

Commission on the
Status of Women

Commission on the Status of Women
Wednesday, January 19, 2022 – 6PM
Zoom Meeting
AGENDA

**PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY
THROUGH VIDEOCONFERENCE AND TELECONFERENCE**

Pursuant to Government Code Section 54953(e) and the state declared emergency, this meeting of the Commission on the Status of Women will be conducted exclusively through teleconference and Zoom videoconference. The COVID-19 state of emergency continues to directly impact the ability of the members to meet safely in person and presents imminent risks to the health of attendees. Therefore, no physical meeting location will be available.

To access the meeting remotely, join from a PC, Mac, iPad, iPhone, or Android device: <https://us02web.zoom.us/j/87407560738?pwd=dzd4VFpqdEtxOGRNQnBqTkFMUnRoQT09>. If you do not wish for your name to appear on the screen, then use the drop-down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon by rolling over the bottom of the screen. To join by phone: **Dial 1-669-900-9128** and enter **Meeting ID: 874 0756 0738**. If you wish to comment during the public comment portion of the agenda, Press *9 and wait to be recognized by the Chair. To submit an e-mail comment during the meeting to be read aloud during public comment, email sallen@cityofberkeley.info with the Subject Line in this format: "PUBLIC COMMENT ITEM ##." Please observe a 150-word limit. Time limits on public comments will apply.

AGENDA

1. Call to Order and Roll call
2. Approval of Agenda
3. Approval of November 17, 2021 Meeting Minutes
4. Public Comment
5. ACCW Membership Renewal
6. CA Commissions Grant
7. CEDAW
8. Friends of the Commission on the Status of Women
9. Townhall
10. Gender equity disparity in city awarded contracts as identified in Mason-Tillman report
11. Film/speaker event on reproductive rights under Roe v. Wade
12. Legislative Updates
13. Chairperson's Report and Commissioner Updates
14. Good of the Order
15. Adjournment



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SB 343 Disclaimer

Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available for public inspection at the City Manager's Office located at 2180 Milvia Street, 5th Floor.

Commission Contact Information

Shallon L. Allen, Secretary

Commission on the Status of Women

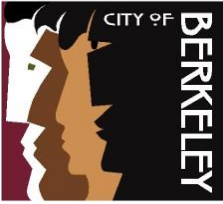
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Commission on the Status of Women

**Commission on the Status of Women
Regular Meeting – November 17, 2021
DRAFT MINUTES**

The meeting convened at 6:11pm with Chairperson Shanoski presiding.

ROLL CALL

Present: Shanoski, Hughes, Burton, Henneman, Marasovic
Absent: Pelley, Lu
Excused: None

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Comments from the Public

- Public attendance: 1
- Public comments: 1

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Action

Item # 2: The Commission on the Status of Women added an agenda item (Introductions) and approved the agenda.

M/S/C: Shanoski/Burton
Ayes: Shanoski, Hughes, Burton, Henneman, Marasovic
Absent: Pelley, Lu
Excused: None

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Item # 3: The Commission on the Status of Women approved the September 15, 2021 meeting minutes.

M/S/C: Hughes/Burton
Ayes: Shanoski, Hughes, Burton
Abstention: Henneman, Marasovic
Absent: Pelley, Lu
Excused: None

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Item # 5: The Commission on the Status of Women approved the meeting dates for 2022.

M/S/C: Burton/Henneman

Ayes: Shanoski, Hughes, Burton, Henneman, Marasovic
Absent: Pelley, Lu
Excused: None

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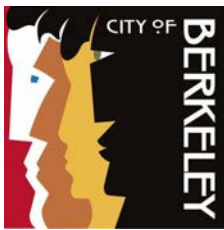
The meeting was adjourned at 7:32pm.

Respectfully Submitted,

**Shallon Allen, Secretary
Commission on the Status of Women**



MASON TILLMAN
ASSOCIATES, LTD



CITY OF BERKELEY AVAILABILITY STUDY

DRAFT FINAL REPORT | NOVEMBER 2021

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CHAPTER 1: Legal Review

I. Introduction

This legal analysis summarizes the constitutional standards that the federal and state courts have applied to review local governments' affirmative action contracting programs. The United States Supreme Court decision of *City of Richmond v. J.A. Croson Co. (Croson)*¹ raised the standard by which lower courts review both local and state affirmative action contracting programs.

The City of Berkeley Availability and Disparity Study was commissioned to examine the City's procurement activities and identify any statistical disparities in the award of contracts to available local, small, emerging, minority, and women business enterprises. Contracting policies, procedures, goals or new programs recommended to remediate the results of the Study's statistical findings will be narrowly tailored in compliance with *Croson* and the California Constitution.

The United States Supreme Court decision in *Croson* sets forth the strict scrutiny constitutional analysis applicable to race-based remedies for public contracting programs. Since the City is located within California, the California Constitution and the United States Court of Appeals for the Ninth Circuit decisions including *Western States Paving v. Washington Department of Transportation*,² constitute binding legal precedent and are discussed herein. Since 1989, courts in several circuits, including the Ninth Circuit, have decided cases involving challenges to affirmative action programs. Case law pertaining to Minority and Woman-owned Business Enterprise (M/WBE) programs adjudicated outside of the Ninth Circuit are discussed because they are instructive, albeit not binding, when implementing race-based public contracting programs.

The legal review also summarizes the state constitutional standard and relevant case law for applying race and gender conscious measures in California. The California Constitution, amended in November 1996 by Proposition 209, prohibits the application of preferences in contracting programs based on race or gender. The California Supreme Court articulated the standard for the application of race conscious measures in public contracting under Article I, section 31 of the California Constitution in *Coral Construction, Inc. v. City and County of San Francisco et al.*³ In another seminal decision, the Ninth Circuit Court of Appeals in *Coalition for Economic Equity v. Pete Wilson et. al.*⁴, considered the constitutionality of Proposition 209 in a challenge under the equal protection clause of the Fourteenth amendment.



¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Please note that in *Adarand Constructors, Inc. v. Federico Peña*, 115 S.Ct. 2097 (1995), the Court applied the same standards to federal Disadvantaged Business Enterprise programs.

² *Western States Paving Co. v. State of Washington Dept. of Transportation*, 407 F.3d 983 (9th Cir. 2005).

³ *Coral Construction Inc. v. City and County of San Francisco, et. al.*, 50 Cal.4th 315 (2010).

⁴ *Coalition for Economic Equity v. Pete Wilson, et al*, 122 F.3d 692 (9th Cir. 1997).

II. *Standard of Review*

The standard of review represents the measure by which a court evaluates whether a legal claim meets a certain statute, rule, or precedent. The standard of review that the Supreme Court set in *Croson* for race-specific programs is applicable to meet constitutional muster. *Croson*, decided in 1989, dealt with non-federally funded programs and established an evidentiary standard of review for race-based programs. The Court announced that programs employing racial classification would be subject to “strict scrutiny,” the highest legal standard. Broad notions of equity or general allegations of historical and societal discrimination against minorities fail to meet the requirements of strict scrutiny. Local governments, as set forth in *Croson*, 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.

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-based, 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 Speaking for the majority, Justice O’Connor 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

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:⁹

⁵ *Croson*, 488 U.S. at 493-95.

⁶ *Id.* at 493.

⁷ *Croson*, 488 U.S. at 509.

⁸ *Croson*, 488 U.S. 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 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 These were the issues on which the district court in Philadelphia reviewed the disparity study before it.



- Disparity exists due to race-neutral reasons
- Methodology is flawed
- Findings from data analysis are statistically insignificant
- Conflicting 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.¹⁰

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.¹¹ The issue of whether or not the government has produced a strong basis in evidence is a question of law.¹² 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.¹³

The adequacy of the government’s evidence is “evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction].”¹⁴ The onus is upon the jurisdiction to provide a factual predicate that is sufficient in scope and precision to demonstrate that current disparity in utilization necessitated the adoption of the MBE program.

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.¹⁵ The plaintiff must persuade the court that the program is constitutionally flawed by challenging the government’s factual predicate for the program or by demonstrating that the program is overly broad.

Justice O’Connor explained the nature of the plaintiff’s burden of proof in her concurring opinion in *Wygant v. Jackson Board of Education (Wygant)*.¹⁶ She stated that following the production of the factual predicate supporting the program:

¹⁰ *Croson*, 488 U.S. 469.

¹¹ *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)).

¹² *Id.* (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 944 (D.Conn 1992)).

¹³ *Concrete Works I*, 36 F.3d at 1522.

¹⁴ *Concrete Works I*, 36 F.3d at 1522. (citing *Croson* 488 U.S. at 498).

¹⁵ *Id.* (citing *Wygant*, 476 U.S. at 277-278).

¹⁶ *Wygant v. Jackson Board of Education*, 476 U.S. 267, 293 (1986).



[I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently “narrowly tailored.”¹⁷

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.¹⁸ That court wrote that the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered.¹⁹ 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.²⁰

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.²¹

In *Concrete Works II*, the Tenth Circuit clearly stated that as 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.”²²

The Supreme Court’s disposition of the plaintiff’s petition for *certiorari* strongly supports the conclusion that the plaintiff has the burden of proof. Supreme Court review of appellate decisions is discretionary in that four justices must 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

¹⁷ *Wygant*, 476 U.S. at 293.

¹⁸ *Contractors Association of Eastern Pennsylvania v. City of 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).

¹⁹ *Id.* at 597

²⁰ *Contractors Association of Eastern Pennsylvania*, 893 F.Supp. at 597.

²¹ At first glance, the position of the Third Circuit does not square with what the Eleventh Circuit announced as its standard in reviewing whether a jurisdiction has established the “compelling interest” required by strict scrutiny. The Eleventh Circuit said the inquiry 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 was approached: If one starts with the disparity study—whether a compelling interest has been shown—factual issues are critical. If the focus is the remedy, because the constitutional issue of equal protection in the context of race comes into play, the review is necessarily a legal one.

²² *Concrete Works II*, 321 F.3d at 979 (quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (2000)).



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*.²³

Justice Scalia would place the burden of proof squarely on the defendant jurisdiction when a plaintiff pleads unequal treatment. Pursuant to Justice Scalia’s argument, 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 Justice Scalia’s dissenting opinion, the Tenth Circuit in *Concrete Works II* held that the defendant must show “a strong basis” for concluding that MBEs are being discriminated against. Additionally, the plaintiff must 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 to ensure that the adopted MBE program complies with the requirements of the Equal Protection clause of the U.S. Constitution. The framework must comply with the stringent requirements of the strict scrutiny standard. Accordingly, there must be a strong basis in evidence, and the race-conscious remedy must be “narrowly tailored,” as set forth in *Croson*. A summary of the appropriate types of evidence to satisfy the first element of the *Croson* standard follows.

A. *Active or Passive Participation*

Croson requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program. However, the local entity need not be an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court’s strict scrutiny review.²⁴

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.²⁵



²³ *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*”).

²⁴ *Croson*, 488 U.S. at 509.

²⁵ *Wygant v. Jackson Board of Education*, 476 U.S. 267 at 275 (1985).

An entity is considered to be a “passive” participant in private sector discriminatory practices if it has infused tax dollars into that discriminatory industry.²⁶ 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.²⁷

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 was likely to be a fruitful line of inquiry.²⁸ On remand the district court rejected the three disparity studies offered to support the continuation of Denver’s M/WBE program, because each focused on purely private sector discrimination. Indeed, Denver’s focus on purely private sector discrimination may account for what seemed to be a shift by the court away from the standard *Croson* queries of: (1) whether there was a firm basis in the entity’s contracting process to conclude that discrimination existed; (2) whether race-neutral remedies would resolve what was found; 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:

- Was there pervasive discrimination throughout the Denver Metropolitan Statistical Area (MSA)?
- Were all designated groups equally affected?
- Was discrimination intentional?
- Would Denver’s use of such firms constitute “passive” participation?
- Would the proposed remedy change industry practices?
- Was the burden of compliance—which was on white male prime contractors in an intensely competitive, low profit margin business—a fair one?

²⁶ *Croson*, 488 U.S. at 492; *Coral Construction*, 941 F.2d at 916.

²⁷ *Croson*, 488 U.S. at 492.

²⁸ *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 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.”



The court concluded that the City of Denver had not documented a firm basis of identified discrimination derived from the statistics submitted.²⁹

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. Relying on *Shaw v. Hunt*,³⁰ a post-*Croson* Supreme Court decision, the court 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.*³¹

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."³² The court emphasized that its reading of *Croson*³³ and its own precedents supported that conclusion. Also, the court pointed out that the plaintiff, which had the burden of proof, failed to introduce conflicting evidence and merely *argued* that the private sector was out of bounds and that Denver's data were flawed.³⁴

The courts found that the disparities in MBE private sector participation, demonstrated with the rate of business formation and lack of access to credit that affected MBEs' ability to expand in order to perform larger contracts, gave Denver a firm basis to conclude that there was actionable private sector discrimination. For technical legal reasons,³⁵ however, the court did not examine whether the consequent public-sector remedy—i.e., one involving a goal requirement on the City

²⁹ *Id.* at 61.

³⁰ *Shaw v. Hunt*, 517 U.S. at 519.

³¹ *Concrete Works II*, 321 F.3d at 975-76.

³² Slip opinion, pg. 20.

³³ See also *Shaw v. Hunt*, 517 U.S. 899 (1996), which it cited.

³⁴ 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."

³⁵ Plaintiff had not preserved the issue on appeal; therefore, it was no longer part of the case.



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*,³⁶ 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*.³⁷

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*.³⁸ In this case, the Seventh Circuit cited *Associated General Contractors of Ohio v. Drabik*³⁹ 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 found that the County, in order to justify the public-sector remedy, 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.

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).⁴⁰ Thus, it is essential to demonstrate a pattern and practice

³⁶ 298 F.Supp2d 725 (N.D.Ill. 2003).

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

³⁸ 256 F.3d 642 (7th Cir. 2001).

³⁹ 214 F.3d 730 (6th Cir. 2000).

⁴⁰ *Croson*, 488 U.S. at 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



of such discriminatory exclusion in the relevant market area.⁴¹ 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.⁴² Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

Croson enumerates several ways an entity may establish the requisite factual predicate. First, a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by an entity or by the entity's prime contractors may support an inference of discriminatory exclusion.⁴³ 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."⁴⁴

The *Croson* Court made clear that both prime contract and subcontracting data were relevant. The Court observed that "[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures."⁴⁵ Subcontracting data are also 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 may also be different.

Second, "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."⁴⁶ 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.⁴⁷ Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

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.

⁴¹ *Croson*, 488 U.S. at 509.

⁴² *Croson*, 488 U.S. 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*.

⁴³ *Croson*, 488 U.S. at 509.

⁴⁴ *Id.* at 501 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

⁴⁵ *Croson*, 488 U.S. at 502-03.

⁴⁶ *Id.* at 509.

⁴⁷ *Id.*



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.⁴⁸ 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.⁴⁹

Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.⁵⁰ Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”⁵¹

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.”⁵² 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.⁵³

Taken together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. *Croson* and its progeny did not provide a bright line rule for local market area, which determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.⁵⁴ Extra-jurisdictional evidence may be permitted when it is reasonably related to where the jurisdiction contracts.⁵⁵

⁴⁸ *Coral Construction*, 941 F.2d at 919.

⁴⁹ *Id.*

⁵⁰ *Coral Construction*, 941 F.2d at 919.

⁵¹ *Id.* (quoting *International Brotherhood of Teamsters v. United States (Teamsters)*, 431 U.S. 324, 339 (1977)).

⁵² *Coral Construction*, 941 F.2d at 925.

⁵³ *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); 86 F. Supp. 2d 1042 (D. Colo. 2000).

⁵⁴ *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).

⁵⁵ 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.



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.

On the one hand, *Croson* requires that an MBE program be "narrowly tailored" to remedy current evidence of discrimination.⁵⁶ 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.⁵⁷ 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.⁵⁸

Pre-program data regarding an entity's utilization of MBEs prior to enacting the MBE program may be relevant to assess the need for the agency to keep such a program intact. A 1992 unpublished 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)*,⁵⁹ set forth the possible significance of statistical data during an entity's "pre-program" years. Judge Henderson opined that statistics that provide data for 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."⁶⁰ 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, which 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.

⁵⁶ See *Croson*, 488 U.S. at 509-10.

⁵⁷ See *Croson*, 488 U.S. at 499 (stating that "[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination").

⁵⁸ See *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991). (Consultant study looked at City's MBE utilization over a one-year period).

⁵⁹ See November 25, 1992, Order by Judge Thelton Henderson (on file with Mason Tillman Associates).

⁶⁰ *Id.*



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 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.⁶¹

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

3. Statistical Evidence

To determine whether statistical evidence is adequate to infer discrimination, courts have looked to the “disparity index,” which consists of the percentage of minority or women contractor participation in local contracts divided by the percentage of minority or women contractor availability or composition in the population of available firms in the local market area.⁶² Disparity indexes have been found highly probative evidence of discrimination where they ensure that the “relevant statistical pool” of minority or women contractors is being considered.

In *Philadelphia*, the Third Circuit Court of Appeals ruled that the “relevant statistical pool” includes those businesses that not only exist in the marketplace but that are qualified and interested in performing the public agency’s work. In that case, the Third Circuit rejected a statistical disparity finding in which the pool of minority businesses used in comparing utilization to availability were those that were merely licensed to operate in the City of Philadelphia. Merely being licensed to do business with the City does not indicate either a willingness or capability to do work for the City. As such, the Court concluded this statistical disparity did not satisfy *Croson*.⁶³

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

⁶¹ *Eng’g Contractors Ass’n v. Metro. Dade County*, 122 F.3d 895, 912 (11th Cir. 1997).

⁶² 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 ethic-neutral alternatives to the plan.

⁶³ *Philadelphia*, 91 F.3d at 586. The courts have not spoken to the non-M/WBE component of the disparity index. However, if only as a matter of logic, the “availability” of non-M/WBEs requires that their willingness to be government contractors be established. The same measures used to establish the interest of M/WBEs should be applied to non-M/WBEs.



product/service category and the number of available MBEs in the relevant market area specializing in the specified product/service category would infer discriminatory exclusion. Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between 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.⁶⁴

Whether a disparity index supports an inference that there is discrimination in the market depends 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.”⁶⁵

However, the Court has not assessed nor attempted to cast bright lines for determining if a disparity index is enough 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.⁶⁶

Following the dictates of *Croson*, courts may carefully examine whether there are data that show that MBEs are ready, willing, and able to perform.⁶⁷ *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 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.⁶⁸

⁶⁴ *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.

⁶⁵ *Croson*, 488 U.S. at 501 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977)).

⁶⁶ *Concrete Works*, 36 F.3d at 1522.

⁶⁷ The *Philadelphia* study was vulnerable on this issue.

⁶⁸ *Concrete Works*, 36 F.3d at 1528.



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.⁶⁹ The State’s factual predicate study based its statistical evidence on the percentage of M/WBE businesses in the population.

The statistical evidence did not consider the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.⁷⁰ 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.⁷¹

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

The appellate opinions in *Philadelphia*⁷² and *Dade County*⁷³ regarding disparity studies involving public sector contracting are particularly instructive in defining availability. First, in *Philadelphia*, the earlier of the two decisions, contractors’ associations challenged a city ordinance that created set-asides for minority subcontractors on city public works contracts. Summary judgment was granted for the contractors.⁷⁴ 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.⁷⁵

⁶⁹ See *Contractors of Ohio v. Drabik*, 214 F.3d 730 (6th Cir. 2000). The Court reviewed Ohio’s 1980, pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass’n v. Keip*, 1983 U.S. App. LEXIS 24185 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

⁷⁰ *Drabik*, 214 F.3d at 730.

⁷¹ *Id.* at 736.

⁷² *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).

⁷³ *Dade County*, 943 F.Supp. 1546 (11th Circuit, 1997).

⁷⁴ *Philadelphia*, 91 F.3d at 586.

⁷⁵ *Id.* at 586.



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.”⁷⁶ 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 on 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.⁷⁷

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that “[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE” and that it was a “reasonable choice” under the circumstances to use a list of certified contractors as a source for available firms.⁷⁸ 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 from trying to secure work.”⁷⁹

In addition, the court found that a program certifying MBEs for federal construction projects was a satisfactory measure of capability of MBE firms.⁸⁰ 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.”⁸¹ The court found certification to be an adequate process of identifying capable firms, recognizing that the process may even understate the

⁷⁶ *Id.* at 605.

⁷⁷ 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.

⁷⁸ *Philadelphia*, 91 F.3d at 603.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*



availability of MBE firms.⁸² 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 considered.⁸³ 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.⁸⁴ In addition, a comprehensive count of bidders is dependent on the adequacy of the agency's record keeping.⁸⁵

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.

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."⁸⁶ 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.⁸⁷

⁸² *Id.*

⁸³ *Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Florida 1996).

⁸⁴ 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.)

⁸⁵ 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.)

⁸⁶ *Croson*, 488 U.S. at 509. The Court specifically cited to *Teamsters*, 431 U.S. at 338.

⁸⁷ 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.]").



As discussed below, anecdotal evidence alone will not suffice to establish the requisite predicate for a race-conscious program. Its great value lies in pointing to remedies that are “narrowly tailored,” which is the second prong of a *Croson* study.

The following types of anecdotal evidence have been presented 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*⁸⁸
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs—*Cone Corporation v. Hillsborough County*⁸⁹
- M/WBEs’ inability to obtain contracts for private sector work—*Coral Construction*⁹⁰
- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties—*AGCC*⁹¹
- Attempts to circumvent M/WBE project goals—*Concrete Works I*⁹²
- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on an entity's contracts—*AGCC*⁹³

Courts must assess the extent to which relief measures disrupt settled “rights and expectations” when determining the appropriate corrective measures.⁹⁴ 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.”⁹⁵

⁸⁸ *Philadelphia*, 6 F.3d at 1002.

⁸⁹ *Cone Corporation v. Hillsborough County*, 908 F.2d at 916 (11th Cir.1990).

⁹⁰ 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 seven percent of the firm’s business came from private contracts and that most of its business resulted from gender-based set-asides).

⁹¹ *AGCC II*, 950 F.2d at 1415.

⁹² *Concrete Works*, 36 F.3d at 1530.

⁹³ *AGCC II*, 950 F.2d at 1415.

⁹⁴ *Wygant*, 476 U.S. at 283.

⁹⁵ *Croson*, 488 U.S. at 509, citing *Teamsters*, 431 U.S. at 338.



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.”⁹⁶

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 discrimination may be occurring in much of the King County business community.”⁹⁷

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.”⁹⁸ 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.⁹⁹

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.”¹⁰⁰

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*.¹⁰¹ 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.¹⁰² The circuit court stated:

⁹⁶ *Croson*, 488 U.S. at 480.

⁹⁷ *Coral Construction*, 941 F.2d at 917-18.

⁹⁸ *Coral Construction*, 941 F.2d 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).

⁹⁹ *Coral Construction*, 941 F.2d at 919.

¹⁰⁰ *Id.*

¹⁰¹ *Philadelphia*, 6 F.3d at 1002.

¹⁰² *Id.* at 1003.



Yet, [g]iven *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, we do not believe this amount of anecdotal evidence is sufficient to satisfy strict scrutiny [quoting *Coral, supra*]. Although anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.¹⁰³

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*.¹⁰⁴ 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.¹⁰⁵

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.”¹⁰⁶ However, it held that this was not the “exceptional case” where, unreinforced by statistics, the anecdotal evidence was enough.¹⁰⁷

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.¹⁰⁸

The court noted that the City had provided such systemic evidence.

¹⁰³ *Philadelphia*, 6 F.3d at 1003.

¹⁰⁴ 963 F.2d at 427 (D.C. Cir.1992).

¹⁰⁵ *Id.*

¹⁰⁶ *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).

¹⁰⁷ *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County*, 943 F.Supp. at 926.

¹⁰⁸ *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*.¹⁰⁹ 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.¹¹⁰ 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 requirements.¹¹¹ These requirements are that the accounts:

- Are gathered from minority contractors, preferably those that are “qualified.”¹¹²
- Concern specific, verifiable instances of discrimination.¹¹³
- Involve the actions of governmental officials.¹¹⁴
- Involve events within the relevant jurisdiction’s market area.¹¹⁵
- Discuss the harm that the improper conduct has inflicted on the businesses in question.¹¹⁶
- Collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.¹¹⁷

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

¹⁰⁹ *AGCC II*, 950 F.2d at 1401.

¹¹⁰ *AGCC II*, 950 F.2d at 1415.

¹¹¹ *Philadelphia*, 6 F.3d at 1003. The anecdotal evidence must be “dominant or pervasive.”

¹¹² *Philadelphia*, 91 F.3d at 603.

¹¹³ *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.”

¹¹⁴ *Croson*, 488 U.S. at 509.

¹¹⁵ *Coral Construction*, 941 F.2d at 925.

¹¹⁶ *O’Donnell*, 963 F.2d at 427.

¹¹⁷ *Coral Construction*, 941 F.2d at 919.



Philadelphia makes clear that 14 anecdotal accounts will not suffice.¹¹⁸ 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 139.¹¹⁹ It is, of course, a matter of speculation as to how many of these accounts were indispensable to the court’s approval of the Denver M/WBE program.

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

D. Remedial Statutory Scheme

In 2010, *H.B. Rowe Company (Rowe) v. Tippett* challenged the constitutionality of the North Carolina General Assembly’s Statute 136-28.4 (Statute), promulgated in 1983.¹²⁰ The Statute set forth a general policy to promote the use of small, minority, physically handicapped, and women contractors in non-federally funded State construction projects. The 1983 Statute directed North Carolina Department of Transportation (NCDOT) to encourage and promote the policy. Seven years later, in 1990, the Statute was amended to include specific participation goals on state-funded transportation construction contracts for minority and women-owned businesses.

As a result of the amendment, NCDOT created a Minority Business Enterprise and Women Business Enterprise Program for non-federally funded highway and bridge construction contracts. For all intents and purposes, the program mirrored the federal DBE Program pursuant to 49 CFR Part 26. In 1991, the Statute was challenged in District Court regarding its constitutionality. The District court ruled in favor of the plaintiff, stating that in order to implement race-conscious measures to remedy discrimination, the governmental entity must identify, with “some specificity,” the racial discrimination it seeks to remedy. As a result of the District court decision, NCDOT suspended its M/WBE Program in 1991.

¹¹⁸ *Philadelphia*, 6 F.3d. at 1002-03.

¹¹⁹ 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 these 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.

¹²⁰ *H.B. Rowe Company v. Tippett*, 615 F.3d 233, (4th Cir. 2010).



In 1993, NCDOT commissioned a disparity study on state-funded transportation construction contracts. The study determined that minority and women subcontractors were statistically significantly underutilized, and the M/WBE Program was re-implemented. In 1998, the North Carolina General Assembly commissioned an update to the 1993 study. The 1998 update study concluded that minority and women-owned businesses continued to be underutilized in State-funded road construction contracts.

In 2002, H.B. Rowe Company was denied a NCDOT contract because the company's bid included 6.6 percent women subcontractor participation and no minority subcontractor participation. NCDOT claimed that Rowe failed to meet the good faith effort requirements.

A third study was commissioned in 2004 to again study minority and women contractor participation on the State's highway construction industry. In 2006, relying on the 2004 study, the North Carolina General Assembly amended Statute 136-28.4. The principle modifications were:

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

First, the court considered whether the statutory scheme as it relates to minorities survives the "strict scrutiny" standard. The circuit court reviewed the statistical evidence detailed in the 2004 disparity study to determine if the statutory scheme was based on strong statistical evidence to implement race-conscious subcontractor goals. The statistical evidence was also examined to determine if the statute's definition of minorities was over-inclusive by including minority groups that did not suffer discrimination pursuant to the statistical standards set forth in the 2004 disparity study.

The court did not consider whether the statistical methodology employed in the 2004 disparity study was sufficient to support a compelling state interest. The court noted and accepted that the disparity index was the statistical measure used to determine whether the underutilization of minorities on the State's subcontracts was statistically significant. The 2004 disparity study calculated a disparity at .05 confidence level. A statistical calculation is significant at the .05 confidence level because the probability of that result occurring by chance is five percent or less.¹²¹ The .05 confidence level is used in social and physical sciences as a marker of when a result is a product of some external influence, rather than ordinary variation or sampling error.¹²²

The circuit court admonished that "the study itself sets out the standard by which one could confidently conclude that discrimination was at work," but the standard was not followed in the

¹²¹ Fourth Circuit Court citing, *Research Methods and Statistics: A Critical Thinking Approach*, Sherri L. Jackson, (3ed. 2009).

¹²² Fourth Circuit Court citing, *The Practice of Social Research*, Earl Babbie, (12th ed. 2010).



State's statutory scheme. The statistical evidence in the 2004 disparity study demonstrated that African American and Native American subcontractors were underutilized at a disparity index of .05. Hispanic American and Asian American subcontractors were also underutilized, but not at a .05 confidence level. The 2004 Study determined that underutilization was not statistically significant.

Therefore, the statutory scheme was ruled "narrowly tailored" to achieve the State's compelling interest as it relates to African American and Native American subcontractors but not Hispanic American and Asian American subcontractors. Thus, the State provided a strong basis in evidence for minority subcontractor participation goals pertaining to African American and Native American subcontractors.

Second, the court considered whether the statutory scheme as it relates to women survives the intermediate scrutiny standard. The evidence demonstrated that the State's prime contractors "substantially over-utilized" women-owned businesses on public road construction projects. The 2004 disparity study calculated the overutilization of women subcontractors as statistically significant at a 96 percent (.04) confidence level. The circuit court further noted that the private sector evidence was insufficient to overcome the strong evidence of overutilization. Consequently, the circuit court determined that the evidence in the 2004 disparity study did not provide "exceedingly persuasive justification" to include women-owned businesses in gender-based remedies.

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

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

V. Consideration of Race-Neutral Options

A remedial program must address the source of the disadvantage faced by minority businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.¹²³ On the other hand, an MBE program cannot stand if the sole barrier to minority or woman-owned business participation is a barrier that is faced by all new businesses, regardless of ownership.¹²⁴ If the evidence demonstrates that the sole barrier to M/WBE participation is that M/WBEs

¹²³ *AGCC II*, 950 F.2d at 1404.

¹²⁴ *Croson*, 488 U.S. at 508.



disproportionately lack capital or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.¹²⁵ 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[.]” *Gratz*, 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.¹²⁶

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, as long as it also includes race-neutral measures to address the capital and bonding barriers.¹²⁷

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.¹²⁸ 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.¹²⁹

¹²⁵ *Id.* at 507.

¹²⁶ *Hershell Gill*, 333 F.Supp. 2d 1305, 1330 (S.D.Fla. 2004) (quoting *Gratz v. Bollinger*, 123 S. Ct 2411 (2003)); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹²⁷ *Hershell Gill*, 333 F.Supp. 2d at 1330 (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

¹²⁸ *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

¹²⁹ *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*.



VI. United States Court of Appeals for the Ninth Circuit

The United States Court of Appeals for the Ninth Circuit defines the legal standards applied to public agencies implementing race-conscious affirmative action programs. Although the Ninth Circuit cases that adjudicate this issue apply to federally funded Disadvantaged Business Enterprise (DBE) programs, the Ninth Circuit’s analysis is instructive on the methodology that will be accepted as the legal predicate for race-conscious programs in the jurisdiction.

There have since been several challenges to the DBE regulations. A major decision was adjudicated in the Ninth Circuit, and the decision acts as binding precedent for the City, particularly as it relates to federally funded grants. The relevant decisions are discussed herein.

A. Analysis of the Ninth Circuit Challenges

The landmark Ninth Circuit cases challenging the constitutionality of race-based elements of a DBE program, *Western States Paving Co. v. Washington State Department of Transportation*,¹³⁰ and *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (AGC)* are discussed below.

1. Western States

Western States, decided in 2005, 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 constitutional, and the other assessed whether the State of Washington’s application of the DBE regulations was valid.

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. As applied by the State of Washington, the TEA-21 DBE Program was 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.

According to *Croson*, the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.¹³¹ 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.”¹³² The Court concluded that a substantial body

¹³⁰ *Western States Paving Co., v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005).

¹³¹ *Croson*, 488 U.S. 469, 492 (1982).

¹³² *Id.* at 493.



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 that hindered minorities' ability to compete for federally funded contracts.¹³³

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.¹³⁴

The Court referenced *Sherbrooke Turf Inc. v. Minnesota Department of Transportation*, noting the Eighth Circuit holding that the DBE programs of the Minnesota and Nebraska Departments of Transportation independently satisfied the strict scrutiny's narrow tailoring requirement by relying on two disparity studies.¹³⁵

The Minnesota Department of Transportation (MnDOT) offered statistical evidence of the highway contracting market in Minnesota. Following the goal setting methodology set forth in 49 CFR Section 26.45(c), MnDOT formulated a factual predicate that illustrated the DBE availability in MnDOT's relevant market area. Findings from the statistical analysis of business formation statistics were used to adjust the base figure upward based on the rationale that the number of participating minority-owned businesses would be higher in a race-neutral market.

MnDOT implemented good faith efforts to encourage prime contractors to meet the DBE goal. The availability of DBEs and the extent of subcontracting opportunities for each project were considered when setting the race-conscious portion of the overall DBE goal. The Eighth Circuit court agreed with the district court that MnDOT's revised DBE Program served a compelling government interest and was narrowly tailored on its face and as applied in Minnesota. Similarly, the Nebraska Department of Transportation (NDOT) also set an overall DBE goal pursuant to the DBE regulations for the Nebraska highway construction market. Like Minnesota, the Eighth Circuit found that NDOT's DBE Program was narrowly tailored. 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 utilization goal in the regulation was only "aspirational" and that the regulation provides that each state must establish a DBE utilization goal based on the proportion of ready, willing, and able DBEs in its transportation contracting industry.¹³⁶ 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



¹³³ *Western States Paving Co., v. Washington State Department of Transportation*, 407 F.3d at 983 (9th Cir. 2005).

