEs and made available in hard copy format, as well. Resources should be made available to the Office of Civil Rights (OCR) to market these opportunities to DBEs capable of providing goods and services for these smaller procurements.

- b. Recommendation 3.1.2: Revisit the Development of a Small Business Enterprise Program**

In order to provide economic opportunity for DBEs and other small businesses and stimulate economic development, BART should pursue the development of a Small Business Enterprise



(SBE) Program. The SBE Program would increase opportunities for more qualified small businesses to participate in BART-sponsored contracts as prime contractors. During the study period, 80 percent of the prime contract dollars and 14.96 percent of the contracts were awarded to 66 businesses. A SBE Program could help spread BART's contract dollars to more businesses. Moreover, a SBE Program is race and gender-neutral and could be designed to encourage and promote participation of small businesses domiciled in the market area. Utilizing the Program provisions, BART staff will be able to take affirmative steps to encourage SBEs to participate on all contracts, including construction, professional services, and goods and other services contracts. In addition, special efforts could be undertaken to encourage small businesses to participate in educational and networking opportunities that enhance their ability to perform work and to achieve business success on BART's contracts.

4. Objective 4: Develop Communication Programs and Procedures Which Will Acquaint Prospective DBEs with the District's Contract Procedures, Activities, and Requirements and Allow DBEs to Provide the District with Feedback on Existing Barriers to Participation and Effective Procedures to Eliminate Those Barriers

As provided in 49 CFR Part 26 §26.51(b)(4), federal recipients are encouraged to carry out communications programs on contracting procedures and specific contracting opportunities.

- **Finding 4.1**

In an effort to promote the objectives of the DBE Program and reach out to small businesses, BART participates with the OCR in supporting various trade fairs and other outreach events and should continue to engage in and sponsor these activities.

- a. Recommendation 4.1.1: Conduct an Extensive DBE and Other Small Business Outreach Campaign**

Efforts to meet the program objectives and policy goals could be enhanced with a comprehensive outreach campaign to communicate contracting opportunities, contracting procedures, and goals and objectives of the DBE Program. Table 11.07 below lists the strategies and tactics that can be used to market the DBE Program to attract DBE firms to certify with BART and bid on BART contracts, as well as to inform the business community of the new requirements and enhanced services.



Table 11.07 Outreach and Marketing Strategies

Strategy	Tactics
Design tagline and produce banner display	<ul style="list-style-type: none"> • Develop tagline • Design banner with placement of existing logo and new tagline
Define design standards layout for a uniform appearance of procurement documents	<ul style="list-style-type: none"> • Revise all procurement materials to include the program logo and tagline in order to have a uniform appearance
Develop collateral print material for outreach campaign	<ul style="list-style-type: none"> • Produce brochure to reflect program changes • Develop articles and media packets
Launch outreach campaign	<ul style="list-style-type: none"> • Distribute media packets and press releases • Place public service announcements • Pitch campaign to broadcast media
Host semi-annual contractors' open house and other networking events	<ul style="list-style-type: none"> • Plan and coordinate open house events • Send out invitations by mail, fax, and e-mail • Include procurement department in outreach events • Make informal contract opportunities available • Distribute contract forecasts and certification forms
Distribute forecasts to targeted businesses	<ul style="list-style-type: none"> • Advertise on trains and billboards • Post forecast to website • Distribute through fax and e-mail • Advertise forecasts on trains and billboards
Partner with agencies and organizations to disseminate program information	<ul style="list-style-type: none"> • Continue current agency partnerships • Develop local business and trade group partners
Conduct an annual program evaluation	<ul style="list-style-type: none"> • Establish measurable outcomes • Conduct surveys • Examine bidding history

b. Recommendation 4.2.1: Expand Project Manager Participation on Outreach Events

The outreach events should be expanded to include Project Managers and provide information about small projects as well as the large major capital projects. A procedure should be established to follow-up on inquiries and requests for information from the attendees.

• Finding 4.2

BART's website allows the public to download the monthly newsletter, *BART Times*, which provides updates on upcoming events, agencies partnering with BART to provide additional services to riders, travel information, station development updates, and various other entertainment-based information. However, there is no publication which specifically targets DBEs and other small businesses.



c. Recommendation 4.2.1: Improve Communication with DBEs and Other Small Businesses

Following the model used for the *BART Times*, a monthly procurement newsletter should be developed in conjunction with the OCR that targets DBE and small businesses. The newsletter should be made available online. Business owners could also sign up for e-mail alerts and news briefs. The newsletter would contain information about upcoming contracts, trade fairs, business focus groups, and other information pertinent to the business community. Additionally, each newsletter could contain an advertisement and website link to an online DBE certification application.

d. Recommendation 4.2.2: Establish Method to Obtain Business Feedback

A Small Business Advisory Committee should be established to gain insight from the business community regarding common barriers, obstacles, or impediments experienced in the contracting with BART. This committee should convene at least semi-annually, and a report of its findings should be submitted to the OCR for review after each meeting. This committee would be responsible for gathering information through focus groups and surveys conducted with a random sample of DBEs listed in BART's directory.

B. Post-Award Recommendations

1. Objective 5: Administer the DBE Program in Close Coordination with the Various Departments within the District So As to Facilitate the Successful Implementation of the Program

Recipients of federal funds are motivated in accordance with 49 CFR Part 26 §26.51(b)(5) to develop supportive service programs in an effort to improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses. These services involve participation of all BART departments to ensure the successful implementation of the DBE Program.

• **Finding 5.1**

No systematic methods or procedures are consistently followed by BART Project Managers to provide supportive services to DBEs in conjunction with the OCR for contracting and procurement. Contracts regularly let without notice to the OCR thereby reduces the number of contract opportunities potentially available to DBEs and other small businesses. BART Project Managers should consistently follow the methods and procedures regularly employed by the Procurement Department.



a. Recommendation 5.1.1: Improve Procurement Procedures

BART's procurement procedures should be revised to include a requirement that the OCR should be consistently informed in writing and receive a copy of any proposed contract or procurement for construction, professional services, and goods and other services at least seven (7) business days prior to the release of the Request For Proposals, Request For Quotations, Request For Bids, or Letters Of Intent. Additionally, a report of all contracts and procurements advertised by BART should continue to be produced and submitted to the OCR on a regular basis. This procedure would result in more contract opportunities being advertised to DBEs.

• **Finding 5.2:**

BART does not engage in department-wide DBE training for department managers or departmental staff.

b. Recommendation 5.2.1: Establish Performance Accountability Reviews

Accountability standards to promote and ensure compliance with the revised procurement procedures should be developed. These standards would be incorporated as part of the management and staff performance reviews. Development of accountability standards reduces potential non-compliance with the revised procurement procedures, and will function to increase the number of DBEs aware of contract opportunities as well as the number of DBEs and other small businesses utilized on these contracts.

c. Recommendation 5.2.2: Develop Department-Wide DBE Manager and Staff Training

A DBE training program and manual should be developed for the entire district. This program would provide background on the DBE Program, the federal regulations which govern the program, and BART's DBE policy and objectives and the procedures employed by OCR to increase DBE participation and administer the Program in accordance with federal regulations. Managers and departmental staff would be required to attend annual training seminars to ensure that they are abreast of current changes in the federal regulations and enhancements to BART's DBE Program.

• **Finding 5.3**

BART's GEAC legacy financial system tracks payments by purchase orders and contracts. Excel files and a Contract Management Database System (CMDB) are maintained separately to track contract awards.

Aspects of the current system should be enhanced in order to more effectively track and monitor prime contract and subcontract awards. The recommended enhancements would allow



BART to conduct a more accurate assessment of the effectiveness of its DBE Program and compliance with its policies and the reporting requirements of the Federal regulations in CFR Part 26.

d. Recommendation 5.3.1: Implement Contract Tracking Module

A contract module within BART's new financial system should be developed. This module would track prime contract information. Capturing contract information would make it possible to track and monitor modifications to the original contract award amount during the term of the contract and to record annual renewals. It would also enable the tracking of purchase order payments to the encumbered contract award amount and any payments issued against the purchase order or contract.

Data to be recorded in the contract module includes contract number, name, description, original award amount, and award modifications. Additionally, all purchase orders would be tied to the contract number.

• **Finding 5.4**

BART's GEAC system tracks both successful and unsuccessful construction bidders in separate Microsoft Word documents maintained by the OCR.

e. Recommendation 5.4.1: Implement a Bidder Tracking Module

It is recommended that BART implements a bidders tracking module in its new financial system to tabulate electronically critical information on businesses which bid or propose on construction, professional services, and goods and other services contracts. The uniform electronic collection of bid tabulations will also provide information that can be used to identify available businesses when setting DBE goals. Increased information on available businesses would be helpful in identifying and increasing the pool of certified M/WBE firms.

f. Recommendation 5.4.2: Design a Utilization Tracking Database

Effective contract compliance will require a relational database that can track and report BART contracting activity. A comprehensive utilization tracking database should be linked to the new financial system by the unique contract number. This tool will be critical in monitoring utilization and conducting contract compliance. The tracking database should be designed so that all prime contractor and subcontractor utilization information on construction, professional services, and goods and other services contracts can be tracked.



2. Objective 6: Identify Business Enterprises That Are Qualified as DBEs and Are Qualified to Provide the District with Required Materials, Equipment, Supplies, and Services

- **Finding 6.1**

The Federal regulations 49 CFR Part 26 26.51(b)(6) include provisions for establishing services to help DBEs improve long term development and achieve eventual self-sufficiency. Identifying DBEs that are qualified to assist BART is paramount to achieving this goal. Establishing professional relationships and good working rapport with business owners through support services and outreach programs will facilitate the growth of DBEs and eventual self-sufficiency, thereby meeting the program goals.

Several recommendations contained in section 4.1 can be utilized to meet this program objective. However, BART should consider the following recommendations as well.

a. Recommendation 6.1.1: Sponsor Open House Events

BART should sponsor quarterly open house events to meet and greet DBEs and other small businesses. These open house events should provide general information regarding procedures for the contract and procurement process. Sign up sheets at these events should at a minimum collect vendor names, addresses, contact information, and type of services provided. This information can be added to a tracking database which will be accessible to the OCR.

b. Recommendation 6.1.2: Conduct Bi-Annual Review of the DBE Directory

Departments have demonstrated a practice of utilizing a limited number of contractors on a regular basis. During the study period 66 contractors performed 80 percent of BART's contracts. The OCR should conduct a bi-annual review of each department's contracting activities to determine the types of goods and services it procures. This information should be compared against the DBE directory to identify certified DBEs capable of providing services to BART in specific industries but have not been utilized.

3. Objective 7: Ensure that the DBE Program is Narrowly Tailored in Accordance with Applicable Law.

- **Finding 7.1**

As required by California State law and 49 CFR Part 26 §26.29, BART promotes an expedited payment program. This program is narrowly tailored in accordance with applicable laws and requires that prime contractors be paid by government agencies within thirty (30) days. Professional Service Agreements also require that the prime contractor pay subcontractors within thirty (30) days of an acceptable invoice.



a. Recommendation 7.1.1: Conduct Routine Post-Award Contract Compliance Monitoring

Routine and rigorous contract compliance monitoring should continue to be conducted by the OCR to ensure that the subcontractor participation listed in the bids, proposals, and statements of qualification is achieved and maintained throughout the duration of a contract and that the businesses are paid according to the prompt payment program standards. To successfully monitor subcontracting participation of truckers, subcontractors, and suppliers of materials and equipment, all participants must be listed on all bids, proposals, and statement of qualifications. The monitoring would verify the prime contractor's commitments prior to and after the award of the contract. Consistent contract compliance would minimize the hardships experienced by DBEs and small businesses due to unauthorized substitutions and late payments by prime contractors. It would also ensure that the remedy is narrowly tailored.

4. Objective 8: Ensure that Only Firms that Fully Meet the Eligibility Standards of 49 CFR Part 26 Are Permitted to Participate as DBEs

49 CFR Part 26 §26.51(b)(8) requires federal recipients to ensure that firms certified as DBEs meet the eligibility criteria, and DBE directories and relevant information are disseminated to the widest feasible audience of potential prime contractors. These directories must contain only those firms that meet the federal eligibility requirements. As such, BART must ensure that it follows procedures to track and monitor DBE eligibility, thereby protecting the integrity of directories and information distributed to prime contractors.

• **Finding 8.1**

BART participates in the California Unified Certification Program (CUCP) and performs certifications on behalf of the CUCP. The CUCP and BART's initial certification procedures follow the standards set forth in 49 CFR Part 26, Subpart D.

a. Recommendation 8.1.1: Publish Enhanced DBE Utilization Reports

Utilization reports submitted quarterly by OCR to measure the effectiveness of BART's DBE Program should include verified payment and award data organized by industry, department, ethnicity, gender, DBE status, change orders, and subcontractor substitutions. The fourth quarter report should include an assessment of program activities and recommendations for improvement. Exemplary practices and achievements in each department should also be noted in the fourth quarter report. All utilization reports should be posted on BART's website to those interested and be made available to businesses by e-mail.

The DBE Quarterly Utilization Reports and the Uniform DBE Reports submitted to FTA should also be posted to BART's website.



5. Objective 9: Assist in the Development of DBE Firms That Can Compete Successfully in the Marketplace Outside of the DBE Program

Subsection 26.51(b)(9) of 49 CFR Part 26 provides that federal recipients should assist DBEs and other small businesses in developing their capacity to conduct business. Introducing programs and services that promote DBE participation will invariably increase their utilization and allow them to compete for contracts outside of the DBE Program.

- **Finding 9.1: Technical Assistance to Businesses Attempting to Do Business with BART**

BART engages in outreach activities and provides technical assistance to businesses attempting to do business with BART.

- a. **Recommendation 9.1.1: Convene Debriefing Sessions for Unsuccessful Bidders**

Regular debriefing sessions for unsuccessful bidders should be held. These sessions will provide vital information for assisting DBEs and other small businesses in targeting areas of their bid, proposal, or interview that could be enhanced to make them more competitive when pursuing future contracts.

- b. **Recommendation 9.1.2: Provide Five-Day Notice of Invoice Disputes**

Within five days of receiving a disputed invoice, the contractor should receive a notice from the prime contractor or BART detailing any item in dispute. Undisputed invoice amounts should be paid promptly, and disputed items should be resolved in a timely manner.

- c. **Recommendation 9.1.3: Establish Penalties for Failure to Submit Completed *Designation of Subcontractors Form***

Failure by prime contractors to list the names of all subcontractors on the *Designation of Subcontractors* form should render the submittal non-responsive and therefore void.

- **Finding 9.2**

BART requires prime contractors to provide immediate notification if a DBE subcontractor is unable or unwilling to perform the work it was contracted to perform, substantiated by supporting documentation. Capturing information on all DBE and non-DBE subcontractors is critical to perform a subcontracting analysis.



d. Recommendation 9.2.1: Expand Subcontractor Substitution Standards

Subcontractor substitution standards ensure that prime contractors remain accountable for subcontractor commitments made at the time of award. Substitution standards should address the dropping of any subcontractor. The standards are a means of ensuring the integrity of the DBE Program and the reporting to the OCR. Substitution standards are also necessary to generate accurate subcontract reports. District-wide substitution standards should be expanded and employed by all departments. Additionally, all subcontractor substitutions, DBE status of the substituted contractors, amounts awarded, and other critical information should be incorporated in the DBE Quarterly Reports submitted to the Board as part of the Quarterly Progress Reports to ensure compliance with the policy.

e. Recommendation 9.2.2: Conduct Routine Post-Award Contract Compliance Monitoring

Quarterly compliance monitoring should continue to be conducted to ensure that the DBE and non-DBE subcontractor participation listed in the bids, proposals, and statements of qualification is achieved throughout the duration of a contract. Regular compliance monitoring would verify that the prime contractors are honoring their subcontracting commitments prior to and after the award of the contract. Quarterly compliance reports should be prepared. Consistent contract compliance monitoring and reporting would minimize the hardships experienced by DBEs and small businesses due to unauthorized substitutions and late payments.

The following contract compliance monitoring methods are recommended:

- 1) Track and report subcontractor utilization in an electronic database
- 2) Collect copies of the canceled checks written to subcontractors in order to verify payment information on a quarterly basis
- 3) Impose penalties for failure to list a subcontractor in the Designation of Subcontractors and M/WBE Form or to pay a subcontractor for work performed. The listing on the Designation of Subcontractors and M/WBE Form for construction projects should extend beyond the California Public Contract Code requirement to list businesses receiving more than .01 percent of the bid amount. There are significant contracting opportunities for subcontracting in the general conditions of a large construction project.



V. ADMINISTRATIVE RECOMMENDATIONS

A. Website Enhancements

- **Finding 1.1**

BART's website has recently been redesigned. It is aesthetically pleasing and user-friendly for visitors wishing to obtain information about BART's services. There are, however, some modifications which could increase its functionality and informativeness and provide user-friendly access to contracting and procurement information.

- a. Recommendation 1.1.1: Develop Conspicuous Links to the Contracts and Procurement Page**

BART's website provides information related to doing business with BART. However, this information is not easily located or readily accessible. There are no menu items or links specifically indicating or providing details about contracting opportunities with BART. The site could be enhanced by including a menu item or link on the opening page clearly directing businesses to the procurement information. Providing relevant information for businesses on the opening page will greatly reduce the amount of time and effort individuals expend searching for business opportunities with BART. Ready access is critical for small businesses and DBEs which may not have resources for such tasks, compared to their larger counterparts.

Menu items or a link on the front page can also function as a form of outreach. All visitors to the website could be made equally aware of potential opportunities to work with BART. Some visitors looking for rider-related information on the website are also business owners, who might be unaware of BART's potential as a future client. Making the business pages easy to find, use, and navigate would improve the likelihood of casual visitors becoming future bidders and contractors.

- **Finding 2.1**

BART has a clear idea of the type of services and issues most critical to their riders, and a significant emphasis is placed on features such as the QuickPlanner, Service Advisories, and Real Time Arrivals, all of which appear in prime positions on BART's opening web page.

- b. Recommendation 2.1.1: Provide Site Restructuring to Assist Business Users**

BART's comprehensive approach to rider information should be replicated on the business pages. It should identify who will visit this section and the information and services that are important to this target group. These users and their priorities should be the organizing principles of this business site, and the website should be structured so that users can



immediately identify the areas that apply to them. The structure of the site should actively guide them toward their goals. For example, a firm considering doing business with BART should be able to click on the link on the front page and arrive at the business page. There the user is presented with a list of links or menu items that are concise verb phrases that describe the kinds of business activities available with BART.

For example, the “Bid on Contracts” page should not only include a listing of bid openings, but it should also describe a how-to guide for correctly submitting a bid and considerations that a bidder must take into account when producing a bid. This would also be the natural place to promote outreach efforts, available assistance, or DBE Program objectives, as well as forms required to comply with the procurement standards. Contact information for technical and support staff should be included. This page should level the playing field and give the first-time bidder the resources to correctly prepare a bid as an experienced contractor.

c. Recommendation 2.1.2: Create Interactive Website Portal

BART should create a more interactive web interface in which prime contractors and subcontractors could upload, download, and submit compliance documents to the purchasing department and OCR. The website should supplement paper or manual forms with electronic documents to the maximum extent possible. The interactive tools should include forms to allow current contractors and vendors to perform reporting and other administrative tasks. The site would serve as a management tool for both sides of the contracting relationship, keeping all parties informed. For example, the tool could allow BART to post change orders, update specifications, and notice changes in bid opening dates with automated notification. This would minimize the time and cost of direct communication to and from BART and the businesses.

d. Recommendation 2.1.3: Expand Purchasing and Contracting Information

Bid summaries in addition to DBE goal reports or any other document intended for public consumption should be posted with the contract awards that are currently posted. The objective is to answer as many questions that may arise about BART and its procurement activities via the website, reducing the effort, time, and cost expended for such purposes.

e. Recommendation 2.1.4: Include Contracts on Website

Notice of bid openings should be advertised on the website. Solicitations should be listed 45 days prior to the bid opening date, when feasible. The listings would consist of the project description or product specifications, bid opening date, and subcontracting goals. Listings should be posted the same day each week.

BART payments to prime contractors and prime contractor payments to subcontractors should also be posted on the website. The website would provide timely public notice to businesses that responded to the solicitation and the general public. In addition, BART should post its Intent to Award decisions. Monthly reports of formal and informal contract awards should



also be posted. This public notice should include the contractor's name, awarding procurement official, award amount, and contractor's DBE status.



12

SUPPLEMENTAL STUDIES: PRIVATE SECTOR ANALYSIS, OTHER PUBLIC AGENCIES DBE UTILIZATION ANALYSIS, AND REGRESSION ANALYSIS

I. INTRODUCTION

This chapter reports the findings from the private sector analysis, the analysis of the Disadvantaged Business Enterprise (DBE) utilization by other public agencies, and the regression analysis. The three questions the chapter addresses are supplemental to the San Francisco Rapid Transit District's (BART's) Availability and Utilization Study (Study). As part of the Study, BART requested an analysis of DBE participation on contracts with and without affirmative action components in order to determine the impact on minority and woman-owned business enterprises which occurred when contracts were awarded without goals. BART also requested the determination of the DBE prime contractor and subcontractor utilization by other transit agencies in the three industries under examination in the disparity study. Finally, BART requested a BART-specific multivariate regression analysis to determine whether ethnicity and gender have a statistically significant effect on business earnings, when controlling for business owners' characteristics, such as age, education, access to capital, and other variables

The methodology employed to address the three questions and the findings from the analysis of the private sector, the DBE utilization by other transit agencies, and the regression analysis are set forth below.



II. PRIVATE SECTOR ANALYSIS

A. Background

This section reports the findings from the private sector analysis. *Concrete Works of Colorado v. City and County of Denver*¹ (*Concrete Works*) and *Builders Association of Greater Chicago v. City of Chicago*² (*City of Chicago*) decided in 2003 explicitly held that business activities conducted in the private sector, if within the government's marketplace, are appropriate areas to examine the issue of discrimination. The *City of Chicago* held that a finding of discrimination from a private sector analysis, to be actionable by government, must show a nexus between the government remedy and the private sector discrimination. Given the legal standard the persuasive evidence of private sector discrimination could be derived from a statistical analysis of private sector activity which involves government's passive participation of its prime contractor's subcontracts.

The private sector study analyzed contracting which involved the San Francisco Bay Area Rapid Transit District (BART) as a passive participant in the contracting process. The analysis was an alternative means of assessing whether discrimination existed in BART's market area when contractors could bid without having to respond to government's requirement to utilize minority and woman-owned businesses. The analysis compares minority and woman-owned business enterprise participation on contracts with and without goals. The findings are also a measure of the impact on minority and woman-owned business enterprises that occurred when BART's race-specific goals were suspended in May 2006.

B. Methodology

To perform the analysis it was necessary to determine the use of M/WBEs on federally-funded contracts with goal requirements versus the locally funded contracts without goal requirements. The federally-funded contracts were identified by BART for the entire five year period covered in the disparity analysis. The federally-funded contracts awarded after May 2006 did not have goals.

The prime contracts awarded during the five year study period and their subcontractors were identified as part of the utilization analysis performed for the disparity study. These records were classified into contracts awarded with and without goals. All non-federally funded contracts during the study period were awarded without goals. And all federally-funded projects awarded after May 2006 also did not have goals. Once the prime contracts were classified as awarded with and without goals, the analysis was undertaken to determine the level of minority and woman-owned business enterprise participation achieved on contracts that had goals as compared to those that did not have them.

¹ *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (Tenth Circuit, 2003)
² *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. III. 2003)



C. Data Analysis

- **Contracts with Goals Versus Contracts without Goal Requirements**

The level of M/WBE subcontracting reported by prime contractors on BART contracts with goals and those without goals were compared with the purpose of determining whether or not the presence of goals influences M/WBE subcontractor utilization. The construction and professional services industries offered contracts with and without goals. The results of the analysis of BART contracts with and without goals are presented below.

As Table 12.01 below illustrates, in the construction and professional services industries, prime contractors subcontracted a significantly higher percentage of M/WBEs on contracts with goals than on contracts without goals.

Table 12.01 M/WBE Subcontractor Utilization on Contracts With and Without Goals July 1, 2002 to December 31, 2008

Contract	Prime Contract Amount	Amount M/WBE Subcontractor Received	Percentage of Award M/WBE Subcontractor Received
Construction			
Contracts with Goals	\$21,401,977	\$2,600,773	12.15%
Contracts without Goals	\$146,728,712	\$3,396,169	2.31%
Professional Services			
Contracts with Goals	\$10,400,000	\$3,447,401	33.15%
Contracts without Goals	\$103,160,584	\$16,168,422	15.67%

D. Conclusion

Using the data available, Mason Tillman's M/WBE participation analysis has determined that M/WBE utilization was significantly lower when construction contracts and professional services contracts were awarded without goals. It is evident that the participation of M/WBEs on BART's construction contracts and professional services contracts without a DBE Program in place would decline.



III. OTHER PUBLIC AGENCIES DISADVANTAGED BUSINESS ENTERPRISE UTILIZATION ANALYSIS

A. Background

The San Francisco Bay Area Rapid Transit District (BART) has requested the determination of the utilization of Disadvantaged Business Enterprise (DBE) prime contractors and subcontractors by other transit agencies in the three industries under examination in the disparity study, as well as disadvantaged groups as defined by the United States Department of Transportation (US DOT) regulations 49 CFR Part 26 (Part 26), Subpart A 26.5. The three industries are public works construction, purchase contracts, and professional services for architectural and engineering services and non-architectural and engineering services. California transit agencies subject to the provisions of Part 26 were considered as a comparative group.

The provisions of Part 26 apply to transportation agencies receiving federal aid from any of the three US DOT Operating Administrations: the Federal Highway Administration, Federal Transit Administration, and Federal Aviation Administration. Transit agencies receive financial aid from the Federal Transit Administration (FTA). The provisions of Part 26 state that recipients of FTA planning, capital, or operating assistance which annually award prime contracts exceeding \$250,000, excluding transit vehicle purchases, must have a DBE program. One requirement of the DBE program is compliance with annually set overall DBE goals.

To document compliance with their overall DBE goals, transit agencies must submit to FTA the Uniform Report of DBE Awards or Commitments and Payments (Uniform Report). The Uniform Report is an accounting of compliance with the annual goal set by a transit agency. The FTA requires its grantees to submit Uniform Reports on a semi-annual basis. The Uniform Report captures prime and subcontract expenditures by DBE status, as well as the total number and value of contracts awarded by ethnicity and gender.

The Uniform Report was identified as a significant source in determining a transit agency's utilization of DBEs. An extensive effort was therefore undertaken to collect the Uniform Reports for certain California transit agencies.

B. Methodology

The goal of the data collection process was to make an accurate comparison of BART to other transit agencies similar in size, function, and location. Initially, there were two criteria used in the selection process. First, the agency must be located within BART's four county market area. Second, the agency must receive federal aid similar in size to BART.



Within the four counties—Alameda, Contra Costa, San Francisco, and San Mateo—six transit agencies were identified. To increase the number of transit agencies and further diversify the comparison, four more transit agencies were identified within the state of California using the second criterion. Uniform Reports of ten transit agencies were collected for comparison with BART’s DBE utilization. The ten transit agencies are:

- Alameda-Contra Costa Transit District
- Central Contra Costa County Transit Authority
- Fresno Area Express
- Golden Gate Bridge, Highway, and Transportation District
- Los Angeles County Metropolitan Transportation Authority
- Peninsula Corridor Joint Powers Board
- Sacramento Regional Transit District
- San Diego Metropolitan Transit System
- San Francisco Municipal Transportation Agency
- San Mateo County Transit District

1. Data Collection

Several methods were used to collect each of the ten agency’s Uniform Reports for the study period. Internet research was initially utilized since the Uniform Reports are considered public information and thus should be readily available. However, this method was largely unsuccessful. In fact, none of the ten transit agencies had their Uniform Reports available online. Each agency was then contacted and asked to provide its Uniform Report for each of the five years of the study period. Again, after numerous attempts to contact each agency via telephone and e-mail, this method proved to be largely unsuccessful. Only two of the ten agencies provided their Uniform Reports as a result of telephone and e-mail efforts. Most agencies that were successfully contacted indicated that they would prefer that their reports be obtained from the FTA.

As a result, the FTA was asked to provide the Uniform Reports for the remaining eight transit agencies through Freedom of Information Act requests. After two months of extensive efforts the Uniform Reports for the ten transit agencies were obtained. However, only one complete set of Uniform Reports for the study period was received from the ten transit agencies. The remaining sets of Uniform Reports were incomplete. Table 12.02 depicts, by agency, the number and format of the Uniform Reports received.



Table 12.02 Ten Transit Reporting Agencies

Transit Agency	2003		2004		2005		2006		2007	
	Quarterly	Semi-Annual	Quarterly	Semi-Annual	Quarterly	Semi-Annual	Quarterly	Semi-Annual	Quarterly	Semi-Annual
Alameda-Contra Costa County Transit Authority	0	0	0	1	0	2	0	0	0	0
Central Contra Costa County Transit Authority	1	0	0	0	0	2	0	1	0	1
Fresno Area Express	0	0	2	0	3	0	4	0	1	0
Golden Gate Bridge, Highway, and Transportation District	0	2	0	2	0	2	0	2	0	2
LA County Metropolitan Transportation Authority	2	0	0	2	0	2	0	2	0	1
Peninsula Corridor Joint Powers Board	0	1	0	2	0	2	0	2	1	1
Sacramento Regional Transit District	0	0	0	1	0	0	0	1	0	0
San Diego Metropolitan Transit System	0	0	0	1	0	1	0	1	0	0
San Francisco Municipal Transportation Agency	4	0	4	0	4	0	3	0	1	0
San Mateo County Transit District	0	1	0	2	0	2	0	2	0	2

For most agencies Uniform Reports were received for each of the study period years; however, they were reported in two different formats—quarterly and semi-annual reports. The difference in reporting formats is a result of each individual agency’s DBE program requirements. The requirements set forth in Part 26 are fulfilled with either semi-annual or quarterly reports. Unfortunately, the two different formats provided inconsistent data.

2. Data Analysis

The data common to both the quarterly and semi-annual report types includes total expenditures for DBEs and non-DBEs, by ethnicity. Therefore, these are the only data sets that can be compared. Moreover, in order to make an accurate comparison the data common to both report types must represent a similar time period. Thus, there was a decision to treat each semi-annual report as two quarterly reports by splitting the data in half, making the data from both report types represent the same time frame. This allowed for a more accurate comparison to be made by using the limited existing data. Had quarterly reports been doubled to represent a semi-annual report, a projection of non-existing data would have been included in the comparison. A comparison of projected data would have been less accurate than a comparison of existing data, regardless of the completeness of the existing data.

Once all the data was reduced into similar components, the data common to both report types was entered into a database. This was a necessary first step because any across-the-board comparison required data for all ten transit agencies. The ten transit agencies did not submit complete data for the study period, thus a comparison of similar units or time frames had to



suffice in order to make meaningful extrapolations and interpolations. The initial analysis is based on an average quarter across all of the ten transit agencies. This calculation summed the number of quarters each report covered, so that a semi-annual report would count as two reporting quarters, and a quarterly report as one. Then, the dollars reported by all the agencies were totaled and divided by the total number of quarters for which the transit agencies had reported. This calculation provided a representative quarter across all agencies and all years.

Further comparisons were made on an annual basis where applicable. Unfortunately, due to the incomplete data and different reporting formats, a complete comparison of the ten transit agencies' DBE utilization to BART's DBE utilization for the study period was not possible. Furthermore, each group presumed to be disadvantaged as defined in 49 CFR Part 26 was not represented in the data given in the Uniform Reports. Therefore, all findings and comparisons were severely limited by the quality and quantity of the data.

C. Analytical Findings

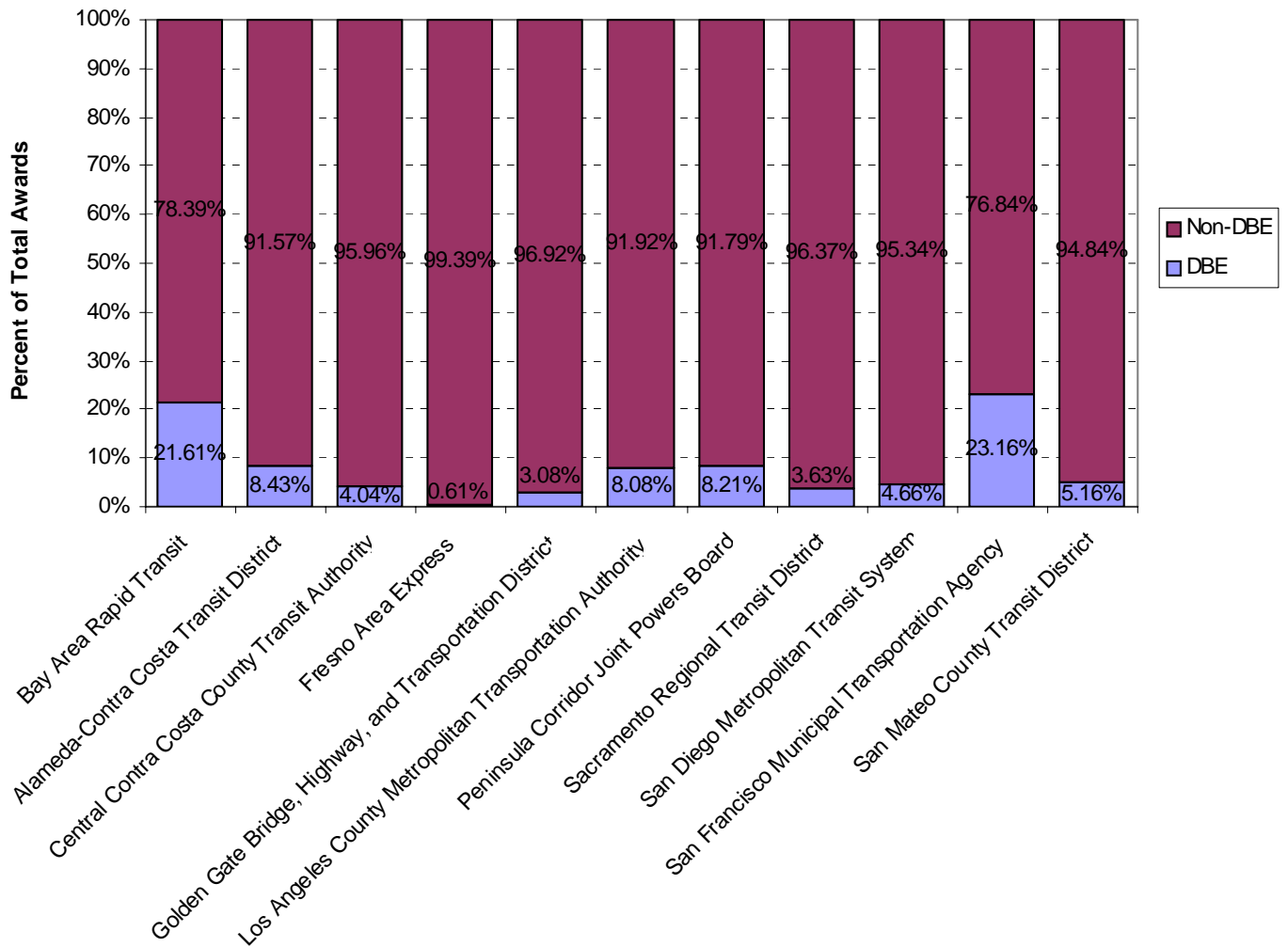
The findings present a comparison for all transit agencies including BART. The three comparisons are the average DBE utilization per quarter, an annual comparison of DBE utilization, and the utilization of the groups presumed to be disadvantaged as defined in 49 CFR Part 26 where applicable.

1. Quarterly DBE Utilization Comparison

To compare complete data for all ten transit agencies and BART, the average quarterly DBE utilization was determined for each agency. The San Francisco Municipal Transportation Agency attained the highest DBE participation per average quarter with 23.16 percent. By comparison BART's average quarterly DBE utilization was 21.61 percent. The Fresno Area Express had the lowest average quarterly DBE utilization at 0.61 percent. Chart 12.01 depicts the average quarterly DBE utilization by transit agency.