¹³⁴ *Western States*, 407 F.3d at 983.

¹³⁵ See generally *Gross Seed Co. v. Nebraska Department of Roads, et. al.*, 345 F.3d 964 (8th Cir. 2003); *Sherbrook Turf Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003).

¹³⁶ *Western States*, 407 F.3d at 983.

transportation contracting industry. The Court ultimately held that it was 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. Application of the Narrowly Tailored Standard in Overall Goal Setting

The second prong of the Court's analysis considered whether the utilization goals established by the State of Washington "as applied" were unconstitutional, because there is no evidence of discrimination within the State's transportation industry. The State contended that its implementation of the 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.¹³⁷ 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. The Ninth Circuit opined that the only other circuit to consider an applied challenge to the federal DBE program was the Eighth Circuit in *Sherbrook*. In discussing the Eighth Circuit's opinion in *Sherbrook*, the Ninth Circuit reasoned that both Minnesota and Nebraska had hired outside consulting firms to conduct statistical analyses of the availability and capacity of DBEs in their local market. Accordingly, *Western States* concluded that the Eighth Circuit had relied on the statistical evidence in the studies to hold that the State's DBE program was narrowly tailored and satisfied strict scrutiny.

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. The Ninth Circuit also concluded that, in order to satisfy the narrowly tailored requirement, even when discrimination is present, the State may only implement a remedial race-conscious program, including those minority groups that have suffered discrimination. The Ninth Circuit found 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.¹³⁸



¹³⁷ *Western States Paving Co., v. Washington State Department of Transportation*, 407 F.3d at 983 (9th Cir. 2005).

¹³⁸ *Western States*, 407 F.3d at 983.

The Court concluded that the District Court erred when it upheld the State’s DBE program 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.

c. Evidentiary Requirements for Overall Goal Setting

In response to *Western States*, the USDOT issued a Memorandum in 2005, recommending a disparity study that adheres to the evidentiary standards set forth in *Croson* as the appropriate method for USDOT recipients in the Ninth Circuit to formulate narrowly tailored DBE goals.¹³⁹

2. Associated General Contractors

Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (AGC), filed in 2011 in the District Court, cited civil rights violations in the application of California Department of Transportation’s (Caltrans) 2009 DBE Program.¹⁴⁰ *AGC* charged that the Equal Protection Clause, federal DBE program regulations, and the U.S. Constitution generally require that Caltrans’ DBE Program be predicated on evidence showing intentional discrimination. *AGC* argued that the remedial scheme regarding various groups based on Caltrans’ statistical evidence violates the nondiscrimination mandate of Title VI of the 1964 Civil Rights Act. Additionally, *AGC* argued that Caltrans, as a federal grantee, did not demonstrate that it would lose its federal funds if it did not implement the 2009 DBE program.

Specifically, *AGC* challenged the 2005 congressionally enacted “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users” as applied by Caltrans. The Act requires that a minimum of ten percent of federal dollars be expended with disadvantaged business enterprises (DBEs).

AGC sought an injunction against Caltrans’ DBE program, declaring the program unconstitutional. *AGC* asserted that Caltrans must identify intentional acts of discrimination and that failing to identify specific acts of intentional discrimination renders its program unconstitutional. The program was also attacked on the grounds that some of the categories included in the DBE goal



¹³⁹ We note that the USDOT regulations, as demanded in 1992 recommends the use of a disparity study among other availability sources for setting the DBE goals.

¹⁴⁰ California Department of Transportation (Caltrans) in the matter, *Associated General Contractors of California, San Diego Chapter v. Caltrans* (2:09-CV-01622-JAM-GGH) March 23, 2011.

did not include sufficient specific statistical evidence pertaining to minority women. The statistical evidence in the disparity study found disparities for minorities, but the findings were not broken down by gender.

To rebut *AGC's* claim, Caltrans argued that its program met the requirements set forth in *Western States's* two-prong test for narrow tailoring. The presence or absence of discrimination in the State's transportation contracting industry and the narrowly tailored remedy limited to minority groups that had suffered discrimination were the two prongs.

The court compared the probative evidence presented in *Western States* and *AGC*. It was determined that in *Western States* there was insufficient evidence of discrimination within the department's own contracting market. Thus, Washington failed to meet its burden of demonstrating that its DBE program was narrowly tailored to further Congress's compelling remedial interest. To calculate a disparity in *Western States*, the proportion of DBE firms in the state was compared with the percentage of contracts awarded to DBEs on race-neutral contracts. This methodology was found to be oversimplified by the Appellate Court. In contrast, the evidence Caltrans proffered was characterized by the District Court as extensive statistical and anecdotal evidence of discrimination in the California contracting industry.

On March 23, 2011, the District Court granted summary judgment in the *AGC* case in favor of Caltrans. The Court found that Caltrans met the standard set forth in *Croson* by identifying discrimination with "specificity," and showing a pattern of "deliberate exclusion."¹⁴¹

AGC appealed the District Court's decision to the Ninth Circuit Court of Appeals, where it is currently under review. On April 16, 2013, Judge Jerome Harris delivered the opinion for the Ninth Circuit, dismissed *AGC's* appeal, and upheld Caltrans' DBE Program, ruling that it survived the strict scrutiny standard.¹⁴² Judge Harris opined that Caltrans presented sufficient evidence of discrimination in the California transportation contracting industry, and that the DBE Program was narrowly tailored to remedy the identified discrimination.¹⁴³ The Ninth Circuit dismissed the appeal for lack of standing, and held that *AGC* did not establish that any of its members had suffered or will suffer harm as a result of Caltrans' program.¹⁴⁴

VII. Section 31 of the California Constitution

California Constitution, Section 31, is a constitutional amendment that precludes discrimination and the use of preferences based on race, sex, color, ethnicity, or national origin in the award of public contracts. Although the amendment allows for the affirmative action requirements of a federal grant, the question of the appropriate application of a DBE program by a USDOT grantee in California has not been reviewed by the Ninth Circuit. The question of the appropriate

¹⁴¹ *Croson*, 488 U.S. at 509.

¹⁴² *ACG II*, 713 F.3d at 1200.

¹⁴³ *Id.*

¹⁴⁴ *Associated General Contractors of California, San Diego Chapter v. Caltrans*, Case No. 11-16228 (9th Cir. April 16, 2013).



application of the DBE program by a USDOT grantee in California was reviewed by the Ninth Circuit in *AGC*, and the court determined that Caltrans was required to comply with the DBE regulations.¹⁴⁵

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. Section 31 does state that “if any parts are found to conflict with federal law or 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*¹⁴⁶, *Ward Connerly v. State Personnel Board* and *Coral Construction, Inc. v. City and County of San Francisco et al.*¹⁴⁷ In *Hi-Voltage*, the California Supreme Court held that Section 31 prohibited the City of San Jose 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 and (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 the five California statutory programs before that court.¹⁴⁸ 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 discrimination and implementation of a race-conscious remedy.

Hi-Voltage addressed the impact of Section 31 on a targeted outreach program by the City of San Jose. 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...¹⁴⁹

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.¹⁵⁰

¹⁴⁵ *ACG II*, 713 F.3d at 1200.

¹⁴⁶ 24 Cal. 4th 537 (Cal. 2000).

¹⁴⁷ 92 Cal. App. 4th 16 (Cal. 2001).

¹⁴⁸ State Lottery, Professional Bond Services, State Civil Service, Community Colleges, State Contracting (reporting requirements).

¹⁴⁹ *Hi-Voltage*, 24 Cal. 4th 537 at 569.

¹⁵⁰ *Id.*



The Supreme Court offered no guidance, however, upon the perimeters of Section 31 and whether the inclusion of a disparity study in this case may have permitted a race-conscious remedy.

In *Coral Construction v. San Francisco*,¹⁵¹ the California Superior Court determined that Proposition 209 barred San Francisco's race-conscious program.¹⁵² 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.¹⁵³

In a subsequent appeal following remand, the California Supreme Court weighed in on Article I, section 31 of the California Constitution in *Coral Construction, Inc. v. City and County of San Francisco et al.*¹⁵⁴ The Supreme Court considered a challenge to the City and County of San Francisco ("City") MWBE program. The California Supreme Court rejected the City's argument that section 31 violates the political structure doctrine relying upon the reasoning in the Ninth Circuit's decision in *Wilson*. The Supreme Court, however, recognized that there may be rare circumstances in which racial preferences are required by the Fourteenth Amendment's equal protection clause. The Supreme Court opined:

Accordingly, even in the rare case in which racial preferences are required by equal protection as a remedy for discrimination, the government body adopting such remedies must undertake an extraordinary burden of justification.¹⁵⁵

The California Supreme Court also rejected the City's argument that the federal funding exception compelled the adoption of race conscious measures. The *Coral* Court concluded federal regulations permits not requires the use of race conscious measures if not prohibited by other law.¹⁵⁶ Finally, the California Supreme Court also considered the City's argument in *Coral Construction* that the Fourteenth Amendment's equal protection clause mandates that the City adopt an MWBE program as a remedy for its' own discrimination. The Supreme Court reasoned that the federal compulsion argument is largely a factual dispute and hinges upon the Board's decision to adopt race conscious legislation and remanded the matter back to the trial court for further proceedings.¹⁵⁷

¹⁵¹ *Coral Construction, Inc. v. City & County of San Francisco*, See 116 Cal. App. 4th 6 (2004).

¹⁵² It is also challenging the procedural propriety of the court granting plaintiff summary judgment because the factual record did not support one.

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

¹⁵⁴ *Coral Construction Inc. v. City and County of San Francisco, et. al.*, 50 Cal.4th 315 (2010).

¹⁵⁵ *Id.* at 332.

¹⁵⁶ *Id.* at 335.

¹⁵⁷ *Id.* at 336. See also *Hi-Voltage Wire Works Inc. v. City of San Jose*, 24 Cal.4th 537 (2000) (The California Supreme Court held that the governmental entity may adopt race conscious remedies as a remedy for that entity's intentional discrimination.)



The application of Title VI to the Sacramento Municipal Utility District was also raised in *C&C Construction v. Sacramento Municipal Utility District (SMUD)*.¹⁵⁸ 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 209.¹⁵⁹ Also, both SMUD’s 1993 disparity study and its 1998 update found *Crosby*-level discrimination against MBEs, but they did not look at whether race-neutral remedies would suffice to meet its federal nondiscrimination obligations.¹⁶⁰ 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*,¹⁶¹ 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.¹⁶² The Department Secretary determined SMUD’s compliance with the federal regulations. 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 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.¹⁶³

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

¹⁵⁹ 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.

¹⁶⁰ By implication, we note, if SMUD had, it could have move to a race-conscious program.

¹⁶¹ 920 F.2d 752 (11th Cir. 1991).

¹⁶² 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.

¹⁶³ 122 Cal. App. 4th 284 at 324.



Finally, in *Coalition for Economic Equity v. Pete Wilson et. al.*¹⁶⁴, the Ninth Circuit Court of Appeals also considered a challenge to Proposition 209. Following the adoption of Proposition 209, a challenge was initiated in federal court seeking to enjoin the implementation of Proposition 209. The Plaintiffs, a coalition of individuals and civil rights organizations filed suit alleging that Proposition 209 violated the equal protection clause of the Fourteenth Amendment and that the proposition is void under the Supremacy Clause because it conflicts with several federal statutes. The lower court granted a preliminary injunction enjoining the State of California from implementing or enforcing Proposition 209 in public employment, public education or contracting.¹⁶⁵

The *Wilson* Court vacated the preliminary injunction and remanded the case to the lower court. In reaching this decision, the Ninth Circuit concluded that “as a matter of conventional equal protection analysis, there is simply no doubt that Proposition 209 is constitutional.”¹⁶⁶ The Court for the Ninth Circuit rejected the argument that Proposition 209 violated the political structure doctrine, equal protection clause or was preempted by the Civil Rights Act of 1964.¹⁶⁷

VIII. Conclusion

The decisions of the United States Supreme Court in *Croson* and *Adarand* changed the legal landscape for business affirmative action programs. These United States Supreme Court decisions imposed the highest legal standard on the government’s use of local and federal funds to institute remedial race-conscious public contracting programs.

This chapter has examined what *Croson* and its progeny require for a local government to institute a constitutional race or gender-conscious public contracting program. In addition to the rigorous standard of review required under *Croson*, the California constitution also places restrictions on the use of race and gender in public contracting. Article 1, Section 31 of the California constitution prohibits discrimination or preferential treatment on the basis of race and gender in public contracting. Although Section 31 prohibits race and gender conscious measures, the California Supreme Court¹⁶⁸ acknowledged that the federal equal protection clause may, under rare circumstances, compel the use of race and gender conscious measures to remedy a public entities intentional discrimination.

¹⁶⁴ *Coalition for Economic Equity v. Pete Wilson, et al*, 122 F.3d 692 (9th Cir. 1997).

¹⁶⁵ *Id.* at 697.

¹⁶⁶ *Id.* at 701.

¹⁶⁷ *Id.* at 710. The Ninth Circuit Court of Appeals held that Proposition 209 is not preempted by the preemption provisions of Title VII or Title IX.

¹⁶⁸ *Hi-Voltage*, 24 Cal. 4th at 675.



In assessing the probative value of a disparity study, the Supreme Court stated, at best, the disparity study creates an inference of discrimination against M/WBE subcontractors by prime contractors but does not establish intentional acts by the City.¹⁶⁹ The California Supreme Court, however, concurs that any race conscious measure, even remedial laws must survive strict scrutiny. Further, the California Supreme Court agrees that providing a remedy for the government's own discriminatory conduct is a compelling interest. Under these circumstances the federal equal protection clause, notwithstanding Section 31 of the State constitution, may compel the use of race and gender conscious measures as a remedy for the City's own discrimination. If the City has intentionally discriminated against minority and women owned businesses, it may fashion a remedy utilizing race and gender conscious measures.

This study will examine the City of Berkeley's contracting process to determine if there is a strong basis in evidence to draw the conclusion that the City has intentionally engaged in discriminatory conduct. In the event the findings document intentional discrimination and race and gender conscious measures are the only or most likely means of addressing the injury, race and gender conscious measures may be appropriate under both federal and state law.



¹⁶⁹ *Id.* at 675-676. The California Supreme Court stated in *Hi-Voltage* that the disparity study was not part of the record and the Court made no comment on the impact of the disparity study on the analysis. *Id.* at 676.

IX. List of Authorities

A. Cases

Cases	Pages
<i>Adarand Constructors, Inc. v. Federico Peña</i> , 115 S.Ct. 2097 (1995)	1
<i>Adarand Constructors, Inc. v. Slater</i> , 228 F.3d 1147 (10th Cir. 2000)	4
<i>Associated Gen. Contractors of Cal., San Diego Chapter v. Caltrans</i> , Case No. 11-16228 (9th Cir. April 16, 2013)	27, 29
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<i>Associated Gen. Contractors v. Coal. for Econ. Equity (“AGCC II”)</i> , 950 F.2d 1401 (9th Cir. 1991)	<i>passim</i>
<i>Associated Gen. Contractors of Ohio, Inc. v. Drabik</i> , 214 F.3d 730 (6th Cir. 2000)	8, 13, 14
<i>Associated Gen. Contractors v. New Haven</i> , 791 F. Supp. 941 (D. Conn. 1992)	3
<i>Builders Ass’n of Greater Chi. v. City of Chi.</i> , 298 F. Supp. 2d 725 (N.D. Ill. 2003)	7
<i>Builders Ass’n of Greater Chicago v. Cnty. of Cook</i> , 256 F.3d 642 (7th Cir. 2001)	8
<i>C & C Construction v. Sacramento Municipal Utility District (SMUD)</i> , 122 Cal. App. 4th 284 (Cal. App. 2004)	<i>passim</i>
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	<i>passim</i>
<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works I”)</i> , 823 F. Supp. 821 (D. Colo. 1993)	<i>passim</i>
<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works II”)</i> , 36 F.3d 1513 (10th Cir. 1994)	<i>passim</i>



<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works III”),</i> 86 F. Supp. 2d 1042 (D. Colo. 2000)	10
<i>Concrete Works of Colo., Inc. v. City & Cnty. of Denver (“Concrete Works IV”),</i> 321 F.3d 950 (10th Cir. 2003)	4, 7, 20
<i>Cone Corp. v. Hillsborough Cnty.,</i> 908 F.2d 908 (11th Cir. 1990)	10, 16
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<i>Contractors Ass’n of E. Pa. v. City of Philadelphia (“Philadelphia V”),</i> 893 F. Supp. 419 (E.D. Pa.1995)	3
<i>Contractors Ass’n of E. Pa v. City of Philadelphia (“Philadelphia VI”),</i> 91 F.3d 586 (3rd Cir. 1996)	<i>passim</i>
<i>Coral Constr. Co. v. King County,</i> 941 F.2d 910 (9th Cir. 1991)	<i>passim</i>
<i>EEOC v. Am. Nat’l Bank,</i> 652 F.2d 1176 (4th Cir. 1981)	15
<i>Eng’g Contractors Ass’n v. Metro. Dade Cnty. (“Dade County I”),</i> 943 F. Supp. 1546 (S.D. Fla. 1996)	14, 15, 19
<i>Eng’g Contractors Ass’n v. Metro. Dade Cnty. (“Dade County II”),</i> 122 F.3d 895 (11th Cir. 1997)	11, 19, 24
<i>Gratz v. Bollinger,</i> 123 S. Ct. 2411 (2003)	7, 24
<i>Grutter v. Bollinger,</i> 539 U.S. 306 (2003)	24
<i>Gross Seed Co. v. Nebraska Department of Roads, et. al.,</i> 345 F.3d 964 (8th Cir. 2003)	26
<i>Hazelwood Sch. Dist. v. United States,</i> 433 U.S. 299 (1977)	9, 12
<i>H.B. Rowe Co. v. N.C. Dep’t of Transp.,</i> 615 F.3d 233 (4th Cir. 2010)	<i>passim</i>



<i>Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade Cnty.</i> , 333 F. Supp. 2d 1305 (S.D. Fla. 2004)	24
<i>Hi-Voltage Wire Works Inc. v. City of San Jose</i> , 24 Cal.4th 537 (2000)	29, 30
<i>Int'l Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977)	9, 16, 17
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<i>Monterey Mech. Co. v. Pete Wilson et al.</i> , 125 F.3d 702 (9th Cir. 1997)	8
<i>O'Donnell Constr. Co. v. D.C.</i> , 963 F.2d 420 (D.C. Cir. 1992)	22, 18, 20
<i>Ohio Contractors Ass'n v. Keip</i> , 1983 U.S. App. LEXIS 24185 (6th Cir. 1983)	13
<i>Reynolds v. Sheet Metal Workers, Local 102</i> , 498 F. Supp. 952 (D.C. Cir. 1980)	15
<i>RGW Construction v. San Francisco Bay Area Rapid Transit District</i> , No. C92-2938 THE (N.D. Cal. Sept. 18, 1992).	11
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<i>Western States Paving Co. v. State of Washington Dept. of Transportation</i> , 407 F.3d 983 (9th Cir. 2005)	1, 25, 26, 27
<i>Wygant v. Jackson Bd. of Educ.</i> , 476 U.S. 267 (1986)	2, 3, 5, 17



B. Statutes

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

49 CFR Part 26.

Cal. Const., Article I, Section 31.

Cal. Public Contracting Code, Section 2002.



CHAPTER 2: Procurement Review

I. Procurement Overview

This chapter is an overview of the standards that governed the City of Berkeley’s procurement process during the January 1, 2016 to December 31, 2019, study period. The procurement standards are defined in the City of Berkeley (City), California Municipal Code (Code). Legislative authority to authorize, amend, and approve the procurement standards is vested in the City Council. The authority to implement procurement policy and procedures is delegated to the General Services Division by the provisions of the Code.¹⁷⁰ Additionally, City policies and procedures are subject to the provisions of California State Law.

The governing laws and guidelines reviewed to prepare this chapter include the City of Berkeley Code and the State of California Revised Code. The Code and the state laws that govern the City’s purchase of construction, professional services, and good and services are presented below.

A. Procurement Standards

1. State of California Revised Code

The State of California’s Qualifications-Based Selection (QBS) Law governs the City’s procurement of architectural, engineering, environmental, land surveying, and construction management professional services. For these professional services, the QBS law requires evaluation and ranking procedures based on competence and qualifications, without regard to price. Only after a firm is tentatively selected on this basis do price negotiations begin. If the City cannot reach a satisfactory negotiated price with the highest-ranked firm, then the City begins price negotiations with the second highest-ranked firm.¹⁷¹

2. City of Berkeley, California Municipal Code

The City’s procurement of construction, professional services excluding QBS-governed services, and goods and services contracts is governed by Article 11, Section 67 of the Code.¹⁷² The Code establishes standards for expending public funds and defines the procurement methods that the City can use to purchase construction, professional services, and goods and services.¹⁷³



¹⁷⁰ BERKELEY, CAL., MUNICIPAL CODE art. 11.

¹⁷¹ CAL. GOV’T CODE tit. 1, div. 5, ch. 10 § 4525-4529.5 (1987).

¹⁷² BERKELEY, CAL., MUNICIPAL CODE Art. 11, § 67 *et seq.*

¹⁷³ *Id.*

B. Industry Definitions

The City of Berkeley 2020 Availability Study for Affirmative Action in City Contracting (Study) was commissioned to measure the utilization of available minority and woman-owned businesses willing to perform the contracts and grants awarded by the City from January 1, 2016 to December 31, 2019. The Study analyzes construction, professional services that include architecture and engineering, environmental, land surveying services, construction project management, and goods and services contracts. The definitions of each industry are presented below. In this Study, goods and services are analyzed as one industry.

Construction: Work on buildings and/or major capital projects.¹⁷⁴

Professional Services: Services of an advisory or artistic nature, including accounting, legal, architectural, or engineering services, land surveying, construction project management, economic, market and systems analysis, program evaluation, operations research, development of unique computer programs, training, medical service, and legal advice or representation.¹⁷⁵

Goods: Supplies, equipment, and materials.¹⁷⁶

Services: Labor, maintenance services, or a combination of services and supplies that support public works projects.

II. Construction Procurement Process

A. Informal Construction Contracts Valued \$25,000 or Less

The City procures construction contracts valued \$25,000 or less through an informal procurement process, which does not require advertisement.¹⁷⁷ The user department is required to follow the informal solicitation, evaluation, and award requirements. Reasonable measures must be undertaken by the user department to secure written or oral quotes from at least three vendors. This requirement is satisfied if the user department secures at least three written responses to the solicitation. The City must solicit from available businesses which the City has certified as local Berkeley businesses.

1. Advertising Requirements

There are no advertising requirements.



¹⁷⁴ City of Berkeley, Purchasing Manual, (2016).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

2. Evaluation and Award

Local Berkeley businesses' bids are discounted by 5% for evaluation consideration. The award is made to the lowest responsive bidder whose price is fair and reasonable.

A bidder is determined to be responsive when the submitted bid complies with bid specifications and submission requirements.¹⁷⁸ Upon approval of a bid, the user department requests a purchase order (PO). The City Auditor's office then approves the PO and notifies the General Services Division to issue the agreement.¹⁷⁹

B. Formal Construction Contracts Valued from \$25,001 to \$200,000

There are two levels of formal construction contracts: 1) contracts valued from \$25,001 to \$200,000,¹⁸⁰ and 2) formal construction contracts valued over \$200,000.¹⁸¹ For the solicitation of formal construction contracts valued from \$25,001 to \$200,000, the City uses the invitation-for-bid (IFB) process. The project manager within the requesting department prepares the solicitation—including the specifications, contractual terms, and conditions applicable to the procurement—before submitting for review by the General Services Division.¹⁸²

1. Advertising Requirements

The General Services Division posts IFBs on the City website and physically on display in front of the City Council chambers. The General Services Division coordinates the distribution of the IFB with user departments. The user departments may also advertise through other mediums if desired. Bids are opened only on Tuesdays and Thursdays at 2:00 pm at the offices of the City of Berkeley's Finance Department.¹⁸³

2. Evaluation of the Submittal

The contract award is made to the lowest, responsive, and responsible bidder. A bidder is determined to be responsive when the submitted bid complies with bid specifications and submission requirements, and if the price is fair and reasonable. A bidder is determined to be responsible after a review of the firm's record of past performance, financial and technical

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*



resources, and competency and capability to perform the type of services requested. In the City’s evaluation of responsibility, consideration must be given to the bidder’s compliance with federal, state, and local laws.¹⁸⁴

3. Approval and Authorization of the Award

The user department makes the recommendation for the award, and the contract award is authorized by the General Services Division.¹⁸⁵ These projects must be completed through a blue-backed contract, which is a formal written legal agreement between the City and the contractor/s. Blue-backed contracts are not required for low-risk services.¹⁸⁶

C. Formal Construction Contracts Valued Over \$200,000

The process for formal construction contracts valued over \$200,000 mirrors the process for contracts valued from \$25,001 to \$200,000, except that the City Council must review and approve the advertisement of the solicitation prior to bid posting and must approve the contract award.¹⁸⁷

The City procures construction contracts valued over \$200,000 and through an IFB process. The project manager within the requesting department prepares the solicitation, including the specifications, contractual terms, and conditions applicable to the procurement, and submits the document to the General Services Division for review.¹⁸⁸

1. Advertising Requirements

The General Services Division posts IFBs on the City website and posts solicitations on the board in front of the City Council chambers. The General Services Division also coordinates the distribution of the IFB with user departments. The user department may also advertise through other mediums, if desired. Bids are opened only on Tuesdays and Thursdays at 2:00 pm at the offices of the City of Berkeley’s Finance Department.¹⁸⁹

2. Evaluation of the Submittal

The contract award is made to the lowest, responsive, and responsible bidder. A bidder is determined to be responsive when the submitted bid complies with bid specifications and submission requirements, and the price is fair and reasonable. A bidder is determined to be responsible after a review of the firm’s record of past performance, financial and technical

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*



resources, and competency and capability to perform the type of services requested. In the City’s evaluation of responsibility, consideration must be given to the bidder’s compliance with federal, state, and local laws.¹⁹⁰

3. Approval and Authorization of the Award

The user department makes the recommendation for the award, the contract award is authorized by the General Services Division, and the award is made by City Council.¹⁹¹ These projects must be completed through a blue-backed contract.

III. Professional Services Procurement Process

There are two procurement methods for purchasing professional services. Professional services except formal architectural, landscape architectural, engineering, environmental, land surveying and construction management services are purchased according to the City’s Purchasing Manual as described in this section. Formal architectural, landscape architectural, engineering, environmental, land surveying and construction management services are purchased according to the QBS law as described in Section IV below.

A. Informal Professional Services Contracts Valued \$25,000 and Less

The City procures professional services contracts valued \$25,000 and less through an informal bidding process, which does not require advertising.¹⁹² The user department is required to follow informal solicitation requirements.

1. Advertising Requirements

There are no advertisement requirements.

2. Evaluation of the Submittal

The user department requests the PO, and the City Auditor’s office approves the PO and notifies the General Services Division to initiate it.¹⁹³ Reasonable measures must be undertaken by the user department to secure quotes from at least three vendors. These requirements are satisfied if the user department solicits quotes from a reasonably sufficient number of vendors to secure at least three written responses to the solicitation. The City must solicit from local Berkeley businesses if they are available.



¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

The contract award is made to the lowest, responsive, and responsible bidder. A bidder is determined to be responsive when the submitted bid complies with bid specifications and submission requirements, and if the price is fair and reasonable. A bidder is determined to be responsible after a review of the firm’s record of past performance, financial and technical resources, and competency and capability to perform the type of services requested. In the City’s evaluation of responsibility, consideration must be given to the bidder’s compliance with federal, state, and local laws.¹⁹⁴

3. Approval and Authorization of the Award

The user department makes the recommendation for the award, and the contract award is authorized by the General Services Division.¹⁹⁵

B. Formal Professional Services Contracts Valued from \$25,001 to \$50,000

There are two levels of formal professional services contracts: 1) contracts valued from \$25,001 to \$50,000,¹⁹⁶ and 2) contracts valued over \$50,000.¹⁹⁷ For the solicitation of formal professional services contracts, the City uses the Request for Proposal (RFP) process. The project manager within the requesting department prepares the RFP, including the specifications, contractual terms, selection criteria, and conditions applicable to the procurement, before submitting the RFP to the General Services Division for review.¹⁹⁸

1. Advertising Requirements

The General Services Division posts RFPs on the City website and on the display board in front of the City Council chambers. The General Services Division coordinates its distribution of the RFP with user departments. The user department may also advertise through other mediums if desired. Proposals are opened only on Tuesdays and Thursdays at 2:00 pm at the offices of the City of Berkeley’s Finance Department.¹⁹⁹

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*



2. Approval and Authorization of the Award

The user department makes the recommendation for the award, and the contract award is authorized by the General Services Division.²⁰⁰ These projects must be completed through a blue-backed contract.

IV. Architecture and Engineering Services Procurement Process

Pursuant to the QBS, the procurement process for architecture and engineering services also applies to landscape architectural, environmental, construction management and land surveying services, which are the other QBS-governed services. The City procures architecture, engineering, and the other QBS-governed services contracts through the requests for qualifications (RFQ) procurement method.²⁰¹ Under an RFQ process, the proposal that best meets the standards for qualification, previous experience, and expertise is chosen. If a successful price cannot be negotiated with the highest ranked firm, the City then attempts to negotiate with the second-ranked firm.

The City's procurement method for architecture, engineering, and the other QBS-governed services requires the solicitation of qualifications and the evaluation and ranking of the proposers' qualifications without consideration of price.²⁰² The QBS Law mandates that the award of these professional services contracts is based on a firm's demonstrated competence and qualifications for the type of services to be performed, at a fair and reasonable price for the public agency.²⁰³ There are requirements for public announcement, evaluation, ranking, and an initial negotiation process based on competence and qualifications.²⁰⁴

A. Architecture and Engineering Services Contracts Valued from \$25,001 to \$50,000

Architecture, engineering, and the other QBS-governed services contracts valued from \$25,001 to \$50,000 require the advertising and evaluation methods described below.

1. Advertising Requirements

The General Services Division posts RFQs on the City website and on the display board in front of the City Council chambers. The General Services Division coordinates the distribution of the

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at § 4526.

²⁰⁴ *Id.* at § 4527.



RFQ with user departments. The user department may also advertise through other mediums, if desired. Proposals are opened only on Tuesdays and Thursdays at 2:00 pm at the offices of the City of Berkeley's Finance Department.²⁰⁵

2. Evaluation and Award

The user department must conduct the evaluation in two phases: 1) the qualifications-based selection process and 2) the fee negotiation process.²⁰⁶

a. Qualifications-Based Selection

In the first phase of the evaluation, a selection committee coordinated by the user department evaluates and ranks the firms based on criteria that are set forth in the RFQ. The selection committee must rank the firms most qualified to provide the required services.²⁰⁷ The evaluation is based on the firm's experience on similar projects; the expertise of key professional staff; the firm's resources, including personnel, facilities and equipment; the firm's references; and other qualitative factors.

b. Negotiations

In the second phase of the evaluation, the user department conducts negotiations with the top-ranked firm to establish the specific scope of services and negotiate a fee that is fair and reasonable. When making the determination of fair and reasonable fee, the user department conducts a detailed cost analysis of the services required, considering the scope and complexity of the project with the advice and consent of the selected firm.²⁰⁸ Should the user department be unable to negotiate a contract with the top-ranked firm at a price determined to be fair and reasonable, the user department will undertake negotiations with the second-most qualified firm.²⁰⁹

3. Approval and Authorization of the Award

The user department makes the recommendation for the award, and the contract award is authorized by the General Services Division and awarded by the City Council.²¹⁰

²⁰⁵ *Id.*

²⁰⁶ CAL. GOV'T CODE tit. 1, div. 5, ch. 10 § 4527 (1987).

²⁰⁷ City of Berkeley, *Purchasing Manual* (2016).

²⁰⁸ CAL. GOV'T CODE tit. 1, div. 5, ch. 10 § 4527 (1987).

²⁰⁹ *Id.* at § 4528.

²¹⁰ City of Berkeley, *Purchasing Manual* (2016).



V. Goods and Services Procurement Process

There are two procurement methods for goods and services, informal and formal. The procurement methods for goods and services are the same, except that services above \$5,000 require a blue-backed contract, whereas the blue-backed contract is only required for goods above \$25,000.

A. Informal Goods and Services Contracts Valued \$25,000 and Less

There are three levels of informal goods and services contracts. Informal contracts do not require advertisement or a competitive bid solicitation process. The City procures construction contracts valued \$25,000 and less through an informal procurement process, which does not require advertisement.²¹¹ The user department is required to follow the informal solicitation, evaluation, and award requirements. Reasonable measures must be undertaken by the user department to secure written or oral quotes from at least three vendors. This requirement is satisfied if the user department secures at least three written responses to the solicitation. The City must solicit from available local Berkeley businesses.

B. Informal Goods and Services Contracts Valued from \$51 to \$1,000

1. Advertising Requirements

Informal purchases valued from \$51 to \$1,000 are not required to be advertised. The General Services Division may request the solicitation of quotes for these contracts. Quotes should be solicited from local Berkeley businesses.²¹²

2. Approval and Authorization of the Award

The user department makes the award, which is then authorized for payment by the General Services Division.²¹³



²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

C. Informal Goods and Services Contracts Valued from \$5,001 to \$25,000

1. Advertising Requirements

Informal purchases valued from \$1,001 to \$5,000 are not required to be advertised. The user department must solicit quotes from at least three businesses. Quotes should be solicited from local Berkeley businesses.²¹⁴

2. Approval and Authorization of the Award

The user department makes the award, which is then authorized for payment by the General Services Division.²¹⁵

D. Informal Goods and Services Contracts Valued from \$5,001 to \$25,000

The City procures goods and services valued from \$5,001 to \$25,000 through an informal solicitation process which does not require advertisement.²¹⁶ The procurement of services (excluding low-risk services) in this range must be completed using a blue-backed contract. The user department is required to follow informal solicitation requirements. Reasonable measures must be undertaken by the user department to secure quotes from at least three vendors. The requirement is satisfied if the user department solicits quotes from a reasonably sufficient number of vendors to secure at least three written responses to the solicitation. The City must solicit from available local Berkeley businesses.