Chart 12.01 Average Quarterly DBE Utilization



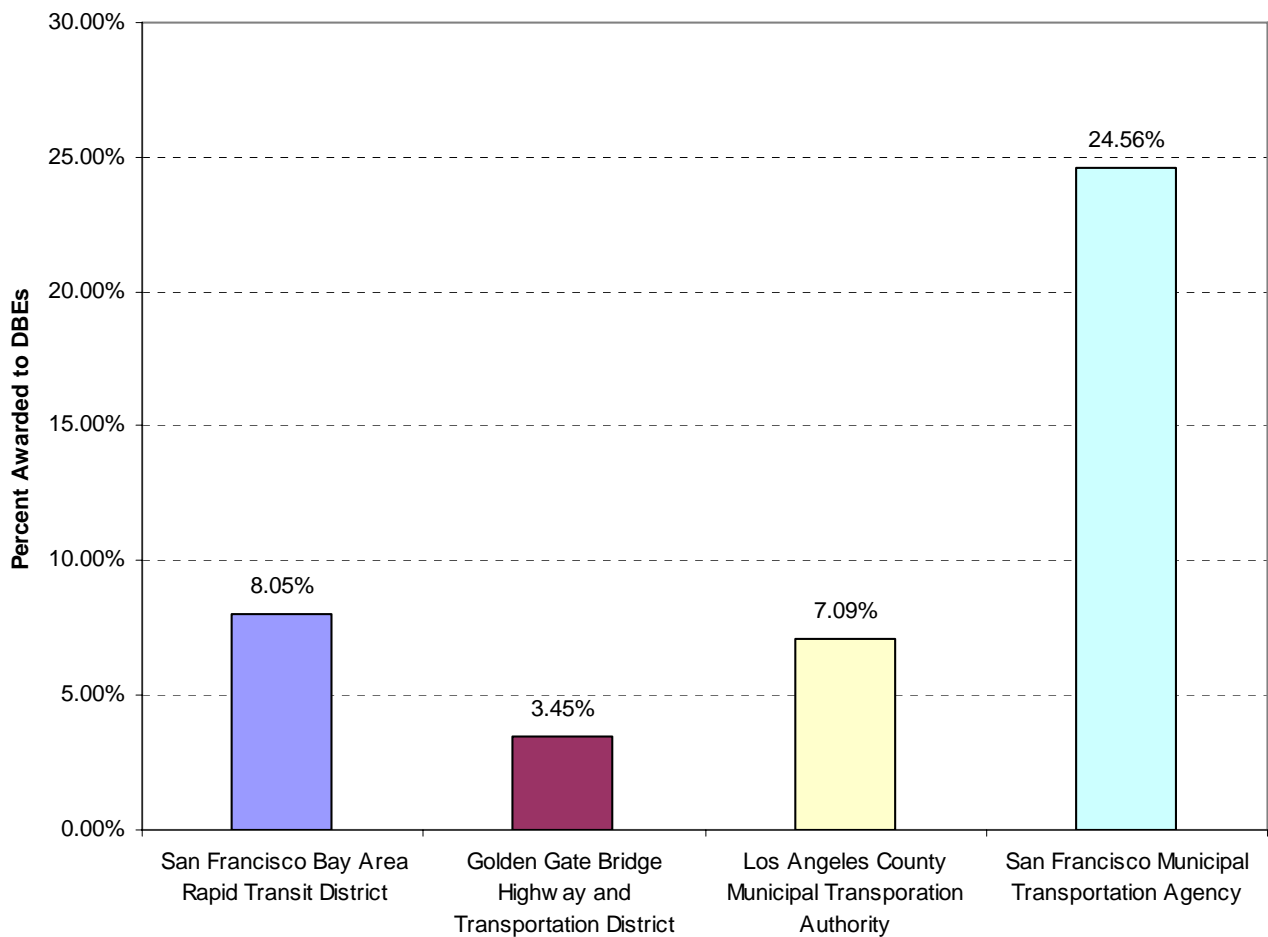
2. Annual DBE Utilization Comparison

This section compares the DBE utilization of BART and those transit agencies that submitted complete data for each fiscal year of the study period.

a. Fiscal Year 2003

Complete data for Fiscal Year 2003 was received for three transit agencies and BART. During this time period the San Francisco Municipal Transportation Agency had the highest DBE participation rate at 24.56 percent, representing \$26,463,322 of total contract awards. The Golden Gate Bridge, Highway, and Transportation District had the lowest DBE participation rate at 3.45 percent, representing \$41,747 of total contract awards. Chart 12.02 depicts Fiscal Year 2003's DBE utilization by transit agency.

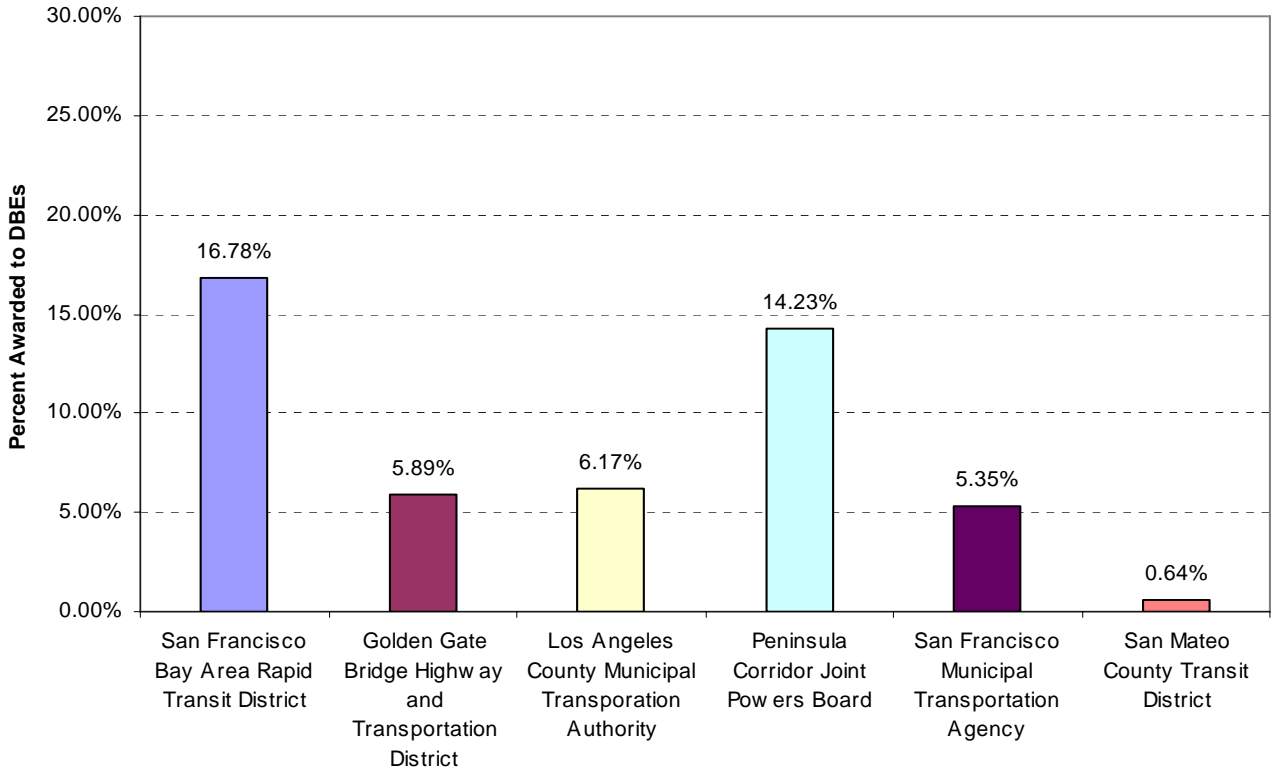
Chart 12.02 Fiscal Year 2003 DBE Utilization



b. Fiscal Year 2004

Complete data for Fiscal Year 2004 was received for five transit agencies and BART. During this time period BART had the highest DBE participation rate at 16.78 percent, representing \$578,200 of total contract awards. The San Mateo County Transit District had the lowest DBE participation rate at 0.64 percent, representing \$20,000 of total contract awards. Chart 12.03 depicts Fiscal Year 2004's DBE utilization by transit agency.

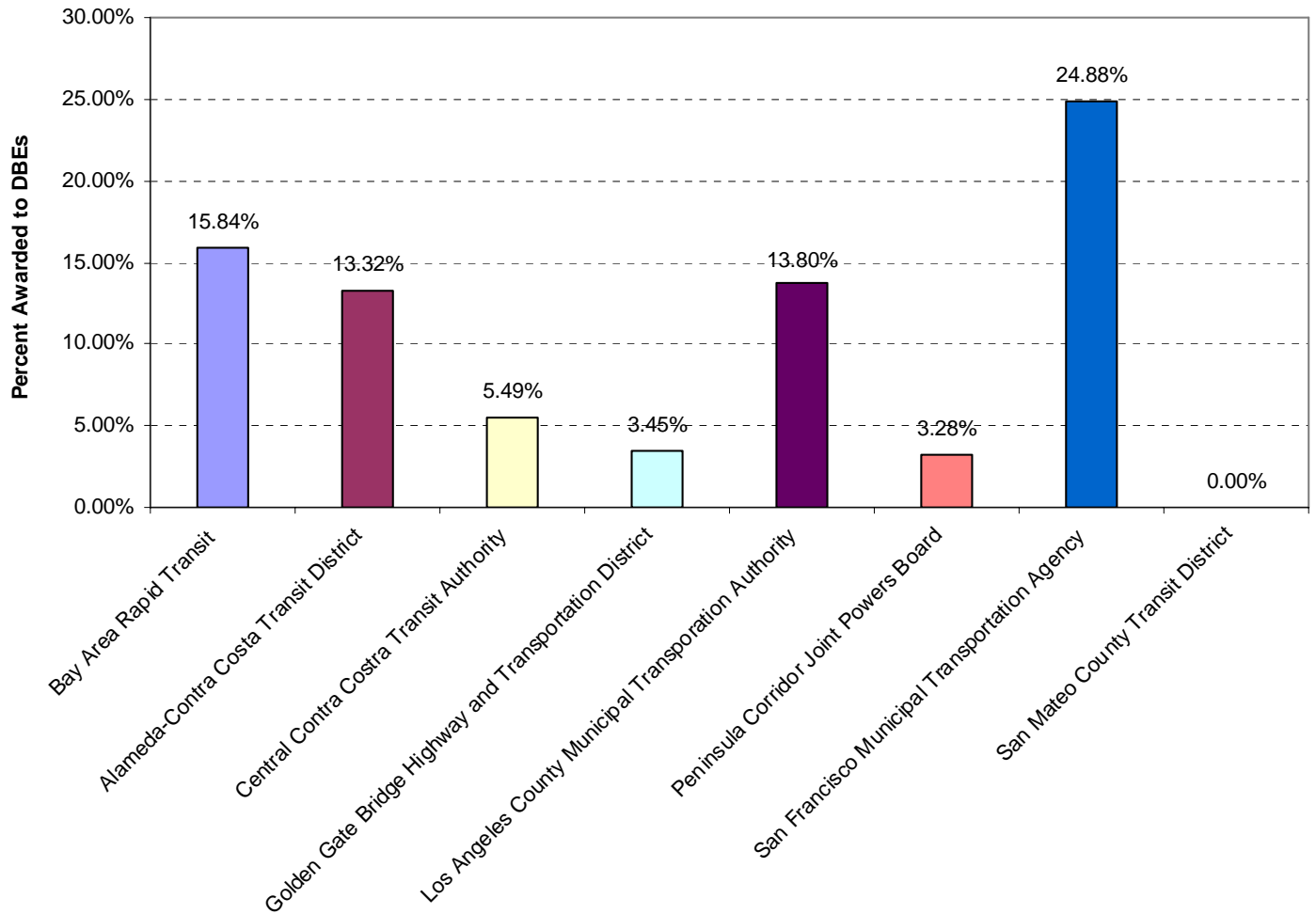
Chart 12.03 Fiscal Year 2004 DBE Utilization



c. Fiscal Year 2005

Complete data for Fiscal Year 2005 was received for seven transit agencies and BART. During this time period the San Francisco Municipal Transportation Agency had the highest DBE participation rate at 24.88 percent, representing \$33,563,392 of total contract awards. The San Mateo County Transit District reported no DBE participation for fiscal year 2005. Chart 12.04 depicts Fiscal Year 2005's DBE utilization by transit agency.

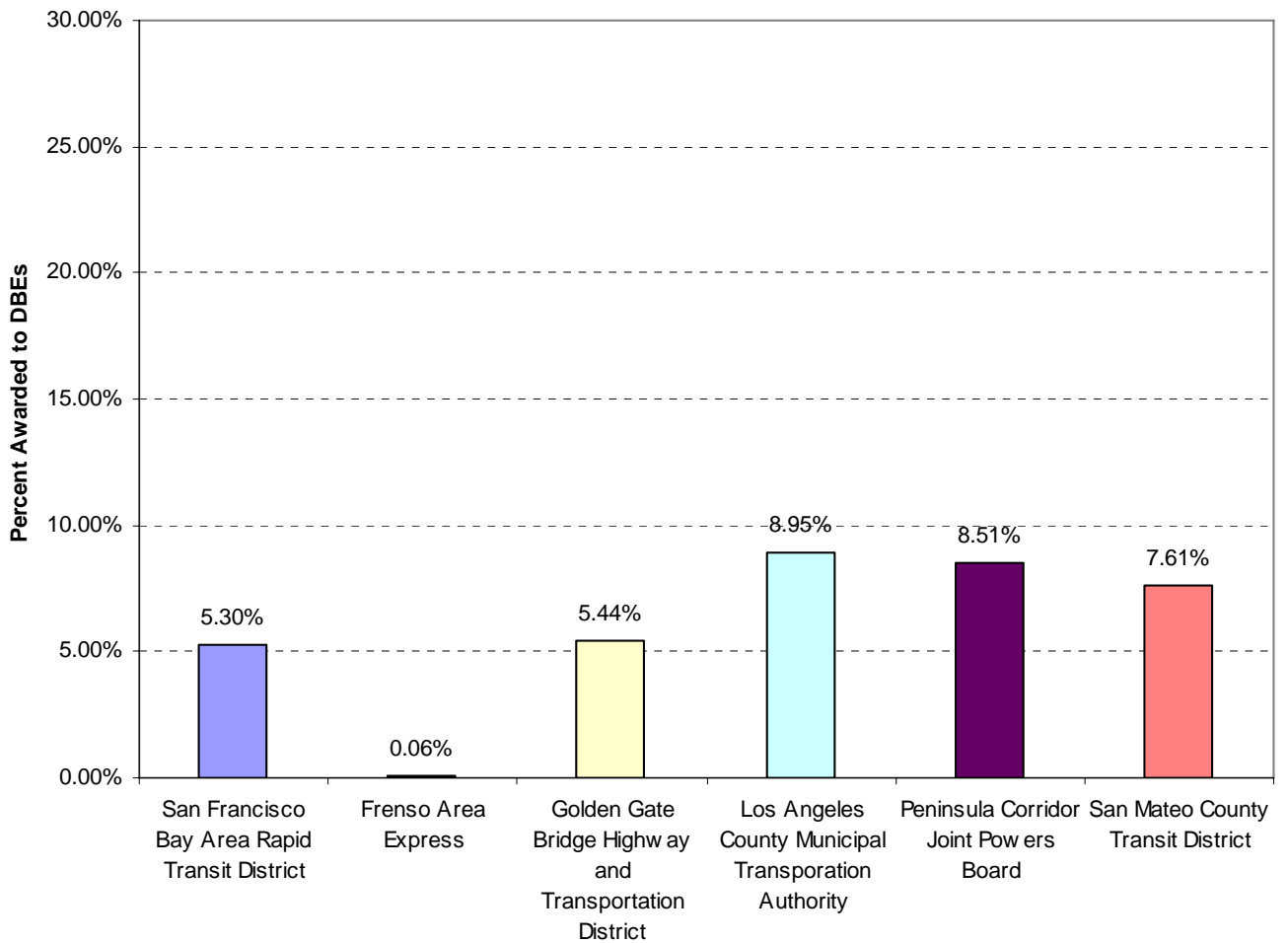
Chart 12.04 Fiscal Year 2005 DBE Utilization



d. Fiscal Year 2006

Complete data for Fiscal Year 2006 was received for five transit agencies and BART. During this time period the Los Angeles County Municipal Transportation Authority had the highest DBE participation rate at 8.95 percent, representing \$15,812,795 of total contract awards. The Fresno Area Express had the lowest DBE participation rate at 0.06 percent, representing \$2,137 of total contract awards. Chart 12.05 depicts Fiscal Year 2006's DBE utilization by transit agency.

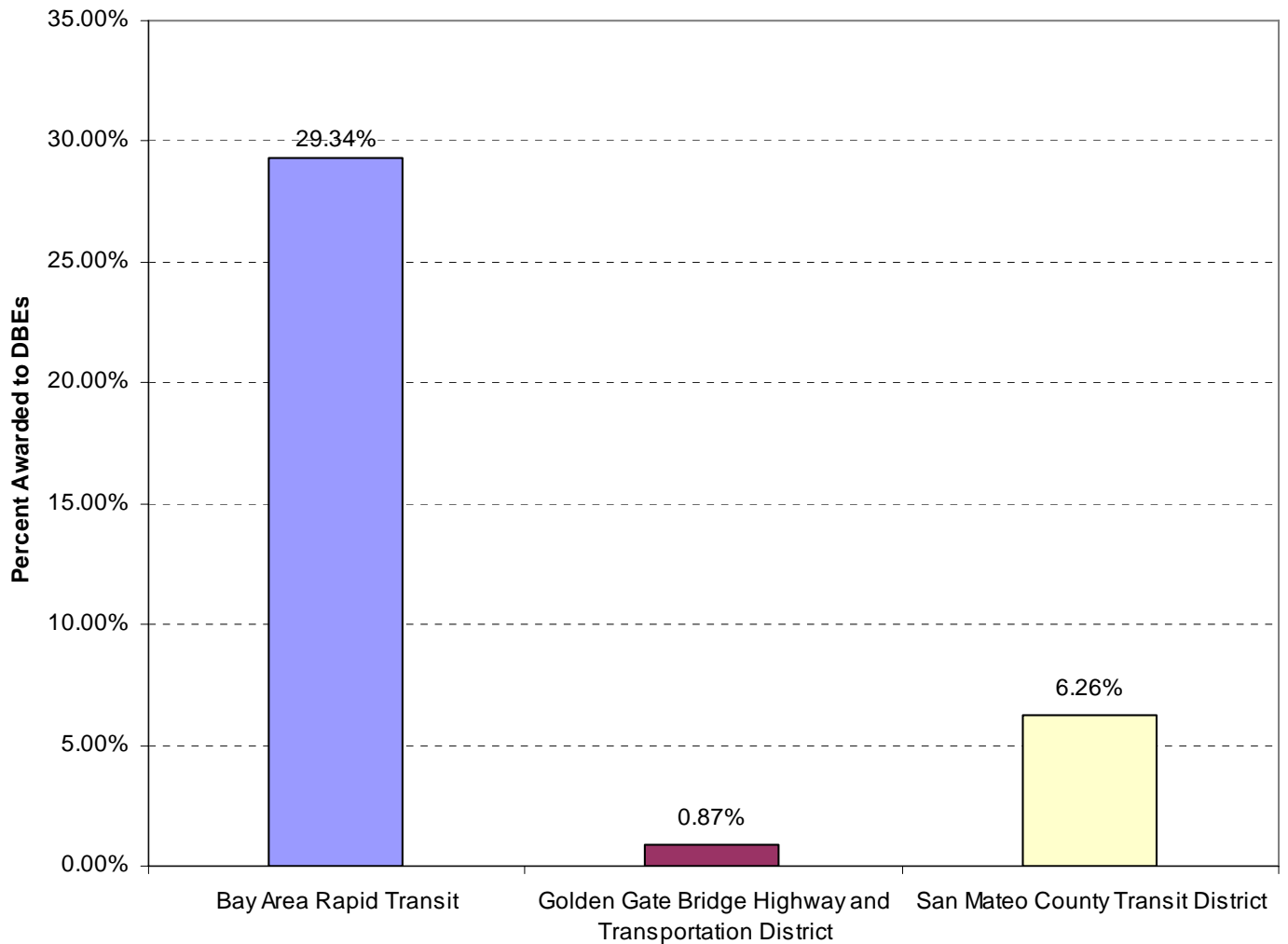
Chart 12.05 Fiscal Year 2006 DBE Utilization



e. Fiscal Year 2007

Complete data for Fiscal Year 2007 was received for two transit agencies and BART. During this time period BART had the highest DBE participation rate at 29.34 percent, representing \$21,125,262 of total contract dollars awarded. The Golden Gate Bridge, Highway, and Transportation District had the lowest DBE participation rate at 0.87 percent, representing \$39,883 of total contract awards. Chart 12.06 depicts Fiscal Year 2007's DBE utilization by transit agency.