1. Advertising Requirements

There are no advertisement requirements.

2. Evaluation and Award

The contract award is made to the lowest responsive bidder, whose price is fair and reasonable. A bidder is determined to be responsive when the submitted bid complies with bid specifications and submission requirements. Bids by local Berkeley businesses are discounted by 5% for evaluation consideration.²¹⁷



²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

3. Approval and Authorization of the Award

The user department approves the award and requests the purchase order. The City Auditor's office then approves the purchase order and notifies the General Services Division to initiate the agreement.²¹⁸

E. Formal Goods and Services Contracts Valued Over \$25,000

The City procures goods and services contracts valued over \$25,000 through a formal bidding process using an invitation to bid (IFB). All goods and services must be procured using a blue-backed contract. The City Council must approve the solicitation for services valued greater than \$50,000 and goods valued greater than \$100,000. The City Council must also approve of the contract award for goods and services above these thresholds.²¹⁹ For the solicitation of goods and services, the City uses the IFB process. The user department prepares the IFB, including the specifications, contractual terms, and conditions applicable to the procurement, before submitting the solicitation to the General Services Division for review and, as required, to the City Council for approval.²²⁰

1. Advertising Requirements

The General Services Division posts the IFB on the City website and on the display board in front of the City Council chambers. The General Services Division coordinates the distribution of the IFB with user departments. The user department may also advertise through other mediums if desired. Bids are opened only on Tuesdays and Thursdays at 2:00 pm at the offices of the City of Berkeley's Finance Department.²²¹

2. Evaluation and Award

The contract award is made to the lowest, responsive, and responsible bidder. A bidder is determined to be responsive when the submitted bid complies with the specifications and submission requirements, and if the price is fair and reasonable. A bidder is determined to be responsible after a review of the firm's record of past performance, financial and technical resources, and competency and capability to perform the type of services or goods requested. In the City's evaluation of responsibility, consideration must be given to the bidder's compliance with federal, state, and local laws.²²²

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*



3. Approval and Authorization of the Award

The user department makes the recommendation for the award. Awarding authority of the contracts depends on the amount. The City Council must award service contracts greater than \$50,000 and goods contracts greater than \$100,000. The General Services Division awards all other contracts for goods and services.²²³

VI. Purchases Requiring Special Handling

A. Petty Cash

User departments may make purchases valued at \$50 or less using the petty cash discretionary funds kept on-hand in the user department for minor purchases. Petty cash purchases do not require advertising, formal approval or authorization. This purchase method cannot be used for recurring purchases.

B. Emergency Procurements

If an emergency has been declared by the City Manager, the City Manager may approve the use of the “field purchase order” method, which must be authorized by the General Services Division. When using the emergency procurement method, the formal procurement method should be adhered to whenever possible.²²⁴

C. Blanket Purchase Orders

Blanket Purchase Orders (BPOs) may be issued against a formal contract for goods with a specified spending limit but not specified deliverables. The contract that is issued with a value greater than \$100,000 requires City Council approval. The BPO process authorizes City departments to purchase goods from the vendor without an additional solicitation. Departments are limited to purchasing goods in small increments over the term of the contract.²²⁵

D. Single/Sole-Source Procurement

Under the single/sole-source procurement method, there is no competitive solicitation process; the user department authorizes the procurement and the City Manager approves it. This method may be used in three cases: (1) the competitive solicitation only identified one vendor, (2) competition is “found to be inadequate”, or (3) an emergency renders a competitive solicitation process



²²³ City of Berkeley, *Purchasing Manual* (2016).

²²⁴ *Id.*

²²⁵ *Id.*

impractical. While this procurement method does not require a competitive solicitation, the General Services Division may conduct market research to ensure that the contract amount is fair.²²⁶

VII. Local Vendor Preference Program Requirements

The City of Berkeley an incentive to Berkeley vendors to bid on informal City contracts valued \$25,000 and below for supplies, equipment, and nonprofessional services. Bids submitted by a local business for an informal contract to provide supplies, equipment, and nonprofessional services valued \$25,000 and below are reduced by 5% for evaluation purposes. The award is at the value of the bid. User departments soliciting bids for informal contracts must contact a registered Berkeley business enterprise (LBE) to obtain quotes.²²⁷

To register as a City of Berkeley local business, the company must hold a current Berkeley business license and have a “fixed office or distribution point” within the City.²²⁸ The City of Berkeley Business program registration form is available on the City’s website.



²²⁶ *Id.*

²²⁷ City of Berkeley – Finance Department, *Local Vendor Preferences*, https://www.cityofberkeley.info/Finance/Home/Vendors_Local_Vendor_Preferences.aspx.

²²⁸ *Id.*

CHAPTER 3: Prime Contractor Utilization Analysis

I. Introduction

This chapter documents the utilization of Minority and Woman-owned Business Enterprise (M/WBE)²²⁹ and non-Minority Male-owned Business Enterprise (non-M/WBE) prime contractors for the City of Berkeley, California (City) by ethnicity, gender, and industry, from January 1, 2016 to December 31, 2019. The City’s prime contracts examined were classified into three industries—Construction, Professional Services (including Architecture and Engineering), and Goods and Services.

- **Construction:** Work on buildings and/or major capital projects.²³⁰
- **Professional Services:** Advisory or artistic services, including accounting, legal, architectural, or engineering services, land surveying, construction project management, economic, market and systems analysis, program evaluation, operations research, computer science, and training.²³¹
- **Goods and Services:** Supplies, equipment, and materials²³² and labor maintenance services, or a combination of services and supplies that support public works projects.

The data in the Disparity Study (Study) are disaggregated into seven ethnic and gender groups, listed in Table 3.1.



²²⁹ City of Berkeley, *Purchasing Manual*, (2016).

²³⁰ City of Berkeley, *Purchasing Manual*, (2016).

²³¹ Id.

²³² Id.

Table 3.1: Business Ethnic and Gender Groups

Ethnicity and Gender Category	Definition
African Americans	Businesses owned by male and female African Americans
Asian Pacific Americans	Businesses owned by male and female Asian Pacific Americans
Asian Indian Americans	Businesses owned by male and female Asian Indian Americans
Hispanic Americans	Businesses owned by male and female Hispanic Americans
Native Americans	Businesses owned by male and female Native Americans
Caucasian Female	Businesses owned by Caucasian females
Non-minority Male-owned Businesses	Businesses owned by Caucasian males and businesses that could not be identified as minority or female-owned ²³³
Minority-owned Businesses	Businesses owned by male and female African Americans, Asian Pacific Americans, Asian Indian Americans, Hispanic Americans, and Native Americans
Woman-owned Businesses	Businesses owned by African American, Asian Pacific American, Asian Indian American, Hispanic American, Native American, and Caucasian females

II. Prime Contract Data Sources

The prime contract data for the study period of January 1, 2016 to December 31, 2019 were extracted from the City’s financial systems. The prime contracts awarded from January 1, 2016 to November 1, 2018 were extracted from CMS Info, the legacy system. Contracts in the MUNIS system awarded from November 1, 2018 to December 31, 2019, and open balances from contracts awarded from January 2016 to 2018 and migrated from the legacy system were extracted for the analysis. Both datasets were normalized to conform to Mason Tillman’s database structure and combined to create a single prime contract dataset. Each prime contract was assigned an industry.

The combined dataset was scrubbed to remove duplicates, prime contracts awarded outside the study period, and not-for-profit entities. State and other local government entities were also excluded, along with claims/reimbursements, utility payments, purchases of proprietary



²³³ See Section II: Prime Contract Data Sources for the methodology employed to identify the ethnicity and gender of the City’s utilized prime contractors.

commodities, and maintenance and service of proprietary commodities. Each prime contract included in the analysis was assigned a unique number based on either a contract number, a requisition number (REQP), or the contract description.

Each prime contract was classified into one of the three industries—construction, professional services, and goods and services. The assignment of industry classifications was reviewed and approved by the City.

Steps were taken to determine the ethnicity and gender of each prime contractor. The initial step determined whether or not the contractor was certified by a government entity. When available, the ethnicity and gender of the certified firms were derived from the certification record. Ethnicity and gender of non-certified contractors were derived from trade and professional organization membership lists, internet research, and contractor surveys. When internet research was conducted, the company’s website, social media, and business listings were reviewed to determine the business owner’s ethnicity and gender. The contractor survey solicited ethnicity and gender information directly from the business. Contractors whose ethnicity and gender could not be verified as minority or female were classified as non-M/WBE. The non-M/WBE category also included publicly traded corporations, employee-owned businesses, and partnerships in which neither a minority nor a woman owned 51 percent or more of the business.

III. Thresholds for Analysis

The City’s prime contracts are analyzed in each industry at three size thresholds: (1) all prime contracts, (2) informal prime contracts, as defined by the City’s Purchasing Manual, and (3) formal prime contracts with the outliers excluded. Although the City’ Purchasing Manual defined formal contracts without an upper limit, for this analysis an upper limit was set for each industry, with the outliers excluded to remove anomalies. The methodology for defining the upper limits of the formal threshold for each industry is detailed below.

A. Informal Thresholds

There are three thresholds for analysis of the City’s informal prime contracts, one for each industry,²³⁴ which are listed in Table 3.2.



²³⁴ City of Berkeley, *Purchasing Manual*, (2016).

Table 3.2: Informal Contract Threshold by Industry

Industry	Informal Contract Threshold
Construction	\$25,000 and Less
Professional Services (including Architecture and Engineering)	\$25,000 and Less
Goods and services	\$25,000 and Less

B. Formal Thresholds

The formal threshold, as defined in the City’s Purchasing Manual for each industry, included all contracts greater than \$25,000. The upper limits of the formal contracts were modified to remove the outliers or atypical contract values notably different from the rest of the contract values in the dataset. Outliers, which can skew the statistical findings, are therefore removed from the statistical analysis of disparity.

Given the wide range of contract amounts in the City’s dataset, a distribution analysis was undertaken to determine the characteristics of the atypical data. The distribution analysis revealed the presence of outliers in the dataset. To define the actual outliers, the 1.5 x interquartile range (IQR) rule was applied.²³⁵

The utilization analysis presented in this chapter describes both the utilization of M/WBEs and non-M/WBE contractors on contracts with and without the outliers. The dataset with outliers illustrates the City’s total spend during the study period and is the dataset used to define the high rollers awarded the majority of the contract dollars.

C. Determining the Outliers

Determining the outliers required calculating the interquartile range, which is calculated by identifying the value of the contract at the first and third quartile, with the difference designated as the interquartile range. The interquartile range multiplied by 1.5 was subtracted from the first quartile to identify the lower limit of the accepted contract amount. The value of 1.5 multiplied by the interquartile range was then added to the third quartile to identify the upper limit of the accepted contract amount. Contracts that had an amount outside the upper range were considered outliers and excluded from the disparity analysis of the formal contracts presented in *Chapter 7 – Prime Contract Disparity Analysis*. Table 3.3 shows the formal contract thresholds for each of the industries, with the outliers removed.



²³⁵ The interquartile range (IQR) is a measure of variability based on dividing a data set into quartiles.

Table 3.3: Formal Contract Threshold by Industry

Industry	Formal Contract Threshold
Construction	Between \$25,000 and \$2,140,000
Professional Services	Between \$25,000 and \$450,000
Goods and services	Between \$25,000 and \$350,000

IV. Prime Contractor Utilization

A. All Prime Contractors

As shown in Table 3.4, the City issued 1,665 prime contracts from January 1, 2016 to December 31, 2019. These prime contracts include the outliers. The 1,665 prime contracts included 113 for construction, 440 for professional services, and 1,112 for goods and services. The payments made by the City during the study period totaled \$257,721,172, which included \$127,236,940 for construction, \$51,370,633 for professional services and \$79,113,600 for goods and services.

The 1,665 prime contracts included 113 for construction, 440 for professional services, and 1,112 for goods and services. The payments made by the City during the study period totaled \$257,721,172, which included \$127,236,940 for construction, \$51,370,633 for professional services and \$79,113,600 for goods and services.

**Table 3.4: Total Prime Contracts and Dollars Expended:
All Industries, January 1, 2016, to December 31, 2019**

Industry	Total Number of Contracts	Total Dollars Expended
Construction	113	\$127,236,940
Professional Services	440	\$51,370,633
Goods and services	1,112	\$79,113,600
Total Expenditures	1,665	\$257,721,172



B. Highly Used Construction Prime Contractors

The City awarded a total of 112 construction contracts during the study period. As shown in Table 3.5, the City's 112 construction prime contracts were awarded to 60 unique businesses.

Table 3.5: Construction Prime Contracts

Total Prime Contracts	113
Total Utilized Businesses	61
Total Expenditures	\$127,236,940

Table 3.5 shows the distribution of the City's construction prime contracts by the number of businesses. Eight of the 61 businesses received \$88,351,659, or 70%, of the total construction prime contract dollars. The findings show that a small group of prime contractors received the majority of construction prime contract dollars awarded by the City.

Table 3.6: Construction Prime Contracts Distributed by Number of Businesses

Businesses	Total Dollars	Percent of Dollars ²³⁶	Number of Contracts	Percent of Contracts ²³⁷
8 Highly Used Businesses	\$88,351,659	70%	18	16%
53 Businesses	\$38,885,280	30%	95	84%
61 Total Businesses	\$127,236,940	100%	112	100%

Table 3.7 shows the ethnicity and gender of the most highly used construction prime contractors who received approximately 50% of the construction prime contract dollars. The most highly used prime contractors were Hispanic American and non-minority male-owned businesses. The contracts received by these four businesses ranged from \$218,900 to \$38,317,106.

Table 3.7: Top Four Highly Used Construction Prime Contractors

Ethnicity/ Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Non-Minority Males	\$57,136,741	44.91%	7	6.19%
Hispanic Americans	\$8,101,210	6.36%	4	3.53%

C. Highly Used Professional Services Prime Contractors

The City awarded a total of 440 professional services contracts during the study period. As shown in Table 3.8, The City's 440 professional services prime contracts were received by 268 unique businesses.



²³⁶ Percentages are rounded to the nearest whole number.

²³⁷ Percentages are rounded to the nearest whole number.

Table 3.8: Professional Services Prime Contracts

Total Prime Contracts	440
Total Utilized Businesses	268
Total Expenditures	\$51,370,633

Table 3.9 shows the distribution of the City’s professional services prime contracts by the number of businesses. Forty-one of the 268 businesses received \$35,880,278, or 70%, of the total professional services prime contract dollars. The findings show that a small group of prime contractors received the majority of professional services prime contract dollars spent by the City.

Table 3.9: Professional Services Prime Contracts Distributed by Number of Businesses

Businesses	Total Dollars	Percent of Dollars²³⁸	Number of Contracts	Percent of Contracts²³⁹
38 Highly Used Businesses	\$35,880,278	70%	106	24%
230 Businesses	\$15,490,354	30%	334	76%
268 Total Businesses	\$51,370,633	100%	440	100%

Table 3.10 shows the ethnicity and gender of the most highly used professional services prime contractors, who received approximately 50% of the professional services prime contract dollars. The 16 most highly used prime contractors were Asian Pacific American, Asian Indian American, Hispanic American, Native American, Caucasian female, and non-minority male-owned businesses. The contracts received by these 16 businesses ranged from \$1,512 to \$4,295,946.

Table 3.10: Top 16 Highly Used Professional Services Prime Contractors

Ethnicity/ Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Asian Pacific Americans	\$3,757,075	7.31%	17	3.86%
Asian Indian Americans	\$899,785	1.75%	1	0.22%
Hispanic Americans	\$814,847	1.58%	2	0.45%
Caucasian Females	\$6,431,815	1.25%	5	1.13%
Non-Minority Males	\$13,886,111	27.03%	40	0.90%

D. Highly Used Goods and services Prime Contractors

The City awarded a total of 1,112 goods and services contracts during the study period. As shown in Table 3.11, the City’s 1,112 goods and services prime contracts were received by 692 unique businesses.



²³⁸ Percentages are rounded to the nearest whole number.

²³⁹ Percentages are rounded to the nearest whole number.

Table 3.11: Goods and services Prime Contracts

Total Prime Contracts	1,112
Total Utilized Businesses	692
Total Expenditures	\$79,113,600

Table 3.12 shows the distribution of the City goods and services prime contracts by the number of businesses. Seventy-three of the 692 businesses received \$55,382,963, or 70%, of the total goods and services prime contract dollars. The findings show that a small group of prime contractors received the majority of goods and services prime contract dollars spent by the City.

Table 3.12: Goods and Services Prime Contracts Distributed by Number of Businesses

Businesses	Total Dollars	Percent of Dollars²⁴⁰	Number of Contracts	Percent of Contracts²⁴¹
73 Highly Used Businesses	\$55,382,963	70%	141	12%
619 Businesses	\$23,730,637	30%	971	88%
692 Total Businesses	\$79,113,600	100%	1,112	100%

Table 3.13 presents the ethnicity and gender of the most highly used goods and services prime contractors, who received approximately 50% of the goods and services prime contract dollars. The 25 most highly used prime contractors were Hispanic American and non-minority male-owned businesses. The contracts received by these 25 businesses ranged from \$132 to \$5,400,905.

Table 3.13: Top 25 Highly Used Goods and Services Prime Contractors

Ethnicity/ Gender	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Hispanic Americans	\$1,117,359	1.41%	8	0.71%
Non-Minority Males	\$38,614,817	48.80%	55	4.94%



²⁴⁰ Percentages are rounded to the nearest whole number.

²⁴¹ Percentages are rounded to the nearest whole number.

E. All Prime Contracts by Industry

1. Construction Prime Contract Utilization: All Contracts

Table 3.14 summarizes all prime contract dollars expended by the City on construction prime contracts. Minority Business Enterprises (MBE) received 15.49% of the construction prime contract dollars, Woman Business Enterprises (WBE) received 0.35%, and non-minority male-owned businesses (non-M/WBEs) received 84.28%.

African Americans received 1, or 0.88%, of all construction prime contracts awarded during the study period, representing \$938,897, or 0.74%, of the construction prime contract dollars.

Asian Pacific Americans received 2, or 1.77%, of all construction prime contracts awarded during the study period, representing \$1,030,975, or 0.81%, of the construction prime contract dollars.

Asian Indian Americans received none of the construction prime contracts awarded during the study period.

Hispanic Americans received 24, or 21.24%, of all construction prime contracts awarded during the study period, representing \$17,736,714, or 13.94%, of the construction prime contract dollars.

Native Americans received none of the construction prime contracts awarded during the study period.

Caucasian Females received 4, or 3.54%, of all construction prime contracts awarded during the study period, representing \$299,436, or 0.24%, of the construction prime contract dollars.

Non-minority Males received 82, or 72.57%, of all construction prime contracts awarded during the study period, representing \$107,230,919, or 84.28%, of the construction prime contract dollars.

Minority Business Enterprises received 27, or 23.89%, of all construction prime contracts awarded during the study period, representing \$19,706,585, or 15.49%, of the construction prime contract dollars.

Woman Business Enterprises received 5, or 4.42%, of all construction prime contracts awarded during the study period, representing \$449,436, or 0.35%, of the construction prime contract dollars.



**Table 3.14: Construction Prime Contract Utilization:
All Contracts, January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	1	0.88%	\$938,897	0.74%
Asian Pacific Americans	2	1.77%	\$1,030,975	0.81%
Asian Indian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	24	21.24%	\$17,736,714	13.94%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	4	3.54%	\$299,436	0.24%
Non-minority Males	82	72.57%	\$107,230,919	84.28%
TOTAL	113	100.00%	\$127,236,940	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	1	0.88%	\$938,897	0.74%
Asian Pacific American Females	0	0.00%	\$0	0.00%
Asian Pacific American Males	2	1.77%	\$1,030,975	0.81%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	1	0.88%	\$150,000	0.12%
Hispanic American Males	23	20.35%	\$17,586,714	13.82%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	4	3.54%	\$299,436	0.24%
Non-minority Males	82	72.57%	\$107,230,919	84.28%
TOTAL	113	100.00%	\$127,236,940	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	27	23.89%	\$19,706,585	15.49%
Woman Business Enterprises	5	4.42%	\$449,436	0.35%



2. Professional Services Prime Contract Utilization: All Contracts

Table 3.15 summarizes all contract dollars expended by the City on professional services prime contracts. MBEs received 15.18% of the professional services prime contract dollars, WBEs received 17.46%, and non-M/WBEs received 69.25%.

African Americans received 13, or 2.95%, of all professional services prime contracts awarded during the study period, representing \$350,389, or 0.68%, of the professional services prime contract dollars.

Asian Pacific Americans received 22, or 5.00%, of all professional services prime contracts awarded during the study period, representing \$4,071,136, or 7.93%, of the professional services prime contract dollars.

Asian Indian Americans received 12, or 2.73%, of all professional services prime contracts awarded during the study period, representing \$2,351,066, or 4.58%, of the professional services prime contract dollars.

Hispanic Americans received 8, or 1.82%, of all professional services prime contracts awarded during the study period, representing \$1,023,719, or 1.99%, of the professional services prime contract dollars.

Native Americans received none of the professional services prime contracts awarded during the study period.

Caucasian Females received 47, or 10.68%, of all professional services prime contracts awarded during the study period, representing \$8,002,085, or 15.58%, of the professional services prime contract dollars.

Non-minority Males received 338, or 76.82%, of all professional services prime contracts awarded during the study period, representing \$35,572,238, or 69.25%, of the professional services prime contract dollars.

Minority Business Enterprises received 55, or 12.50%, of all professional services prime contracts awarded during the study period, representing \$7,796,310, or 15.18%, of the professional services prime contract dollars.

Woman Business Enterprises received 57, or 12.95%, of all professional services prime contracts awarded during the study period, representing \$8,966,921, or 17.46%, of the professional services prime contract dollars.



**Table 3.15: Professional Services Prime Contract Utilization:
All Contracts, January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	13	2.95%	\$350,389	0.68%
Asian Pacific Americans	22	5.00%	\$4,071,136	7.93%
Asian Indian Americans	12	2.73%	\$2,351,066	4.58%
Hispanic Americans	8	1.82%	\$1,023,719	1.99%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	47	10.68%	\$8,002,085	15.58%
Non-minority Males	338	76.82%	\$35,572,238	69.25%
TOTAL	440	100.00%	\$51,370,633	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	1	0.23%	\$9,504	0.02%
African American Males	12	2.73%	\$340,885	0.66%
Asian Pacific American Females	3	0.68%	\$230,604	0.45%
Asian Pacific American Males	19	4.32%	\$3,840,532	7.48%
Asian Indian American Females	2	0.45%	\$534,879	1.04%
Asian Indian American Males	10	2.27%	\$1,816,187	3.54%
Hispanic American Females	4	0.91%	\$189,849	0.37%
Hispanic American Males	4	0.91%	\$833,870	1.62%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	47	10.68%	\$8,002,085	15.58%
Non-minority Males	338	76.82%	\$35,572,238	69.25%
TOTAL	440	100.00%	\$51,370,633	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	55	12.50%	\$7,796,310	15.18%
Woman Business Enterprises	57	12.95%	\$8,966,921	17.46%



3. Goods and Services Prime Contract Utilization: All Contracts

Table 3.16 summarizes all contract dollars expended by the City on goods and services prime contracts. MBEs received 2.98% of the goods and services prime contract dollars, WBEs received 3.95%, and non-M/WBEs received 93.41%.

African Americans received none of the goods and services prime contract dollars.

Asian Pacific Americans received 14, or 1.26%, of all goods and services prime contracts awarded during the study period, representing \$829,681 or 1.05%, of the goods and services prime contract dollars.

Asian Indian Americans received 1, or 0.09%, of all goods and services prime contracts awarded during the study period, representing \$6,862 or 0.01%, of the goods and services prime contract dollars.

Hispanic Americans received 37, or 3.33%, of all goods and services prime contracts awarded during the study period, representing \$1,520,514, or 1.92%, of the goods and services prime contract dollars.

Native Americans received none of the goods and services prime contracts awarded during the study period.

Caucasian Females received 52, or 4.68%, of all goods and services prime contracts awarded during the study period, representing \$2,856,011, or 3.61%, of the goods and services prime contract dollars.

Non-minority Males received 1,008, or 90.65%, of all goods and services prime contracts awarded during the study period, representing \$73,900,532, or 93.41%, of the goods and services prime contract dollars.

Minority Business Enterprises received 52, or 4.68%, of all goods and services prime contracts awarded during the study period, representing \$2,357,057, or 2.98%, of the goods and services prime contract dollars.

Woman Business Enterprises received 78, or 7.01%, of all goods and services prime contracts awarded during the study period, representing \$3,127,255, or 3.95%, of the goods and services prime contract dollars.



**Table 3.16: Goods and Services Prime Contract Utilization:
All Contracts, January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Pacific Americans	14	1.26%	\$829,681	1.05%
Asian Indian Americans	1	0.09%	\$6,862	0.01%
Hispanic Americans	37	3.33%	\$1,520,514	1.92%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	52	4.68%	\$2,856,011	3.61%
Non-minority Males	1,008	90.65%	\$73,900,532	93.41%
TOTAL	1,112	100.00%	\$79,113,600	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian Pacific American Females	2	0.18%	\$91,562	0.12%
Asian Pacific American Males	12	1.08%	\$738,119	0.93%
Asian Indian American Females	1	0.09%	\$6,862	0.01%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	23	2.07%	\$172,821	0.22%
Hispanic American Males	14	1.26%	\$1,347,693	1.70%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	52	4.68%	\$2,856,011	3.61%
Non-minority Males	1,008	90.65%	\$73,900,532	93.41%
TOTAL	1,112	100.00%	\$79,113,600	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	52	4.68%	\$2,357,057	2.98%
Woman Business Enterprises	78	7.01%	\$3,127,255	3.95%



F. Informal Contracts by Industry

1. Construction Prime Contract Utilization: Contracts Valued \$25,000 and Less

Table 3.17 summarizes all contract dollars expended by the City on construction prime contracts valued \$25,000 and less. MBEs received 17.90% of the construction prime contract dollars, WBEs received 0.00%; and non-M/WBEs received 82.10%.

African Americans received none of the construction prime contracts valued \$25,000 and less awarded during the study period.

Asian Pacific Americans received none of the construction prime contracts valued \$25,000 and less awarded during the study period.

Asian Indian Americans received none of the construction prime contracts valued \$25,000 and less awarded during the study period.

Hispanic Americans received 3, or 15.00%, of the construction prime contracts valued \$25,000 and less awarded during the study period, representing \$28,158, or 17.90%, of the construction prime contract dollars.

Native Americans received none of the construction prime contracts valued \$25,000 and less awarded during the study period.

Caucasian Females received none of the construction prime contracts valued \$25,000 and less awarded during the study period.

Non-minority Males received 17, or 85.00%, of the construction prime contracts valued \$25,000 and less awarded during the study period, representing \$129,106, or 82.10%, of the construction prime contract dollars.

Minority Business Enterprises received 3, or 15.00%, of the construction prime contracts valued \$25,000 and less awarded during the study period, representing \$28,158, or 17.90%, of the construction prime contract dollars.

Woman Business Enterprises received none of the construction prime contracts valued \$25,000 and less awarded during the study period.



**Table 3.17: Construction Prime Contract Utilization:
Contracts Valued \$25,000 and Less, January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Pacific Americans	0	0.00%	\$0	0.00%
Asian Indian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	3	15.00%	\$28,158	17.90%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	0	0.00%	\$0	0.00%
Non-minority Males	17	85.00%	\$129,106	82.10%
TOTAL	20	100.00%	\$157,265	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian Pacific American Females	0	0.00%	\$0	0.00%
Asian Pacific American Males	0	0.00%	\$0	0.00%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	3	15.00%	\$28,158	17.90%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	0	0.00%	\$0	0.00%
Non-minority Males	17	85.00%	\$129,106	82.10%
TOTAL	20	100.00%	\$157,265	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	3	15.00%	\$28,158	17.90%
Woman Business Enterprises	0	0.00%	\$0	0.00%



2. Professional Services Prime Contract Utilization: Contracts Valued \$25,000 and Less

Table 3.18 summarizes all contract dollars expended by the City on professional services prime contracts valued \$25,000 and less. MBEs received 11.03% of the professional services prime contract dollars, WBEs received 19.22%, and non-M/WBEs received 73.41%.

African Americans received 5, or 2.51%, of the professional services prime contracts valued \$25,000 and less awarded during the study period, representing \$33,679, or 1.56%, of the professional services prime contract dollars.

Asian Pacific Americans received 9, or 4.52%, of the professional services prime contracts valued \$25,000 and less awarded during the study period, representing \$130,192, or 6.03%, of the professional services prime contract dollars.

Asian Indian Americans received 3, or 1.51%, of the professional services prime contracts valued \$25,000 and less awarded during the study period, representing \$33,535, or 1.55%, of the professional services prime contract dollars.

Hispanic Americans received 4, or 2.01%, of the professional services prime contracts valued \$25,000 and less awarded during the study period, representing \$40,823, or 1.89%, of the professional services prime contract dollars.

Native Americans received none of the professional services prime contracts valued \$25,000 and less awarded during the study period.

Caucasian Females received 25, or 12.56%, of the professional services prime contracts valued \$25,000 and less awarded during the study period, representing \$336,103, or 15.56%, of the professional services prime contract dollars.

Non-minority Males received 153, or 76.88%, of the professional services prime contracts valued \$25,000 and less awarded during the study period, representing \$1,585,373, or 73.41%, of the professional services prime contract dollars.

Minority Business Enterprises received 21, or 10.55%, of the professional services prime contracts valued \$25,000 and less awarded during the study period, representing \$238,229, or 11.03%, of the professional services prime contract dollars.

Woman Business Enterprises received 30, or 15.08%, of the professional services prime contracts valued \$25,000 and less awarded during the study period, representing \$415,071, or 19.22%, of the professional services prime contract dollars.



**Table 3.18: Professional Services Prime Contract Utilization:
Contracts Valued \$25,000 and Less, January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	5	2.51%	\$33,679	1.56%
Asian Pacific Americans	9	4.52%	\$130,192	6.03%
Asian Indian Americans	3	1.51%	\$33,535	1.55%
Hispanic Americans	4	2.01%	\$40,823	1.89%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	25	12.56%	\$336,103	15.56%
Non-minority Males	153	76.88%	\$1,585,373	73.41%
TOTAL	199	100.00%	\$2,159,705	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	1	0.50%	\$9,504	0.44%
African American Males	4	2.01%	\$24,175	1.12%
Asian Pacific American Females	2	1.01%	\$47,664	2.21%
Asian Pacific American Males	7	3.52%	\$82,528	3.82%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	3	1.51%	\$33,535	1.55%
Hispanic American Females	2	1.01%	\$21,800	1.01%
Hispanic American Males	2	1.01%	\$19,023	0.88%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	25	12.56%	\$336,103	15.56%
Non-minority Males	153	76.88%	\$1,585,373	73.41%
TOTAL	199	100.00%	\$2,159,705	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	21	10.55%	\$238,229	11.03%
Woman Business Enterprises	30	15.08%	\$415,071	19.22%



3. Goods and Services Prime Contract Utilization: Contracts Valued \$25,000 and Less

Table 3.19 summarizes all contract dollars expended by the City on goods and services prime contracts valued \$25,000 and less. MBEs received 3.60% of the goods and services prime contract dollars, WBEs received 4.81%, and non-M/WBEs received 92.12%.

African Americans received none of the goods and services prime contracts valued \$25,000 and less awarded during the study period.

Asian Pacific Americans received 7, or 0.95%, of the goods and services prime contracts valued \$25,000 and less awarded during the study period, representing \$40,843, or 0.65%, of the goods and services prime contract dollars.

Asian Indian Americans received 1, or 0.14%, of the goods and services prime contracts valued \$25,000 and less awarded during the study period, representing \$6,862, or 0.11%, of the goods and services prime contract dollars.

Hispanic Americans received 29, or 3.92%, of the goods and services prime contracts valued \$25,000 and less awarded during the study period, representing \$149,061, or 2.38%, of the goods and services prime contract dollars.

Native Americans received none of the goods and services prime contracts valued \$25,000 and less awarded during the study period.

Caucasian Females received 31, or 4.19%, of the goods and services prime contracts valued \$25,000 and less awarded during the study period, representing \$292,043, or 4.66%, of the goods and services prime contract dollars.

Non-minority Males received 672, or 90.81%, of the goods and services prime contracts valued \$25,000 and less awarded during the study period, representing \$5,773,364, or 92.19%, of the goods and services prime contract dollars.

Minority Business Enterprises received 37, or 5.00%, of the goods and services prime contracts valued \$25,000 and less awarded during the study period, representing \$196,767, or 3.14%, of the goods and services prime contract dollars.

Woman Business Enterprises received 53, or 7.16%, of the goods and services prime contracts valued \$25,000 and less awarded during the study period, representing \$360,203, or 5.75%, of the goods and services prime contract dollars.



**Table 3.19: Goods and Services Prime Contract Utilization:
Contracts Valued \$25,000 and Less, January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Pacific Americans	7	0.95%	\$40,843	0.65%
Asian Indian Americans	1	0.14%	\$6,862	0.11%
Hispanic Americans	29	3.92%	\$149,061	2.38%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	31	4.19%	\$292,043	4.66%
Non-minority Males	672	90.81%	\$5,773,364	92.19%
TOTAL	740	100.00%	\$6,262,174	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian Pacific American Females	0	0.00%	\$0	0.00%
Asian Pacific American Males	7	0.95%	\$40,843	0.65%
Asian Indian American Females	1	0.14%	\$6,862	0.11%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	21	2.84%	\$61,298	0.98%
Hispanic American Males	8	1.08%	\$87,764	1.40%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	31	4.19%	\$292,043	4.66%
Non-minority Males	672	90.81%	\$5,773,364	92.19%
TOTAL	740	100.00%	\$6,262,174	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	37	5.00%	\$196,767	3.14%
Woman Business Enterprises	53	7.16%	\$360,203	5.75%



G. Prime Contracts Valued \$25,000 to \$2,140,000, by Industry

1. Construction Prime Contract Utilization: Contracts Valued \$25,000 to \$2,140,000

Table 3.20 summarizes all contract dollars expended by the City on construction prime contracts valued \$25,000 to \$2,140,000. MBEs received 22.90% of the construction prime contract dollars, WBEs received 1.31%, and non-M/WBEs received 76.23%.

African Americans received 1, or 1.28%, of the construction prime contracts valued \$25,000 to \$2,140,000 awarded during the study period, representing \$938,897, or 2.73%, of the construction prime contract dollars.

Asian Pacific Americans received 2, or 2.56%, of the construction prime contracts valued \$25,000 to \$2,140,000 awarded during the study period, representing \$1,030,975, or 3.00%, of the construction prime contract dollars.

Asian Indian Americans received none of the construction prime contracts valued \$25,000 to \$2,140,000 awarded during the study period.

Hispanic Americans received 17, or 21.79%, of the construction prime contracts valued \$25,000 to \$2,140,000 awarded during the study period, representing \$5,910,458, or 17.17%, of the construction prime contract dollars.

Native Americans received none of the construction prime contracts valued \$25,000 to \$2,140,000 awarded during the study period.

Caucasian Females received 4, or 5.13%, of the construction prime contracts valued \$25,000 to \$2,140,000 awarded during the study period, representing \$299,436, or 0.87%, of the construction prime contract dollars.

Non-minority Males received 54, or 69.23%, of the construction prime contracts valued \$25,000 to \$2,140,000 awarded during the study period, representing \$26,236,346, or 76.23%, of the construction prime contract dollars.

Minority Business Enterprises received 20, or 25.64%, of the construction prime contracts valued \$25,000 to \$2,140,000 awarded during the study period, representing \$7,880,329, or 22.90%, of the construction prime contract dollars.

Woman Business Enterprises received 5, or 6.41%, of the construction prime contracts valued \$25,000 to \$2,140,000 awarded during the study period, representing \$449,436, or 1.31%, of the construction prime contract dollars.



**Table 3.20: Construction Prime Contract Utilization:
Contracts Valued \$25,000 to \$2,140,000,
January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	1	1.28%	\$938,897	2.73%
Asian Pacific Americans	2	2.56%	\$1,030,975	3.00%
Asian Indian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	17	21.79%	\$5,910,458	17.17%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	4	5.13%	\$299,436	0.87%
Non-minority Males	54	69.23%	\$26,236,346	76.23%
TOTAL	78	100.00%	\$34,416,111	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	1	1.28%	\$938,897	2.73%
Asian Pacific American Females	0	0.00%	\$0	0.00%
Asian Pacific American Males	2	2.56%	\$1,030,975	3.00%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	1	1.28%	\$150,000	0.44%
Hispanic American Males	16	20.51%	\$5,760,458	16.74%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	4	5.13%	\$299,436	0.87%
Non-minority Males	54	69.23%	\$26,236,346	76.23%
TOTAL	78	100.00%	\$34,416,111	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	20	25.64%	\$7,880,329	22.90%
Woman Business Enterprises	5	6.41%	\$449,436	1.31%



2. Professional Services Prime Contract Utilization: Contracts Valued \$25,000 to \$450,000

Table 3.21 summarizes all contract dollars expended by the City on professional services prime contracts valued \$25,000 to \$450,000. MBEs received 14.39% of the professional services prime contract dollars, WBEs received 10.23%, and non-M/WBEs received 79.02%.

African Americans received 8, or 3.60%, of the professional services prime contracts valued \$25,000 to \$450,000 awarded during the study period, representing \$316,710, or 1.27%, of the professional services prime contract dollars.

Asian Pacific Americans received 11, or 4.95%, of the professional services prime contracts valued \$25,000 to \$450,000 awarded during the study period, representing \$1,410,919, or 5.64%, of the professional services prime contract dollars.

Asian Indian Americans received 8, or 3.60%, of the professional services prime contracts valued \$25,000 to \$450,000 awarded during the study period, representing \$1,417,746, or 5.66%, of the professional services prime contract dollars.

Hispanic Americans received 3, or 1.35%, of the professional services prime contracts valued \$25,000 to \$450,000 awarded during the study period, representing \$457,076, or 1.83%, of the professional services prime contract dollars.

Native Americans received none of the construction prime contracts valued \$25,000 to \$450,000 awarded during the study period.

Caucasian Females received 20, or 9.01%, of the professional services prime contracts valued \$25,000 to \$450,000 awarded during the study period, representing \$1,648,980, or 6.59%, of the professional services prime contract dollars.

Non-minority Males received 172, or 77.48%, of the professional services prime contracts valued \$25,000 to \$450,000 awarded during the study period, representing \$19,780,503, or 79.02%, of the professional services prime contract dollars.

Minority Business Enterprises received 30, or 13.51%, of the professional services prime contracts valued \$25,000 to \$450,000 awarded during the study period, representing \$3,602,451, or 14.39%, of the professional services prime contract dollars.

Woman Business Enterprises received 26, or 11.71%, of the professional services prime contracts valued \$25,000 to \$450,000 awarded during the study period, representing \$2,559,849, or 10.23%, of the professional services prime contract dollars.



**Table 3.21: Professional Services Prime Contract Utilization:
Contracts Valued \$25,000 to \$450,000, January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	8	3.60%	\$316,710	1.27%
Asian Pacific Americans	11	4.95%	\$1,410,919	5.64%
Asian Indian Americans	8	3.60%	\$1,417,746	5.66%
Hispanic Americans	3	1.35%	\$457,076	1.83%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	20	9.01%	\$1,648,980	6.59%
Non-minority Males	172	77.48%	\$19,780,503	79.02%
TOTAL	222	100.00%	\$25,031,934	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	8	3.60%	\$316,710	1.27%
Asian Pacific American Females	2	0.90%	\$207,941	0.83%
Asian Pacific American Males	9	4.05%	\$1,202,978	4.81%
Asian Indian American Females	2	0.90%	\$534,879	2.14%
Asian Indian American Males	6	2.70%	\$882,867	3.53%
Hispanic American Females	2	0.90%	\$168,049	0.67%
Hispanic American Males	1	0.45%	\$289,027	1.15%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	20	9.01%	\$1,648,980	6.59%
Non-minority Males	172	77.48%	\$19,780,503	79.02%
TOTAL	222	100.00%	\$25,031,934	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	30	13.51%	\$3,602,451	14.39%
Woman Business Enterprises	26	11.71%	\$2,559,849	10.23%



3. Goods and Services Prime Contract Utilization: Contracts \$25,000 to \$380,000

Table 3.22 summarizes all contract dollars expended by the City on goods and services prime contracts valued \$25,000 to \$380,000. MBEs received 2.17% of the goods and services prime contract dollars, WBEs received 7.90%, and non-M/WBEs received 90.61%.

African Americans received none of the goods and services prime contract dollars.

Asian Pacific Americans received 6, or 1.81%, of the goods and services prime contracts valued \$25,000 to \$380,000 awarded during the study period, representing \$308,375, or 1.04%, of the goods and services prime contract dollars.

Asian Indian Americans none of the goods and services prime contracts valued \$25,000 to \$380,000 awarded during the study period.

Hispanic Americans received 6, or 1.81%, of the goods and services prime contracts valued \$25,000 to \$380,000 awarded during the study period, representing \$336,834, or 1.13%, of the goods and services prime contract dollars.

Native Americans none of the goods and services prime contracts valued \$25,000 to \$380,000 awarded during the study period.

Caucasian Females received 20, or 6.04%, of the goods and services prime contracts valued \$25,000 to \$380,000 awarded during the study period, representing \$2,146,762, or 7.22%, of the goods and services prime contract dollars.

Non-minority Males received 299, or 90.33%, of the goods and services prime contracts valued \$25,000 to \$380,000 awarded during the study period, representing \$26,935,623, or 90.61%, of the goods and services prime contract dollars.

Minority Business Enterprises received 12, or 3.63%, of the goods and services prime contracts valued \$25,000 to \$380,000 awarded during the study period, representing \$645,210, or 2.17%, of the goods and services prime contract dollars.

Woman Business Enterprises received 24, or 7.25%, of the goods and services prime contracts valued \$25,000 to \$380,000 awarded during the study period, representing \$2,349,846, or 7.90%, of the goods and services prime contract dollars.



**Table 3.22: Goods and services Prime Contract Utilization:
Contracts Valued \$25,000 to \$380,000, January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Pacific Americans	6	1.81%	\$308,375	1.04%
Asian Indian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	6	1.81%	\$336,834	1.13%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	20	6.04%	\$2,146,762	7.22%
Non-minority Males	299	90.33%	\$26,935,623	90.61%
TOTAL	331	100.00%	\$29,727,594	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian Pacific American Females	2	0.60%	\$91,562	0.31%
Asian Pacific American Males	4	1.21%	\$216,814	0.73%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	2	0.60%	\$111,523	0.38%
Hispanic American Males	4	1.21%	\$225,311	0.76%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	20	6.04%	\$2,146,762	7.22%
Non-minority Males	299	90.33%	\$26,935,623	90.61%
TOTAL	331	100.00%	\$29,727,594	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	12	3.63%	\$645,210	2.17%
Woman Business Enterprises	24	7.25%	\$2,349,846	7.90%



V. Summary

The prime contract utilization analysis examined 1,665 prime contracts awarded by the City from January 1, 2016 to December 31, 2019. The \$257,721,172 expended included \$127,236,940 for construction, \$51,370,633 for professional services, and \$79,113,600 for goods and services. A total of 1,665 prime contracts were analyzed, which included 113 for construction, 440 for professional services, and 1,112 for goods and services.

The utilization analysis was performed for prime contracts in the construction, professional services, and goods and services industries at three-dollar thresholds (1) all prime contracts regardless of award amount, (2) all informal prime contracts valued \$25,000 and less for construction, professional services, and goods and services, as defined by the City's Purchasing Manual, and (3) formal prime contracts, with thresholds set for each industry to eliminate outliers. Given the application of the thresholds, the formal prime contracts analyzed were valued \$25,000 to \$2,140,000 for construction, \$25,000 to \$450,000 for professional services, and \$25,000 to \$350,000 for goods and services. *Chapter 7: Prime Contract Disparity Analysis* presents the statistical analysis of disparity in each of the three industries.



CHAPTER 4: Subcontractor Utilization Analysis

I. Introduction

A disparity study, as required by *Croson*, must document the local government's utilization of available Minority and Woman-owned Business Enterprises (M/WBE), and non-minority male-owned businesses (non-M/WBE) as prime contractors and subcontractors. The objective of this chapter is to present the M/WBEs and non-M/WBEs subcontractor utilization by ethnicity, gender, and industry. The analysis examined the subcontracts awarded by the City of Berkeley's (City) construction and professional services (including architecture and engineering) prime contractors during the January 1, 2016 to December 31, 2019 study period.

II. Data Sources

During the study period the City did not maintain comprehensive data on the subcontracts awarded by its prime contractors, although the California Public Contracts Code §4104 requires construction prime contractors to list on their bid all subcontractors to perform more than 0.5 percent of the prime contract bid amount.

In the absence of a comprehensive subcontractor dataset extensive research was undertaken in an effort to reconstruct the subcontracts issued by the City's construction, and professional service (including architecture and engineering) prime contractors. Since subcontract records had to be reconstructed, the analysis was limited to construction and professional service (including architecture and engineering) prime contracts valued \$250,000 and over.

A. Data Collection Process

There was a total of 69 prime contractors that received 97 contracts valued \$250,000 and greater. Several methods were used to compile a comprehensive subcontract dataset for the 97 contracts. The initial step was to review each prime contract available on Records Online, the online web portal where scanned copies of awarded contracts are stored. The review determined that all contracts within the threshold were not saved in Records Online. Therefore, two additional methods were employed to reconstruct the subcontracts for each construction and professional service contract valued \$250,000 and over. One method requested subcontractors directly from the prime contractors awarded one or more of the construction or professional service contracts valued \$250,000 and greater. The other was an appeal to the City's department managers for subcontractors from their project files. The subcontractor data collection was undertaken in cooperation with the disparity study project manager.



1. Online Prime Contract Records

The online web portal housed 70 of the 97 prime contracts \$250,000 and over. Subcontract records were found in 11 of these contracts. Data found in the contracts saved to the online portal, were downloaded, and entered into Mason Tillman’s subcontractor database for analysis. Table 4.1 lists the number of subcontracts identified from the online records by industry.

Table 4.1: Data Identified from Records Online

Industry	Subcontracts Identified from Records Online
Construction	22
Professional Services	5

2. Prime Contractor Expenditure Survey

The prime contractors were asked to provide the subconsultant, subcontractor, supplier and trucker name and payment amount for each of their City contracts valued \$250,000 and greater during the study period. To maximize the response rate, a letter from the City Manager requesting the prime contractor’s cooperation accompanied the survey form. Mason Tillman also made follow-up calls to each prime contractor to address any questions concerning the Study. Only seven of the 28 construction and 41 professional service prime contractors surveyed provided subcontract data. Table 4.2 lists the number of subcontracts identified from the prime contractor survey.

Table 4.2: Data Identified from Prime Contractor Expenditure Survey

Industry	Subcontracts Identified from Prime Expenditure Survey
Construction	48
Professional Services	26

3. Department Provided Subcontract Records

The third method requested the project managers to review their files and provide subcontractor information for each of the 97 awarded prime contracts valued \$250,000 and over. Subcontract records were requested directly from the nine departments that awarded the prime contracts. The number of prime contracts awarded by each department within the survey is presented in Table 4.3. Two departments provided subcontract records for one or more of their prime contracts. Table 4.3 lists the subcontracts provided by the four departments surveyed.



Table 4.3: Data Provided by Department Managers

Department	Prime Contracts Included in Data Collection	Prime Contracts with Reported Subcontracts	Subcontracts Provided by Department
Rent Stabilization Board	1	0	0
Economic Development	1	0	0
Attorney's Office	3	0	0
Finance	1	0	0
Information Technology	8	0	0
Parks, Recreation & Waterfront	18	13	55
Planning	8	4	12
Public Works	56	0	0
City Manager	1	0	0

Table 4.4 presents the size distribution of the prime contracts for which no subcontracts were identified. The award amounts for the prime contracts for which no subcontractors were identified ranged in value from \$252,040 to \$38,317,107. The fact that 18 prime contracts with no reported subcontractors exceeded \$1,000,000, and eight exceeded \$3,000,000, clearly indicates that the actual subcontract utilization is understated. It is notable that the California Public Contract Code §4104 requires construction prime contract bids to list all subcontracts with a value greater than 0.5% of the prime contract amount.

Table 4.4: Size Distribution of Prime Contracts with no Subcontractor Data

Size of Contract	Count of Construction Contracts with No Subcontractor Data	Count of Professional Service Contracts with No Subcontractor Data
\$250,000 - \$499,999	8	20
\$500,000 - \$999,999	8	9
\$1,000,000 - \$2,999,999	7	3
\$3,000,000 and Greater	8	0

B. Subcontract Data Analysis

The identified subcontract records were appended to the relational database and cleaned. The ethnicity and gender of each subcontractor was verified through a combination of certification directories, Internet research, and telephone surveys. Once the data were cleaned, the subcontract utilization tables were prepared for the two industries, identifying the dollars and number of subcontracts awarded to each ethnic and gender group. Subcontractor utilization organized by ethnicity and gender within the two industries is presented below.



III. Subcontractor Utilization

A. All Subcontracts

As listed in Table 4.5, 166 of the reconstructed subcontracts with either award or payment data were analyzed. The subcontracts reconstructed included 110 construction and 56 professional services subcontracts.

There were \$12,353,005 subcontract dollars analyzed for the January 1, 2016 to December 31, 2019 study period. These dollars included \$8,383,599 for construction and \$3,969,406 for professional services subcontracts.

**Table 4.5: Subcontracts Awarded and Dollars Expended by Industry,
January 1, 2016 to December 31, 2019**

Industry	Total Number of Subcontracts	Total Amount Expended
Construction	110	\$8,383,599
Professional Services	56	\$3,969,406
Total	166	\$12,353,005



1. Construction Subcontracts

Table 4.6 lists the identified construction subcontracts awarded by the City's prime contractors. Minority-owned businesses (MBE) received 13.92%, woman-owned businesses (WBE) received 32.80%, and non-minority male-owned businesses (non-M/WBE) received 53.36% of the construction subcontract dollars.

African Americans received none of the City's construction subcontract dollars awarded during the study period.

Asian Pacific Americans received 1 or 0.91% of the City's construction subcontracts during the study period, representing \$15,917 or 0.19% of the construction subcontract dollars.

Asian Indian Americans received none of the City's construction subcontract dollars awarded during the study period.

Hispanic Americans received 9 or 8.18% of the City's construction subcontracts during the study period, representing \$1,151,315 or 13.73% of the construction subcontract dollars.

Native Americans received none of the City's construction subcontract dollars during the study period.

Caucasian Females received 11 or 10.00% of the City's construction subcontracts during the study period, representing \$2,742,632 or 32.71% of the construction subcontract dollars.

Non-minority Males received 89 or 80.91% of the City's construction subcontracts during the study period, representing \$4,473,736 or 53.36% of the construction subcontract dollars.

Minority Business Enterprises received 10 or 9.09% of the City's construction subcontracts during the study period, representing \$1,167,232 or 13.92% of the construction subcontract dollars.

Woman Business Enterprises received 12 or 10.91% of the City's construction subcontracts during the study period, representing \$2,750,027 or 32.80% of the construction subcontract dollars.



**Table 4.6: Construction Subcontractor Utilization,
January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American	0	0.00%	\$0	0.00%
Asian Pacific American	1	0.91%	\$15,917	0.19%
Asian Indian American	0	0.00%	\$0	0.00%
Hispanic American	9	8.18%	\$1,151,315	13.73%
Native American	0	0.00%	\$0	0.00%
Caucasian Females	11	10.00%	\$2,742,632	32.71%
Non-minority Males	89	80.91%	\$4,473,736	53.36%
TOTAL	110	100.00%	\$8,383,599	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian Pacific American Females	0	0.00%	\$0	0.00%
Asian Pacific American Males	1	0.91%	\$15,917	0.19%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	1	0.91%	\$7,395	0.09%
Hispanic American Males	8	7.27%	\$1,143,920	13.64%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	11	10.00%	\$2,742,632	32.71%
Non-minority Males	89	80.91%	\$4,473,736	53.36%
TOTAL	110	100.00%	\$8,383,599	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	10	9.09%	\$1,167,232	13.92%
Woman Business Enterprises	12	10.91%	\$2,750,027	32.80%



2. Professional Services Subcontracts

Table 4.7 lists the professional services subcontracts issued by the City's prime contractors. MBEs received 5.81%; WBEs received 2.72%; and non-M/WBEs received 92.76% of the professional services subcontract dollars.

African Americans received none of the City's professional services subcontract dollars.

Asian Pacific Americans received 5 or 8.93% of the City's professional services subcontracts during the study period, representing \$230,790 or 5.81% of the professional services subcontract dollars.

Asian Indian Americans received none of the City's professional services subcontract dollars.

Hispanic Americans received none of the City's professional services subcontract dollars.

Native Americans received none of the City's professional services subcontract dollars.

Caucasian Females received 4 or 7.14% of the City's professional services subcontracts during the study period, representing \$56,721 or 1.43% of the professional services subcontract dollars.

Non-minority Males received 47 or 83.93% of the City's professional services subcontracts during the study period, representing \$3,681,894 or 92.76% of the professional services subcontract dollars.

Minority Business Enterprises received 5 or 8.93% of the City's professional services subcontracts during the study period, representing \$230,790 or 5.81% of the professional services subcontract dollars.

Woman Business Enterprises received 6 or 10.71% of the City's professional services subcontracts during the study period, representing \$107,823 or 2.72% of the professional services subcontract dollars.



**Table 4.7: Professional Services Subcontractor Utilization,
January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American	0	0.00%	\$0	0.00%
Asian Pacific American	5	8.93%	\$230,790	5.81%
Asian Indian American	0	0.00%	\$0	0.00%
Hispanic American	0	0.00%	\$0	0.00%
Native American	0	0.00%	\$0	0.00%
Caucasian Females	4	7.14%	\$56,721	1.43%
Non-minority Males	47	83.93%	\$3,681,894	92.76%
TOTAL	56	100.00%	\$3,969,406	100.00%
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian Pacific American Females	2	3.57%	\$51,102	1.29%
Asian Pacific American Males	3	5.36%	\$179,689	4.53%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	4	7.14%	\$56,721	1.43%
Non-minority Males	47	83.93%	\$3,681,894	92.76%
TOTAL	56	100.00%	\$3,969,406	100.00%
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	5	8.93%	\$230,790	5.81%
Woman Business Enterprises	6	10.71%	\$107,823	2.72%



IV. Summary

The construction and professional services subcontracts awarded by the City's prime contractors had to be reconstructed using a multi-faceted research methodology because the City did not maintain comprehensive subcontract records during the study period. The subcontract utilization analysis was therefore limited to the subcontract records that could be reconstructed through the combined effort of the City, the City's prime contractors, and Mason Tillman. The subcontract utilization analysis was limited to the construction and professional services (including architecture and engineering services) prime contracts for which subcontract records could be reconstructed. The reconstructed construction and professional services subcontracts were valued at \$12,353,005. The reconstructed subcontracts examined were awarded by the City's prime contractors from January 1, 2016 to December 31, 2019. The \$12,353,005 expended included \$8,383,599 for construction and \$3,969,406 for professional services. A total of 166 subcontracts were analyzed, which included 110 for construction and 56 for professional services.



CHAPTER 5: Market Area Analysis

I. Market Area Definition

A. Legal Criteria for Geographic Market Area

The Supreme Court’s decision in *City of Richmond v. J.A. Croson Co.*²⁴² (*Croson*) held that programs established by local governments to set goals for the participation of Minority-owned Business Enterprises (MBEs) must be supported by evidence of past discrimination in the award of their contracts. Prior to the *Croson* decision, local governments could implement race-conscious programs without developing a detailed public record to document the underutilization of MBEs in their award of contracts. Instead, they relied on widely recognized societal patterns of discrimination.²⁴³

Croson established that a local government could not rely on society-wide discrimination as the basis for a race-based contracting program. Instead, a local government was required to identify discrimination within its own contracting jurisdiction.²⁴⁴ In *Croson*, the United States Supreme Court found the City of Richmond, Virginia’s MBE construction program to be unconstitutional because there was insufficient evidence of discrimination in the local construction market.

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

B. Application of the Croson Standard

While *Croson* emphasized the importance of the local market area, it provided little assistance in defining its parameters. However, it is informative to review the Court’s definition of the City of Richmond, Virginia’s market area. In discussing the geographic parameters of the constitutional violation that must be investigated, the Court interchangeably used the terms “relevant market,” “Richmond construction industry,”²⁴⁵ and “city’s construction industry.”²⁴⁶ These terms were used to define the proper scope for examining the existence of discrimination within the City. This interchangeable use of terms lends support to a definition of market area that coincides with the boundaries of a contracting jurisdiction.

²⁴² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁴³ *United Steelworkers v. Weber*, 433 U.S. 193, 198, n. 1 (1979).

²⁴⁴ *Croson*, 488 U.S. at 497.

²⁴⁵ *Id.* at 500.

²⁴⁶ *Id.* at 470.



An analysis of the cases following *Croson* provides additional guidance for defining the market area. The body of cases examining the *reasonable* market area definition is *fact-based*—rather than dictated by a specific formula.²⁴⁷ In *Cone Corporation v. Hillsborough County*,²⁴⁸ the United States Eleventh Circuit Court of Appeals considered a disparity study in support of Hillsborough County, Florida’s MBE Program. The MBE program used minority contractors located in Hillsborough County as the measure of available firms. The program was found to be constitutional under the compelling governmental interest element of the strict scrutiny standard.

Hillsborough County’s program was based on statistics indicating that specific discrimination existed in the construction contracts awarded by Hillsborough County, not in the construction industry in general. Hillsborough County extracted data from within its own jurisdictional boundaries and assessed the percentage of minority businesses available in Hillsborough County. The Court stated that the disparity study was properly conducted within the “local construction industry.”²⁴⁹

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII)*,²⁵⁰ the United States Ninth Circuit Court of Appeals found the City and County of San Francisco, California’s MBE Program to have the factual predicate necessary to survive strict scrutiny. The San Francisco MBE Program was supported by a disparity study that assessed the number of available MBE contractors within the City and County of San Francisco, California. The Court found it appropriate to use the City and County as the relevant market area within which to conduct a disparity study.²⁵¹

In *Coral Construction v. King County*, the United States Ninth Circuit Court of Appeals held that “a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program.”²⁵² In support of its MBE program, King County, Washington offered studies compiled by other jurisdictions, including entities completely within the County, others coterminous with the boundaries of the County, as well as a jurisdiction significantly distant from King County. The plaintiffs contended that *Croson* required King County, Washington, to compile its own data and cited *Croson* as prohibiting data sharing.

The Court found that data sharing could potentially lead to the improper use of societal discrimination data as the factual basis for a local MBE program and that innocent third parties could be unnecessarily burdened if an MBE program were based on data outside the government’s

²⁴⁷ See e.g., *Concrete Works of Colorado v. City of Denver, Colorado*, 36 F.3d 1513, 1528 (10th Cir. 1994) (“*Concrete Works*”).

²⁴⁸ *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

²⁴⁹ *Id.* at 915.

²⁵⁰ *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991).

²⁵¹ *AGCCII*, 950 F.2d at 1415.

²⁵² *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).



jurisdictional boundaries. However, the Court also found that the data from entities within King County and from coterminous jurisdictions were relevant to discrimination in the County. They also found that the data posed no risk of unfairly burdening innocent third parties.

The Court concluded that data gathered by a neighboring county could not be used to support King County's MBE program. The Court noted, "It is vital that a race-conscious program align itself as closely to the scope of the problem sought to be rectified by the governmental entity. To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries."²⁵³ However, the Court did note that the "world of contracting does not conform itself neatly to jurisdictional boundaries."²⁵⁴

There are other situations where courts have approved a market area definition that extended beyond a jurisdiction's geographic boundaries. In *Concrete Works v. City and County of Denver (Concrete Works)*,²⁵⁵ the United States Tenth Circuit Court of Appeals directly addressed the issue of whether extra-jurisdictional evidence of discrimination can be used to determine the "local market area" for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver, Colorado Metropolitan Statistical Area (Denver MSA) to support its MBE program. Plaintiffs argued that the federal constitution prohibited consideration of evidence beyond jurisdictional boundaries. The Court of Appeals disagreed.

Critical to the Court's acceptance of the Denver MSA as the relevant local market was the finding that more than 80% of construction and design contracts awarded by the City and County of Denver were awarded to contractors within the Denver MSA. Another consideration was that the City and County of Denver's analysis was based on United States Census data, which was available for the Denver MSA but not for the City of Denver itself. There was no undue burden placed on nonculpable parties, as the City and County of Denver had expended a majority of its construction contract dollars within the area defined as the local market. Citing *AGCC II*,²⁵⁶ the Court noted "that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions the city has taken in the past have visited racial discrimination on such individuals."²⁵⁷

Similarly, New York State conducted a disparity study in which the geographic market consisted of New York State and eight counties in northern New Jersey. The geographic market was defined as the area encompassing the location of businesses that received more than 90% of the dollar value of all contracts awarded by the agency.²⁵⁸

²⁵³ *Coral Construction Co. v. King County*, 941 F.2d at 917.

²⁵⁴ *Id.*

²⁵⁵ *Concrete Works*, 36 F.3d at 1528.

²⁵⁶ *AGCC II*, 950 F.2d at 1401.

²⁵⁷ *Concrete Works*, 36 F.3d at 1528.

²⁵⁸ *Opportunity Denied! New York State's Study*, 26 Urban Lawyer No. 3, Summer 1994.



State and local governments must pay special attention to the geographical scope of their disparity studies. *Croson* determined that the statistical analysis should focus on the number of qualified minority business owners in the government’s marketplace.²⁵⁹ 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.

It follows then that an entity may limit consideration of evidence of discrimination to discrimination occurring within its own jurisdiction.

II. Market Area Analysis

Although *Croson* and its progeny do not provide a bright line rule for the delineation of the local market area the determination can include additional jurisdictions when there is evidence that a significant percentage of the government’s expenditures extend beyond its boundaries. A fact-based analysis of the City of Berkeley’s (City) expenditures supports a definition of market area that extends beyond the City’s geographic boundaries. The statistical evidence shows the City of Berkeley’s market area extends to seven contiguous Alameda County cities: Alameda, Albany, Berkeley, Emeryville, Hayward, Piedmont, Oakland, and San Leandro. Prime contractors domiciled in the eight market area cities received 59.71 percent of all prime contract dollars awarded.

A. Summary of the Distribution of All Prime Contracts Awarded

The City of Berkeley (City) awarded 1,665 prime contracts valued at \$257,721,172 from January 1, 2016 to December 31, 2019. The distribution of all prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area is depicted in Table 5.1.



²⁵⁹ *Croson*, 488 U.S. at 501.

Table 5.1: Distribution of All Contracts Awarded

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Alameda County Market Area Cities	650	39.04%	\$153,882,845	59.71%
Alameda County Other Cities	103	6.19%	\$15,769,988	6.12%
Contra Costa	143	8.59%	\$13,650,289	5.30%
City & County of San Francisco	57	3.42%	\$11,834,751	4.59%
Santa Clara	53	3.18%	\$8,134,797	3.16%
Los Angeles	77	4.62%	\$8,086,697	3.14%
Stanislaus	5	0.30%	\$5,531,595	2.15%
Sonoma	34	2.04%	\$4,241,964	1.65%
San Mateo	35	2.10%	\$3,433,954	1.33%
Sacramento	36	2.16%	\$3,333,053	1.29%
Placer	13	0.78%	\$1,891,303	0.73%
Solano	25	1.50%	\$1,750,169	0.68%
Nevada	9	0.54%	\$1,485,234	0.58%
Marin	14	0.84%	\$1,271,972	0.49%
Orange	16	0.96%	\$1,203,360	0.47%
San Bernardino	14	0.84%	\$796,243	0.31%
Tuolumne	2	0.12%	\$759,222	0.29%
San Luis Obispo	2	0.12%	\$715,027	0.28%
Yolo	6	0.36%	\$535,763	0.21%
San Diego	15	0.90%	\$497,668	0.19%
San Joaquin	11	0.66%	\$462,377	0.18%
Fresno	3	0.18%	\$448,911	0.17%
Napa	2	0.12%	\$404,313	0.16%
El Dorado	13	0.78%	\$401,436	0.16%
Monterey	5	0.30%	\$240,804	0.09%
Ventura	9	0.54%	\$211,485	0.08%
Plumas	1	0.06%	\$204,015	0.08%
Riverside	13	0.78%	\$202,852	0.08%
Santa Barbara	3	0.18%	\$103,404	0.04%
Santa Cruz	8	0.48%	\$84,180	0.03%
Calaveras	3	0.18%	\$69,506	0.03%
Butte	2	0.12%	\$69,363	0.03%
Madera	2	0.12%	\$62,600	0.02%
Mendocino	1	0.06%	\$6,000	0.00%
Out of State	278	16.70%	\$15,907,748	6.17%
Out of Country	2	0.12%	\$36,287	0.01%
Total	1,665	100.00%	\$257,721,172	100.00%



B. Distribution of Construction Prime Contracts

The City awarded 113 construction prime contracts valued at \$127,236,940 during the study period. Businesses located in the market area received 52.21% of the construction prime contracts and 75.85% of the dollars. The distribution of the construction prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area is depicted in Table 5.2.

Table 5.2: Distribution of Construction Prime Contracts

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Alameda County Market Area Cities	59	52.21%	\$96,509,904	75.85%
Alameda County Other Cities	8	7.08%	\$11,394,161	8.96%
City & County of San Francisco	8	7.08%	\$9,161,905	7.20%
San Mateo	7	6.19%	\$2,805,468	2.20%
Sonoma	2	1.77%	\$2,667,371	2.10%
Contra Costa	9	7.96%	\$2,646,958	2.08%
Sacramento	2	1.77%	\$342,700	0.27%
Santa Clara	2	1.77%	\$274,244	0.22%
Napa	1	0.88%	\$259,251	0.20%
El Dorado	3	2.65%	\$243,804	0.19%
Marin	2	1.77%	\$233,564	0.2%
Fresno	1	0.88%	\$182,587	0.14%
Solano	4	3.54%	\$74,940	0.06%
Out of State	5	4.42%	\$440,082	0.35%
Total	113	100.00%	\$127,236,940	100.00%

C. Distribution of Professional Services Prime Contracts

The City awarded 440 professional services prime contracts valued at \$51,370,633 during the study period. Businesses located in the market area received 41.36% of the professional services prime contracts and 58.32% of the dollars. The distribution of the professional services prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area is depicted in Table 5.3.