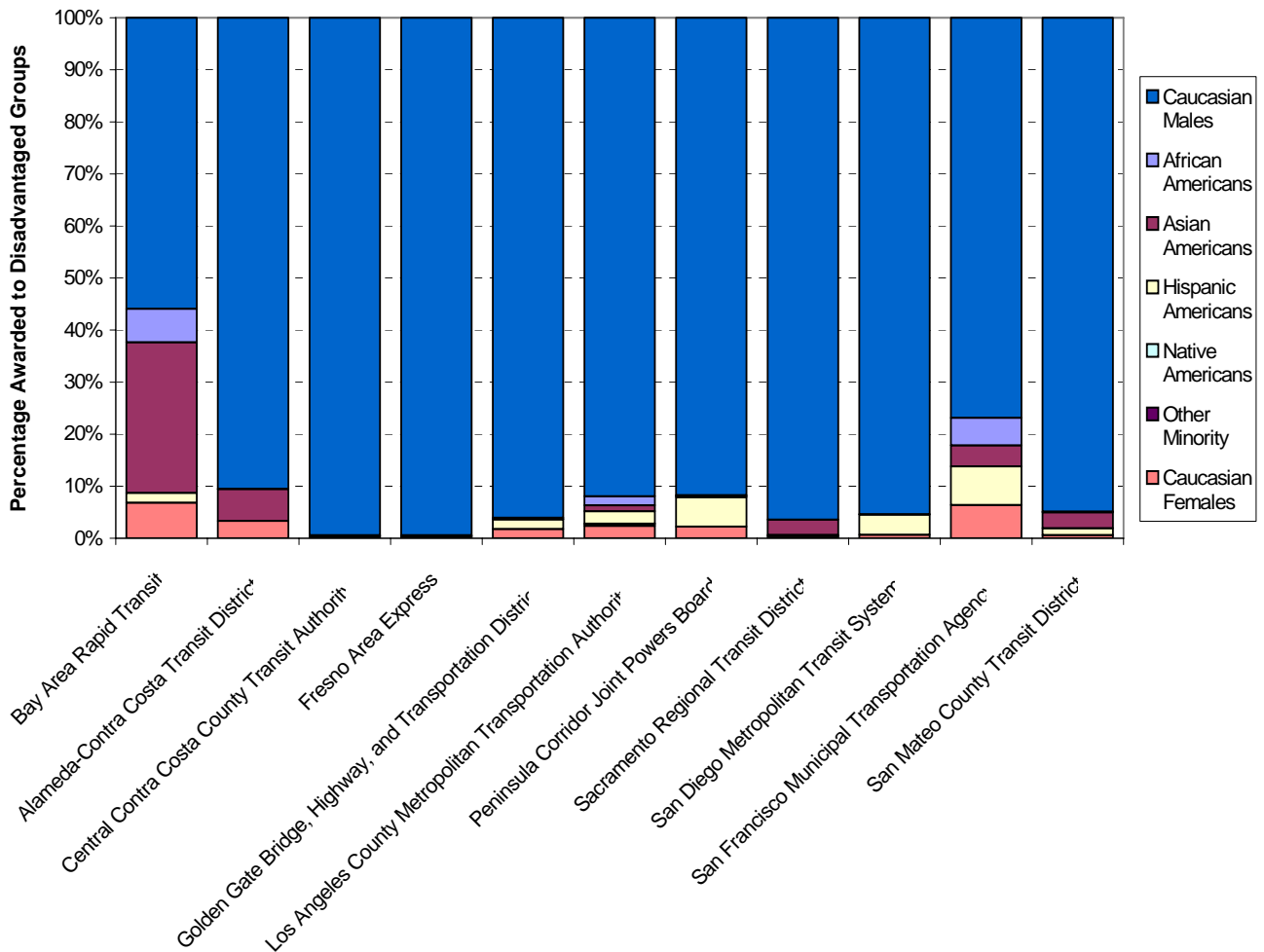
Chart 12.06 Fiscal Year 2007 DBE Utilization



3. Ethnic and Gender Utilization Comparison

The utilization of disadvantaged groups as defined by 49 CFR Part 26 by the ten transit agencies and BART was compared for the entire study period. It is important to note that aside from BART and the Golden Gate Bridge, Highway, and Transportation District, data from the ten transit agencies is incomplete for the duration of the study period. Therefore, the following comparison merely provides a snapshot of each transit agency's contracting practices. All ten transit agencies and BART contracted a majority to Caucasian males, with Central Contra Costa County Transit Authority and Fresno Area Express awarding the lowest percentage of contracts to minority males. BART utilized the highest percentage of disadvantaged groups during the course of the study period with the majority of those contracts being awarded to Asian Americans. Chart 12.07 depicts the percentage of contract awards to ethnic groups by transit agency for the entire study period.

Chart 12.07 Ethnic and Gender Utilization



For an average quarter minority business enterprises were utilized at 7.19 percent, compared to Caucasian male business enterprises which were utilized at 89.87 percent. Native Americans were the minority group utilized the least at 0.02 percent, while Hispanic Americans were the minority group utilized the most at 3.57 percent per quarter. Table 12.03 describes the average contract dollars per quarter spent by the ten agencies by ethnicity and gender.

Table 12.03 Average Contract Dollars Spent by Agencies Per Quarter from 2003 to 2007

Ethnicity/ Gender	Percent of Contract Dollars Per Quarter	Contract Dollars Per Quarter
African American Businesses	2.08 Percent	\$300,092
Asian American Businesses	1.52 Percent	\$219,440
Hispanic American Businesses	3.57 Percent	\$514,166
Native American Businesses	0.02 Percent	\$3,162
Minority Business Enterprises	7.19 Percent	\$1,036,861
Caucasian Female Business Enterprises	2.94 Percent	\$423,391
Caucasian Male Business Enterprises	89.87 Percent	\$12,954,874
Disadvantaged Business Enterprises	10.4 Percent	\$1,499,579

In comparison, for an average quarter BART utilized minority business enterprises at 37.26 percent, compared to Caucasian male business enterprises which were utilized at 55.88 percent. Native Americans were not utilized at all, while Asian Americans were the minority group utilized the most at 28.94 percent per quarter. Table 12.04 describes the average contract dollars per quarter spent by the ten agencies by ethnicity and gender.



Table 12.04 Average Contract Dollars Spent by Agencies Per Quarter from 2003 to 2007

Ethnicity/ Gender	Percent of Contract Dollars Per Quarter	Contract Dollars Per Quarter
African American Businesses	6.45 Percent	\$353,292
Asian American Businesses	28.94 Percent	\$1,586,589
Hispanic American Businesses	1.87 Percent	\$102,767
Native American Businesses	0.00 Percent	\$0
Minority Business Enterprises	37.26 Percent	\$2,042,648
Caucasian Female Business Enterprises	6.85 Percent	\$375,746
Caucasian Male Business Enterprises	55.88 Percent	\$3,063,127
Disadvantaged Business Enterprises	21.61 Percent	\$1,184,673

D. Conclusion

The ten transit agencies analyzed expended 10.4 percent of their contract dollars on DBEs per quarter during the reporting period. Minority Business Enterprises received an average of 7.19 percent per quarter, Caucasian Female Business Enterprises received an average of 2.94 percent per quarter, and Caucasian Male Business Enterprises received an average of 89.87 percent per quarter.

Moreover, during the reporting period BART had the second highest DBE participation on both prime and subcontracts with 21.61 percent of total contract dollars awarded to DBEs. BART also awarded the highest percentage of dollars to minority and woman-owned businesses with 44.11 percent of total contract dollars being awarded to minority and woman-owned businesses. Based on the analysis and comparisons made in this Chapter, BART’s DBE Program is generally more successful than the DBE programs of the ten transit agencies examined.

It is important to note the limitations of this analysis due to the fact that complete Uniform Reports for all transit agencies were not available for the entire study period. Aside from BART, The Golden Gate Bridge, Highway, and Transportation District was the only transit agency of the ten that had complete data for the entire study period. A comprehensive



comparison and analysis would require complete data from all ten transit agencies for the study period. Thus, any comparison between the ten transit agencies only provides a snapshot of their contracting practices.

IV. REGRESSION ANALYSIS

A. Introduction

This chapter reports the findings from the regression analysis, which was performed as research supplemental to the Availability and Utilization Study (Study). BART requested a multi-variate regression analysis to determine whether ethnicity and gender have a statistically significant effect on business earnings, when controlling for business owners' characteristics.

The methodology employed to address the question and the findings from the regression analysis are set forth below.

B. Regression Analysis Methodology

1. Background

Mason Tillman Associates, Ltd. (Mason Tillman) conducted a mail survey in an effort to gather information about market area businesses and their earnings. Respondents were encouraged to respond via the Internet, email, telephone, fax, or mail. Two rounds of follow-up telephone calls were placed to all businesses that did not respond within one week. The source of the businesses in the survey was the availability list prepared for the Availability and Utilization Study. After the data were collected, an ordinary least squares (OLS) regression analysis was used to address the question of the specific effect of ethnicity and gender on business earnings by controlling for age, number of employees, credit rating, and bonding. An OLS regression analysis is used when the outcome variable is continuous – as in the amount of business earnings.

2. Methodology

The availability list, comprised of firms in the four-county market area, included 1,916 construction firms and 4,158 professional services firms. Mason Tillman contacted, and attempted to solicit a response from, all firms on the availability list. A total of 858 firms responded to the survey, representing a 14 percent total response rate. However, the sample of respondents from each of the ethnic minority groups was too small to yield a statistically significant result. In addition to the cross-sectional analysis, Mason Tillman conducted a cohort analysis in order to solicit more respondents from the ethnic groups. This attempt, however, still did not provide enough power to yield statistically significant results for every ethnic group, although the trend indicated statistical significance.



After gathering all the data, Mason Tillman compared and contrasted average gross revenues across various categories. The regression analysis found that the following variables, when viewed individually, had statistically significant effects on income: years in business, small local business status, disadvantaged and minority business status, certification, number of employees, ethnicity, access to credit, and bonding.

Next, a multiple regression analysis was performed to study the individual effects that each independent variable (ethnicity, gender, number of employees, etc.) had on gross income while keeping all other independent variables constant.

3. Limitations

The findings of this regression analysis must be reviewed with some reservation for two reasons. First, there is a likelihood of a non-response bias. An equal response rate among all ethnic groups would be ideal. However, the firms that responded may be the larger businesses, thus decreasing the reliability of the survey data and producing results that are not statistically significant.

Second, it must be noted that many of the variables included in the survey, such as credit rating and age of business, while seeming to be race and gender-neutral, may in fact be correlated with race and gender. If discriminating factors in the market area increase the likelihood of minority firms going out of business, we would expect minority businesses to be younger. Thus, entering age of business as a predictor variable may have the effect of inadvertently diminishing the impact of ethnicity in predicting gross revenues.

C. Regression Analysis Findings

First, the multiple regression analysis consisted of analyzing the age of the business, number of employees, owner's credit score, and bonding status as the independent variables. A description of the variables reported used in the analysis are provided below:



Table 12.05 Regression Analysis Variables

Variable	Description
busage	Number of Years in Business
grsrev	Gross Revenue
_Iemployee_2	6-10 Employees
_Iemployee_3	11-20 Employees
_Iemployee_4	21+ Employees
creditB	Credit Rating
bonded	Bonding
_Iethnicit~1	Caucasian American
_Iethnicit~2	African American
_Iethnicit~3	Asian American
_Iethnicit~4	Hispanic American
_Iethnicit~5	Native American/Other
fgender	Woman-owned Business Enterprise
_cons	Constant Variable

The analysis found that while all four factors have statistically significant effects on income, looking at credit score and bonding status is not needed in the presence of business age and the number of employees, as they capture the same information and represent similar outcomes (see Model 1 below).³



³ For a description of the variables used in the analysis, please see Table 12.05 above.

Model 1

. xi: regress grsrev busage i.employee creditB bonded

i.employee _Iemployee_1-4 (naturally coded; _Iemployee_1 omitted)

Source	SS	df	MS	Number of obs = 334		
Model	948083246	6	158013874	F(6, 327)	=	38.63
Residual	1.3375e+09	327	4090166.74	Prob > F	=	0.0000
Total	2.2856e+09	333	6863566.88	R-squared	=	0.4148
				Adj R-squared	=	0.4041
				Root MSE	=	2022.4

grsrev	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
busage	17.85723	7.043008	2.54	0.012	4.001908	31.71255
_Iemployee_2	758.6492	300.2738	2.53	0.012	167.937	1349.361
_Iemployee_3	1640.612	338.0539	4.85	0.000	975.5776	2305.647
_Iemployee_4	3902.364	315.09	12.38	0.000	3282.505	4522.223
creditB	219.4505	226.056	0.97	0.332	-225.2571	664.1581
bonded	206.0567	258.9877	0.80	0.427	-303.4357	715.5491
_cons	4.073537	288.479	0.01	0.989	-563.4353	571.5823

Next, the multiple regression analysis used ethnicity and gender as independent variables. The regression analysis found that while average business earnings of minority-owned businesses are notably lower than that of Caucasian-owned businesses, the income disparity is not statistically significant for any of the ethnicity groups (see Model 3 below).⁴ However, strong evidence of discrimination was still present. Each minority group had a lower average income than their Caucasian American counterparts: -\$260,000 for African Americans, -\$541,000 for Asian Americans, -\$238,000 for Hispanic Americans, and -\$370,000 for Native Americans and other minorities. This model was problematic because it divided each minority group by gender as well. So, for example, African American women and men were analyzed as two different groups.



⁴ For a description of the variables used in the analysis, please see Table 12.05 above.

Model 3

```
. xi: regress grsrev busage i.employee i.ethnicity fgender
i.employee      _Iemployee_1-4      (naturally coded; _Iemployee_1 omitted)
i.ethnicity      _Iethnicity_1-5     (naturally coded; _Iethnicity_1 omitted)
```

Source	SS	df	MS	Number of obs =	338
Model	1.0347e+09	9	114968113	F(9, 328) =	26.87
Residual	1.4035e+09	328	4279080.93	Prob > F =	0.0000
				R-squared =	0.4244
				Adj R-squared =	0.4086
Total	2.4383e+09	337	7235167.84	Root MSE =	2068.6

grsrev	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
busage	16.84603	7.318039	2.30	0.022	2.449816	31.24224
_Iemployee_2	773.4213	304.2535	2.54	0.011	174.8867	1371.956
_Iemployee_3	1684.092	348.5179	4.83	0.000	998.4795	2369.704
_Iemployee_4	4073.002	315.2248	12.92	0.000	3452.885	4693.12
_Iethnicit~2	-260.1699	320.5153	-0.81	0.418	-890.6949	370.3552
_Iethnicit~3	-541.5523	423.3762	-1.28	0.202	-1374.428	291.323
_Iethnicit~4	-238.8252	320.9844	-0.74	0.457	-870.2731	392.6226
_Iethnicit~5	-370.7858	812.4089	-0.46	0.648	-1968.975	1227.404
fgender	88.45833	277.658	0.32	0.750	-457.7568	634.6735
_cons	361.5701	287.1377	1.26	0.209	-203.2938	926.434

In Model 4, gender was dropped from the analysis. Combining male and female-owned businesses for each ethnicity group had the effect of increasing the sample size for each group and amplifying the effects of ethnicity. Income disparity was statistically significant for Asian Americans, and the income gap between the other minority groups and Caucasian Americans widened. While the income disparity was not statistically significant for African American, Hispanic American, and Native American businesses, the trend suggests that there is discrimination against these minority groups as well. African American and Hispanic American-owned businesses earned an average of \$304,000 and \$255,000 less than Caucasian-owned businesses, respectively (see Model 4 below).⁵ In fact, when African American, Hispanic American, Asian American, and Native American/other minorities were combined, minority-owned businesses earned an average of \$365,000 less than Caucasian-owned businesses. Although the contrast between Caucasian Americans and minorities as an entire group was not the major purpose of this Study since the question was the effect of race on business earning across multiple ethnic groups, the finding is important to bear in mind.

⁵ For a description of the variables used in the analysis, please see Table 12.05 above.



Model 4

```
. xi: regress grsrev busage i.employee i.ethnicity
i.employee      _Iemployee_1-4      (naturally coded; _Iemployee_1 omitted)
i.ethnicity     _Iethnicity_1-5     (naturally coded; _Iethnicity_1 omitted)
```

Source	SS	df	MS	Number of obs =	335
Model	957558871	8	119694859	F(8, 326) =	29.34
Residual	1.3298e+09	326	4079137.61	Prob > F =	0.0000
				R-squared =	0.4186
				Adj R-squared =	0.4044
Total	2.2874e+09	334	6848376.44	Root MSE =	2019.7

grsrev	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
busage	15.47469	7.183403	2.15	0.032	1.343015	29.60637
_Iemployee_2	760.9973	297.2814	2.56	0.011	176.1654	1345.829
_Iemployee_3	1659.031	338.6912	4.90	0.000	992.7351	2325.327
_Iemployee_4	3925.958	308.1263	12.74	0.000	3319.791	4532.125
_Iethnicit~2	-304.7624	314.4328	-0.97	0.333	-923.3359	313.811
_Iethnicit~3	-729.7009	418.5442	-1.74	0.082	-1553.089	93.68752
_Iethnicit~4	-255.0592	313.2113	-0.81	0.416	-871.2297	361.1112
_Iethnicit~5	-391.5993	792.107	-0.49	0.621	-1949.886	1166.687
_cons	477.1379	273.4586	1.74	0.082	-60.82837	1015.104

As mentioned earlier, not having enough power within each ethnic group prevented the analysis from concluding that ethnicity has a statistically significant effect on business earnings for any of the ethnic groups other than Asian Americans. The regression analysis sought to compensate for its lack of power to get a clearer picture of what would happen if more data was available and the current trend persisted. The results of Model 5⁶ corroborate the existence of significant income disparity between Caucasian American-owned businesses and minority-owned businesses. Had the survey been able to solicit responses from more businesses from each ethnic group, the trend suggests that income disparity would be statistically significant for African American and Hispanic American businesses vis-a-vis Caucasian-owned businesses (see Model 5 below).⁷

⁶ For a description of the variables used in the analysis, please see Table 12.05 above.

⁷ Model 5 indicates survey data multiplied by a factor of 3.



Model 5

. xi: regress grsrev busage i.employee i.ethnicity

i.employee _Iemployee_1-4 (naturally coded; _Iemployee_1 omitted)
i.ethnicity _Iethnicity_1-5 (naturally coded; _Iethnicity_1 omitted)

Source	SS	df	MS			
Model	2.8727e+09	8	359084577	Number of obs = 1005		
Residual	3.9894e+09	996	4005418.25	F(8, 996) = 89.65		
Total	6.8621e+09	1004	6834734.26	Prob > F = 0.0000		
				R-squared = 0.4186		
				Adj R-squared = 0.4140		
				Root MSE = 2001.4		

grsrev	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
busage	15.47469	4.109693	3.77	0.000	7.410041	23.53934
_Iemployee_2	760.9973	170.0775	4.47	0.000	427.246	1094.749
_Iemployee_3	1659.031	193.7684	8.56	0.000	1278.79	2039.272
_Iemployee_4	3925.958	176.282	22.27	0.000	3580.032	4271.885
_Iethnicit~2	-304.7624	179.89	-1.69	0.091	-657.7693	48.24441
_Iethnicit~3	-729.7009	239.4531	-3.05	0.002	-1199.591	-259.8105
_Iethnicit~4	-255.0592	179.1912	-1.42	0.155	-606.6947	96.57632
_Iethnicit~5	-391.5993	453.1719	-0.86	0.388	-1280.881	497.682
_cons	477.1379	156.4483	3.05	0.002	170.1319	784.144

The regression analysis concluded that gender does not have an effect on business earnings. The data showed that there is no difference in the gross revenue generated by female-owned businesses, when compared to businesses owned by males. In fact, when adjustments were made for business owners' characteristics, female-owned businesses generated higher gross revenues than male-owned businesses.

D. Conclusion

This Study sought to answer the question of whether ethnicity and gender, when controlled for characteristics of the business owners, have a statistically significant effect on business earnings. The survey found that there is statistically significant income disparity between Asian American and Caucasian-owned businesses. Although the results for other cohort groups were not statistically significant due to lack of power among those groups, the regression analysis found that African American and Hispanic American-owned businesses earn notably lower income in contrast to Caucasian-owned businesses. If more data of the same trend were collected from African American and Hispanic American businesses, the regression analysis would find statistically significant income disparity for these two groups.



APPENDIX



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1

EXPANDED LEGAL ANALYSIS

I. INTRODUCTION

This chapter discusses the state of the law applicable to public contracting affirmative action programs. Since the San Francisco Bay Area Rapid Transit District (BART) is a recipient of funds from the United States Department of Transportation (USDOT), specific reference is made to the case law affecting the USDOT Disadvantaged Business Enterprise regulations. In addition this chapter discusses the application of the constitutional amendment approved by the voters in 1996, with the passage of Proposition 209, to a non-federally funded BART affirmative action contracting program.

Two United States Supreme Court decisions, *City of Richmond v. J.A. Croson Co.*¹ (*Croson*) and *Adarand v. Peña*² (*Adarand*), raised the standard by which federal courts shall review both local and federal government minority business enterprise and disadvantaged business enterprise contracting programs.

In *Croson*, which dealt with non-federally funded programs, the Court announced that the programs that employ racial classification would be subject to “strict scrutiny,” the highest legal standard. Broad notions of equity or general allegations of historical and societal discrimination against minorities are insufficient to meet the requirements of strict scrutiny. Governments may adopt race-conscious programs only as a remedy for identified statistical findings of discrimination, and the remedy must impose a minimal burden upon unprotected classes.

Adarand, which the US Supreme Court decided in 1995, challenged the USDOT’s Disadvantaged Business Enterprise (DBE) Program as set forth in statute and regulations. The Court found a compelling interest for the USDOT DBE Program but ruled, after

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

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



applying the strict scrutiny standard to this federal program, that the DBE Program was not narrowly tailored. In response, the USDOT amended its regulations in 1999 to include goals which can be met by race-neutral and race-specific means.

Following *Adarand* there were several other circuit court cases which challenged the constitutionality of the USDOT DBE regulations.³ However, until *Western States Paving Co. v. State of Washington Dept. of Transportation*⁴ (*Western States*) was decided in 2005 these challenges had been unsuccessful. *Western States* found that Washington State's DBE Program was facially constitutional but determined the State's application of the regulations invalid. These cases and their application to BART's federally funded program are discussed in *United States Department of Transportation Disadvantaged Business Enterprise Programs* under Section VI of this chapter.

In 1996, Proposition 209 was passed by referendum in California. After legal challenges were settled, the proposition went into effect in 1997 and was codified in Article I, Section 31 of the California Constitution. Section 31 prohibits the State, local governments, districts, public universities, colleges, schools, and other governmental instrumentalities from discriminating against or giving preferential treatment on the basis of race, sex, color, ethnicity, or national origin to any individual or group in public employment, public education, or public contracting. In Section VI of this chapter there is also a discussion on Section 31 of the California Constitution and its legal challenges.

II. STANDARDS OF REVIEW

The standard of review represents the measure by which a court evaluates whether a particular legal claim meets a certain statute, rule, or precedent. First, the standard of review that the Supreme Court set for local programs in *Croson* will be discussed. The lower courts' interpretations and the implications for contracting affirmative action program design that arises from these decisions are also discussed. The standard of review, as used in this chapter, is the measure by which a court evaluates a particular legal issue.

A. Race-Conscious Programs

In *Croson*, the United States Supreme Court affirmed that pursuant to the 14th Amendment, the proper standard of review for state and local MBE programs which are necessarily race-

³ *Sherbrooke Turf Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 969-73 (8th Cir 2003); *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (2007); *Gross Seed Co. v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003).

⁴ *Western States Paving Co. v. State of Washington Dept. of Transportation*, 407 F. 3d 983 (9th Cir. 2005)



based programs is strict scrutiny.⁵ Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.⁶ The Court recognized that a state or local entity may take action, in the form of an MBE program, to rectify the effects of *identified, systemic racial discrimination* within its jurisdiction.⁷ Justice O'Connor, speaking for the majority, articulated various methods of demonstrating discrimination and set forth guidelines for crafting MBE programs so that they are “narrowly tailored” to address systemic racial discrimination.⁸ The specific evidentiary requirements are detailed in Section IV.

B. Woman-Owned Business Enterprise Programs

Since *Croson*, the Supreme Court has remained silent with respect to the appropriate standard of review for woman-owned business enterprise (WBE) programs and local business enterprise (LBE) programs which are geographically based. *Croson* was limited to the review of a race-conscious plan. In other contexts, however, the Supreme Court has ruled that gender classifications are not subject to the rigorous strict scrutiny standard applied to racial classifications. Instead, gender classifications are subject only to an “intermediate” level of review, regardless of which gender is favored.

Notwithstanding the Supreme Court’s failure thus far to rule on a WBE program, the consensus among the Circuit Courts of Appeals is that WBE programs are subject only to intermediate scrutiny, rather than the more exacting strict scrutiny to which race-conscious programs are subject.⁹ Intermediate review requires the governmental entity to demonstrate an “important governmental objective” and a method for achieving this objective which bears

⁵ *Croson*, 488 U.S. at 493-95.

⁶ *Id.* at 493.

⁷ *Croson*, 488 U.S. at 509.

⁸ *Id.* at 501-02. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting: compelling interest and narrowly tailored remedies. The Supreme Court in *Croson* and subsequent cases provides fairly detailed guidance on how those concepts are to be treated in contracting. In education and employment, the concepts are not explicated to nearly the same extent. Therefore, references in those cases to “compelling governmental interest” and “narrow tailoring” for purposes of contracting are essentially generic and of little value in determining the appropriate methodology for disparity studies.

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



a fair and substantial relation to the goal.¹⁰ The Court has also expressed the test as requiring an “exceedingly persuasive justification” for classifications based on gender.¹¹

The Supreme Court acknowledged that in limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists the members of that sex which are disproportionately burdened.¹²

The Third Circuit in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)* ruled in 1993 that the standard of review that governs WBE programs is different from the standard imposed upon MBE programs.¹³ The Third Circuit held that whereas MBE programs must be “narrowly tailored” to a “compelling state interest,” WBE programs must be “substantially related” to “important governmental objectives.”¹⁴ An MBE program would only survive constitutional scrutiny by demonstrating a pattern and practice of systemic racial exclusion or discrimination in which a state or local government was an active or passive participant.¹⁵

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

The Eleventh Circuit also applies intermediate scrutiny.¹⁸ The district court in *Engineering Contractors Association of South Florida v. Metropolitan Dade County (Dade County)*, which was affirmed by the Eleventh Circuit U.S. Court of Appeals, cited the Third Circuit’s 1993 formulation in *Philadelphia*: “[T]his standard requires the [county] to present probative evidence in support of its stated rationale for the gender preference, discrimination against

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

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

¹² *Id.* at 728.

¹³ *Philadelphia*, 6 F.3d at 1000-01.

¹⁴ *Id.* at 1009.

¹⁵ *Id.* at 1002.

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

¹⁷ *Id.* at 940.

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



women-owned contractors.”¹⁹ Although the *Dade County* district court applied the intermediate scrutiny standard, it queried whether the Supreme Court decision in *United States v. Virginia*,²⁰ finding the all-male program at Virginia Military Institute unconstitutional, signaled a heightened level of scrutiny: parties who seek to defend gender-based government action must demonstrate an “exceedingly persuasive justification” for that action.²¹ The *Dade County* appellate court echoed that speculation but likewise concluded that “[u]nless and until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective.”²²

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

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

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

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

²² *Dade County*, 122 F.3d at 908.

²³ *Id.* at 909.

²⁴ *Id.*

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

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

²⁷ *Id.* (citing *Philadelphia*, 6 F.3d at 1010 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 582-583 (1990)).

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



program need not closely tie its numerical goals to the proportion of qualified women in the market.”²⁹

C. Local Business Enterprise Programs

Federal constitutional issues do not end the inquiry, however. State statutes may have imposed their own restrictions. Generally, LBE programs are neutral as to race, ethnicity, national origin, age, sex, and other protected classes.³⁰

The Ninth Circuit Court of Appeals applied the rational basis standard when evaluating LBE programs, holding that a local entity may give a preference to local businesses to address the economic disadvantages those businesses face in doing business within the city or county.³¹ In *AGCC I*, a pre-*Croson* case, the City and County of San Francisco conducted a detailed study of the economic disadvantages faced by San Francisco-based businesses versus businesses located outside the City and County boundaries. The study showed a competitive disadvantage in public contracting for businesses located within the City versus businesses from other areas.

San Francisco-based businesses incurred higher administrative costs in doing business within the City. Such costs included higher taxes, rents, wages, insurance rates, and benefits for labor. In upholding the LBE Ordinance, the Ninth Circuit held that “. . . the city may rationally allocate its own funds to ameliorate disadvantages suffered by local businesses, particularly where the city itself creates some of the disadvantages.”³²

1. California Case Law-Assembly Bill 1084

A recent change in the California Public Contract Code allowed by Assembly Bill 1084 provides a legal basis for extending preferences to local small businesses.

Assembly Bill 1084 became law in January 2002. Assembly Bill 1084 amended Sections 14836, 14837, 14838.5, 14839, 14840, 14843, and 14842.5 of the Government Code and repealed and added Section 14838 to the Public Contracting Code. The Bill also amended Sections 2000 and 2001 relating to public contracts and added Sections 2002 and 10116 to the Public Contracting Code.

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

³⁰ As such, LBE Programs do not involve U. S. Constitutional issues related to those classes. They need only be consistent with federal, state or local programmatic policy.

³¹ *AGCC I*, 813 F.2d at 943.

³² *Id.* At 943.



The law as it stands require state agencies to give small businesses³³ a five percent preference in contracts for construction, the procurement of goods, or the delivery of services. It also includes microbusinesses³⁴ and revises annual goals for the program. Further, the Bill authorizes a local agency to provide for a small business preference in construction, the procurement of goods, or the delivery of services, and to establish a subcontracting participation goal for small businesses on contracts with a preference for those bidders who meet the goal.

2. Public Contracting Code Section 2002

The amended Section 2002 of the Public Contracting Code permits local agencies to enact the following:

- A small business preference in construction, the procurement of goods, or the delivery of services where responsibility and quality are equal and a preference to a small business up to five percent of the lowest responsible bidder.
- A subcontracting participation goal for small businesses on contracts and a preference up to a maximum five percent to bidders who meet the goal.
- Good Faith Efforts to meet a subcontracting participation goal for small business contracts.
- The definition of a small business shall be determined by each local agency.

III. BURDEN OF PROOF

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

³³ A small business is defined as "an independently owned and operated business, which is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with its affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees."

³⁴ A microbusiness is defined as "a small business that, together with affiliates, has average annual gross receipts of two million five hundred thousand dollars or less over the previous three years, or is a manufacturer, as defined in subsection (c), with 25 or fewer employees."

³⁵ These were the issues on which the district court in Philadelphia reviewed the disparity study before it.



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

Thus, a disparity study must be analytically rigorous, at least to the extent that the data permits, if it is to withstand legal challenge.³⁶

A. Strong Basis in Evidence

Croson requires defendant jurisdictions to produce a “strong basis in evidence” that the objective of the challenged MBE program is to rectify the effects of discrimination.³⁷ The issue of whether or not the government has produced a strong basis in evidence is a question of law.³⁸ Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.³⁹

The adequacy of the government’s evidence is “evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction].”⁴⁰ The onus is upon the jurisdiction to provide a factual predicate which is sufficient in scope and precision to demonstrate that contemporaneous discrimination necessitated the adoption of the MBE program. The various factors which must be considered in developing and demonstrating a strong factual predicate in support of MBE programs are discussed in Section IV.

B. Ultimate Burden of Proof

The party challenging an MBE program will bear the ultimate burden of proof throughout the course of the litigation—despite the government’s obligation to produce a strong factual predicate to support its program.⁴¹ The plaintiff must persuade the court that the program

³⁶ *Croson*, 488 U.S. 469.

³⁷ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513 at 1522 (10th Cir. 1994), (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 292 (1986); see *Croson* 488 U.S. at 509 (1989)).

³⁸ *Id.* (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 944 (D.Conn 1992)).

³⁹ *Concrete Works I*, 36 F.3d at 1522.

⁴⁰ *Id.* (citing *Croson* 488 U.S. at 498).

⁴¹ *Id.* (citing *Wygant*, 476 U.S. at 277-278).



is constitutionally flawed by challenging the government’s factual predicate for the program or by demonstrating that the program is overly broad.

Justice O’Connor explained the nature of the plaintiff’s burden of proof in her concurring opinion in *Wygant v. Jackson Board of Education (Wygant)*.⁴² She stated that following the production of the factual predicate supporting the program:

[I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently “narrowly tailored.”⁴³

In *Philadelphia*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether facts constitute a “strong basis” in evidence.⁴⁴ That court wrote that the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered.⁴⁵ If the plaintiff’s theory is that an agency has adopted race-based preferences with a purpose other than remedying past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else.⁴⁶

The situation differs if the plaintiff’s theory is that an agency’s conclusions as to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, once the agency comes forward with evidence of facts alleged to justify its conclusions, the plaintiff has the burden of persuading the court that those facts are not accurate. However, the ultimate issue of whether a strong basis in evidence exists is an issue of law, and the burden of persuasion in the traditional sense plays no role in the court’s resolution of that ultimate issue.⁴⁷

⁴² *Wygant v. Jackson Board of Education*, 476 U.S. 267, 293 (1986).

⁴³ *Id.*

⁴⁴ *Philadelphia*, 91 F.3d at 597.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ At first glance, the position of the Third Circuit does not square with what the Eleventh Circuit announced as its standard in reviewing whether a jurisdiction has established the “compelling interest” required by strict scrutiny. That court said the inquiry was factual and would be reversed only if it was “clearly erroneous.” However, the difference in formulation may have had to do with the angle from which the question is approached: If one starts with the disparity study — whether a compelling interest has been shown —factual issues are critical. If the focus is the remedy, because the constitutional issue of equal protection in the context of race comes into play, the review is necessarily a legal one.



Concrete Works II made clear that the plaintiff’s burden is an evidentiary one; it cannot be discharged simply by argument. The court cited its opinion in *Adarand Constructors Inc. v. Slater*, 228 F.3d 1147 (2000): “[g]eneral criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity study is of little persuasive value.”⁴⁸

The Supreme Court’s disposition of the plaintiff’s petition for *certiorari* strongly supports the conclusion that plaintiff has the burden of proof. Supreme Court review of appellate decisions is discretionary in that four justices have to agree, so normally little can be inferred from its denial. However, *Concrete Works* is not the typical instance. Justice Scalia concurred in *Croson* that strict scrutiny was required of race-conscious contracting programs. However, his antagonism there and over the years to the use of race is clear. Justice Scalia’s view is that governmental remedies should be limited to provable individual victims. That view is at the base of his written dissent, on which only Chief Justice Rehnquist joined, to the Court’s November 17, 2003 decision not to grant *certiorari* in *Concrete Works*.⁴⁹

Justice Scalia would place the burden of proof squarely on the defendant jurisdiction when a plaintiff pleads unequal treatment. For him, the Tenth Circuit was simply wrong, because the defendant should have to *prove* that there was discrimination. He takes this position despite the case law in equal employment cases, from which *Croson* was derived, that the defendant has the burden of *production*. Once the defendant satisfies that, the burden of *proof* shifts to the plaintiff.