Table 5.3: Distribution of Professional Services Prime Contracts

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Alameda County Market Area Cities	182	41.36%	\$29,959,433	58.32%
Contra Costa	39	8.86%	\$6,123,410	11.92%
Alameda County Other Cities	26	5.91%	\$2,008,114	3.91%
City & County of San Francisco	27	6.14%	\$1,883,381	3.67%
Los Angeles	23	5.23%	\$1,673,105	3.26%
Sacramento	19	4.32%	\$1,552,362	3.02%
Placer	6	1.36%	\$779,767	1.52%
San Luis Obispo	2	0.45%	\$715,027	1.39%
Marin	6	1.36%	\$641,184	1.25%
Sonoma	4	0.91%	\$475,849	0.93%
Orange	6	1.36%	\$455,144	0.89%
Santa Clara	10	2.27%	\$402,453	0.78%
Yolo	3	0.68%	\$365,997	0.71%
Tuolumne	1	0.23%	\$269,962	0.53%
Fresno	2	0.45%	\$266,324	0.52%
Plumas	1	0.23%	\$204,015	0.40%
San Mateo	5	1.14%	\$202,347	0.39%
San Diego	4	0.91%	\$194,126	0.38%
Solano	3	0.68%	\$124,165	0.24%
Santa Cruz	5	1.14%	\$73,999	0.14%
Ventura	5	1.14%	\$69,524	0.14%
San Bernardino	1	0.23%	\$17,900	0.03%
Monterey	1	0.23%	\$11,000	0.02%
Riverside	1	0.23%	\$7,750	0.02%
Mendocino	1	0.23%	\$6,000	0.01%
Out of State	57	12.95%	\$2,888,294	5.62%
Total	440	100.00%	\$51,370,633	100.00%

D. Distribution of Goods and Services Prime Contracts

The City awarded 1,112 goods and services prime contracts valued at \$79,113,600 during the study period. Businesses located in the market area received 36.78% of the goods and services prime contracts and 34.65% of the dollars. The distribution of the goods and services prime contracts awarded and dollars received by all firms domiciled inside and outside of the market area is depicted in Table 5.4.



Table 5.4: Distribution of Goods and Services Prime Contracts

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Alameda County Market Area Cities	409	36.78%	\$27,413,507	34.65%
Santa Clara	41	3.69%	\$7,458,100	9.43%
Los Angeles	54	4.86%	\$6,413,592	8.11%
Stanislaus	5	0.45%	\$5,531,595	6.99%
Contra Costa	95	8.54%	\$4,879,920	6.17%
Alameda County Other Cities	69	6.21%	\$2,367,712	2.99%
Solano	18	1.62%	\$1,551,064	1.96%
Nevada	9	0.81%	\$1,485,234	1.88%
Sacramento	15	1.35%	\$1,437,991	1.82%
Placer	7	0.63%	\$1,111,536	1.40%
Sonoma	28	2.52%	\$1,098,744	1.39%
City & County of San Francisco	22	1.98%	\$789,465	1.00%
San Bernardino	13	1.17%	\$778,343	0.98%
Orange	10	0.90%	\$748,216	0.95%
Tuolumne	1	0.09%	\$489,260	0.62%
San Joaquin	11	0.99%	\$462,377	0.58%
San Mateo	23	2.07%	\$426,138	0.54%
Marin	6	0.54%	\$397,224	0.50%
San Diego	11	0.99%	\$303,542	0.38%
Monterey	4	0.36%	\$229,804	0.29%
Riverside	12	1.08%	\$195,102	0.25%
Yolo	3	0.27%	\$169,767	0.21%
El Dorado	10	0.90%	\$157,632	0.20%
Napa	1	0.09%	\$145,062	0.18%
Ventura	4	0.36%	\$141,962	0.18%
Santa Barbara	3	0.27%	\$103,404	0.13%
Calaveras	3	0.27%	\$69,506	0.09%
Butte	2	0.18%	\$69,363	0.09%
Madera	2	0.18%	\$62,600	0.08%
Santa Cruz	3	0.27%	\$10,181	0.01%
Out of State	216	19.42%	\$12,579,372	15.90%
Out of Country	2	0.18%	\$36,287	0.05%
Total	1,112	100.00%	\$79,113,600	100.00%



III. Summary

During the study period, the City awarded 1,665 construction, professional services, and goods and services prime contracts valued at \$257,721,172. The City awarded 39.04% of prime contracts and 59.71% of dollars to businesses domiciled within the market area.

Table 5.6 presents an overview of the number of construction, professional services, and goods and services prime contracts the City awarded and the dollars spent in the market area.

Construction Prime Contracts: 59 or 52.21% of construction prime contracts were awarded to market area businesses. Construction prime contracts in the market area accounted for \$96,509,904 or 75.85% of the total construction prime contract dollars.

Professional Services Prime Contracts: 182 or 41.36% of professional services prime contracts were awarded to market area businesses. Professional services prime contracts in the market area accounted for \$29,959,433 or 58.32% of the total professional services prime contract dollars.

Goods and Services Prime Contracts: 409 or 36.78% of goods and services prime contracts were awarded to market area businesses. Goods and services prime contracts in the market area accounted for \$27,413,507 or 34.65% of the total goods and services prime contract dollars.

Table 5.5: City of Berkeley Contract Distribution

Geographic Area	Number of Contracts	Percent of Contracts	Total Dollars	Percent of Dollars
Combined Industries				
Market Area	650	39.04%	\$153,882,845	59.71%
Outside Market Area	1,015	60.96%	\$103,838,328	40.29%
TOTAL	1,665	100.00%	\$257,721,172	100.00%
Construction				
Market Area	59	52.21%	\$96,509,904	75.85%
Outside Market Area	54	47.79%	\$30,727,035	24.15%
TOTAL	113	100.00%	\$127,236,940	100.00%
Professional Services				
Market Area	182	41.36%	\$29,959,433	58.32%
Outside Market Area	258	58.64%	\$21,411,199	41.68%
TOTAL	440	100.00%	\$51,370,633	100.00%
Goods and Services				
Market Area	409	36.78%	\$27,413,507	34.65%
Outside Market Area	703	63.22%	\$51,700,093	65.35%
TOTAL	1,112	100.00%	\$79,113,600	100.00%



CHAPTER 6: Prime Contractor and Subcontractor Availability Analysis

I. Introduction

According to *City of Richmond v. J.A. Croson Co. (Croson)*, availability is defined as the number of businesses in the jurisdiction’s market area that are ready, willing, and able to provide the goods or services procured by the jurisdiction.²⁶⁰ To determine the availability of Minority and Woman-owned Business Enterprises²⁶¹ (M/WBE) and non-minority male-owned businesses (non-M/WBE) within the jurisdiction’s market area, businesses domiciled within the market area need to be enumerated. As defined in *Chapter 5: Market Area Analysis*, the market area is the jurisdictional boundaries of Alameda, Albany, Berkeley, Emeryville, Hayward, Piedmont, Oakland, and San Leandro.

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

II. Prime Contractor Availability Data Sources

A. Identification of Willing Businesses Within the Market Area

To identify willing and able businesses in the boundaries of Alameda, Albany, Berkeley, Emeryville, Hayward, Piedmont, Oakland, and San Leandro that provide the construction, professional services, and goods and services contracts that the City of Berkeley (City) procures, four main sources of information were used: (1) City records, including vendors lists, (2) government certification directories, (3) business owners who attended the City’s Disparity Study business community meetings, and (4) business and trade association membership lists. Only businesses on the membership lists that were determined to be willing, ready, and able were added to the availability list. Any business listed in more than one source was counted only once in the relevant industry. If a business were willing and able to provide goods or services in more than one industry, it was listed separately in each industry.

The four sources were ranked according to their reliability in determining a business’ willingness to contract with the City. The highest rank was assigned to the utilized businesses, bidders, and

²⁶⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁶¹ Hereinafter referred to as Minority and Caucasian female-owned businesses in the statistical tables.



vendors. Government certification lists ranked second, community meeting attendees ranked third, and business and trade association membership lists ranked fourth. Therefore, the first document used to build the availability database was the City’s utilized businesses. Bidders and vendor lists were then appended to the availability database. Businesses identified from government certification agencies were thereafter appended. The certification lists included small, minority, and woman-owned businesses. The business community meeting registration list was appended to the availability list. Businesses identified from association membership lists that also affirmed their willingness through a survey were also appended. The business associations included trade organizations, professional organizations, and chambers of commerce.

B. Prime Contractor Sources

Outreach to business associations in the market area was performed to identify and secure business membership directories. Table 6.1 lists the City sources, certification directories, and business association listings secured through the research effort.

Table 6.1: Prime Contractor Availability Data Sources

Source	Type of Information
City of Berkeley Records	
Contracts Information-2020-1021	M/WBE and non-M/WBE
Tyler Munis ERP 6.30.2020	M/WBE and non-M/WBE
IBM Contracts	M/WBE and non-M/WBE
POs_thru_6.30.2020	M/WBE and non-M/WBE
Government Certification Directories	
Alameda County Small, Local and Emerging Business (SLEB) Program	M/WBE and non-M/WBE
California Department of Transportation Office of Business & Economic Opportunity DBE Program	M/WBE
City of Oakland Small Local Business Enterprise Certification Program	M/WBE and non-M/WBE
City and County of San Francisco, Directory of LBE, LBE-PUC and NPE Certified Firms	M/WBE and non-M/WBE
City of Oakland SLBE Certification Program	M/WBE and non-M/WBE
Contra Costa County SBE Directory	M/WBE and non-M/WBE
Port of Oakland Small Local Business Certification	M/WBE and non-M/WBE
Supplier Clearinghouse - California Public Utilities Commission, Certified Directory	M/WBE and non-M/WBE
U.S. Small Business Administration, Alameda County 8(a)	M/WBE
U.S. Small Business Administration, Alameda County HUBzone	M/WBE and non-M/WBE
U.S. Small Business Administration, Alameda County Small Disadvantaged Business	M/WBE
U.S. Small Business Administration, Alameda County Veteran	M/WBE and non-M/WBE
U.S. Small Business Administration, Alameda County Woman-owned Businesses	M/WBE



Source	Type of Information
Business Association Membership Lists	
Air Conditioning Contractors of America	M/WBE and non-M/WBE
Alameda Chamber of Commerce	M/WBE and non-M/WBE
Albany Chamber of Commerce	M/WBE and non-M/WBE
American Council of Engineering Companies, East Bay Chapter	M/WBE and non-M/WBE
American Institute of Architects East Bay	M/WBE and non-M/WBE
American Institute of Architects, San Francisco Chapter	M/WBE and non-M/WBE
Associated Roofing Contractors of the Bay Area Counties	M/WBE and non-M/WBE
Association of Environmental Contractors	M/WBE and non-M/WBE
Association of Professional Landscape Designers, Bay Area District	M/WBE and non-M/WBE
Bay Area Business Women	M/WBE
Bay Area Organization of Black Owned Businesses Business Directory	M/WBE
Bay Area Sheet Metal and Air Conditioning Contractors' National Association	M/WBE and non-M/WBE
Bayfront Chamber of Commerce	M/WBE and non-M/WBE
Berkeley Chamber of Commerce	M/WBE and non-M/WBE
Black Chamber of Commerce Silicon Valley	M/WBE
Builders Exchange of Alameda County	M/WBE and non-M/WBE
California Association of General Contractors	M/WBE and non-M/WBE
California Land Surveyors Association	M/WBE and non-M/WBE
California Landscape Contractors Association, East Bay Chapter	M/WBE and non-M/WBE
California Landscape Contractors Association, San Francisco Bay Area Chapter	M/WBE and non-M/WBE
California Precast Concrete Association	Non-M/WBE
Castro Valley Chamber of Commerce	M/WBE and non-M/WBE
Cooling Technology Institute	Non-M/WBE
Dimond Business and Professional Association	M/WBE and non-M/WBE
Finishing Contractors Association	M/WBE and non-M/WBE
Floor Covering Institute	M/WBE and non-M/WBE
Golden Gate Business Association	M/WBE and non-M/WBE
Greater Concord Chamber of Commerce	M/WBE and non-M/WBE
Heartland Merchants Association	M/WBE and non-M/WBE
Hispanic Chamber of Commerce Alameda County	M/WBE
Livermore Chamber of Commerce	M/WBE and non-M/WBE
Mason Contractors Association of California	M/WBE and non-M/WBE
Masonry Institute of America	M/WBE and non-M/WBE
National Association of Landscape Professionals	M/WBE and non-M/WBE
National Association of Women Business Owners	M/WBE
National Electrical Contractors Association	M/WBE and non-M/WBE
Newark Chamber of Commerce	M/WBE and non-M/WBE
Northern California Carpenters Regional Council	M/WBE and non-M/WBE



Source	Type of Information
Northern California Engineering Contractors Association	M/WBE and non-M/WBE
Northern California Mechanical Contractors Association	M/WBE and non-M/WBE
Oakland Business Services Organizations Listing	M/WBE and non-M/WBE
Oakland Chinatown Chamber of Commerce	M/WBE and non-M/WBE
Oakley Chamber of Commerce	M/WBE and non-M/WBE
Pile Driving Contractors Association, Pacific Coast Chapter	Non-M/WBE
Pleasant Hill Chamber of Commerce	M/WBE and Non-M/WBE
Pleasanton Chamber of Commerce	M/WBE and non-M/WBE
Plumbing Heating Cooling Contractors Association	M/WBE and Non-M/WBE
Richmond Chamber of Commerce	M/WBE and non-M/WBE
Roofing Contractors Association of California	M/WBE and non-M/WBE
San Francisco Chamber of Commerce	M/WBE and non-M/WBE
San Francisco Electrical Contractors Association, Inc.	M/WBE and non-M/WBE
San Leandro Chamber of Commerce	M/WBE and non-M/WBE
San Ramon Chamber of Commerce	M/WBE and non-M/WBE
Sealant Waterproofing and Restoration Institute	M/WBE and non-M/WBE
Silicon Valley Black Chamber of Commerce	M/WBE
Union City Chamber of Commerce	M/WBE and non-M/WBE
Western Dredging Association	M/WBE and non-M/WBE

C. Determination of Willingness

There were 2,020 unique market area businesses identified from these sources that provided goods or services in one or more of the three industries in the Study. An accounting of the willing businesses enumerated in this research is presented below. A total of 354 unique market area businesses were identified from City records.

1. Government Certification Lists

A total of 1,566 unique market area businesses were added to the availability identified from government certification lists.

2. Business Community Meetings

A total of 36 unique market area businesses were identified from the City's community meetings registration list.

3. Business Association Membership Lists

A total of 564 unique market area businesses, identified from business association membership lists, were surveyed to determine their willingness to contract with the City. Of the 564 surveyed businesses, 8 refused to participate, 105 did not respond, 50 telephone numbers were disconnected,



and 119 businesses completed the survey. Of the 564 surveyed businesses, 48 were deemed willing and added to the availability database.

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

Tables 6.2 through 6.4 present the distribution of willing contractors by source. A distribution of the willing by source also was calculated for each industry. As listed in Table 6.2, 95.23% of the construction businesses identified were derived from the City’s records, other government agencies’ records, and government certification lists. Companies identified through the business association membership lists represent 4.79% of the willing businesses.

Table 6.2: Distribution of Prime Contractor Availability Data Sources, Construction

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	6.29%	16.51%	12.20%
Bidder Lists	2.52%	2.29%	2.39%
Certification Lists	88.05%	75.23%	80.64%
Subtotal	96.86%	94.04%	95.23%
Community Meeting	2.52%	0.46%	1.33%
Willingness Survey	0.63%	5.05%	3.18%
Grand Total*	100.00%	100.00%	100.00%

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



Table 6.3 lists the data sources for the available professional services prime contractors. As noted, 95.95% of the professional services businesses identified were derived from the City’s records, other government agencies’ records, and government certification lists. Companies identified through the business association membership lists represent 3.96% of the willing businesses.

Table 6.3: Distribution of Prime Contractor Availability Data Sources, Professional Services

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	4.28%	16.76%	10.59%
Bidders Lists	0.00%	0.18%	0.09%
Certification Lists	90.88%	79.78%	85.27%
Subtotal	95.16%	96.72%	95.95%
Community Meeting	3.54%	0.55%	2.03%
Willingness Survey	1.12%	2.37%	1.75%
Business Survey	0.19%	0.36%	0.28%
Grand Total*	100.00%	100.00%	100.00%

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



Table 6.4 lists the data sources for the available goods and services prime contractors. As noted, 95.30% of the goods and services businesses identified were derived from the City’s records, other government agencies’ records, and government certification lists. Companies identified through the business association membership lists represent 4.77% of the willing businesses.

Table 6.4: Distribution of Prime Contractor Availability Data Sources, Goods and Services

Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	8.92%	44.18%	31.08%
Bidder Lists	0.74%	0.22%	0.41%
Certification Lists	84.01%	51.87%	63.81%
Subtotal	93.68%	96.26%	95.30%
Community Meeting	4.09%	0.00%	1.52%
Willingness Survey	2.23%	3.30%	2.90%
Business Survey	0.00%	0.44%	0.28%
Grand Total*	100.00%	100.00%	100.00%

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

III. Capacity

The second component of the availability requirement set forth in *Croson* is to assess the capacity or ability of a business to perform the contracts awarded by the jurisdiction.²⁶² Capacity requirements are not delineated in *Croson*, but capacity has been considered in subsequent cases. Specifically, the Third Circuit held certification to be a valid method of defining availability.²⁶³ In *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)*, the court held that utilizing a list of certified contractors was a rational approach to identify qualified, willing firms.²⁶⁴ The court stated that “[a]n analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach [of qualification].”²⁶⁵ As noted in *Philadelphia*, “[t]he issue of qualifications can be approached at different levels of specificity[.]”²⁶⁶ Researchers have attempted to define capacity by profiling the age of the

²⁶² *Croson*, 488 U.S. 469.

²⁶³ *Contractors Ass’n of E. Pa.*, 91 F.3d at 603.

²⁶⁴ *Contractors Ass’n of E. Pa.*, 91 F.3d at 603.

²⁶⁵ *Id.* at 603; see also, *Concrete Works IV*, 321 F.3d at 966 (noting a less sophisticated method to calculate availability does not render a disparity study flawed).

²⁶⁶ *Contractors Ass’n of E. Pa.*, 91 F.3d at 610.



business, education of the business owner, revenue, number of employees, and bonding limits using census data. However, these conventional indices are themselves impacted by race and gender-based discrimination.²⁶⁷

Mason Tillman used five methods to compare the capacity of M/WBEs to similarly situated non-minority male-owned businesses, using five measures that controlled for the impact of race and gender discrimination:

1. Review of the distribution of contracts to determine the size of the contracts that the City awarded.
2. Identification of the largest contracts awarded to M/WBEs.
3. A frequency distribution of City contracts awarded to M/WBEs and Caucasian male-owned firms.
4. Threshold analysis that limited the range of the formal prime contracts to be analyzed by eliminating outliers.
5. Assessment of capacity-related economic factors of M/WBEs and Caucasian male-owned businesses using the results of the capacity eSurvey.

A. Prime Contract Size Distribution

All City contracts were ordered by the size of the payment to determine the distribution of the contracts. The purpose of this distribution is to gauge the capacity required to perform the City's contracts. In Table 6.5, contract payments in the three industries were grouped into nine ranges²⁶⁸ and are presented by non-minority females, non-minority males, minority females, and minority males.

The data revealed that most of the prime contract payments made by the City were small. Table 6.5 shows that 80.60% of the prime contract payments made by the City were less than \$100,000. Additionally, 89.97% were less than \$250,000, 94.65% were less than \$500,000, 97.48% were less than \$1,000,000, and 99.22% were less than \$3,000,000. Only 0.78% of the prime contract payments were valued at \$3,000,000 or greater.



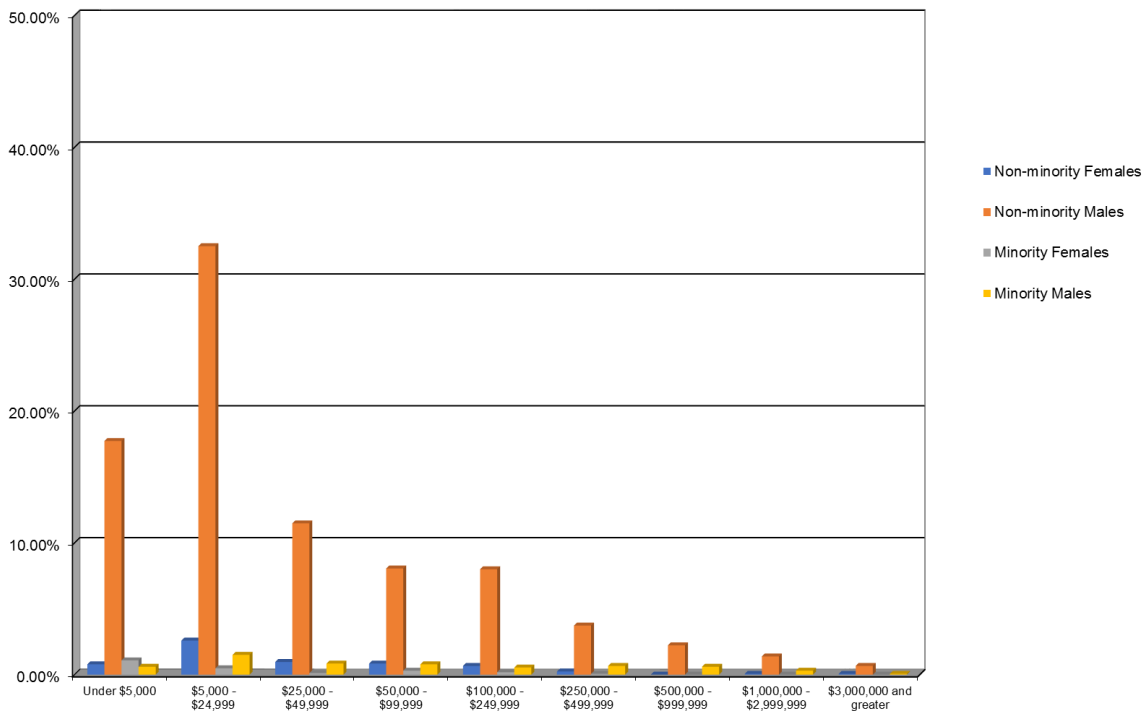
²⁶⁷ Blanchflower, D.G., Levine, P.B., and Zimmerman, D.J. (2003). "Discrimination in the Small-Business Credit Market," *The Review of Economics and Statistics*. Cambridge, MA: MIT Press, 85(4).

²⁶⁸ The nine-dollar ranges are \$5,000 and less; \$5,000 - \$24,999; \$25,000 - \$49,999; \$50,000 - \$99,999; \$100,000 - \$249,999; \$250,000 - \$499,999; \$500,000 - \$999,999; \$1,000,000 - \$2,999,999; and \$3,000,000 and greater.

**Table 6.5: All Industry Contracts by Size
January 1, 2016 to December 31, 2019**

Size	Non-minority				Minority				Total	
	Females		Males		Females		Males			
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent
Under \$5,000	13	0.78%	295	17.72%	18	1.08%	10	0.60%	336	20.18%
\$5,000 - \$24,999	43	2.58%	541	32.49%	8	0.48%	25	1.50%	617	37.06%
\$25,000 - \$49,999	16	0.96%	191	11.47%	2	0.12%	14	0.84%	223	13.39%
\$50,000 - \$99,999	14	0.84%	134	8.05%	5	0.30%	13	0.78%	166	9.97%
\$100,000 - \$249,999	11	0.66%	133	7.99%	3	0.18%	9	0.54%	156	9.37%
\$250,000 - \$499,999	4	0.24%	62	3.72%	1	0.06%	11	0.66%	78	4.68%
\$500,000 - \$999,999	0	0.00%	37	2.22%	0	0.00%	10	0.60%	47	2.82%
\$1,000,000 - \$2,999,999	1	0.06%	23	1.38%	0	0.00%	5	0.30%	29	1.74%
\$3,000,000 and greater	1	0.06%	11	0.66%	0	0.00%	1	0.06%	13	0.78%
Total	103	6.19%	1,427	85.71%	37	2.22%	98	5.89%	1,665	100.00%

**Chart 6.1: All Industry Contracts by Size
January 1, 2016 to December 31, 2019**



The size of the City’s prime contracts is a determinant of the capacity that a willing business needs to be competitive at the prime contract level. The fact that more than 80.60% of the City’s contracts are less than \$100,000 illustrates that the capacity needed to perform a significant number of the City’s contracts is not considerable.

B. Largest M/WBE Prime Contracts Awarded by Industry

Table 6.6 shows that M/WBEs demonstrated the capacity to perform contracts as large as \$3,926,265 in construction, \$4,295,946 in professional services, and \$1,357,843 in goods and services. The size of the largest prime contracts that the City paid to M/WBEs illustrates that M/WBEs have the capacity to perform substantial formal prime contracts.

Table 6.6: Largest Prime Contract Payments by the City of Berkeley to M/WBEs

Ethnic/Gender Group	Construction	Professional Services	Goods and Services
African American Female	----	\$9,504	----
African American Male	\$938,897	\$70,000	----
Asian Pacific American Female	----	\$182,941	\$60,421
Asian Pacific American Male	\$865,057	\$1,357,843	\$480,462
Asian Indian American Female	----	\$441,408	\$6,862
Asian Indian American Male	----	\$899,785	----
Hispanic American Female	\$150,000	\$100,874	\$56,223
Hispanic American Male	\$3,926,265	\$525,820	\$537,618
Native American Female	----	----	----
Native American Male	----	----	----
Caucasian Female	\$125,620	\$4,295,946	\$417,206
Largest Dollar Amounts MBEs	\$3,926,265	\$1,357,843	\$537,618
Largest Dollar Amounts WBEs	\$150,000	\$4,295,946	\$417,206

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

C. Frequency Distribution

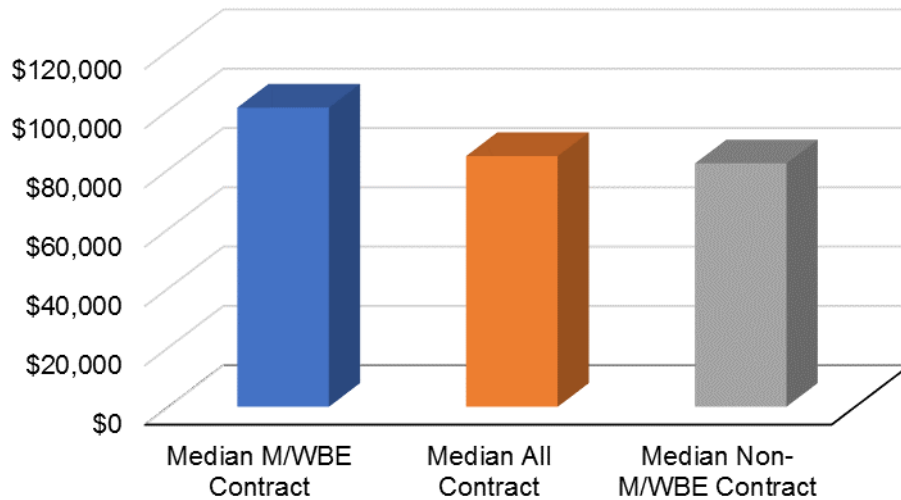
The City’s formal contracts range from \$25,000 to \$38,317,106. A frequency distribution was calculated for all City prime contracts to illustrate the center point of the dataset where the size of a contract marks the midpoint between the smallest and largest contracts. The same distribution was calculated separately for M/WBEs and non-M/WBEs. Within each frequency distribution, the median or center point of the dataset was determined. As shown in Chart 6.2, the center point of all City prime contracts, for all industries, was \$84,549. This center point marks the value at which 50% of contracts were above and below \$84,549. The median prime contract awarded to M/WBEs was \$100,874 and to Caucasian males was \$82,040.



These statistics show the median M/WBE contract value is above the median of all City prime contracts, illustrating that M/WBEs have the capacity to perform a significant number of the prime contracts awarded by the City. As listed in Table 6.6, there are M/WBEs that have the capacity to

perform very large contracts. Furthermore, there are other methods commonly used by prime contractors, such as subcontracting, joint ventures, and staff augmentation, to increase capacity in the presence of contracting opportunities.

Chart 6.2: Median Contract Value



D. Formal Contract Threshold Analysis

As a further measure to ensure that the available businesses have the capacity to perform the contracts analyzed in the disparity analysis, the prime contracts subject to the statistical analysis were limited. As discussed in *Chapter 3: Prime Contractor Utilization Analysis*, the analysis of formal contracts was limited to the awarded contracts with a dollar value less than the 75th percentile plus 1.5 times the interquartile range (IQR). The decision to limit the analysis of disparity to contracts less than the 75th percentile plus 1.5 times the IQR was made to eliminate outliers, which increased the reliability of the statistical findings and reduced the business capacity requirements. Table 6.7 lists the contract distribution for each industry by percentile.



Table 6.7: Threshold Analysis by Size and Industry

Quantiles	All Industries Combined	Construction	Professional Services (including architecture and engineering)	Goods and Services
Minimum	\$25,100	\$25,659	\$25,100	\$25,304
25%	\$45,000	\$143,662	\$48,480	\$38,477
50% Quantile	\$85,505	\$369,874	\$82,449	\$66,578
Mean	\$352,892	\$1,366,448	\$204,195	\$195,837
75%	\$250,000	\$940,000	\$210,000	\$160,000
75%+1.5*IQR	\$540,000	\$2,140,000	\$450,000	\$350,000
Maximum	\$38,317,106	\$38,317,106	\$4,295,946	\$5,400,905

E. Business Capacity Assessment

To assess the relative capacity of the M/WBEs and Caucasian male-owned businesses enumerated in the availability analysis, an assessment of socioeconomic factors was administered to the willing businesses using an eSurvey.

1. Profile of Respondents

Of the business capacity responses, 20.00% were African American, 5.45% were Asian Pacific American, 5.45% were Asian Indian American, 14.55% were Hispanic American, 1.82% were Native American, and 52.73% were Caucasian American. For the gender breakdown, 67.27% were completed by females of all ethnicities and 32.73% were completed by males of all ethnicities.

Table 6.8: Ethnicity and Gender of Businesses

Response	African American	Asian Pacific American	Asian Indian American	Hispanic American	Native American	Caucasian	Total
Female	10.91%	5.45%	3.64%	9.09%	1.82%	36.36%	67.27%
Male	9.09%	0.00%	1.82%	5.45%	0.00%	16.36%	32.73%
Total	20.00%	5.45%	5.45%	14.55%	1.82%	52.73%	100.00%

Due to the limited number of responses, ethnic groups were combined and analyzed as “minority males” and “minority females.” As listed in Table 6.9, 20.00% of businesses provided construction services, 67.27% of businesses provided professional services, and 12.73% of businesses provided goods and services.



Table 6.9: Business Owners' Ethnicity, Gender and Primary Industry

Industry	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Construction	1.82%	9.09%	3.64%	5.45%	20.00%
Professional Services	18.18%	7.27%	30.91%	10.91%	67.27%
Goods and Services	10.91%	0.00%	1.82%	0.00%	12.73%
Total	30.91%	16.36%	36.36%	16.36%	100.00%

2. Capacity Assessment Findings

Table 6.10 lists business annual gross revenue, which shows that 54.17% of businesses earned \$500,000 and under, 12.50% earned \$500,001 to \$1,000,000, 18.75% earned \$1,000,001 to \$3,000,000, 4.17% earned \$3,000,001 to \$5,000,000, 6.25% earned \$5,000,001 to \$10,000,000, and 4.17% earned over \$10,000,000.

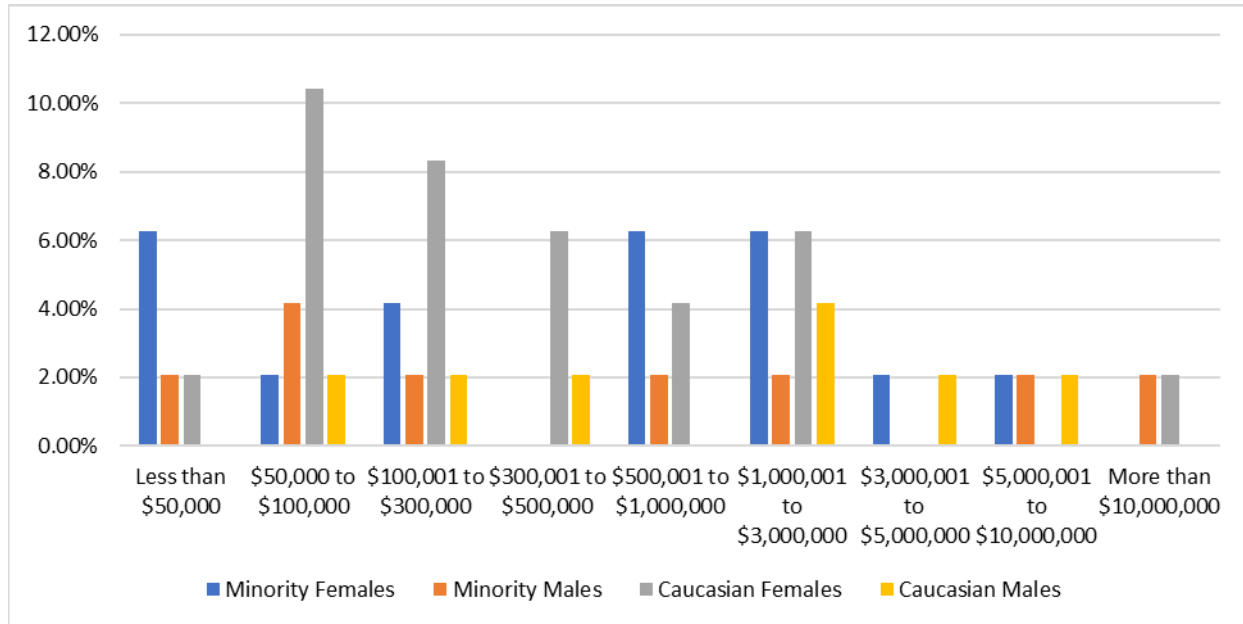
Table 6.10: Annual Gross Revenue

Revenue	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
Less than \$50,000	6.25%	2.08%	2.08%	0.00%	10.42%
\$50,000 to \$100,000	2.08%	4.17%	10.42%	2.08%	18.75%
\$100,001 to \$300,000	4.17%	2.08%	8.33%	2.08%	16.67%
\$300,001 to \$500,000	0.00%	0.00%	6.25%	2.08%	8.33%
\$500,001 to \$1,000,000	6.25%	2.08%	4.17%	0.00%	12.50%
\$1,000,001 to \$3,000,000	6.25%	2.08%	6.25%	4.17%	18.75%
\$3,000,001 to \$5,000,000	2.08%	0.00%	0.00%	2.08%	4.17%
\$5,000,001 to \$10,000,000	2.08%	2.08%	0.00%	2.08%	6.25%
More than \$10,000,000	0.00%	2.08%	2.08%	0.00%	4.17%
Total	29.17%	16.67%	39.58%	14.58%	100.00%

Chart 6.3 shows that minority female, minority male, Caucasian female, and Caucasian male revenue is most similar at the \$1,000,000 and under level. This finding infers that the majority of businesses are small, regardless of the ethnicity and gender of the owner.



Chart 6.3: Annual Gross Revenue



As listed in Table 6.11, 54.90% of business had 0 to 5 employees,²⁶⁹ 9.80% had 6 to 10 employees, 17.65% had 11 to 20 employees, 5.88% had 21 to 30 employees, 7.84% had 31 to 50 employees, and 3.92% had more than 50 employees.

Table 6.11: Number of Employees

Number of Employees	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
0-5 Employees	15.69%	3.92%	31.37%	3.92%	54.90%
6-10 Employees	3.92%	1.96%	1.96%	1.96%	9.80%
11-20 Employees	5.88%	3.92%	3.92%	3.92%	17.65%
21-30 Employees	0.00%	0.00%	1.96%	3.92%	5.88%
31-50 Employees	1.96%	3.92%	0.00%	1.96%	7.84%
Over 50 Employees	1.96%	1.96%	0.00%	0.00%	3.92%
Total	29.41%	15.69%	39.22%	15.69%	100.00%

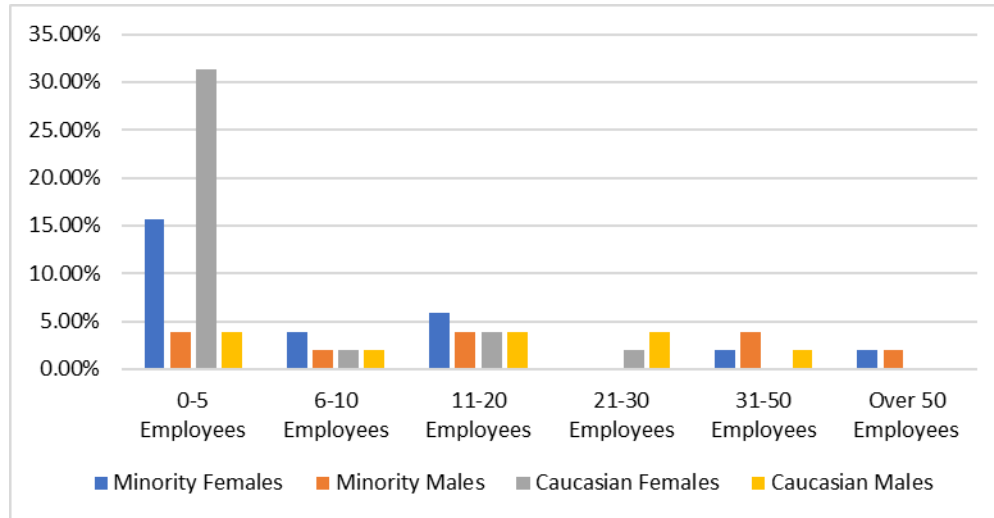
Chart 6.4 shows that most businesses are small, including both M/WBEs and Caucasian male-owned businesses. As reported in the eSurvey, 82.35% of all businesses are small, employing 20 or fewer persons. The responding businesses are smaller than most Alameda County businesses, as reported by the United States Census Survey of Business Owners. The Census reports that 12.13% of businesses in the boundaries of Alameda, Albany, Berkeley, Emeryville, Hayward, Piedmont, Oakland, and San Leandro employ 20 or fewer persons.²⁷⁰



²⁶⁹ Business owners are not counted as employees.

²⁷⁰ United States Census Bureau, 2012 Survey of Business Owners.

Chart 6.4: Number of Employees



One consideration of capacity as discussed in the caselaw considered the ability to bid and perform multiple contracts.²⁷¹ This factor relates to the human resources and capital resources available to perform multiple contracts concurrently. Table 6.12 lists that most businesses, including M/WBEs and Caucasian male-owned businesses, performed multiple concurrent contracts within the previous calendar year. Only 34.78% of businesses reported performing one to five public or private contracts.

Table 6.12: Percent of Annual Contracts

Annual Contracts	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
0 Contracts	6.52%	2.17%	2.17%	0.00%	10.87%
1 to 5 Contracts	8.70%	6.52%	15.22%	4.35%	34.78%
6 to 10 Contracts	2.17%	2.17%	6.52%	2.17%	13.04%
11 to 20 Contracts	2.17%	0.00%	6.52%	0.00%	8.70%
More than 20 Contracts	8.70%	4.35%	10.87%	8.70%	32.61%
Total	28.26%	15.22%	41.30%	15.22%	100.00%

Chart 6.5 shows that most businesses, including M/WBEs and Caucasian male-owned businesses, performed up to 20 contracts, illustrating that M/WBEs and Caucasian male-owned businesses have the capacity to successfully perform multiple contracts concurrently.



²⁷¹ See *Rothe Development Corporation v. U.S. Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001); see also *Rothe Development Corporation v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

Chart 6.5: Number of Contracts

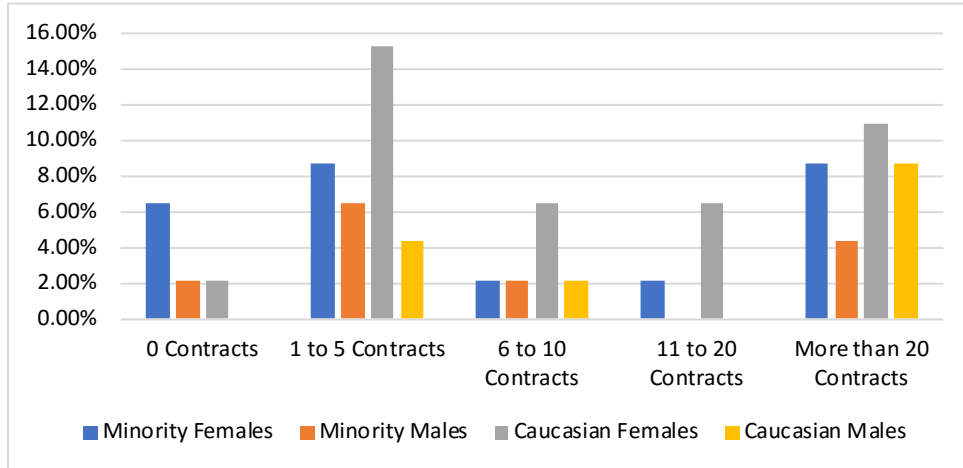


Table 6.13 show that the majority of businesses are under 20 years old (65.45%), illustrating that there are young M/WBEs within the pool of available businesses. Only two minority female businesses are 50 years or older, and none of the minority male businesses are 50 years or older. This finding is consistent with the passage of anti-discrimination legislation, beginning with the Civil Rights Act of 1964, which spawned the 1971 Executive Order 11625. This early legislation applied to federally funded contracts and minimally affected local laws. Local government affirmative action policies were not accelerated until the promulgation of the United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) regulations in 1983. The DBE regulations required states, counties, cities, and transportation agencies to implement affirmative action contracting programs as a condition of USDOT funding.

Table 6.13: Years in Business Operation

Years in Operation	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
5 years and less	7.27%	3.64%	5.45%	3.64%	20.00%
6 -10 years	9.09%	1.82%	3.64%	1.82%	16.36%
11 - 20 years	7.27%	1.82%	16.36%	3.64%	29.09%
21 - 30 years	1.82%	7.27%	3.64%	5.45%	18.18%
31 - 50 years	1.82%	1.82%	7.27%	0.00%	10.91%
More than 50 years	3.64%	0.00%	0.00%	1.82%	5.45%
Total	30.91%	16.36%	36.36%	16.36%	100.00%

Chart 6.6 shows that minority and woman-owned businesses are a growing segment of the contracting market in comparison to Caucasian male-owned businesses. It is important to note, however, that the availability pool includes mature minority and woman-owned businesses with extensive experience in their respective fields.



Chart 6.6: Years in Operation

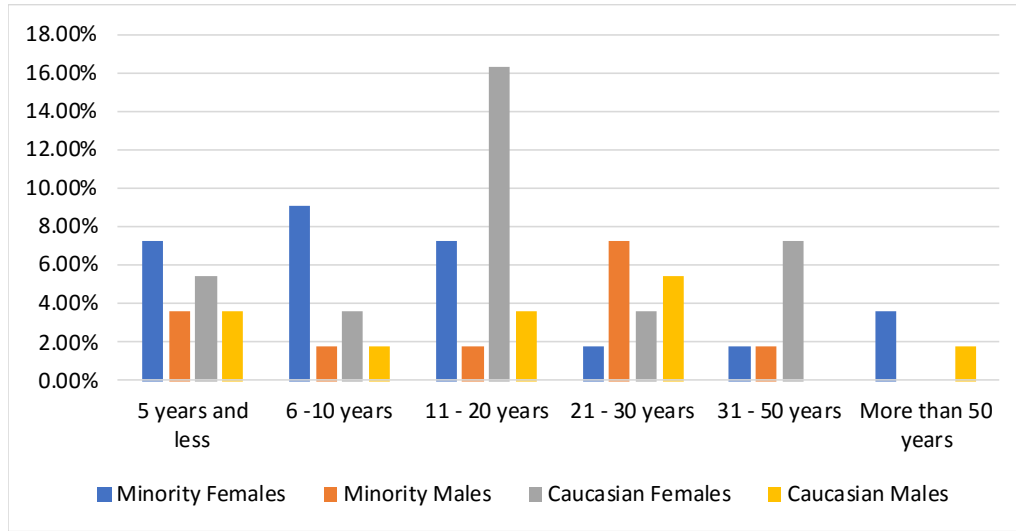


Table 6.14 lists the education of business owners. The data indicate that 28.30% of business owners have a graduate degree.

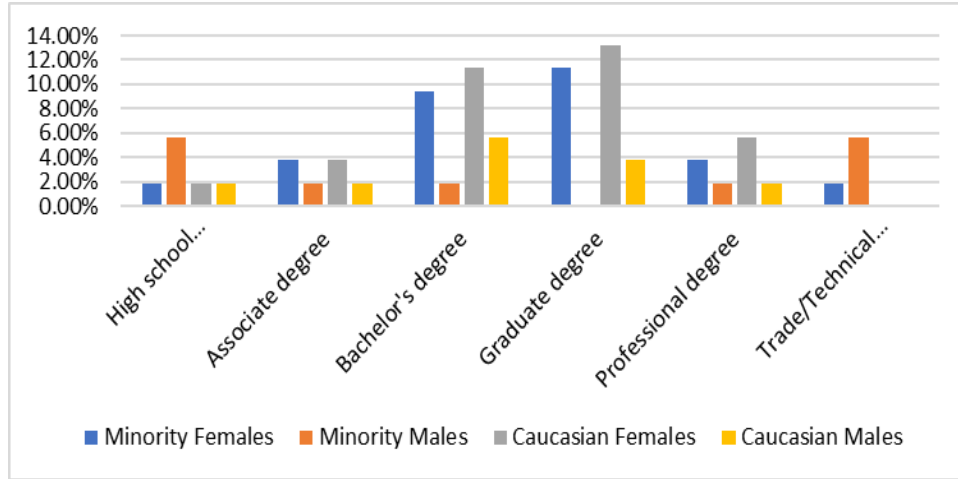
Table 6.14: Education Level of Business Owners

Education	Minority Females	Minority Males	Caucasian Females	Caucasian Males	Total
High school degree or equivalent, e.g. GED	1.89%	5.66%	1.89%	1.89%	11.32%
Associate degree	3.77%	1.89%	3.77%	1.89%	11.32%
Bachelor's degree	9.43%	1.89%	11.32%	5.66%	28.30%
Graduate degree	11.32%	0.00%	13.21%	3.77%	28.30%
Professional degree	3.77%	1.89%	5.66%	1.89%	13.21%
Trade/Technical certificate or degree	1.89%	5.66%	0.00%	0.00%	7.55%
Total	32.08%	16.98%	35.85%	15.09%	100.00%

Chart 6.7 shows that the most common degrees among business owners are a bachelor's degree and a graduate degree. This finding indicates that most business owners, regardless of ethnicity, are educated. 88.68% of business owners have pursued a degree or certification beyond a high school diploma.



Chart 6.7: Educational Attainment



The analysis shows that among similarly situated M/WBEs and Caucasian male-owned businesses, the relative capacity of firms is comparable. Most businesses enumerated in the availability analysis, including M/WBEs and Caucasian males, have the following profile:

- Employ five or fewer persons
- Performed up to 20 public and private contracts concurrently
- Have annual gross revenue of \$500,000 or less
- Operated their business for less than 20 years
- Have a bachelor's or graduate degree

Considering the metrics reviewed in this analysis, Caucasian males are not awarded more contracts because of any single socioeconomic factor or combination of measures. The fact that Caucasian males are awarded more contracts is more likely a function of discrimination in public- and private-sector business practices. The results of this eSurvey are evidence that willing M/WBEs have demonstrated capacity comparable to Caucasian male-owned businesses.



IV. Prime Contractor Availability Analysis

The prime contractor availability analysis is based on the 2,020 willing market area businesses enumerated from the three availability sources described above. The availability of willing market area businesses is presented by ethnicity, gender, and industry in the sections below.

A. Construction Prime Contractor Availability

The distribution of available construction prime contractors is summarized in Table 6.15.

African Americans account for 16.18% of the construction prime contractors in the City's market area.

Asian Pacific Americans account for 5.31% of the construction prime contractors in the City's market area.

Asian Indian Americans account for 0.80% of the construction prime contractors in the City's market area.

Hispanic Americans account for 10.61% of the construction prime contractors in the City's market area.

Native Americans account for 0.80% of the construction prime contractors in the City's market area.

Caucasian Females account for 8.49% of the construction prime contractors in the City's market area.

Non-minority Males account for 57.82% of the construction prime contractors in the City's market area.

Minority Business Enterprises account for 33.69% of the construction prime contractors in the City's market area.

Woman Business Enterprises account for 14.06% of the construction prime contractors in the City's market area.



**Table 6.15: Available Construction Prime Contractors,
January 1, 2016 to December 31, 2019**

Ethnicity	Percent of Businesses
African Americans	16.18%
Asian Pacific Americans	5.31%
Asian Indian Americans	0.80%
Hispanic Americans	10.61%
Native Americans	0.80%
Caucasian Females	8.49%
Non-minority Males	57.82%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	1.59%
African American Males	14.59%
Asian Pacific American Females	2.12%
Asian Pacific American Males	3.18%
Asian Indian American Females	0.27%
Asian Indian American Males	0.53%
Hispanic American Females	1.06%
Hispanic American Males	9.55%
Native American Females	0.53%
Native American Males	0.27%
Caucasian Females	8.49%
Non-minority Males	57.82%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	33.69%
Woman Business Enterprises	14.06%



B. Professional Services Prime Contractor Availability

The distribution of available professional services prime contractors is summarized in Table 6.16.

African Americans account for 14.00% of the professional services prime contractors in the City's market area.

Asian Pacific Americans account for 9.30% of the professional services prime contractors in the City's market area.

Asian Indian Americans account for 3.41% of the professional services prime contractors in the City's market area.

Hispanic Americans account for 5.06% of the professional services prime contractors in the City's market area.

Native Americans account for 0.46% of the professional services prime contractors in the City's market area.

Caucasian Females account for 17.22% of the professional services prime contractors in the City's market area.

Non-minority Males account for 50.55% of the professional services prime contractors in the City's market area.

Minority Business Enterprises account for 32.23% of the professional services prime contractors in the City's market area.

Woman Business Enterprises account for 30.57% of the professional services prime contractors in the City's market area.



**Table 6.16: Available Professional Services Prime Contractors,
January 1, 2016 to December 31, 2019**

Ethnicity	Percent of Businesses
African Americans	14.00%
Asian Pacific Americans	9.30%
Asian Indian Americans	3.41%
Hispanic Americans	5.06%
Native Americans	0.46%
Caucasian Females	17.22%
Non-minority Males	50.55%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	6.26%
African American Males	7.73%
Asian Pacific American Females	3.68%
Asian Pacific American Males	5.62%
Asian Indian American Females	1.01%
Asian Indian American Males	2.39%
Hispanic American Females	2.03%
Hispanic American Males	3.04%
Native American Females	0.37%
Native American Males	0.09%
Caucasian Females	17.22%
Non-minority Males	50.55%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	32.23%
Woman Business Enterprises	30.57%



C. Goods and Services Prime Contractor Availability

The distribution of available goods and services prime contractors is summarized in Table 6.17.

African Americans account for 12.71% of the goods and services prime contractors in the City's market area.

Asian Pacific Americans account for 6.22% of the goods and services prime contractors in the City's market area.

Asian Indian Americans account for 1.80% of the goods and services prime contractors in the City's market area.

Hispanic Americans account for 6.77% of the goods and services prime contractors in the City's market area.

Native Americans account for 0.41% of the goods and services prime contractors in the City's market area.

Caucasian Females account for 9.25% of the goods and services prime contractors in the City's market area.

Non-minority Males account for 62.85% of the goods and services prime contractors in the City's market area.

Minority Business Enterprises account for 27.90% of the goods and services prime contractors in the City's market area.

Woman Business Enterprises account for 19.75% of the goods and services prime contractors in the City's market area.



**Table 6.17: Available Goods and Services Prime Contractors,
January 1, 2016 to December 31, 2019**

Ethnicity	Percent of Businesses
African Americans	12.71%
Asian Pacific Americans	6.22%
Asian Indian Americans	1.80%
Hispanic Americans	6.77%
Native Americans	0.41%
Caucasian Females	9.25%
Non-minority Males	62.85%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	4.70%
African American Males	8.01%
Asian Pacific American Females	2.21%
Asian Pacific American Males	4.01%
Asian Indian American Females	0.69%
Asian Indian American Males	1.10%
Hispanic American Females	2.62%
Hispanic American Males	4.14%
Native American Females	0.28%
Native American Males	0.14%
Caucasian Females	9.25%
Non-minority Males	62.85%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	27.90%
Woman Business Enterprises	19.75%



V. Subcontractor Availability Analysis

A. Source of Willing and Able Subcontractors

All available prime contractors were included in the calculation of the subcontractor availability. Additional subcontractors in the City’s market area were identified using the source in Table 6.18.

Subcontractor availability was not calculated for goods and other services, as the subcontracting activity in that industry was limited.

Table 6.18: Unique Subcontractor Availability Data Source

Type Record	Type Information
Subcontract awards provided by the City	M/WBEs and non-M/WBEs
Prime Expenditure Survey	M/WBEs and non-M/WBEs
Records Online	M/WBEs and non-M/WBEs

B. Determination of Willingness and Capacity

Subcontractor availability was limited to the utilized prime contractors and the unique businesses utilized as subcontractors. Therefore, the determination of willingness and capacity was achieved. Furthermore, *Croson* does not require a separate measure of subcontractor capacity in the analysis of subcontractor availability.



C. Construction Subcontractor Availability

The distribution of available construction subcontractors is summarized in Table 6.19 below.

African Americans account for 16.28% of the construction subcontractors in the City's market area.

Asian Pacific Americans account for 5.50% of the construction subcontractors in the City's market area.

Asian Indian Americans account for 0.92% of the construction subcontractors in the City's market area.

Hispanic Americans account for 10.09% of the construction subcontractors in the City's market area.

Native Americans account for 0.69% of the construction subcontractors in the City's market area.

Caucasian Females account for 8.26% of the construction subcontractors in the City's market area.

Non-minority Males account for 58.26% of the construction subcontractors in the City's market area.

Minority Business Enterprises account for 33.49% of the construction subcontractors in the City's market area.

Woman Business Enterprises account for 14.45% of the construction subcontractors in the City's market area.



**Table 6.19: Available Construction Subcontractors,
January 1, 2016 to December 31, 2019**

Ethnicity	Percent of Businesses
African American	16.28%
Asian Pacific American	5.50%
Asian Indian American	0.92%
Hispanic American	10.09%
Native American	0.69%
Caucasian Females	8.26%
Non-minority Males	58.26%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	2.06%
African American Males	14.22%
Asian Pacific American Females	2.06%
Asian Pacific American Males	3.44%
Asian Indian American Females	0.46%
Asian Indian American Males	0.46%
Hispanic American Females	1.15%
Hispanic American Males	8.94%
Native American Females	0.46%
Native American Males	0.23%
Caucasian Females	8.26%
Non-minority Males	58.26%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	33.49%
Woman Business Enterprises	14.45%



D. Professional Services Subcontractor Availability

The distribution of available professional services subcontractors is summarized in Table 6.20 below.

African Americans account for 14.08% of the professional services subcontractors in the City's market area.

Asian Pacific Americans account for 9.13% of the professional services subcontractors in the City's market area.

Asian Indian Americans account for 3.24% of the professional services subcontractors in the City's market area.

Hispanic Americans account for 5.12% of the professional services subcontractors in the City's market area.

Native Americans account for 0.43% of the professional services subcontractors in the City's market area.

Caucasian Females account for 16.55% of the professional services subcontractors in the City's market area.

Non-minority Males account for 51.45% of the professional services subcontractors in the City's market area.

Minority Business Enterprises account for 32.00% of the professional services subcontractors in the City's market area.

Woman Business Enterprises account for 29.78% of the professional services subcontractors in the City's market area.



**Table 6.20: Available Professional Services Subcontractors,
January 1, 2016 to December 31, 2019**

Ethnicity	Percent of Businesses
African American	14.08%
Asian Pacific American	9.13%
Asian Indian American	3.24%
Hispanic American	5.12%
Native American	0.43%
Caucasian Females	16.55%
Non-minority Males	51.45%
TOTAL	100.00%
Ethnicity and Gender	Percent of Businesses
African American Females	6.14%
African American Males	7.94%
Asian Pacific American Females	3.67%
Asian Pacific American Males	5.46%
Asian Indian American Females	0.94%
Asian Indian American Males	2.30%
Hispanic American Females	2.13%
Hispanic American Males	2.99%
Native American Females	0.34%
Native American Males	0.09%
Caucasian Females	16.55%
Non-minority Males	51.45%
TOTAL	100.00%
Minority and Females	Percent of Businesses
Minority Business Enterprises	32.00%
Woman Business Enterprises	29.78%



VI. Summary

This chapter presented the enumeration of willing and able market area businesses by ethnicity, gender, and industry. The capacity of the enumerated businesses was assessed using five methods: (1) a review of the City contract size distribution to identify the capacity needed to perform most City contracts, (2) a determination of the largest contracts the City awarded to M/WBEs, (3) a frequency distribution that defined the median size of contracts awarded to both M/WBE and non-M/WBEs, (4) a threshold analysis that defined the formal contracts that are less than the 75th percentile plus 1.5 times the IQR in order to eliminate outliers and increase the reliability of the statistical findings, and (5) a business capacity analysis that assessed relevant socioeconomic factors in the private sector affecting business formation and revenue.

The findings from these analyses illustrate that M/WBEs have a socioeconomic profile comparable to similarly situated non-minority male-owned businesses and the capacity to perform large City contracts. Minority-owned businesses account for 30.54% of construction, professional services, and goods and services prime contractors. Caucasian female-owned businesses account for 13.22% and non-minority male-owned business account for 56.24%. Minority-owned businesses account for 30.18% of construction and professional services subcontractors, Caucasian female-owned businesses account for 13.47%, and non-minority male-owned businesses account for 56.35%.



CHAPTER 7: Prime Contract Disparity Analysis

I. Introduction

The objective of this chapter is to determine if available Minority and Woman-owned Business Enterprises (M/WBE) contractors were underutilized on City of Berkeley (City) prime contracts during the January 1, 2016 to December 31, 2019 study period. Under a fair and equitable system of awarding prime contracts, the proportion of prime contract dollars awarded to M/WBEs should be relatively close to the corresponding proportion of available M/WBEs²⁷² in the relevant market area. If the ratio of utilized M/WBE prime contractors compared to available M/WBE prime contractors is less than one, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio. This analysis assumes a fair and equitable system.²⁷³ *City of Richmond v. J.A. Croson Co. (Croson)*²⁷⁴ states that an inference of discrimination can be made if the disparity is statistically significant. Under the *Croson* standard, non-minority male-owned businesses (non-M/WBE) are not subjected to a statistical test of underutilization.

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

For parametric and non-parametric analyses, the p-value takes into account the number of contracts, amount of contract dollars, and variation in contract dollars. If the difference between the actual and expected number of contracts and total contract dollars has a p-value equal to or less than 0.05, the difference is statistically significant.²⁷⁵

In the simulation analysis, the p-value takes into account a combination of the distribution formulated from the empirical data and the contract dollar amounts. If the actual contract dollar amount, or actual contract rank, falls below the fifth percentile of the distribution, it denotes a p-value less than 0.05.

²⁷² Availability is defined as the number of ready, willing, and able firms. The methodology for determining willing and able firms is detailed in *Chapter 6: Prime Contractor and Subcontractor Availability Analysis*.

²⁷³ When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100-percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95-percent confidence level is the statistical standard used in physical and social sciences, and is thus used in the present report to determine if an inference of discrimination can be made.

²⁷⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁷⁵ This study does not statistically test the overutilization of minority or gender groups or the underutilization of non-minority males.



Our statistical model employs all three steps simultaneously to each industry. Findings from one of the three methods are reported. If the p-value from any one of the three methods is less than 0.05, the finding is reported in the disparity tables as statistically significant. If the p-value is greater than 0.05, the finding is reported as not statistically significant.

II. Disparity Analysis

A prime contract disparity analysis was performed on the contracts awarded in the construction, professional services (including architecture and engineering), and goods and services industries during the January 1, 2016 to December 31, 2019 study period. The informal thresholds were defined according to the City’s procurement policies. The informal thresholds for each industry are listed in Table 7.1.

Table 7.1: Informal Thresholds for Analysis by Industry

Industry	Contract Threshold
Construction	\$25,000 and Less
Professional Services	\$25,000 and Less
Goods and Services	\$25,000 and Less

To determine which contracts were outliers, the 1.5 x IQR rule was applied to the prime contracts in each of the three industries. Outliers over the threshold were removed for each industry. The statistical analysis performed to define the formal contract levels analyzed is discussed in *Chapter 3: Prime Contractor Utilization Analysis*. The formal contract levels for each industry are listed in Table 7.2.

Table 7.2: Formal Contract Thresholds for Analysis by Industry

Industry	Contract Threshold
Construction	Between \$25,000 and \$2,140,000
Professional Services	Between \$25,000 and \$450,000
Goods and services	Between \$25,000 and \$350,000



The findings from the methods employed to calculate statistical significance, as discussed on page 7-1, are presented in the subsequent sections. The outcomes of the statistical analyses are presented in the “P-Value” column of the tables. A description of these statistical outcomes, as shown in the disparity tables, is listed in Table 7.3.

Table 7.3: Statistical Outcome Descriptions

P-Value Outcome	Definition of P-Value Outcome
< 0.05 *	This underutilization is statistically significant.
not significant	M/WBEs: This underutilization is not statistically significant. Non-minority males: This overutilization is not statistically significant.
< 0.05 †	This overutilization is statistically significant.
----	While this group was underutilized, there were too few available firms to determine statistical significance.
**	This study does not statistically test the overutilization of minority or gender groups or the underutilization of non-minority males.



A. Disparity Analysis: Informal Prime Contracts by Industry

1. Construction Prime Contracts Valued \$25,000 and Less

The disparity analysis of construction prime contracts valued \$25,000 and less is described below and listed in Table 7.4 and Chart 7.1.

African Americans represent 16.18% of the available construction businesses and received 0.00% of the dollars on construction contracts valued \$25,000 and less. This underutilization is statistically significant.

Asian Pacific Americans represent 5.31% of the available construction businesses and received 0.00% of the dollars on construction contracts valued \$25,000 and less. While this group was underutilized, there were too few available firms to determine statistical significance.

Asian Indian Americans represent 0.80% of the available construction businesses and received 0.00% of the dollars on construction contracts valued \$25,000 and less. While this group was underutilized, there were too few available firms to determine statistical significance.

Hispanic Americans represent 10.61% of the available construction businesses and received 17.90% of the dollars on construction contracts valued \$25,000 and less. This study does not statistically test the overutilization of minority or gender groups.

Native Americans represent 0.80% of the available construction businesses and received 0.00% of the dollars on construction contracts valued \$25,000 and less. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 8.49% of the available construction businesses and received 0.00% of the dollars on construction contracts valued \$25,000 and less. While this group was underutilized, there were too few available firms to determine statistical significance.

Non-minority Males represent 57.82% of the available construction businesses and received 82.10% of dollars on construction contracts valued \$25,000 and less. This overutilization is statistically significant.

Minority Business Enterprises represent 33.69% of the available construction businesses and received 17.90% of the dollars on construction contracts valued \$25,000 and less. This underutilization is not statistically significant.

Woman Business Enterprises represent 14.06% of the available construction businesses and received 0.00% of the dollars on construction contracts valued \$25,000 and less. While this group was underutilized, there were too few available firms to determine statistical significance.



**Table 7.4: Disparity Analysis: Construction Prime Contracts Valued \$25,000 and Less,
January 1, 2016 to December 31, 2019**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$0	0.00%	16.18%	\$25,446	-\$25,446	0.00	< .05 *
Asian Pacific Americans	\$0	0.00%	5.31%	\$8,343	-\$8,343	0.00	---
Asian Indian Americans	\$0	0.00%	0.80%	\$1,251	-\$1,251	0.00	---
Hispanic Americans	\$28,158	17.90%	10.61%	\$16,686	\$11,472	1.69	**
Native Americans	\$0	0.00%	0.80%	\$1,251	-\$1,251	0.00	---
Caucasian Females	\$0	0.00%	8.49%	\$13,349	-\$13,349	0.00	---
Non-minority Males	\$129,106	82.10%	57.82%	\$90,938	\$38,168	1.42	< .05 †
TOTAL	\$157,265	100.00%	100.00%	\$157,265			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	1.59%	\$2,503	-\$2,503	0.00	---
African American Males	\$0	0.00%	14.59%	\$22,943	-\$22,943	0.00	---
Asian Pacific American Females	\$0	0.00%	2.12%	\$3,337	-\$3,337	0.00	---
Asian Pacific American Males	\$0	0.00%	3.18%	\$5,006	-\$5,006	0.00	---
Asian Indian American Females	\$0	0.00%	0.27%	\$417	-\$417	0.00	---
Asian Indian American Males	\$0	0.00%	0.53%	\$834	-\$834	0.00	---
Hispanic American Females	\$0	0.00%	1.06%	\$1,669	-\$1,669	0.00	---
Hispanic American Males	\$28,158	17.90%	9.55%	\$15,017	\$13,141	1.88	**
Native American Females	\$0	0.00%	0.53%	\$834	-\$834	0.00	---
Native American Males	\$0	0.00%	0.27%	\$417	-\$417	0.00	---
Caucasian Females	\$0	0.00%	8.49%	\$13,349	-\$13,349	0.00	---
Non-minority Males	\$129,106	82.10%	57.82%	\$90,938	\$38,168	1.42	< .05 †
TOTAL	\$157,265	100.00%	100.00%	\$157,265			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$28,158	17.90%	33.69%	\$52,978	-\$24,820	0.53	not significant
Woman Business Enterprises	\$0	0.00%	14.06%	\$22,109	-\$22,109	0.00	---

(*) denotes a statistically significant underutilization.