Contrary to Scalia, the Tenth Circuit in *Concrete Works II* held that the defendant must show “a strong basis” for concluding that MBEs are being discriminated against. And, the plaintiff has to put in evidence that negates its validity.

IV. CROSON EVIDENTIARY FRAMEWORK

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

⁴⁸ *Concrete Works II*, 321 F.3d at 979.

⁴⁹ *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado*, 321 F.3d 950 (10th Cir. 2003), *petition for cert. denied*, (U.S. Nov. 17, 2003) (No. 02-1673) (“*Concrete Works II*”).



A. Active or Passive Participation

Croson requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program. However, the local entity need not be an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court’s strict scrutiny review.⁵⁰

An entity will be considered an “active” participant if the evidence shows that it has created barriers that actively exclude MBEs from its contracting opportunities. In addition to examining the government’s contracting record and process, MBEs who have contracted or attempted to contract with that entity can be interviewed to relay their experiences in pursuing that entity’s contracting opportunities.⁵¹

An entity will be considered to be a “passive” participant in private sector discriminatory practices if it has infused tax dollars into that discriminatory industry.⁵² The *Croson* Court emphasized a government’s ability to passively participate in private sector discrimination with monetary involvement, stating, “[I]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice.”⁵³

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. In *Concrete Works I*, the Tenth Circuit considered a purely private sector definition of passive discrimination. Since no government funds were involved in the contracts analyzed in the case, the court questioned whether purely private sector discrimination is likely to be a fruitful line of inquiry.⁵⁴ On remand, the district court rejected the three disparity studies offered to support the continuation of Denver’s M/WBE program because each focused on purely private sector

⁵⁰ *Croson*, 488 U.S. at 509.

⁵¹ *Wygant v. Jackson Board of Education*, 476 U.S. 267 at 275 (1985).

⁵² *Croson*, 488 U.S. at 492; *Coral Construction*, 941 F.2d at 916.

⁵³ *Croson*, 488 U.S. at 492.

⁵⁴ *Concrete Works I*, 36 F.3d at 1529. “What the Denver MSA data does not indicate, however, is whether there is any linkage between Denver’s award of public contracts and the Denver MSA evidence of industry-wide discrimination. That is, we cannot tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that ‘it had essentially become a “a passive participant” in a system of racial exclusion practiced by elements of the local construction industry’ [citing *Croson*]. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program. The record before us does not explain the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and this may well be a fruitful issue to explore at trial.”



discrimination. Indeed, Denver’s focus on purely private sector discrimination may account for what seemed to be a shift by the court away from the standard *Croson* queries of: (1) whether there was a firm basis in the entity’s contracting process to conclude that discrimination existed; (2) whether race-neutral remedies would resolve what was found; and (3) whether any race-conscious remedies had to be narrowly tailored. The court noted that in the City of Denver’s disparity studies the chosen methodologies failed to address the following six questions:

1. Was there pervasive discrimination throughout the Denver Metropolitan Statistical Area (MSA)?
2. Were all designated groups equally affected?
3. Was discrimination intentional?
4. Would Denver’s use of such firms constitute “passive participation?”
5. Would the proposed remedy change industry practices?
6. Was the burden of compliance—which was on white male prime contractors in an intensely competitive, low profit margin business—a fair one?

The court concluded that the City of Denver had not documented a firm basis of identified discrimination derived from the statistics submitted.⁵⁵

However, the Tenth Circuit on appeal of that decision completely rejected the district court’s analysis. The district court’s queries required Denver to prove the existence of discrimination. Moreover, the Tenth Circuit explicitly held that “passive” participation included private sector discrimination in the marketplace. The court, relying on *Shaw v. Hunt*,⁵⁶ a post-*Croson* Supreme Court decision, wrote as follows:

The *Shaw* Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 910. The City can satisfy this condition by identifying the discrimination “public or private, with some specificity.” *Id.* (quoting *Croson*, 488 U.S. at 504 (emphasis added)). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.*⁵⁷

⁵⁵ *Id.* at 61.

⁵⁶ 517 U.S. at 519.

⁵⁷ *Concrete Works II*, 321 F.3d at 975-76.



The Tenth Circuit therefore held that the City was correct in its attempt to show that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against M/WBE subcontractors in other private portions of their business.”⁵⁸ The court emphasized that its reading of *Croson*⁵⁹ and its own precedents supported that conclusion. Also, the court pointed out that the plaintiff, which had the burden of proof, failed to introduce controverting evidence and merely *argued* that the private sector was out of bounds and that Denver’s data was flawed.⁶⁰

The courts found that the disparities in MBE private sector participation, demonstrated with the rate of business formation and lack of access to credit which affected MBEs’ ability to expand in order to perform larger contracts, gave Denver a firm basis to conclude that there was actionable private sector discrimination. For technical legal reasons,⁶¹ however, the court did not examine whether the consequent public sector remedy — i.e., one involving a goal requirement on the City of Denver’s contracts — was “narrowly tailored.” The court took this position despite the plaintiff’s contention that the remedy was inseparable from the findings and that the court should have addressed the issue of whether the program was narrowly tailored.

Ten months later, in *Builders Association of Greater Chicago v. City of Chicago*,⁶² the question of whether a public sector remedy is “narrowly tailored” when it is based on purely private sector discrimination was at issue. The district court reviewed the remedies derived from private sector practices with a more stringent scrutiny. It found that there was discrimination against minorities in the Chicago construction industry. However, it did not find the City of Chicago’s MBE subcontracting goal an appropriate remedy, because it was not “narrowly tailored” to address the lack of access to credit for MBEs which was the documented private discrimination. The court also criticized the remedy because it was a “rigid numerical quota,” and there was no individualized review of MBE beneficiaries, citing Justice O’Connor’s opinion in *Gratz v. Bollinger*.⁶³

58 Slip opinion, pg. 20.

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

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

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

62 298 F.Supp2d 725 (N.D.Ill. 2003).

63 123 S.Ct. 2411, 2431 (2003). *Croson* requires a showing that there was a strong basis for concluding that there was *discrimination* before a race-conscious remedy can be used in government contracting. In the University of Michigan cases that considered race-conscious admissions programs, a key element in the decisions is the Court acceptance of *diversity* as a constitutionally sufficient ground; it did not require a showing of past *discrimination* against minority applicants. If it had, the basis for a program would have disappeared. Discrimination is the historic concern of the 14th Amendment, while promoting diversity is of recent origin. The Court may have been disposed therefore to apply a more rigorous review of legislation based on diversity. The 14th Amendment’s prohibitions are directed against “state action.” The private sector behavior of businesses that contract with state and local governments is a conceptual step away from what it does in its public sector transactions. That



The question of whether evidence of private sector practices met the Court standard also arose in *Builders Ass'n of Greater Chicago v. County of Cook*.⁶⁴ In this case the Seventh Circuit cited *Associated General Contractors of Ohio v. Drabik*⁶⁵ in throwing out a 1988 County ordinance under which at least 30 percent of the value of prime contracts was to go to minority subcontractors and at least ten percent to woman-owned businesses. Appellants argued that evidence of purely private sector discrimination justified a public sector program. The Court, however, found that the County would have had to demonstrate that it had been at least a passive participant in the private discrimination by showing that it had infused tax dollars into the discriminatory private industry in order to justify the public sector remedy.

B. Systemic Discriminatory Exclusion

Croson clearly established that an entity enacting a business affirmative action program must demonstrate identified, systemic discriminatory exclusion on the basis of race or any other illegitimate criteria (arguably gender).⁶⁶ Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.⁶⁷ Using appropriate evidence of the entity's active or passive participation in the discrimination, as discussed above, the showing of discriminatory exclusion must cover each racial group to whom a remedy would apply.⁶⁸ Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

distinction may lead courts to apply the *Gratz* approach of more searching scrutiny to remedial plans based on private sector contracting.

⁶⁴ 256 F.3d 642 (7th Cir. 2001).

⁶⁵ 214 F.3d 730 (6th Cir. 2000).

⁶⁶ *Croson*, 488 U.S. 469. See also *Monterey Mechanical v. Pete Wilson*, 125 F.3d 702 (9th Cir. 1997). The Fifth Circuit Court in *W.H. Scott Construction Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (1999) found that the City's MBE program was unconstitutional for construction contracts because minority participation goals were arbitrarily set and not based on any objective data. Moreover, the Court noted that had the City implemented the recommendations from the disparity study it commissioned, the MBE program may have withstood judicial scrutiny (the City was not satisfied with the study and chose not to adopt its conclusions). "Had the City adopted particularized findings of discrimination within its various agencies and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City's construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support the Department's 15% DBE-participation goal."

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

⁶⁷ *Id.* at 509.

⁶⁸ *Id.* at 506. As the Court said in *Croson*, "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination." See *North Shore Concrete and Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998), which rejected the inclusion of Native Americans and Alaskan Natives in the City's program, citing *Croson*.



Croson enumerates several ways an entity may establish the requisite factual predicate. First, a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by an entity or by the entity’s prime contractors, may support an inference of discriminatory exclusion.⁶⁹ In other words, when the relevant statistical pool is used, a showing of gross statistical disparity alone “may constitute prima facie proof of a pattern or practice of discrimination.”⁷⁰

The *Croson* Court made clear that both prime contract and subcontracting data was relevant. The Court observed that “[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city’s construction expenditures.”⁷¹ Subcontracting data is also an important means by which to assess suggested future remedial actions. Since the decision makers are different for the awarding of prime contracts and subcontracts, the remedies for discrimination identified at a prime contractor versus subcontractor level might also be different.

Second, “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”⁷² Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.⁷³ Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

In *Coral Construction*, the Ninth Circuit Court of Appeals further elaborated upon the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.⁷⁴ The court explained that statistical evidence, standing alone, often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.⁷⁵

⁶⁹ *Id.* at 509.

⁷⁰ *Id.* at 501 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

⁷¹ *Croson*, 488 U.S. at 502-03.

⁷² *Id.* at 509.

⁷³ *Id.*

⁷⁴ *Coral Construction*, 941 F.2d at 919.

⁷⁵ *Id.*



Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.⁷⁶ Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”⁷⁷

1. Geographic Market

Croson did not speak directly to how the geographic market is to be determined. In *Coral Construction*, the Court of Appeals held that “an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction.”⁷⁸ Conversely, in *Concrete Works I*, the Tenth Circuit Court of Appeals specifically approved the Denver MSA as the appropriate market area since 80 percent of the construction contracts were let there.⁷⁹

Read together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. Since *Croson* and its progeny did not provide a bright line rule for local market area, which determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.⁸⁰ Extra-jurisdictional evidence may be permitted, when it is reasonably related to where the jurisdiction contracts.⁸¹ See *Chapter 6: Market Area Analysis* for further discussion and the findings.

2. Current Versus Historical Evidence

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

⁷⁶ *Id.*

⁷⁷ *Id.* (quoting *International Brotherhood of Teamsters v. United States (Teamsters)*, 431 U.S. 324, 339 (1977)).

⁷⁸ *Coral Construction*, 941 F.2d at 925.

⁷⁹ *Concrete Works of Colorado v. City and County of Denver*, 823 F.Supp. 821, 835-836 (D.Colo. 1993); rev’d on other grounds, 36 F.3d 1513 (10th Cir. 1994).

⁸⁰ *Cone Corporation V. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990); *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

⁸¹ There is a related question of which firms can participate in a remedial program. In *Coral Construction*, the Court held that the definition of “minority business” used in King County’s MBE program was over-inclusive. The Court reasoned that the definition was overbroad because it included businesses other than those who were discriminated against in the King County business community. The program would have allowed, for instance, participation by MBEs who had no prior contact with the County. Hence, location within the geographic area is not enough. An MBE had to have shown that it previously sought business, or is currently doing business, in the market area.



On the one hand, *Croson* requires that an MBE program be “narrowly tailored” to remedy current evidence of discrimination.⁸² Thus, goals must be set according to the evidence of disparity found. For example, if there is a current disparity between the percentage of an entity’s utilization of Hispanic construction contractors and the availability of Hispanic construction contractors in that entity’s marketplace, then that entity can set a goal to bridge that disparity.

It is not mandatory to examine a long history of an entity’s utilization to assess current evidence of discrimination. In fact, *Croson* indicates that it may be legally fatal to justify an MBE program based upon outdated evidence.⁸³ Therefore, the most recent two or three years of an entity’s utilization data would suffice to determine whether a statistical disparity exists between current M/WBE utilization and availability.⁸⁴

Pre-program data regarding an entity’s utilization of MBEs prior to enacting the MBE program may be relevant to assessing the need for the agency to keep such a program intact. A 1992 opinion by Judge Henderson of the U.S. District Court for the Northern District of California, *RGW Construction v. San Francisco Bay Area Rapid Transit District (BART)*,⁸⁵ set forth the possible significance of statistical data during an entity’s “pre-program” years. Judge Henderson opined that statistics that provides data on a period when no M/WBE goals were operative is often the most relevant data in evaluating the need for remedial action by an entity. Indeed, “to the extent that the most recent data reflect the impact of operative DBE goals, then such data are not necessarily a reliable basis for concluding that remedial action is no longer warranted.”⁸⁶ Judge Henderson noted that this is particularly so given the fact that M/WBEs report that they are seldom or never used by a majority prime contractor without M/WBE goals. That this may be the case suggests a possibly fruitful line of inquiry: an examination of whether different programmatic approaches in the same market area led to different outcomes in M/WBE participation. The Tenth Circuit came to the same conclusion in *Concrete Works II*. It is permissible for a study to examine programs where there were no goals.

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

⁸² See *Croson*, 488 U.S. at 509-10.

⁸³ *Id.* at 499 (stating that “[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination”).

⁸⁴ See *AGCC II*, 950 F.2d 1401 at 1414 (consultant study looked at City’s MBE utilization over a one year period).

⁸⁵ See November 25, 1992, Order by Judge Thelton Henderson (on file with Mason Tillman Associates).

⁸⁶ *Id.*



relevant market. Still, the court agreed with the district court that it was not enough to speculate on what MBE utilization would have been in the absence of the program.⁸⁷

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

3. Statistical Evidence

To determine whether statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the “disparity index,” which consists of the percentage of minority or women contractor participation in local contracts divided by the percentage of minority or women contractor availability or composition in the population of available firms in the local market area.⁸⁸ Disparity indexes have been found highly probative evidence of discrimination where they ensure that the “relevant statistical pool” of minority or women contractors are being considered.

The Third Circuit Court of Appeals, in *Philadelphia*, ruled that the “relevant statistical pool” includes those businesses that not only exist in the marketplace, but that is qualified and interested in performing the public agency’s work. In that case, the Third Circuit rejected a statistical disparity finding where the pool of minority businesses used in comparing utilization to availability were those that were merely licensed to operate in the City of Philadelphia. Merely being licensed to do business with the City does not indicate either a willingness or capability to do work for the City. As such, the Court concluded this particular statistical disparity did not satisfy *Croson*.⁸⁹

Statistical evidence demonstrating a disparity between the utilization and availability of M/WBEs can be shown in more than one way. First, the number of M/WBEs utilized by an entity can be compared to the number of available M/WBEs. This is a strict *Croson*

⁸⁷ *Dade County*, 122 F.3d at 912.

⁸⁸ Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been taken into account. In addition to looking at Dade County’s contracting and subcontracting statistics, the district court also considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County’s Wainwright study (which compared construction business ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County’s Brimmer Study (which focused only on Black-owned construction firms and looked at whether disparities existed when the sales and receipts of Black-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms).

The court affirmed the judgment that declared appellant’s affirmative action plan for awarding county construction contracts unconstitutional and enjoined the plan’s operation because there was no statistical evidence of past discrimination and appellant failed to consider race and ethnic-neutral alternatives to the plan.

⁸⁹ *Philadelphia*, 91 F.3d 586. The courts have not spoken to the non-M/WBE component of the disparity index. However, if only as a matter of logic, the “availability” of non-M/WBEs requires that their willingness to be government contractors be established. The same measures used to establish the interest of M/WBEs should be applied to non-M/WBEs.



“disparity” formula. A significant statistical disparity between the number of MBEs that an entity utilizes in a given product/service category and the number of available MBEs in the relevant market area specializing in the specified product/service category would give rise to an inference of discriminatory exclusion.

Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between the award of contracts by an entity in the relevant locality/market area to available majority contractors and the award of contracts to M/WBEs. Thus, in *AGCC II*, an independent consultant’s study compared the number of available MBE prime contractors in the construction industry in San Francisco with the amount of contract dollars awarded to San Francisco-based MBEs over a one-year period. The study found that available MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-minority counterparts.⁹⁰

Whether a disparity index supports an inference that there is discrimination in the market turns not only on what is being compared, but also on whether any disparity is statistically significant. In *Croson*, Justice O’Connor opined, “[w]here the gross statistical disparities can be shown, they alone, in a proper case, may constitute a *prima facie* proof of a pattern or practice of discrimination.”⁹¹ However, the Court has not assessed nor attempted to cast bright lines for determining if a disparity index is sufficient to support an inference of discrimination. Rather, the analysis of the disparity index and the finding of its significance are judged on a case-by-case basis.⁹²

Following the dictates of *Croson*, courts may carefully examine whether there is data that shows that MBEs are ready, willing, and able to perform.⁹³ *Concrete Works I* made the same point: capacity—i.e., whether the firm is “able to perform”—is a ripe issue when a disparity study is examined on the merits:

[Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the marketplace overstates “the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than non-minority owned firms.” In other words, a disparity index calculated on the basis of the

⁹⁰ *AGCC II*, 950 F.2d 1401 at 1414. Specifically, the study found that MBE availability was 49.5 percent for prime construction, but MBE dollar participation was only 11.1 percent; that MBE availability was 36 percent prime equipment and supplies, but MBE dollar participation was 17 percent; and that MBE availability for prime general services was 49 percent, but dollar participation was 6.2 percent.

⁹¹ *Croson*, 488 U.S. at 501 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977)).

⁹² *Concrete Works*, 36 F.3d at 1522.

⁹³ The *Philadelphia* study was vulnerable on this issue.



absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs.⁹⁴

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

The Sixth Circuit Court of Appeals, in *Drabik*, concluded that for statistical evidence to meet the legal standard of *Croson*, it must consider the issue of capacity.⁹⁵ The State's factual predicate study based its statistical evidence on the percentage of M/WBE businesses in the population. The statistical evidence did not take into account the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.⁹⁶ The court reasoned as follows:

Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. If MBEs comprise 10% of the total number of contracting firms in the State, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.⁹⁷

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

The appellate opinions in *Philadelphia*⁹⁸ and *Dade County*,⁹⁹ regarding disparity studies involving public sector contracting, are particularly instructive in defining availability.

⁹⁴ *Concrete Works*, 36 F.3d at 1528.

⁹⁵ See *Drabik*, 214 F.3d 730. The Court reviewed Ohio's 1980, pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass'n v. Keip*, 1983 U.S. App. LEXIS 24185 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

⁹⁶ *Id.*

⁹⁷ *Id.* at 736.

⁹⁸ *Philadelphia*, 6 F.3d 990 (3rd Cir. 1993), on remand, 893 F.Supp. 419 (E.D. Penn. 1995), aff'd, 91 F.3d 586 (3rd Cir. 1996).

⁹⁹ *Dade County*, 943 F.Supp. 1546.



First, in *Philadelphia*, the earlier of the two decisions, contractors' associations challenged a city ordinance that created set-asides for minority subcontractors on city public works contracts. Summary judgment was granted for the contractors.¹⁰⁰ The Third Circuit upheld the third appeal, affirming that there was no firm basis in evidence for finding that race-based discrimination existed to justify a race-based program and that the program was not narrowly tailored to address past discrimination by the City.¹⁰¹

The Third Circuit reviewed the evidence of discrimination in prime contracting and stated that whether it is strong enough to infer discrimination is a "close call" which the court "chose not to make."¹⁰² It was unnecessary to make this determination because the court found that even if there was a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.

When the court looked at subcontracting, it found that a firm basis in evidence did not exist. The only subcontracting evidence presented was a review of a random 25 to 30 percent of project engineer logs on projects more than \$30,000. The consultant determined that no MBEs were used during the study period based upon recollections regarding whether the owners of the utilized firms were MBEs. The court found this evidence insufficient as a basis for finding that prime contractors in the market were discriminating against subcontractors.¹⁰³

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that "[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE"; and it was a "reasonable choice" under the circumstances to use a list of certified contractors as a source for available firms.¹⁰⁴ Although theoretically it may have been possible to adopt a more refined approach, the court found that using the list of certified contractors was a rational approach to identifying qualified firms.

Furthermore, the court discussed whether bidding was required in prime construction contracts as the measure of "willingness" and stated, "[p]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged

¹⁰⁰ *Philadelphia*, 91 F.3d 586.

¹⁰¹ *Id.*

¹⁰² *Id.* at 605.

¹⁰³ Another problem with the program was that the 15 percent goal was not based on data indicating that minority businesses in the market area were available to perform 15 percent of the City's contracts. The court noted, however, that "we do not suggest that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides." The court also found the program flawed because it did not provide sufficient waivers and exemptions, as well as consideration of race-neutral alternatives.

¹⁰⁴ *Philadelphia*, 91 F.3d at 603.



from trying to secure work.”¹⁰⁵

In addition, the court found that a program certifying MBEs for federal construction projects was a satisfactory measure of capability of MBE firms.¹⁰⁶ In order to qualify for certification, the federal certification program required firms to detail their bonding capacity, size of prior contracts, number of employees, financial integrity, and equipment owned. According to the court, “the process by which the firms were certified [suggests that] those firms were both qualified and willing to participate in public work projects.”¹⁰⁷ The court found certification to be an adequate process of identifying capable firms, recognizing that the process may even understate the availability of MBE firms.¹⁰⁸ Therefore, the court was somewhat flexible in evaluating the appropriate method of determining the availability of MBE firms in the statistical analysis of a disparity.

In *Dade County*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program, because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs was taken into account.¹⁰⁹ The *Dade County* district court accepted the Disparity Study’s limiting of “available” prime construction contractors to those that had bid at least once in the study period. However, it must be noted that relying solely on bidders to identify available firms may have limitations. If the solicitation of bidders is biased, then the results of the bidding process will be biased.¹¹⁰ In addition, a comprehensive count of bidders is dependent on the adequacy of the agency’s record keeping.¹¹¹

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

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Florida 1996).

¹¹⁰ Cf. *League of United Latin American Citizens v. Santa Ana*, 410 F.Supp. 873, 897 (C.D. Cal. 1976); *Reynolds v. Sheet Metal Workers, Local 102*, 498 F.Supp 952, 964 n. 12 (D. D.C. 1980), aff’d, 702 F.2d 221 (D.C. Cir. 1981). (Involving the analysis of available applicants in the employment context).

¹¹¹ Cf. *EEOC v. American Nat’l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir.), cert. denied, 459 U.S. 923 (1981). (In the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).



C. Anecdotal Evidence

In *Croson*, Justice O'Connor opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."¹¹² Anecdotal evidence should be gathered to determine if minority contractors are systematically being excluded from contracting opportunities in the relevant market area. Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies, such as outreach to the M/WBE community, which are accessible to all segments of the business community regardless of race. They are not intrusive, and in fact, require no evidence of discrimination before implementation. Conversely, race-conscious measures, such as set-asides, fall at the other end of the spectrum and require a larger amount of evidence.¹¹³

As will be discussed below, anecdotal evidence will not suffice standing alone to establish the requisite predicate for a race-conscious program. Its great value lies in pointing to remedies that are "narrowly tailored," the second prong of a *Croson* study.

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

- M/WBEs denied contracts despite being the low bidders —*Philadelphia*¹¹⁴
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs —*Cone Corporation v. Hillsborough County*¹¹⁵
- M/WBEs' inability to obtain contracts for private sector work — *Coral Construction*¹¹⁶

¹¹² *Croson*, 488 U.S. at 509. The Court specifically cited to *Teamsters*, 431 U.S. at 338.

¹¹³ Cf. *AGCC II*, 950 F.2d at 1417-18 (in finding that an ordinance providing for bid preferences was narrowly tailored, the Ninth Circuit stated that the program encompassed the required flexibility and stated that "the burdens of the bid preferences on those not entitled to them appear relatively light and well distributed. . . . In addition, in contrast to remedial measures struck down in other cases, those bidding have no settled expectation of receiving a contract. [Citations omitted.]").

¹¹⁴ *Philadelphia*, 6 F.3d at 1002.

¹¹⁵ *Cone Corporation v. Hillsborough County*, 908 F.2d at 916 (11th Cir.1990).

¹¹⁶ For instance, where a small percentage of an MBE or WBE's business comes from private contracts and most of its business comes from race or gender-based set-asides, this would demonstrate exclusion in the private industry. *Coral Construction*, 941 F.2d 910 at 933 (WBE's affidavit indicated that less than 7 percent of the firm's business came from private contracts and that most of its business resulted from gender-based set-asides).



- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties — *AGCC*¹¹⁷
- Attempts to circumvent M/WBE project goals — *Concrete Works I*¹¹⁸
- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on an entity's contracts — *AGCC*¹¹⁹

Courts must assess the extent to which relief measures disrupt settled “rights and expectations” when determining the appropriate corrective measures.¹²⁰ Presumably, courts would look more favorably upon anecdotal evidence, which supports a less intrusive program than a more intrusive one. For example, if anecdotal accounts related experiences of discrimination in obtaining bonds, they may be sufficient evidence to support a bonding program that assists M/WBEs. However, these accounts would not be evidence of a statistical availability that would justify a racially limited program such as a set-aside.

As noted above, in *Croson*, the Supreme Court found that the City of Richmond’s MBE program was unconstitutional, because the City lacked proof that race-conscious remedies were justified. However, the Court opined that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”¹²¹

In part, it was the absence of such evidence that proved lethal to the program. The Supreme Court stated that “[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”¹²²

This was not the situation confronting the Ninth Circuit in *Coral Construction*. There, the 700-plus page appellate records contained the affidavits of “at least 57 minorities or women contractors, each of whom complain in varying degrees of specificity about discrimination within the local construction industry. These affidavits certainly suggest that ongoing

¹¹⁷ *AGCC II*, 950 F.2d at 1415.

¹¹⁸ *Concrete Works*, 36 F.3d at 1530.

¹¹⁹ *AGCC II*, 950 F.2d at 1415.

¹²⁰ *Wygant*, 476 U.S. at 283.

¹²¹ *Croson*, 488 U.S. at 509, citing *Teamsters*, 431 U.S. at 338.

¹²² *Id.* at 480.



discrimination may be occurring in much of the King County business community.”¹²³

Nonetheless, this anecdotal evidence standing alone was insufficient to justify King County’s MBE program since “[n]otably absent from the record, however, is *any* statistical data in support of the County’s MBE program.”¹²⁴ After noting the Supreme Court’s reliance on statistical data in Title VII employment discrimination cases and cautioning that statistical data must be carefully used, the Court elaborated on its mistrust of pure anecdotal evidence:

Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices.¹²⁵

The Court concluded its discourse on the potency of anecdotal evidence in the absence of a statistical showing of disparity by observing that “rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”¹²⁶

Two other circuit courts also suggested that anecdotal evidence might be dispositive, while rejecting it in the specific case before them. For example, in *Contractors Ass’n*, the Third Circuit Court of Appeals noted that the Philadelphia City Council had “received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination,” which the district court had “discounted” because it deemed this evidence to be “impermissible” for consideration under *Croson*.¹²⁷ The circuit court disapproved of the district court’s actions because in its view the court’s rejection of this evidence betrayed the court’s role in disposing of a motion for summary judgment.¹²⁸ “Yet,” the circuit court stated:

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

¹²³ *Coral Construction*, 941 F.2d at 917-18.

¹²⁴ *Id.* at 918 (emphasis added) (additional statistical evidence gathered after the program had been implemented was also considered by the court and the case was remanded to the lower court for an examination of the factual predicate).

¹²⁵ *Id.* at 919.

¹²⁶ *Id.*

¹²⁷ *Philadelphia*, 6 F.3d at 1002.

¹²⁸ *Id.* at 1003.



here.¹²⁹

The District of Columbia Circuit Court echoed the Ninth Circuit’s acknowledgment of the rare case in which anecdotal evidence is singularly potent in *O’Donnell Construction v. District of Columbia*.¹³⁰ The court found that in the face of conflicting statistical evidence, the anecdotal evidence there was not sufficient:

It is true that in addition to statistical information, the Committee received testimony from several witnesses attesting to problems they faced as minority contractors. Much of the testimony related to bonding requirements and other structural impediments any firm would have to overcome, no matter what the race of its owners. The more specific testimony about discrimination by white firms could not in itself support an industry-wide remedy [quoting *Coral*]. Anecdotal evidence is most useful as a supplement to strong statistical evidence—which the Council did not produce in this case.¹³¹

The Eleventh Circuit is also in accord. In applying the “clearly erroneous” standard to its review of the district court’s decision in *Dade County*, it commented that “[t]he picture painted by the anecdotal evidence is not a good one.”¹³² However, it held that this was not the “exceptional case” where, unreinforced by statistics, the anecdotal evidence was enough.¹³³

In *Concrete Works I*, the Tenth Circuit Court of Appeals described the type of anecdotal evidence that is most compelling: evidence within a statistical context. In approving of the anecdotal evidence marshaled by the City of Denver in the proceedings below, the court recognized that “[w]hile a fact finder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality’s institutional practices carries more weight due to the systemic impact that such institutional practices have on market conditions.”¹³⁴ The court noted that the City had provided such systemic evidence.

¹²⁹ *Id.*

¹³⁰ 963 F.2d at 427 (D.C. Cir.1992).

¹³¹ *Id.*

¹³² *Engineering Contractors Ass’n of South Florida v. Metropolitan Dade County*, 943 F.Supp 1546 (S.D. Fla. 1996), aff’d, 122 F.3d 895 (11th Cir. 1997).

¹³³ *Id.* at 926.

¹³⁴ *Concrete Works I*, 36 F.3d at 1530.



The Ninth Circuit Court of Appeals has articulated what it deems to be permissible anecdotal evidence in *AGCC II*.¹³⁵ There, the court approved a “vast number of individual accounts of discrimination” which included numerous reports of MBEs denied contracts despite being the low bidder; MBEs told they were not qualified although they were later found qualified when evaluated by outside parties; MBEs refused work even after they were awarded the contracts as low bidder; and MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal, the City points to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the city’s procurement processes; an “old boy’s network” still exists; and racial discrimination is still prevalent within the San Francisco construction industry.¹³⁶ Based on *AGCC II*, it would appear that the Ninth Circuit’s standard for acceptable anecdotal evidence is more lenient than other Circuits that have considered the issue.

Taken together, these statements constitute a taxonomy of appropriate anecdotal evidence. The cases suggest that, to be optimally persuasive, anecdotal evidence must satisfy six particular requirements.¹³⁷ These requirements are that the accounts:

- are gathered from minority contractors, preferably those that are “qualified”¹³⁸
- concern specific, verifiable instances of discrimination¹³⁹
- involve the actions of governmental officials¹⁴⁰
- involve events within the relevant jurisdiction’s market area¹⁴¹
- discuss the harm that the improper conduct has inflicted on the businesses in question¹⁴²

¹³⁵ *AGCC II*, 950 F.2d 1401.

¹³⁶ *Id.* at 1415.

¹³⁷ *Philadelphia*, 6 F.3d at 1003. The anecdotal evidence must be “dominant or pervasive.”

¹³⁸ *Philadelphia*, 91 F.3d at 603.

¹³⁹ *Coral Construction*, 941 F.2d at 917-18. *But see Concrete Works II*, 321 F.3d at 989. “There is no merit to [plaintiff’s] argument that the witnesses accounts must be verified to provide support for Denver’s burden.”

¹⁴⁰ *Croson*, 488 U.S. at 509.

¹⁴¹ *Coral Construction*, 941 F.2d at 925.

¹⁴² *O’Donnell*, 963 F.2d at 427.



- collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.¹⁴³

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

Philadelphia makes clear that 14 anecdotal accounts will not suffice.¹⁴⁴ While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type referenced above, were insufficient to justify the program in *Coral Construction*. The number of anecdotal accounts relied upon by the district court in approving Denver’s M/WBE program in *Concrete Works I* is unclear, but by one count the number might have exceeded 139.¹⁴⁵ It is, of course, a matter of speculation as to how many of these accounts was indispensable to the court’s approval of the Denver M/WBE program.

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

V. CONSIDERATION OF RACE-NEUTRAL OPTIONS

A remedial program must address the source of the disadvantage faced by minority businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE

¹⁴³ *Coral Construction*, 941 F.2d at 919.

¹⁴⁴ *Philadelphia*, 6 F.3d. at 1002-03.

¹⁴⁵ The Denver City Council enacted its M/WBE ordinance in 1990. The program was based on the results of public hearings held in 1983 and 1988 at which numerous people testified (approximately 21 people and at least 49 people, respectively), and on a disparity study performed in 1990. See *Concrete Works of Colorado v. Denver*, 823 F.Supp. 821, 833-34. The disparity study consultant examined all of this preexisting data, presumably including the anecdotal accounts from the 1983 and 1988 public hearings, as well as the results of its own 69 interviews, in preparing its recommendations. *Id.* at 833-34. Thus, short of analyzing the record in the case, it is not possible to determine a minimum number of accounts because it is not possible to ascertain the number of consultant interviews and anecdotal accounts that are recycled statements or statements from the same people. Assuming no overlap in accounts, however, and also assuming that the disparity study relied on prior interviews in addition to its own, the number of M/WBEs interviewed in this case could be as high as 139, and, depending on the number of new people heard by the Denver Department of Public Works in March 1988 (*see id.* at 833), the number might have been even greater.



program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.¹⁴⁶

On the other hand, an MBE program cannot stand if the sole barrier to minority or woman-owned business participation is a barrier which is faced by all new businesses, regardless of ownership.¹⁴⁷ If the evidence demonstrates that the sole barrier to M/WBE participation is that M/WBEs disproportionately lack capital or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.¹⁴⁸ In other words, if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

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

The Supreme Court has recently explained that although “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative” it “does require serious, good faith consideration of workable race-neutral alternatives that will achieve ... diversity[.]” *Grutter*, 123 S.Ct, at 2344, 2345. The County has failed to show the necessity for the relief it has chosen, and the efficacy of alternative remedies has not been sufficiently explored.¹⁴⁹

If the barriers appear race-related but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found. If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, MBEs also face race discrimination in the awarding of contracts, then a race-conscious program will stand, so long as it also includes race-neutral measures to address the capital and bonding barriers.¹⁵⁰

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement

¹⁴⁶ *AGCC II*, 950 F.2d at 1404.

¹⁴⁷ *Croson*, 488 U.S. at 508.

¹⁴⁸ *Id.* at 507.

¹⁴⁹ *Hershell Gill*, 333 F.Supp. 2d 1305, 1330 (S.D.Fla. 2004).

¹⁵⁰ *Id.* (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).



that an entity exhaust every possible race-neutral alternative.¹⁵¹ Instead, an entity must make a serious, good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing MBE utilization, it is imperative to examine barriers to MBE participation that go beyond “small business problems.” The impact on the distribution of contracts programs that have been implemented to improve MBE utilization should also be measured.¹⁵²

VI. SECTION 31 OF THE CALIFORNIA CONSTITUTION

In 1996 the California Constitution Section 31 authorized, by the California voters approval as Proposition 209, banning preferences based on race or gender in public sector education, employment and contracting. Specifically, Section 31 provides that the State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. The U.S. Constitution requires governmental agencies to treat all individuals and groups equally in the operation of public employment, public education, and public contracting. However, Section 31 states that “if any parts are found to be in conflict with federal law of the U.S. Constitution, the section shall be implemented to the maximum extent that federal law and the U.S. Constitution permit.”

The leading California cases concerning Section 31 are *Hi-Voltage v. City of San Jose*¹⁵³ and *Ward Connerly v. State Personnel Board*.¹⁵⁴ In *Hi-Voltage*, the California Supreme Court held that Section 31 prohibited the City from requiring construction contractors to document their efforts to solicit M/WBEs as subcontractors. The court noted two fatal flaws: (1) Contractors were required to request bids from at least four M/WBEs, which the court considered a preference in favor of M/WBEs; (2) The program also failed because the extent to which M/WBEs were chosen would be measured against the City’s statistical expectation. *Ward Connerly*, a subsequent appellate court opinion, determined that Section 31 applied to

¹⁵¹ *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

¹⁵² *Dade County*, 122 F.3d at 927. At the same time, the Eleventh Circuit’s caveat in *Dade County* should be kept in mind: “Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications that a government may use to treat race-based problems. Instead, it is the strongest of medicines, with many potentially harmful side-effects, and must be reserved to those severe cases that are highly resistant to conventional treatment.” For additional guidance, see *supra* the discussion of narrow tailoring in *Concrete Works, Adarand,, County of Cook, and City of Chicago*.