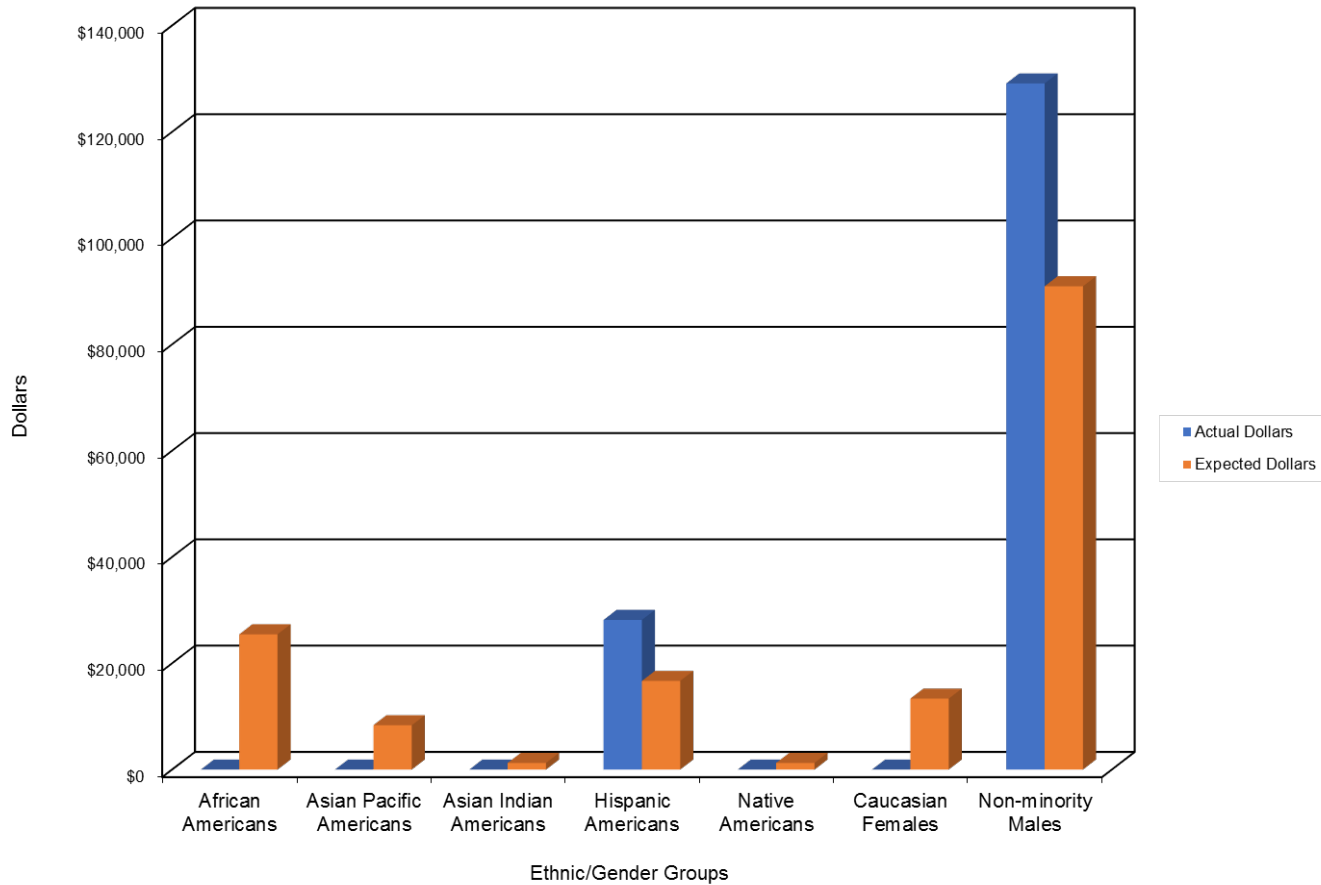
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

(---) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



**Chart 7.1: Disparity Analysis: Construction Prime Contracts Valued \$25,000 and Less,
January 1, 2016 to December 31, 2019**



2. Professional Services Prime Contracts Valued \$25,000 and Less

The disparity analysis of professional services prime contracts valued \$25,000 and less is described below and listed in Table 7.5 and Chart 7.2.

African Americans represent 14.00% of the available professional services businesses and received 1.56% of the dollars on professional services contracts valued \$25,000 and less. This underutilization is statistically significant.

Asian Pacific Americans represent 9.30% of the available professional services businesses and received 6.03% of the dollars on professional services contracts valued \$25,000 and less. This underutilization is not statistically significant.

Asian Indian Americans represent 3.41% of the available professional services businesses and received 1.55% of the dollars on professional services contracts valued \$25,000 and less. This underutilization is not statistically significant.

Hispanic Americans represent 5.06% of the available professional services businesses and received 1.89% of the dollars on professional services contracts valued \$25,000 and less. This underutilization is statistically significant.

Native Americans represent 0.46% of the available professional services businesses and received 0.00% of the dollars on professional services contracts valued \$25,000 and less. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 17.22% of the available professional services businesses and received 15.56% of the dollars on professional services contracts valued \$25,000 and less. This underutilization is not statistically significant.

Non-minority Males represent 50.55% of the available professional services businesses and received 73.41% of the dollars on professional services contracts valued \$25,000 and less. This overutilization is statistically significant.

Minority Business Enterprises represent 32.23% of the available professional services businesses and received 11.03% of the dollars on professional services contracts valued \$25,000 and less. This underutilization is statistically significant.

Woman Business Enterprises represent 30.57% of the available professional services businesses and received 19.22% of the dollars on professional services contracts valued \$25,000 and less. This underutilization is statistically significant.



Table 7.5: Disparity Analysis: Professional Services Prime Contracts Valued \$25,000 and Less, January 1, 2016 to December 31, 2019

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$33,679	1.56%	14.00%	\$302,279	-\$268,600	0.11	< .05 *
Asian Pacific Americans	\$130,192	6.03%	9.30%	\$200,857	-\$70,665	0.65	not significant
Asian Indian Americans	\$33,535	1.55%	3.41%	\$73,581	-\$40,046	0.46	not significant
Hispanic Americans	\$40,823	1.89%	5.06%	\$109,377	-\$68,554	0.37	< .05 *
Native Americans	\$0	0.00%	0.46%	\$9,943	-\$9,943	0.00	---
Caucasian Females	\$336,103	15.56%	17.22%	\$371,883	-\$35,779	0.90	not significant
Non-minority Males	\$1,585,373	73.41%	50.55%	\$1,091,785	\$493,588	1.45	< .05 †
TOTAL	\$2,159,705	100.00%	100.00%	\$2,159,705			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$9,504	0.44%	6.26%	\$135,230	-\$125,726	0.07	< .05 *
African American Males	\$24,175	1.12%	7.73%	\$167,049	-\$142,874	0.14	< .05 *
Asian Pacific American Females	\$47,664	2.21%	3.68%	\$79,547	-\$31,884	0.60	not significant
Asian Pacific American Males	\$82,528	3.82%	5.62%	\$121,309	-\$38,781	0.68	not significant
Asian Indian American Females	\$0	0.00%	1.01%	\$21,875	-\$21,875	0.00	---
Asian Indian American Males	\$33,535	1.55%	2.39%	\$51,706	-\$18,171	0.65	not significant
Hispanic American Females	\$21,800	1.01%	2.03%	\$43,751	-\$21,951	0.50	not significant
Hispanic American Males	\$19,023	0.88%	3.04%	\$65,626	-\$46,603	0.29	not significant
Native American Females	\$0	0.00%	0.37%	\$7,955	-\$7,955	0.00	---
Native American Males	\$0	0.00%	0.09%	\$1,989	-\$1,989	0.00	---
Caucasian Females	\$336,103	15.56%	17.22%	\$371,883	-\$35,779	0.90	not significant
Non-minority Males	\$1,585,373	73.41%	50.55%	\$1,091,785	\$493,588	1.45	< .05 †
TOTAL	\$2,159,705	100.00%	100.00%	\$2,159,705			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$238,229	11.03%	32.23%	\$696,038	-\$457,809	0.34	< .05 *
Woman Business Enterprises	\$415,071	19.22%	30.57%	\$660,241	-\$245,170	0.63	< .05 *

(*) denotes a statistically significant underutilization.

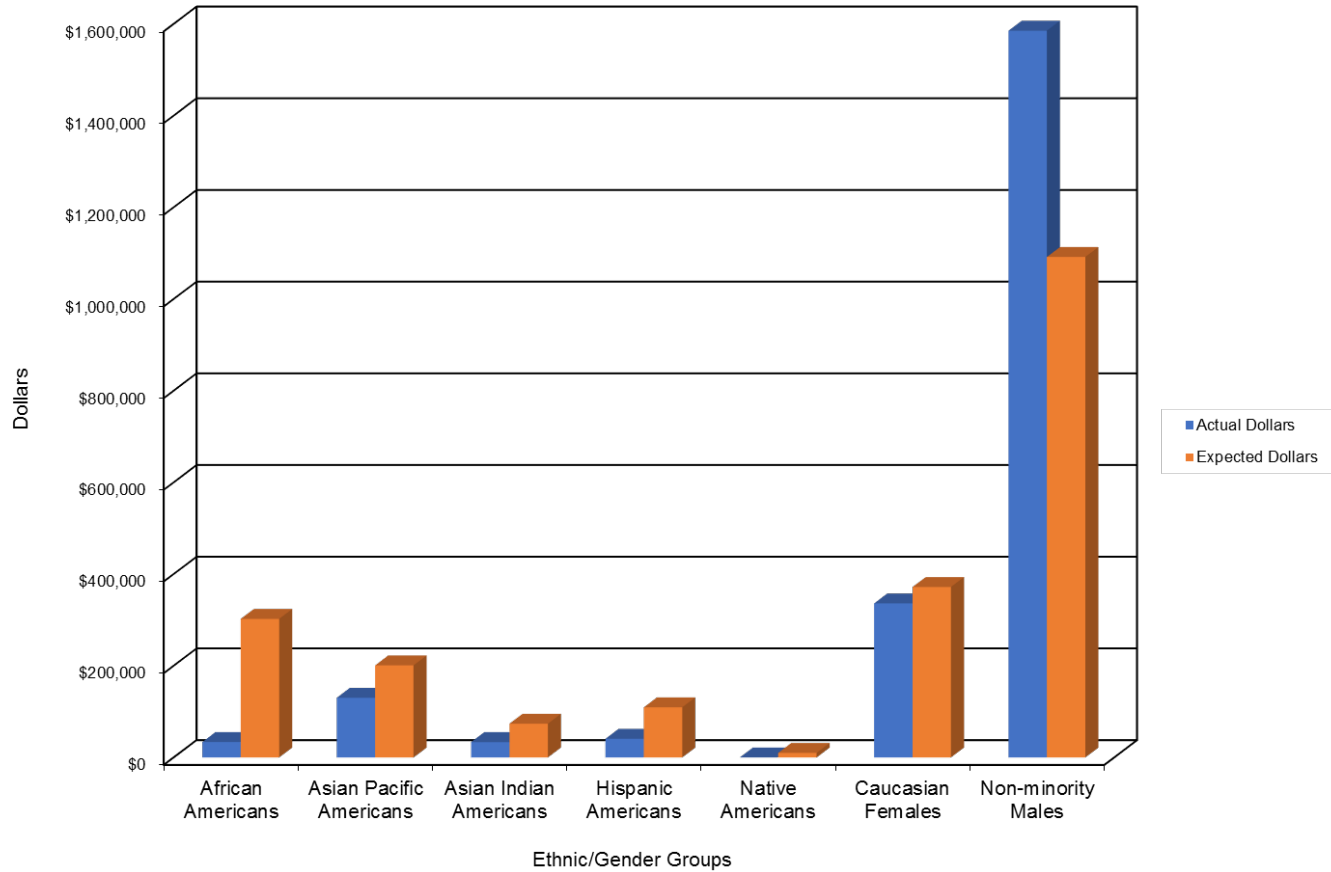
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

(---) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



Chart 7.2: Disparity Analysis: Professional Services Prime Contracts Valued \$25,000 and Less, January 1, 2016 to December 31, 2019



3. Goods and Services Prime Contracts Valued \$25,000 and Less

The disparity analysis of goods and services prime contracts valued \$25,000 and less is described below and listed in Table 7.6 and Chart 7.3.

African Americans represent 12.71% of the available goods and services businesses and received 0.00% of the dollars on goods and services contracts valued \$25,000 and less. This underutilization is statistically significant.

Asian Pacific Americans represent 6.22% of the available goods and services businesses and received 0.65% of the dollars on goods and services contracts valued \$25,000 and less. This underutilization is statistically significant.

Asian Indian Americans represent 1.80% of the available goods and services businesses and received 0.11% of the dollars on goods and services contracts valued \$25,000 and less. This underutilization is statistically significant.

Hispanic Americans represent 6.77% of the available goods and services businesses and received 2.38% of the dollars on goods and services contracts valued \$25,000 and less. This underutilization is statistically significant.

Native Americans represent 0.41% of the available goods and services businesses and received 0.00% of the dollars on goods and services contracts valued \$25,000 and less. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 9.25% of the available goods and services businesses and received 4.66% of the dollars on goods and services contracts valued \$25,000 and less. This underutilization is statistically significant.

Non-minority Males represent 62.85% of the available goods and services businesses and received 92.19% of the dollars on goods and services contracts valued \$25,000 and less. This overutilization is statistically significant.

Minority Business Enterprises represent 27.90% of the available goods and services businesses and received 3.14% of the dollars on goods and services contracts valued \$25,000 and less. This underutilization is statistically significant.

Woman Business Enterprises represent 19.75% of the available goods and services businesses and received 5.75% of the dollars on goods and services contracts valued \$25,000 and less. This underutilization is statistically significant.



**Table 7.6: Disparity Analysis: Goods and Services Prime Contracts Valued \$25,000 and Less,
January 1, 2016 to December 31, 2019**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$0	0.00%	12.71%	\$795,746	-\$795,746	0.00	< .05 *
Asian Pacific Americans	\$40,843	0.65%	6.22%	\$389,224	-\$348,380	0.10	< .05 *
Asian Indian Americans	\$6,862	0.11%	1.80%	\$112,442	-\$105,580	0.06	< .05 *
Hispanic Americans	\$149,061	2.38%	6.77%	\$423,821	-\$274,760	0.35	< .05 *
Native Americans	\$0	0.00%	0.41%	\$25,948	-\$25,948	0.00	---
Caucasian Females	\$292,043	4.66%	9.25%	\$579,511	-\$287,468	0.50	< .05 *
Non-minority Males	\$5,773,364	92.19%	62.85%	\$3,935,482	\$1,837,882	1.47	< .05 †
TOTAL	\$6,262,174	100.00%	100.00%	\$6,262,174			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	4.70%	\$294,080	-\$294,080	0.00	< .05 *
African American Males	\$0	0.00%	8.01%	\$501,666	-\$501,666	0.00	< .05 *
Asian Pacific American Females	\$0	0.00%	2.21%	\$138,391	-\$138,391	0.00	< .05 *
Asian Pacific American Males	\$40,843	0.65%	4.01%	\$250,833	-\$209,990	0.16	< .05 *
Asian Indian American Females	\$6,862	0.11%	0.69%	\$43,247	-\$36,385	0.16	---
Asian Indian American Males	\$0	0.00%	1.10%	\$69,195	-\$69,195	0.00	< .05 *
Hispanic American Females	\$61,298	0.98%	2.62%	\$164,339	-\$103,041	0.37	< .05 *
Hispanic American Males	\$87,764	1.40%	4.14%	\$259,482	-\$171,719	0.34	< .05 *
Native American Females	\$0	0.00%	0.28%	\$17,299	-\$17,299	0.00	---
Native American Males	\$0	0.00%	0.14%	\$8,649	-\$8,649	0.00	---
Caucasian Females	\$292,043	4.66%	9.25%	\$579,511	-\$287,468	0.50	< .05 *
Non-minority Males	\$5,773,364	92.19%	62.85%	\$3,935,482	\$1,837,882	1.47	< .05 †
TOTAL	\$6,262,174	100.00%	100.00%	\$6,262,174			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$196,767	3.14%	27.90%	\$1,747,181	-\$1,550,414	0.11	< .05 *
Woman Business Enterprises	\$360,203	5.75%	19.75%	\$1,236,866	-\$876,663	0.29	< .05 *

(*) denotes a statistically significant underutilization.

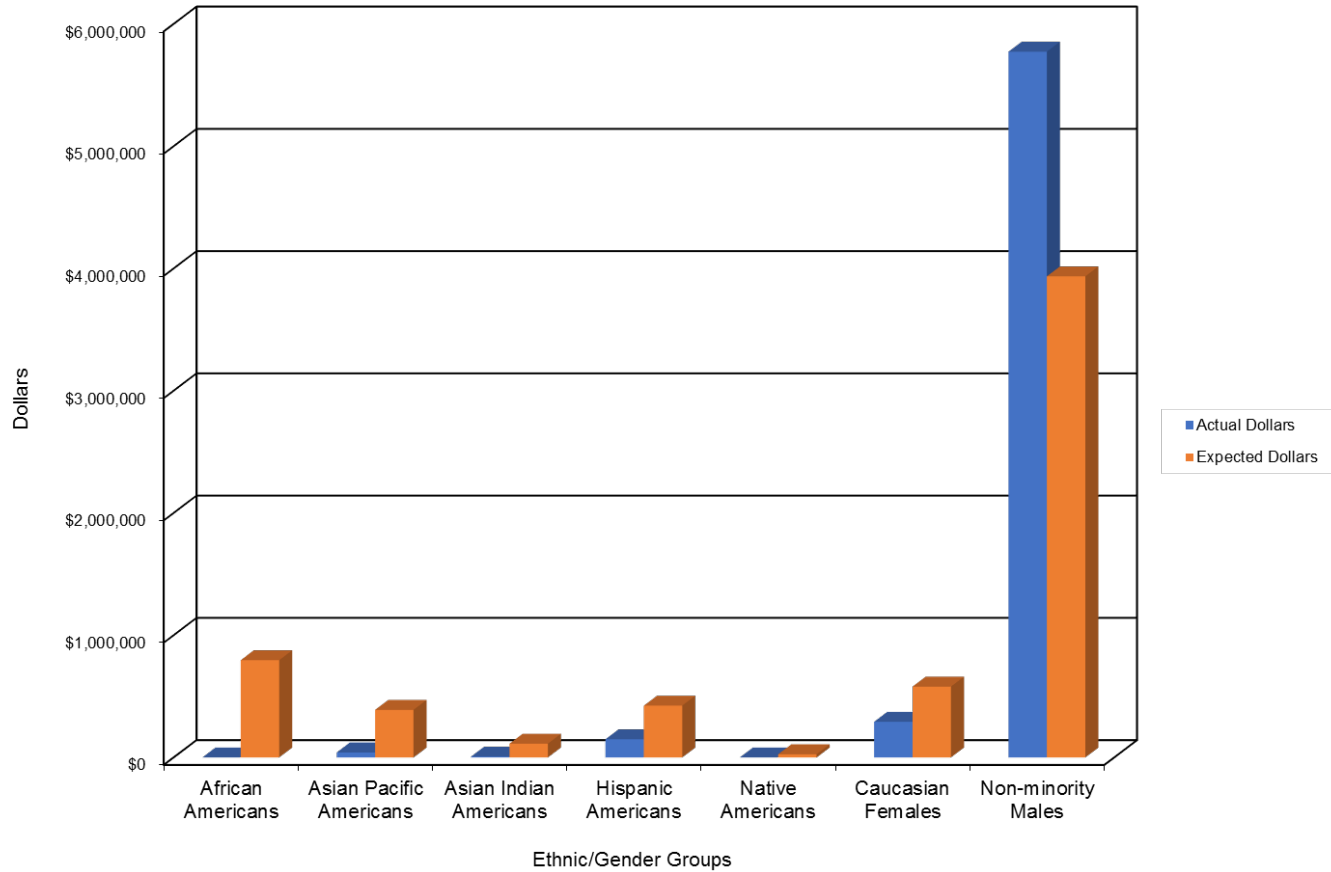
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

(---) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



**Chart 7.3: Disparity Analysis: Goods and Services Prime Contracts Valued \$25,000 and Less,
January 1, 2016 to December 31, 2019**



B. Disparity Analysis: Formal Prime Contracts by Industry

1. Construction Prime Contracts Valued between \$25,000 and \$2,140,000

The disparity analysis of construction prime contracts valued between \$25,000 and \$2,140,000 is described below and listed in Table 7.7 and Chart 7.4.

African Americans represent 16.18% of the available construction businesses and received 2.73% of the dollars on construction contracts valued between \$25,000 and \$2,140,000. This underutilization is statistically significant.

Asian Pacific Americans represent 5.31% of the available construction businesses and received 3.00% of the dollars on construction contracts valued between \$25,000 and \$2,140,000. This underutilization is not statistically significant.

Asian Indian Americans represent 0.80% of the available construction businesses and received 0.00% of the dollars on construction contracts valued between \$25,000 and \$2,140,000. While this group was underutilized, there were too few available firms to determine statistical significance.

Hispanic Americans represent 10.61% of the available construction businesses and received 17.17% of the dollars on construction contracts valued between \$25,000 and \$2,140,000. This study does not statistically test the overutilization of minority or gender groups.

Native Americans represent 0.80% of the available construction businesses and received 0.00% of the dollars on construction contracts valued between \$25,000 and \$2,140,000. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 8.49% of the available construction businesses and received 0.87% of the dollars on construction contracts valued between \$25,000 and \$2,140,000. This underutilization is statistically significant.

Non-minority Males represent 57.82% of the available construction businesses and received 76.23% of the dollars on construction contracts valued between \$25,000 and \$2,140,000. This overutilization is statistically significant.

Minority Business Enterprises represent 33.69% of the available construction businesses and received 22.90% of the dollars on construction contracts valued between \$25,000 and \$2,140,000. This underutilization is not statistically significant.

Woman Business Enterprises represent 14.06% of the available construction businesses and received 1.31% of the dollars on construction contracts valued between \$25,000 and \$2,140,000. This underutilization is statistically significant.



**Table 7.7: Disparity Analysis: Construction Prime Contracts Valued between \$25,000 and \$2,140,000,
January 1, 2016 to December 31, 2019**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$938,897	2.73%	16.18%	\$5,568,655	-\$4,629,758	0.17	< .05 *
Asian Pacific Americans	\$1,030,975	3.00%	5.31%	\$1,825,788	-\$794,813	0.56	not significant
Asian Indian Americans	\$0	0.00%	0.80%	\$273,868	-\$273,868	0.00	---
Hispanic Americans	\$5,910,458	17.17%	10.61%	\$3,651,577	\$2,258,881	1.62	**
Native Americans	\$0	0.00%	0.80%	\$273,868	-\$273,868	0.00	---
Caucasian Females	\$299,436	0.87%	8.49%	\$2,921,261	-\$2,621,826	0.10	< .05 *
Non-minority Males	\$26,236,346	76.23%	57.82%	\$19,901,093	\$6,335,253	1.32	< .05 †
TOTAL	\$34,416,111	100.00%	100.00%	\$34,416,111			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	1.59%	\$547,737	-\$547,737	0.00	---
African American Males	\$938,897	2.73%	14.59%	\$5,020,918	-\$4,082,021	0.19	< .05 *
Asian Pacific American Females	\$0	0.00%	2.12%	\$730,315	-\$730,315	0.00	---
Asian Pacific American Males	\$1,030,975	3.00%	3.18%	\$1,095,473	-\$64,498	0.94	not significant
Asian Indian American Females	\$0	0.00%	0.27%	\$91,289	-\$91,289	0.00	---
Asian Indian American Males	\$0	0.00%	0.53%	\$182,579	-\$182,579	0.00	---
Hispanic American Females	\$150,000	0.44%	1.06%	\$365,158	-\$215,158	0.41	not significant
Hispanic American Males	\$5,760,458	16.74%	9.55%	\$3,286,419	\$2,474,039	1.75	**
Native American Females	\$0	0.00%	0.53%	\$182,579	-\$182,579	0.00	---
Native American Males	\$0	0.00%	0.27%	\$91,289	-\$91,289	0.00	---
Caucasian Females	\$299,436	0.87%	8.49%	\$2,921,261	-\$2,621,826	0.10	< .05 *
Non-minority Males	\$26,236,346	76.23%	57.82%	\$19,901,093	\$6,335,253	1.32	< .05 †
TOTAL	\$34,416,111	100.00%	100.00%	\$34,416,111			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$7,880,329	22.90%	33.69%	\$11,593,756	-\$3,713,427	0.68	not significant
Woman Business Enterprises	\$449,436	1.31%	14.06%	\$4,838,339	-\$4,388,904	0.09	< .05 *

(*) denotes a statistically significant underutilization.

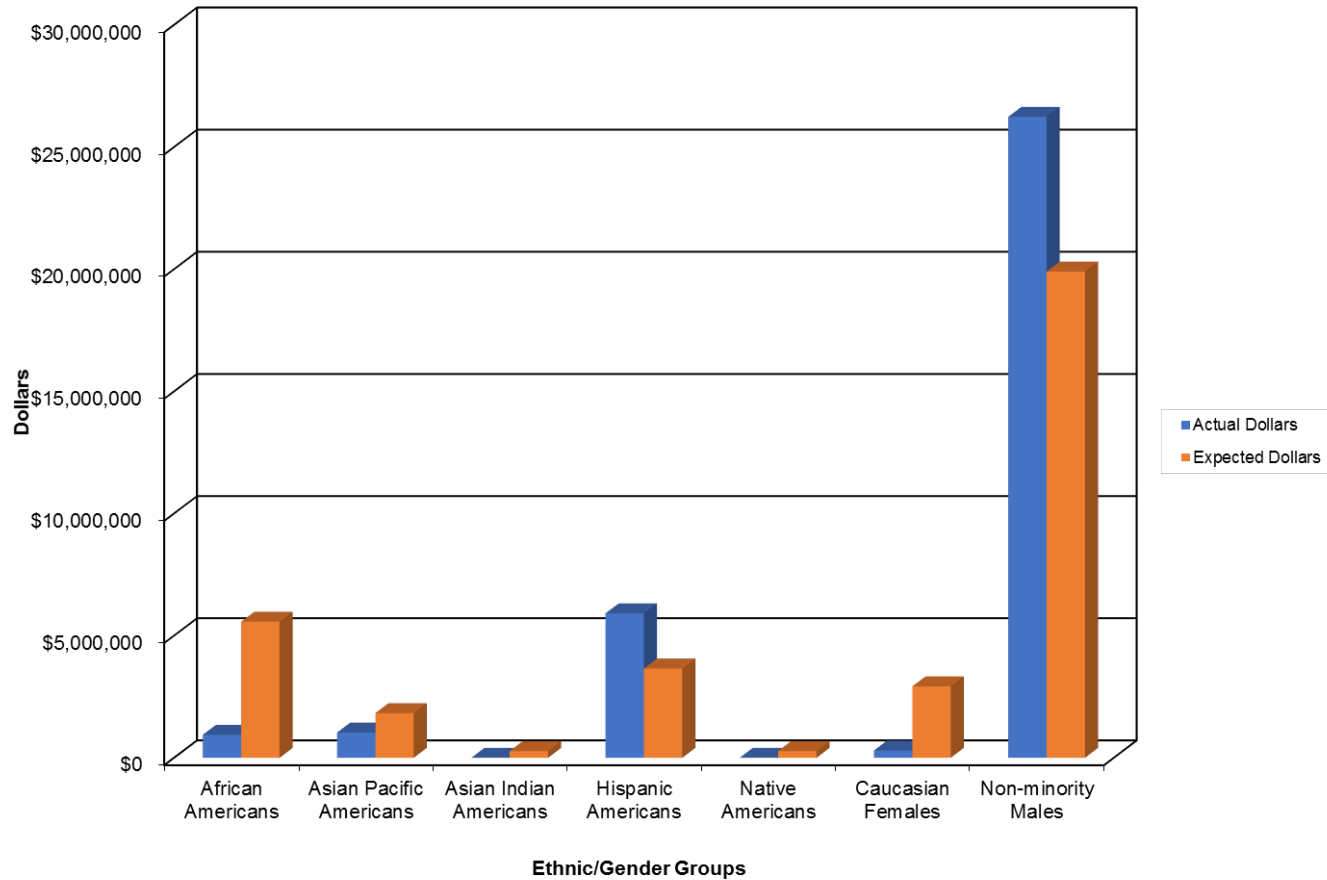
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

(---) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



Chart 7.4: Disparity Analysis: Construction Prime Contracts Valued between \$25,000 and \$2,140,000, January 1, 2016 to December 31, 2019



2. Professional Services Prime Contracts Valued between \$25,000 to \$450,000

The disparity analysis of professional services prime contracts valued between \$25,000 and \$450,000 is described below and listed in Table 7.8 and Chart 7.5.

African Americans represent 14.00% of the available professional services businesses and received 1.27% of the dollars on professional services contracts valued between \$25,000 and \$450,000. This underutilization is statistically significant.

Asian Pacific Americans represent 9.30% of the available professional services businesses and received 5.64% of the dollars on professional services contracts valued between \$25,000 and \$450,000. This underutilization is statistically significant.

Asian Indian Americans represent 3.41% of the available professional services businesses and received 5.66% of the dollars on professional services contracts valued between \$25,000 and \$450,000. This study does not statistically test the overutilization of minority or gender groups.

Hispanic Americans represent 5.06% of the available professional services businesses and received 1.83% of the dollars on professional services contracts valued between \$25,000 and \$450,000. This underutilization is statistically significant.

Native Americans represent 0.46% of the available professional services businesses and received 0.00% of the dollars on professional services contracts valued between \$25,000 and \$450,000. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 17.22% of the available professional services businesses and received 6.59% of the dollars on professional services contracts valued between \$25,000 and \$450,000. This underutilization is statistically significant.

Non-minority Males represent 50.55% of the available professional services businesses and received 79.02% of the dollars on professional services contracts valued between \$25,000 and \$450,000. This overutilization is statistically significant.

Minority Business Enterprises represent 32.23% of the available professional services businesses and received 14.39% of the dollars on professional services contracts valued between \$25,000 and \$450,000. This underutilization is statistically significant.

Woman Business Enterprises represent 30.57% of the available professional services businesses and received 10.23% of the dollars on professional services contracts valued between \$25,000 and \$450,000. This underutilization is statistically significant.



Table 7.8: Disparity Analysis: Professional Services Prime Contracts Valued between \$25,000 and \$450,000, January 1, 2016 to December 31, 2019

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$316,710	1.27%	14.00%	\$3,503,549	-\$3,186,839	0.09	< .05 *
Asian Pacific Americans	\$1,410,919	5.64%	9.30%	\$2,328,016	-\$917,097	0.61	< .05 *
Asian Indian Americans	\$1,417,746	5.66%	3.41%	\$852,838	\$564,909	1.66	**
Hispanic Americans	\$457,076	1.83%	5.06%	\$1,267,731	-\$810,656	0.36	< .05 *
Native Americans	\$0	0.00%	0.46%	\$115,248	-\$115,248	0.00	---
Caucasian Females	\$1,648,980	6.59%	17.22%	\$4,310,287	-\$2,661,307	0.38	< .05 *
Non-minority Males	\$19,780,503	79.02%	50.55%	\$12,654,265	\$7,126,238	1.56	< .05 †
TOTAL	\$25,031,934	100.00%	100.00%	\$25,031,934			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	6.26%	\$1,567,377	-\$1,567,377	0.00	< .05 *
African American Males	\$316,710	1.27%	7.73%	\$1,936,172	-\$1,619,462	0.16	< .05 *
Asian Pacific American Females	\$207,941	0.83%	3.68%	\$921,987	-\$714,046	0.23	< .05 *
Asian Pacific American Males	\$1,202,978	4.81%	5.62%	\$1,406,029	-\$203,051	0.86	not significant
Asian Indian American Females	\$534,879	2.14%	1.01%	\$253,546	\$281,333	2.11	**
Asian Indian American Males	\$882,867	3.53%	2.39%	\$599,291	\$283,576	1.47	**
Hispanic American Females	\$168,049	0.67%	2.03%	\$507,093	-\$339,044	0.33	not significant
Hispanic American Males	\$289,027	1.15%	3.04%	\$760,639	-\$471,612	0.38	< .05 *
Native American Females	\$0	0.00%	0.37%	\$92,199	-\$92,199	0.00	---
Native American Males	\$0	0.00%	0.09%	\$23,050	-\$23,050	0.00	---
Caucasian Females	\$1,648,980	6.59%	17.22%	\$4,310,287	-\$2,661,307	0.38	< .05 *
Non-minority Males	\$19,780,503	79.02%	50.55%	\$12,654,265	\$7,126,238	1.56	< .05 †
TOTAL	\$25,031,934	100.00%	100.00%	\$25,031,934			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$3,602,451	14.39%	32.23%	\$8,067,382	-\$4,464,931	0.45	< .05 *
Woman Business Enterprises	\$2,559,849	10.23%	30.57%	\$7,652,488	-\$5,092,639	0.33	< .05 *

(*) denotes a statistically significant underutilization.

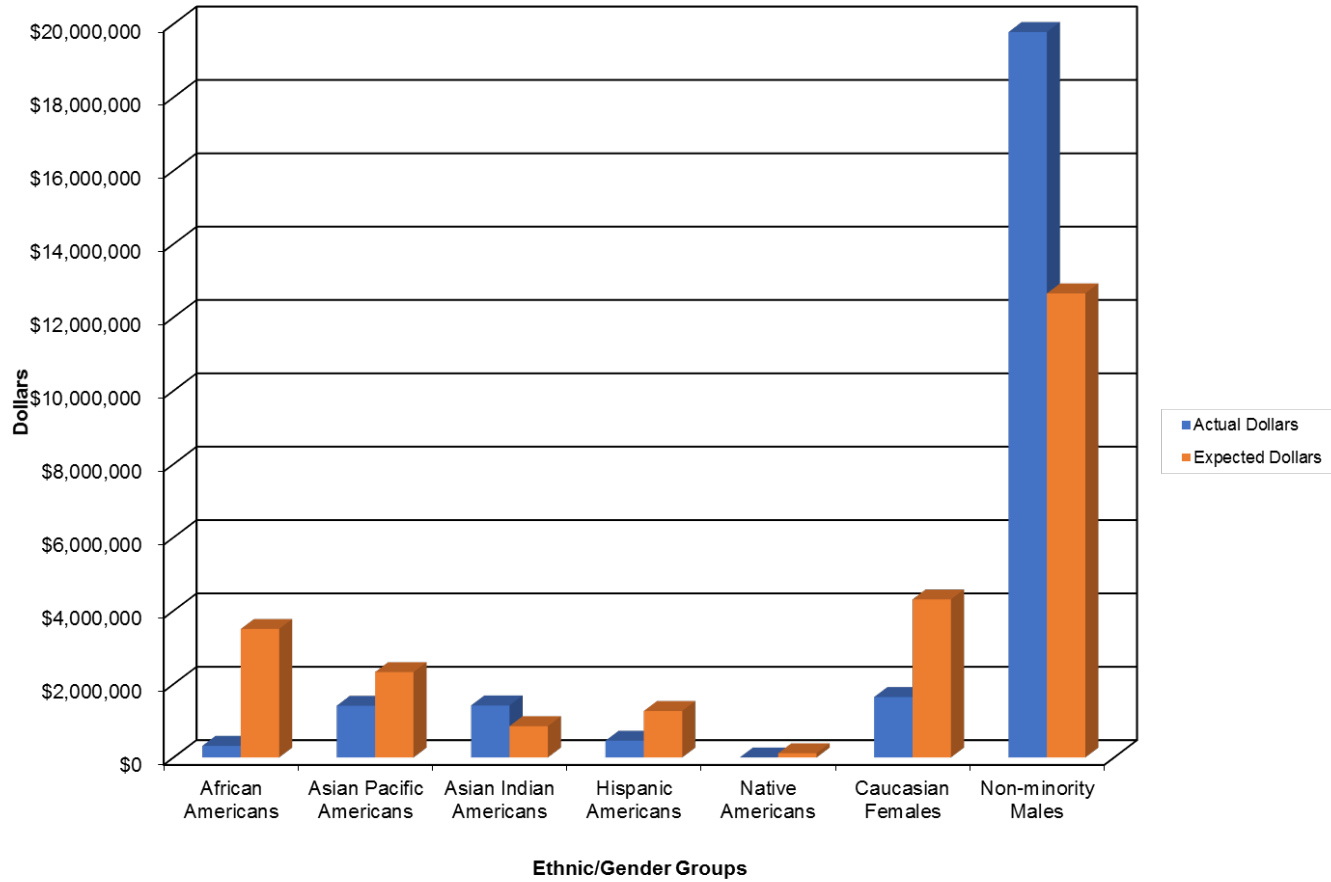
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

(---) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



Chart 7.5: Disparity Analysis: Professional Services Prime Contracts Valued between \$25,000 and \$450,000, January 1, 2016 to December 31, 2019



3. Goods and Services Prime Contracts Valued between \$25,000 and \$350,000

The disparity analysis of goods and services prime contracts valued \$25,000 to \$350,000 is described below and listed in Table 7.9 and Chart 7.6.