¹⁵³ 24 Cal. 4th 537 (Cal. 2000).

¹⁵⁴ 92 Cal. App. 4th 16 (Cal. 2001).



the five California statutory programs before that court.¹⁵⁵ However, neither *Hi-Voltage* nor *Ward Connerly* speak directly to what would happen should the findings of the local government's disparity study point to a race-conscious remedy.

In *Ward Connerly*, the California Court of Appeal stated the following:

Under equal protection principles all state actions that rely upon suspect classifications must be tested under strict scrutiny, but those actions which can meet the rigid strict scrutiny test are constitutionally permissible. Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny.

In this respect the distinction between what the federal Constitution permits and what it requires becomes particularly relevant. To the extent that the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, Proposition 209 precludes such action. In fact, Proposition 209 contains no compelling interest exception.¹⁵⁶

Had there been such an exception, there would have been no conflict between Proposition 209 and use of race, which is permissible under the Fourteenth Amendment. However, the *Crosby* test has a second prong: the remedy has to be "narrowly tailored." Note then the following language in *Ward Connerly*:

The statutory scheme [re: professional bond services] does not arguably withstand strict scrutiny. No justification has been shown. There was no specific finding of identified prior discrimination in the contracting for professional bond services. There was no effort to limit recovery to those who actually suffered from prior discrimination. There was no showing that non-race-based and non-gender-based remedies would be inadequate or were even considered. The scheme is unlimited in duration. And, except for its limitation to citizens and lawfully admitted aliens, the scheme is unlimited in reach.¹⁵⁷

¹⁵⁵ State Lottery, Professional Bond Services, State Civil Service, Community Colleges, State Contracting (reporting requirements).

¹⁵⁶ *Ward Connerly*, 92 Cal. App. 4th at 42.

¹⁵⁷ *Ward Connerly*, 92 Cal. App. 4th at 54.



Hi-Voltage also refers to the impact of a remedy based on a disparity study. The California Supreme Court wrote: “. . .if it were determined the City had violated federal constitutional or statutory law, the supremacy clause as well as the express terms of Proposition 209 would dictate federal law prevails. . .”¹⁵⁸ Crucially, it went on: “The disparity study is not part of the record in this case. Without it, the court has no basis for measuring the fit between the Program and the goal of eliminating a disparity in the amount of contract dollars awarded MBEs in comparison to non-MBEs.”¹⁵⁹ Therefore, it is unclear whether the inclusion of a disparity study in this case may have permitted a race-conscious remedy despite Proposition 209.

Moreover, federal courts still have to decide whether Proposition 209 conflicts with the Equal Protection Clause of the Fourteenth Amendment¹⁶⁰. *Croson* stated that such race-conscious contracting remedies are appropriate. In accordance with the Supreme Court’s 1803 decision, *Marbury v. Madison*,¹⁶¹ the federal courts are granted the power to determine whether a remedy growing out of a disparity study process sanctioned by the Court in *Croson* is narrowly tailored. This question is not intended to be answered by the State of California.

Title VI of the Civil Rights Act of 1964 established nondiscrimination requirements on recipients of federal funds in their non-federally funded programs.¹⁶² In *Coral Construction v. San Francisco*,¹⁶³ the California Superior Court determined that Proposition 209 barred San Francisco’s race-conscious program.¹⁶⁴ On April 18, 2007, the First District Court of Appeals affirmed that judgment but remanded the case for a determination of whether the defendant’s

¹⁵⁸ *Hi-Voltage*, 24 Cal. 4th 537 at 569.

¹⁵⁹ *Id.*

¹⁶⁰ *Cantrell v. Granholm* is a constitutional challenge, framed in the context of higher education, to the Michigan Civil Rights Initiative (a Ward Connerly-backed measure similar to Proposition which became law in 2006). Plaintiffs’ argue that MCRI (1) discriminated against them on account of race; (2) use of the initiative process to amend of Michigan Constitution placed a unique and too heavy a burden on racial minorities in that they in that they would have obtain a constitutional amendment to reverse that policy; and (3) the federal government preempted the field of race and gender discrimination from the states by Title VI of the 1964 Civil Rights Act and Title IX of the Education Amendments of 1972. On March 18, 2008, the District Court granted summary judgment for the Attorney General, rejected each of plaintiffs’ challenges, holding that race conscious state or locally funded programs were a prohibited ‘preference’ within the meaning of MCRI.

¹⁶¹ 5 U.S. 137 (1803).

¹⁶² The 1987 Civil Rights Restoration Act reversed court decisions that restricted its reach.

¹⁶³ *Coral Construction, Inc. v. City & County of San Francisco*, See 116 Cal. App. 4th 6 (2004).

¹⁶⁴ It is also challenging the procedural propriety of the court granting plaintiff summary judgment because the factual record did not support one.



evidence met the majority opinion’s test that the discrimination was intentional.¹⁶⁵

The application of Title VI to the Sacramento Municipal Utility District was also raised in *C&C Construction v. Sacramento Municipal Utility District (SMUD)*.¹⁶⁶ The majority Court of Appeals opinion began with the point that race-neutral programs are the only ones Proposition 209 permits in California, but also acknowledged that its provisions were subject to federal law. It viewed the regulations of the U.S. Departments of Energy, Defense, and Transportation as not *requiring* recipients of federal funds to use race-conscious remedial programs for identified discrimination. Moreover, its reading of the regulations themselves was that SMUD’s actions had to be consistent with Proposition 209.¹⁶⁷ Also, both SMUD’s 1993 disparity study and its 1998 update found *Croscon*-level discrimination against MBEs, but they did not look at whether race-neutral remedies would suffice to meet its federal nondiscrimination obligations.¹⁶⁸ Indeed, the majority observed that the disparity study update was specifically instructed not to consider this factor. Finally, the Court found that SMUD under its reading of the federal regulations, had a burden to show that it would *lose* funds if it did not put in place the race-conscious program.

Citing *S.J. Groves & Sons v. Fulton County*,¹⁶⁹ the dissent’s view of the regulations was that, properly read, a race-conscious program is not an *option* where a race-neutral one will suffice. The required “affirmative action” did not refer only to race-neutral programs, it also included race-conscious programs.¹⁷⁰ The Department Secretary determined whether SMUD was in compliance. What the majority did in affirming the trial court decision to enjoin the use of race interfered with that authority and SMUD’s obligation to comply with the regulations. As such, SMUD violated the Supremacy Clause. However, the majority held that what could be seen as a cogent argument was raised too late to be considered during the appeal.

¹⁶⁵ 149 Cal.App.4th 1218 (2007). The City’s appeal is pending in the California Supreme Court.

¹⁶⁶ 122 Cal. App. 4th 284 (Cal. App. 2004).

¹⁶⁷ “SMUD offers no argument or authority that the Department of Energy requires race-based discrimination [a violation of Proposition 209], either in general or specifically, in SMUD’s case, as an ‘appropriate remedial step.’ It would appear that the Department of Energy, by using the general term ‘appropriate,’ meant for the funding recipient to consider the state laws and regulations relevant to that recipient when determining what action to take. In SMUD’s case, such consideration includes the limitations of [Proposition 209].” The opinion interpreted the Department of Transportation’s regulations as also not *requiring* race conscious responses.

¹⁶⁸ By implication, we note, if SMUD had, it could have move to a race-conscious program.

¹⁶⁹ 920 F.2d 752 (11th Cir. 1991).

¹⁷⁰ The applicable regulation “condone[s], and in some cases *require[s]*, race-conscious regulations and/or action”. (*italics added*), *S.J. Groves*, 920 F.2d at 764-765.



The dissent summarized its position as follows:

Since the requirement of “affirmative action” includes both race-neutral and race-conscious action and the undisputed evidence establishes that SMUD has attempted to use race-neutral outreach and other methods and concluded in good faith that they were not sufficient to remedy the statistical underutilization reflected in the disparity studies, SMUD was left with no other alternative but to adopt a race-conscious remedial plan to eliminate the effects of its own discriminatory practices.¹⁷¹

We turn now to DOT’s DBE regulatory scheme and relevant case law.¹⁷²

VII. UNITED STATES DEPARTMENT OF TRANSPORTATION - DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

In response to the United States Supreme Court’s decision in *Adarand*, which applied the strict scrutiny standard to federal programs, the U.S. Department of Transportation (USDOT) revised provisions of the DBE rules. Effective March 1999, the USDOT replaced 49 CFR Part 23 of its DBE program rules, with 49 CFR Part 26. The goal of promulgating the new rule was to modify the DBE program consistent with the “narrow tailoring” requirement of *Adarand*. The new provisions apply only to the airport, transit, and highway financial assistance programs of the USDOT. See Exhibit A for the main components of the rules.¹⁷³

There have been challenges to the amended DBE regulations. Two circuit courts, the Eighth and Seventh, approved them. One, the Ninth, which BART is bound to follow, did not. We turn first to the Eighth Circuit position, then to the Ninth Circuit’s *Western States*.

The Eighth Circuit Analysis

Sherbrooke Turf Inc. v. Minnesota Department of Transportation and *Gross Seed Co. v.*

¹⁷¹ 122 Cal. App. 4th 284 at 324.

¹⁷² Note well: 49 CFR § 26.21 requires recipients of FTA funds (BART) to have a DBE program and 49 CFR §26.51(d) states “[y]ou **must** establish contract goals to meet any portion of your overall goal you do not project being able to meet using race neutral means.”(emphasis added)

¹⁷³ Exhibit A lays out the main components of the USDOT Rules.



*Nebraska Dep't of Roads*¹⁷⁴ is a 2003 joint decision. (In both cases, the district courts found that the revised DBE Program, as amended in 1999, met the strict scrutiny standard prescribed in *Adarand*.) On appeal, the Circuit Court held that Congress had a “compelling interest” to enact the legislation because it “had a sufficient evidentiary basis on which to conclude that the persistent racism and discrimination in highway subcontracting warranted a race-conscious procurement program.”

For the court’s “narrow tailoring” examination, it looked at the DBE regulations themselves. The court held that four factors demonstrated that the program was narrowly tailored on its face. Those factors were: (1) the emphasis on the use of race-neutral measures to meet goals; (2) the substantial flexibility allowed; (3) goals were tied to the local market; and (4) participation was open to all small businesses who could show that they were socially and economically disadvantaged, and presumption that minority businesses qualified was limited to those with \$750,000 or less in net worth.

The Circuit Court then examined whether the program was narrowly tailored *as applied* by Minnesota and Nebraska in its local labor market. Each state retained a consultant to examine local conditions. In Minnesota, the consultant followed the regulations’ two-step goal setting, reducing the availability it found by the precipitous drop in DBE participation when the program was suspended. In Nebraska, the consultant determined the DBE availability in the four years before the program was amended in 1999 to make clear that the ten percent goal was not mandatory. After determining what decisions had been reached on a race-neutral basis, it predicted the amount of the availability that would require race and gender-conscious subcontracting. Therefore, the Eighth Circuit rejected plaintiffs’ appeal.¹⁷⁵

Western States

*Western States Paving Co. v. Washington State Department of Transportation*¹⁷⁶, filed in U.S. District Court in 2000, subjected the State of Washington’s Department of Transportation DBE Program to a two-pronged analysis. One aspect of the analysis determined whether the USDOT DBE legislation was facially constitutional and the other assessed whether the State of Washington’s application of the DBE regulations was valid.

¹⁷⁴ 345 F.3d 964 (8th Cir. 2003).

¹⁷⁵ The Seventh Circuit is in accord. *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (2007). Consultant’s methodology were consistent with the flexible nature of the DBE regulations: (1) use of its ‘custom census’ was acceptable method to determine Step 1 availability; (2) was not required to separate prime and subcontracting availability; and (3) reasonably determined amount of goal that would use race neutral means.

¹⁷⁶ *Western States Paving Co., v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)



A. Facial Constitutional Challenge

In *Western States* the plaintiff sought a declaratory judgment arguing that the 1998 Transportation Equity Act for the 21st Century's (TEA-21) preference program was in violation of the equal protection provision under the Fifth and Fourteenth Amendments of the U.S. Constitution. The TEA-21 DBE Program on its face and as applied by the State of Washington were claimed to be unconstitutional. In addressing *Western States*' facial challenge the Court interpreted the issue as to whether the United States met its burden of demonstrating that the federal statute and regulations satisfied the strict scrutiny's exacting requirements.

The federal government, according to *Croson*, has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.¹⁷⁷ Thus, the Court evaluated the evidence that Congress considered in enacting the DBE statute to ensure it had a "strong basis in evidence for its conclusion that remedial action was necessary."¹⁷⁸ The Court concluded that a substantial body of statistical and anecdotal evidence was considered by Congress at the time the law was enacted. Therefore, the Court found that Congress had a strong basis in evidence for concluding that at least in some parts of the country there was discrimination within the transportation contracting industry which hindered minorities' ability to compete for federally funded contracts.¹⁷⁹

Next, the Court considered whether the DBE regulation's racial classification was narrowly tailored as represented in the State of Washington's DBE goals. Citing *Croson*, *Western States* decided that a minority preference program must establish utilization goals that bear a close relationship to minority firms' availability in a particular market in order to be narrowly tailored.¹⁸⁰ The Court referenced *Sherbrooke* noting that the Eighth Circuit in holding that the DBE programs of the Minnesota and Nebraska Departments of Transportation independently satisfied the strict scrutiny's narrow tailoring requirement, relied upon two disparity studies.

The Court notes that the DBE regulations did not establish a mandatory nationwide minority utilization goal in transportation contracting. The Court found that the ten percent DBE

¹⁷⁷ *Croson*, 488 U.S. 469, 492 (1982).

¹⁷⁸ *Id.* at 493.

¹⁷⁹ *Western States* at 983.

¹⁸⁰ *Id.* *Western States*



utilization goal in the regulation was only “aspirational,” and the regulation provides that each state must establish a DBE utilization goal that is based upon the proportion of ready, willing, and able DBEs in its transportation contracting industry.¹⁸¹ Because the regulations require each state to set minority utilization goals that reflect the contractor availability in its own labor market, the Court found the DBE regulations to be narrowly tailored to remedy the effects of race and sex-based discrimination within the transportation contracting industry. The Court ultimately held that they were satisfied that TEA-21's DBE program was narrowly tailored to remedy the effects of race and sex-based discrimination within the transportation contracting industry, and thus *Western States*' facial challenge failed.

B. Washington State's Application of the Narrowly Tailored Standard

The second prong of the Court's analysis considered whether the utilization goals established by the State of Washington were unconstitutional. The State contended that its DBE program was constitutional because it comported with the federal statute and regulations. The State also proffered that since the proportion of DBEs in the state was 11.17 percent, and the percentage of contracting funds awarded to them on race-neutral contracts was only nine percent, discrimination was demonstrated.¹⁸² The Court disagreed with the rationale. It found that this oversimplified statistical evidence is entitled to little weight, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work. DBE firms may be smaller and less experienced than non-DBE firms or they may be concentrated in certain geographical areas of the State, rendering them unavailable for a disproportionate amount of work.

Citing *Croson* the Court opined that recipients of federal funds could not use race-conscious methods to meet their DBE goals without a finding of discrimination. There is insufficient evidence suggesting that minorities currently or previously suffered discrimination in the Washington transportation contracting industry. Further, the Court found that the State of Washington failed to provide evidence of discrimination within its own contracting market and thus failed to meet its burden of demonstrating that its DBE program was narrowly tailored to further Congress's compelling remedial interest.¹⁸³

The Court concluded that the District Court erred when it upheld the State's DBE program

¹⁸¹ *Western States*.

¹⁸² *Western States*.

¹⁸³ *Id.*



simply because the State complied with the federal program's requirement. Washington's DBE program was categorized as an "unconstitutional windfall to minority contractors solely on the basis of their race or sex."

In sum, *Western States* found that Washington's DBE program met the first prong of the test and was held facially constitutional but it did not pass the second prong because the State's application of the DBE regulations was not narrowly tailored to a finding of statistically significant underutilization of the respective minority groups. Therefore, the State's application of the DBE regulations was deemed unconstitutional.

In response to *Western States*, the USDOT issued a Memorandum in 2005 recommending a disparity study as an appropriate method for USDOT recipients in the Ninth Circuit to formulate narrowly tailored DBE goals. (We note that the USDOT regulations, as promulgated in 1992 recommends the use of a disparity study among other availability sources for setting the DBE goals.)

Performing a disparity study can overcome some of the State of Washington's evidentiary deficiencies by determining whether underutilization of the respective ethnic groups exist. The Disparity Study meets the Step One base figure determination by enumerating ready, willing, and able M/WBEs by ethnic group and gender relative to ready, willing, and able non-M/WBEs. And it provides data for the Step Two adjustment to the base figure a required step to reaching the overall DBE goal. The Study also determines the current DBE capacity as measured by participation in BART contracts in recent years and any statistically significant underutilization by ethnic group and gender. And there is a determinate of the portion of the overall goal that should be reachable by race-neutral means. The starting point is prime contracts that DBEs won competitively and subcontracts they obtained where there were no contract goals. Statistically significant underutilization of available DBEs points to that portion of the overall goal that it would likely take race-conscious subcontracting goals to achieve. See *Chapter 3: DBE Program Review*, which reviews how BART operates its DBE program, and lays out race-neutral measures that are to be used to the maximum feasible extent in pursuing the adjusted DBE goal.

VIII. CONCLUSION

The decision of the U.S. Supreme Court in the *Croson* and *Adarand* cases changed the legal landscape for business affirmative action programs. The U.S. Supreme Court altered the authority of local government to use local and federal funds to institute remedial race-conscious public contracting programs. This chapter has examined what *Croson*, *Adarand*,



and their progeny require for a local government to institute a constitutional public contracting race-conscious program.

In the Ninth Circuit a disparity study must serve as legal justification for any race (and gender)-conscious affirmative action contracting program BART may enact for its contracts funded by either federal or local dollars. In addition consideration has also been given in this Chapter to Proposition 209's effect on the remedies available for BART as a recipient of US DOT funds.

IX. LIST OF AUTHORITIES

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

Statutes

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

49 CFR Parts 23 and 26.

Cal. Const., Article I, Section 31.

Cal. Public Contracting Code, Section 2002.



Exhibit A

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

1. Meeting Overall Goals

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

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

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

2. Good Faith Efforts

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

3. DBE Diversification

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



4. Alternative Programs

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