African Americans represent 12.71% of the available goods and services businesses and received 0.00% of the dollars on goods and services contracts valued between \$25,000 and \$350,000. This underutilization is statistically significant.

Asian Pacific Americans represent 6.22% of the available goods and services businesses and received 1.04% of the dollars on goods and services contracts valued between \$25,000 and \$350,000. This underutilization is statistically significant.

Asian Indian Americans represent 1.80% of the available goods and services businesses and received 0.00% of the dollars on goods and services contracts valued between \$25,000 and \$350,000. This underutilization is statistically significant.

Hispanic Americans represent 6.77% of the available goods and services businesses and received 1.13% of the dollars on goods and services contracts valued between \$25,000 and \$350,000. This underutilization is statistically significant.

Native Americans represent 0.41% of the available goods and services businesses and received 0.00% of the dollars on goods and services contracts valued between \$25,000 and \$350,000. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 9.25% of the available goods and services businesses and received 7.22% of the dollars on goods and services contracts valued between \$25,000 and \$350,000. This underutilization is statistically significant.

Non-minority Males represent 62.85% of the available goods and services businesses and received 90.61% of the dollars on goods and services contracts valued between \$25,000 and \$350,000. This overutilization is statistically significant.

Minority Business Enterprises represent 27.90% of the available goods and services businesses and received 2.17% of the dollars on goods and services contracts valued between \$25,000 and \$350,000. This underutilization is statistically significant.

Woman Business Enterprises represent 19.75% of the available goods and services businesses and received 7.90% of the dollars on goods and services contracts valued between \$25,000 and \$350,000. This underutilization is statistically significant.



Table 7.9: Disparity Analysis: Goods and Services Prime Contracts Valued between \$25,000 and \$350,000, January 1, 2016 to December 31, 2019

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$0	0.00%	12.71%	\$3,777,540	-\$3,777,540	0.00	< .05 *
Asian Pacific Americans	\$308,375	1.04%	6.22%	\$1,847,710	-\$1,539,334	0.17	< .05 *
Asian Indian Americans	\$0	0.00%	1.80%	\$533,783	-\$533,783	0.00	< .05 *
Hispanic Americans	\$336,834	1.13%	6.77%	\$2,011,950	-\$1,675,116	0.17	< .05 *
Native Americans	\$0	0.00%	0.41%	\$123,181	-\$123,181	0.00	---
Caucasian Females	\$2,146,762	7.22%	9.25%	\$2,751,034	-\$604,272	0.78	< .05 *
Non-minority Males	\$26,935,623	90.61%	62.85%	\$18,682,397	\$8,253,226	1.44	< .05 †
TOTAL	\$29,727,594	100.00%	100.00%	\$29,727,594			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	4.70%	\$1,396,047	-\$1,396,047	0.00	< .05 *
African American Males	\$0	0.00%	8.01%	\$2,381,492	-\$2,381,492	0.00	< .05 *
Asian Pacific American Females	\$91,562	0.31%	2.21%	\$656,963	-\$565,402	0.14	< .05 *
Asian Pacific American Males	\$216,814	0.73%	4.01%	\$1,190,746	-\$973,932	0.18	< .05 *
Asian Indian American Females	\$0	0.00%	0.69%	\$205,301	-\$205,301	0.00	---
Asian Indian American Males	\$0	0.00%	1.10%	\$328,482	-\$328,482	0.00	< .05 *
Hispanic American Females	\$111,523	0.38%	2.62%	\$780,144	-\$668,621	0.14	< .05 *
Hispanic American Males	\$225,311	0.76%	4.14%	\$1,231,806	-\$1,006,495	0.18	< .05 *
Native American Females	\$0	0.00%	0.28%	\$82,120	-\$82,120	0.00	---
Native American Males	\$0	0.00%	0.14%	\$41,060	-\$41,060	0.00	---
Caucasian Females	\$2,146,762	7.22%	9.25%	\$2,751,034	-\$604,272	0.78	< .05 *
Non-minority Males	\$26,935,623	90.61%	62.85%	\$18,682,397	\$8,253,226	1.44	< .05 †
TOTAL	\$29,727,594	100.00%	100.00%	\$29,727,594			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$645,210	2.17%	27.90%	\$8,294,163	-\$7,648,954	0.08	< .05 *
Woman Business Enterprises	\$2,349,846	7.90%	19.75%	\$5,871,610	-\$3,521,764	0.40	< .05 *

(*) denotes a statistically significant underutilization.

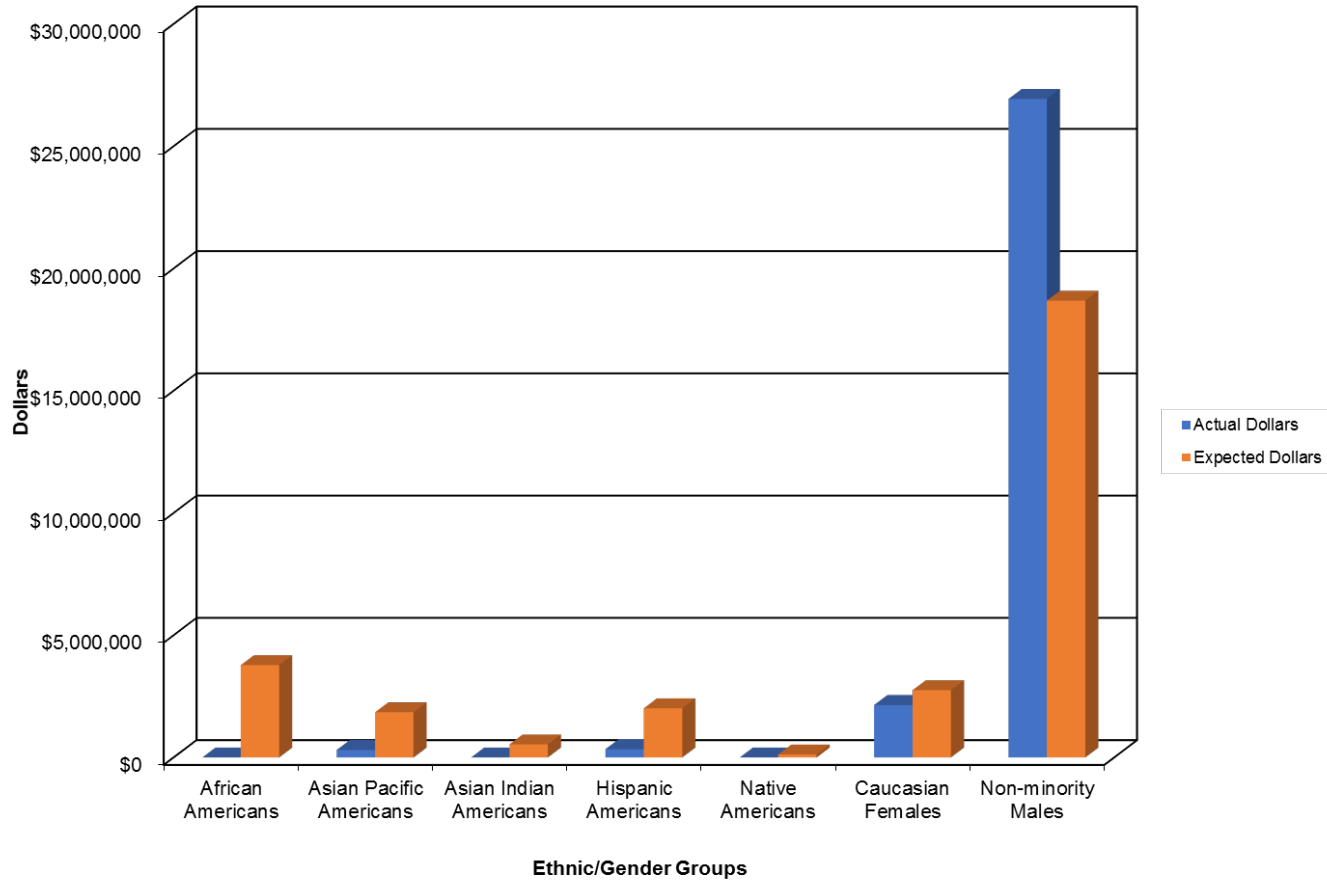
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

(---) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



Chart 7.6: Disparity Analysis: Goods and Services Prime Contracts Valued between \$25,000 and \$350,000, January 1, 2016 to December 31, 2019



III. Disparity Analysis Summary

A. Construction Prime Contracts

As indicated in Table 7.10 below, disparity was found for African American prime contractors on construction contracts valued \$25,000 and less. Disparity was also found for African American and woman business enterprise prime contractors on construction contracts valued between \$25,000 and \$2,140,000. Underutilization was found for Caucasian female prime contractors on construction contracts valued between \$25,000 and \$2,140,000.

Table 7.10: Disparity Summary: Construction Prime Contract Dollars, January 1, 2016 to December 31, 2019

Ethnicity/Gender	Construction	
	Contracts Valued \$25,000 and Less	Contracts Valued between \$25,000 and \$2,140,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Pacific Americans	----	No Disparity
Asian Indian Americans	----	----
Hispanic Americans	No Disparity	No Disparity
Native Americans	----	----
Caucasian Females	----	Underutilized
Minority Business Enterprises	No Disparity	No Disparity
Woman Business Enterprises	----	<i>Disparity</i>



B. Professional Services Prime Contracts

As indicated in Table 7.11 below, disparity was found for African American, Hispanic American, minority business enterprise, and woman business enterprise prime contractors on professional services contracts valued \$25,000 and less. Underutilization was found for Caucasian female prime contractors on professional services contracts valued \$25,000 and less. Disparity was also found for African American, Asian Pacific American, Hispanic American, Caucasian female, minority business enterprise, and woman business enterprise prime contractors on professional services contracts valued between \$25,000 and \$450,000.

Table 7.11: Disparity Summary: Professional Services Prime Contract Dollars, January 1, 2016 to December 31, 2019

Ethnicity/Gender	Professional Services	
	Contracts Valued \$25,000 and Less	Contracts Valued between \$25,000 and \$450,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Pacific Americans	No Disparity	<i>Disparity</i>
Asian Indian Americans	No Disparity	No Disparity
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>
Native Americans	----	----
Caucasian Females	Underutilized	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>	<i>Disparity</i>
Woman Business Enterprises	<i>Disparity</i>	<i>Disparity</i>



C. Goods and Services Prime Contracts

As indicated in Table 7.12 below, disparity was found for African American, Asian Pacific American, Asian Indian American, Hispanic American, Caucasian female, minority business enterprise, and woman business enterprise prime contractors on goods and services contracts valued \$25,000 and less. Disparity was also found for African American, Asian Pacific American, Asian Indian American, Hispanic American, Caucasian female, minority business enterprise, and woman business enterprise prime contractors on goods and services contracts valued between \$25,000 and \$350,000.

Table 7.12: Disparity Summary: Goods and Services Prime Contract Dollars, January 1, 2016 to December 31, 2019

Ethnicity/Gender	Goods and Services	
	Contracts Valued \$25,000 and Less	Contracts Valued between \$25,000 and \$350,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Pacific Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Indian Americans	<i>Disparity</i>	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>
Native Americans	-----	-----
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>	<i>Disparity</i>
Woman Business Enterprises	<i>Disparity</i>	<i>Disparity</i>



CHAPTER 8: Subcontract Disparity Analysis

I. Introduction

The objective of this chapter is to determine if available Minority and Woman-owned Business Enterprise (M/WBE) were underutilized in the award of subcontracts by the City of Berkeley's prime contractors during the January 1, 2016 to December 31, 2019 study period. A detailed discussion of the statistical procedures for conducting a disparity analysis is set forth in *Chapter 7: Prime Contract Disparity Analysis*. These same statistical procedures are used to perform the subcontract disparity analysis.

Under a fair and equitable system of awarding subcontracts, the proportion of subcontracts and subcontract dollars awarded to M/WBE subcontractors should be relatively close to the proportion of available M/WBE subcontractors in the City of Berkeley's market area. Availability is defined as the number of willing and able businesses. The methodology for determining willing and able businesses is detailed in *Chapter 6: Prime Contractor and Subcontractor Availability Analysis*.

If the ratio of utilized M/WBE subcontractors to available M/WBE subcontractors is less than one, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio or any event which is less probable.²⁷⁶ *Croson* states that an inference of discrimination can be made *prima facie* if the observed disparity is statistically significant. Under the *Croson* standard, the underutilization of non- minority male-owned businesses (non-M/WBE) are not subjected to a statistical test.²⁷⁷

II. Disparity Analysis

The disparity analysis was performed on subcontracts issued from January 1, 2016 to December 31, 2019. As detailed in *Chapter 4: Subcontractor Utilization Analysis*, extensive efforts were undertaken to obtain subcontract records for the City of Berkeley's construction, and professional services (including architecture and engineering) prime contracts. For 23 construction contracts, and 11 professional service contracts, the subcontractor records were sufficient to undertake a statistical analysis. On the other hand, the 29 construction and 34 professional service contracts had insufficient data to perform a meaningful analysis.



²⁷⁶ When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100-percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95-percent confidence level is the statistical standard used in physical and social sciences, and is thus used in the present report to determine if an inference of discrimination can be made.

²⁷⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The subcontract disparity findings in the two industries under consideration are detailed in *Section III*. The outcomes of the statistical analyses are presented in the “P-Value” column of the tables. A description of the statistical outcomes in the disparity tables are presented in Table 8.1.

Table 8.1: Statistical Outcome Descriptions

P-Value Outcome	Definition of P-Value Outcome
< 0.05 *	This underutilization is statistically significant.
not significant	<ul style="list-style-type: none"> • M/WBEs: This underutilization is not statistically significant. • Non-minority males: This overutilization is not statistically significant.
< 0.05 †	This overutilization is statistically significant.
----	While this group was underutilized, there were too few available firms to determine statistical significance.
**	This study does not statistically test the overutilization of minority or gender groups or the underutilization of non-minority males.



III. Disparity Analysis: All Subcontracts by Industry

A. Construction Subcontracts

The disparity analysis of construction subcontracts is described below and shown in Table 8.2 and Chart 8.1.

African Americans represent 16.28% of the available construction businesses and received 0.00% of the construction subcontract dollars. This underutilization is statistically significant.

Asian Pacific Americans represent 5.50% of the available construction businesses and received 0.19% of the construction subcontract dollars. This underutilization is statistically significant.

Asian Indian Americans represent 0.92% of the available construction businesses and received 0.00% of the construction subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

Hispanic Americans represent 10.09% of the available construction businesses and received 13.73% of the construction subcontract dollars. This study does not test statistically the overutilization of minority or gender groups.

Native Americans represent 0.69% of the available construction businesses and received 0.00% of the construction subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 8.26% of the available construction businesses and received 32.71% of the construction subcontract dollars. This study does not test statistically the overutilization of minority or gender groups.

Non-minority Males represent 58.26% of the available construction businesses and received 53.36% of the construction subcontract dollars. This study does not test statistically the underutilization of non-minority males.

Minority Business Enterprises represent 33.49% of the available construction businesses and received 13.92% of the construction subcontract dollars. This underutilization is statistically significant.

Woman Business Enterprises represent 14.45% of the available construction businesses and received 32.80% of the construction subcontract dollars. This study does not test statistically the overutilization of minority or gender groups.



**Table 8.2: Disparity Analysis: Construction Subcontracts,
January 1, 2016 to December 31, 2019**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American	\$0	0.00%	16.28%	\$1,365,219	-\$1,365,219	0.00	< .05 *
Asian Pacific American	\$15,917	0.19%	5.50%	\$461,483	-\$445,566	0.03	< .05 *
Asian Indian American	\$0	0.00%	0.92%	\$76,914	-\$76,914	0.00	----
Hispanic American	\$1,151,315	13.73%	10.09%	\$846,051	\$305,264	1.36	**
Native American	\$0	0.00%	0.69%	\$57,685	-\$57,685	0.00	----
Caucasian Females	\$2,742,632	32.71%	8.26%	\$692,224	\$2,050,408	3.96	**
Non-minority Males	\$4,473,736	53.36%	58.26%	\$4,884,024	-\$410,288	0.92	**
TOTAL	\$8,383,599	100.00%	100.00%	\$8,383,599			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	2.06%	\$173,056	-\$173,056	0.00	----
African American Males	\$0	0.00%	14.22%	\$1,192,163	-\$1,192,163	0.00	< .05 *
Asian Pacific American Females	\$0	0.00%	2.06%	\$173,056	-\$173,056	0.00	----
Asian Pacific American Males	\$15,917	0.19%	3.44%	\$288,427	-\$272,510	0.06	not significant
Asian Indian American Females	\$0	0.00%	0.46%	\$38,457	-\$38,457	0.00	----
Asian Indian American Males	\$0	0.00%	0.46%	\$38,457	-\$38,457	0.00	----
Hispanic American Females	\$7,395	0.09%	1.15%	\$96,142	-\$88,747	0.08	not significant
Hispanic American Males	\$1,143,920	13.64%	8.94%	\$749,909	\$394,011	1.53	**
Native American Females	\$0	0.00%	0.46%	\$38,457	-\$38,457	0.00	----
Native American Males	\$0	0.00%	0.23%	\$19,228	-\$19,228	0.00	----
Caucasian Females	\$2,742,632	32.71%	8.26%	\$692,224	\$2,050,408	3.96	**
Non-minority Males	\$4,473,736	53.36%	58.26%	\$4,884,024	-\$410,288	0.92	**
TOTAL	\$8,383,599	100.00%	100.00%	\$8,383,599			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$1,167,232	13.92%	33.49%	\$2,807,352	-\$1,640,120	0.42	< .05 *
Woman Business Enterprises	\$2,750,027	32.80%	14.45%	\$1,211,392	\$1,538,635	2.27	**

(*) denotes a statistically significant underutilization.

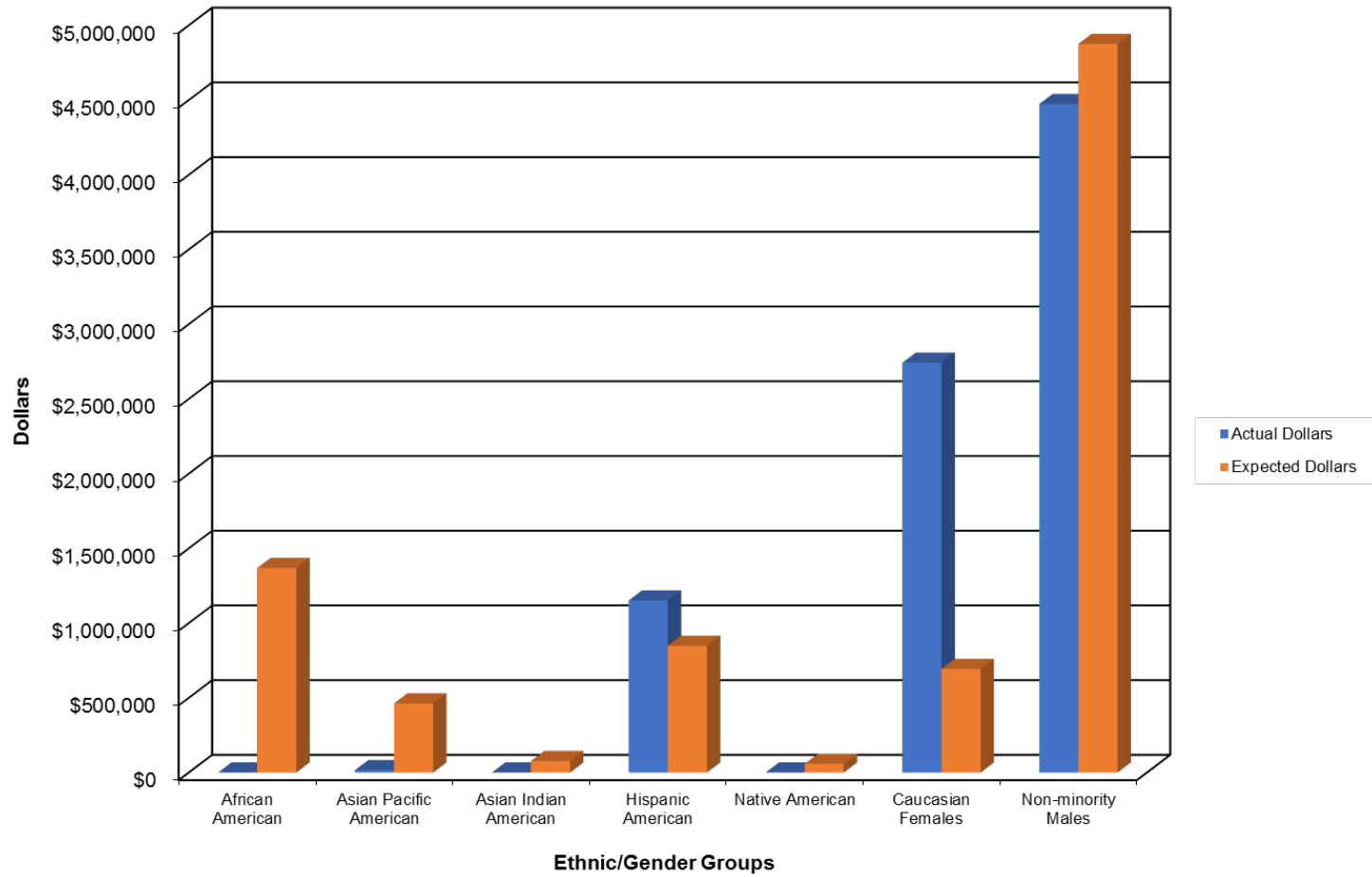
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

(----) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



**Chart 8.1: Disparity Analysis: Construction Subcontracts,
January 1, 2016 to December 31, 2019**



B. Professional Services Subcontracts

The disparity analysis of professional services subcontracts is described below and shown in Table 8.3 and Chart 8.2.

African Americans represent 14.08% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. This underutilization is statistically significant.

Asian Pacific Americans represent 9.13% of the available professional services businesses and received 5.81% of the professional services subcontract dollars. This underutilization is not statistically significant.

Asian Indian Americans represent 3.24% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

Hispanic Americans represent 5.12% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

Native Americans represent 0.43% of the available professional services businesses and received 0.00% of the professional services subcontract dollars. While this group was underutilized, there were too few available firms to determine statistical significance.

Caucasian Females represent 16.55% of the available professional services businesses and received 1.43% of the professional services subcontract dollars. This underutilization is statistically significant.

Non-minority Males represent 51.45% of the available professional services businesses and received 92.76% of the professional services subcontract dollars. This overutilization is statistically significant.

Minority Business Enterprises represent 32.00% of the available professional services businesses and received 5.81% of the professional services subcontract dollars. This underutilization is statistically significant.

Woman Business Enterprises represent 29.78% of the available professional services businesses and received 2.72% of the professional services subcontract dollars. This underutilization is statistically significant.



**Table 8.3: Disparity Analysis: Professional Services Subcontracts,
January 1, 2016 to December 31, 2019**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American	\$0	0.00%	14.08%	\$558,833	-\$558,833	0.00	< .05 *
Asian Pacific American	\$230,790	5.81%	9.13%	\$362,395	-\$131,604	0.64	not significant
Asian Indian American	\$0	0.00%	3.24%	\$128,701	-\$128,701	0.00	----
Hispanic American	\$0	0.00%	5.12%	\$203,212	-\$203,212	0.00	----
Native American	\$0	0.00%	0.43%	\$16,934	-\$16,934	0.00	----
Caucasian Females	\$56,721	1.43%	16.55%	\$657,052	-\$600,330	0.09	< .05 *
Non-minority Males	\$3,681,894	92.76%	51.45%	\$2,042,280	\$1,639,614	1.80	< .05 †
TOTAL	\$3,969,406	100.00%	100.00%	\$3,969,406			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	6.14%	\$243,854	-\$243,854	0.00	< .05 *
African American Males	\$0	0.00%	7.94%	\$314,978	-\$314,978	0.00	< .05 *
Asian Pacific American Females	\$51,102	1.29%	3.67%	\$145,635	-\$94,533	0.35	not significant
Asian Pacific American Males	\$179,689	4.53%	5.46%	\$216,759	-\$37,071	0.83	not significant
Asian Indian American Females	\$0	0.00%	0.94%	\$37,256	-\$37,256	0.00	----
Asian Indian American Males	\$0	0.00%	2.30%	\$91,445	-\$91,445	0.00	----
Hispanic American Females	\$0	0.00%	2.13%	\$84,672	-\$84,672	0.00	----
Hispanic American Males	\$0	0.00%	2.99%	\$118,540	-\$118,540	0.00	----
Native American Females	\$0	0.00%	0.34%	\$13,547	-\$13,547	0.00	----
Native American Males	\$0	0.00%	0.09%	\$3,387	-\$3,387	0.00	----
Caucasian Females	\$56,721	1.43%	16.55%	\$657,052	-\$600,330	0.09	< .05 *
Non-minority Males	\$3,681,894	92.76%	51.45%	\$2,042,280	\$1,639,614	1.80	< .05 †
TOTAL	\$3,969,406	100.00%	100.00%	\$3,969,406			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$230,790	5.81%	32.00%	\$1,270,074	-\$1,039,284	0.18	< .05 *
Woman Business Enterprises	\$107,823	2.72%	29.78%	\$1,182,016	-\$1,074,193	0.09	< .05 *

(*) denotes a statistically significant underutilization.

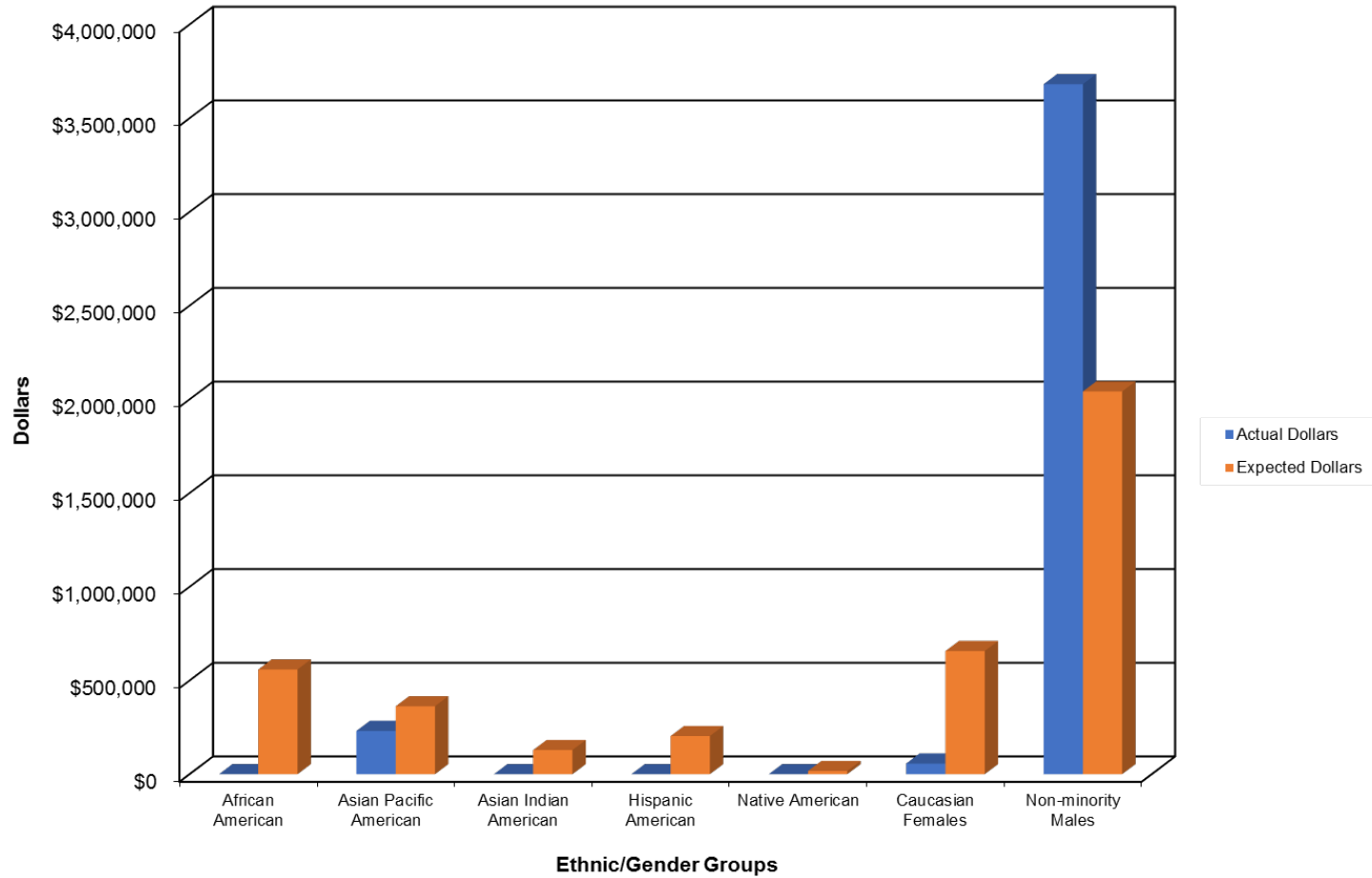
(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.

(----) denotes an underutilized group with no contracts awarded, too few contracts awarded, or too few available firms to test statistical significance.



Chart 8.2: Disparity Analysis: Professional Services Subcontracts, January 1, 2016 to December 31, 2019



IV. Subcontract Disparity Summary

As indicated in Table 8.4, disparity was found for African American, Asian Pacific American, and minority business enterprise construction subcontractors. Disparity was also found for African American, Caucasian female, minority business enterprise, and woman business enterprise professional services subcontractors.

**Table 8.4: Subcontract Disparity Summary,
January 1, 2016 to December 31, 2019**

Ethnicity/Gender	Construction	Professional Services
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Pacific Americans	<i>Disparity</i>	No Disparity
Asian Indian Americans	----	----
Hispanic Americans	No Disparity	----
Native Americans	----	----
Caucasian Females	No Disparity	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>	<i>Disparity</i>
Woman Business Enterprises	No Disparity	<i>Disparity</i>

(----) While this group was underutilized, there were too few available firms to determine statistical significance.



CHAPTER 9: Anecdotal Analysis

I. Anecdotal eSurvey Purpose and Background

The purpose of the Anecdotal eSurvey was to solicit information from M/WBEs and Caucasian male business owners enumerated in the City of Berkeley Availability Study as willing and able to perform the City’s contracts. The survey provided an opportunity for the available businesses to express their experiences working with or seeking work from the City.

II. Anecdotal eSurvey Methodology

The survey population was identified to be the businesses available to perform the City’s contracts during the January 1, 2016 to December 31, 2019 study period. The survey was administered in a digital format.

A. eSurvey Instrument Design

The survey questions were designed to elicit the following information from the respondents: 1) general background information about their business, 2) experience submitting bids/proposals, and 3) history working with the City.

The survey included 25 questions yielding either yes-or-no or multiple-choice responses. The survey questions were imported into Form Assembly™, an online research tool that converted the questions into an eSurvey. A copy of the eSurvey is attached as Appendix A.

B. Identification of the eSurvey Population

The survey population consisted of 1,647 minority, female-owned, and Caucasian male-owned construction, professional services (including architecture and engineering), and goods and services firms. The population was the database of businesses identified for the market area chapter of the Study. The profile of the 1,647 businesses by ethnicity and gender is presented in Table 9.1.



Table 9.5: Profile of eSurvey Population by Ethnicity and Gender

Ethnicity/Gender	Number	Percent
African Americans	249	15.12%
Asian Pacific Americans	143	8.68%
Asian Indian Americans	44	2.67%
Hispanic Americans	124	7.53%
Native Americans	9	0.55%
Caucasian Females	204	12.39%
Non-minority Males	874	53.07%
TOTAL	1,647	100.00%

C. *Distribution of the eSurvey Instrument*

The eSurvey was emailed to the 1,647 businesses in the population. The email transmission included a description of the purpose for the survey and the Uniform Resource Locator (URL) link to the eSurvey. The business owners were encouraged to complete all questions but were informed that including their company name was optional. In an effort to maximize the number of responses, a reminder email was sent to the 1,647 businesses, encouraging them to complete the survey.

III. *Survey Findings*

Responses to the questions in the eSurvey are presented below in two sections—*Profile of the Survey Respondents* and *Overview of Business Practices*.



A. Profile of the Survey Respondents

Chart 9.1 presents the industry of the businesses that responded to the survey. The findings revealed that 53.00% of businesses classified themselves as professional services, 27.00% as goods, commodities, and supplies, and 20.00% as construction firms.

Chart 9.3: Respondents by Industry

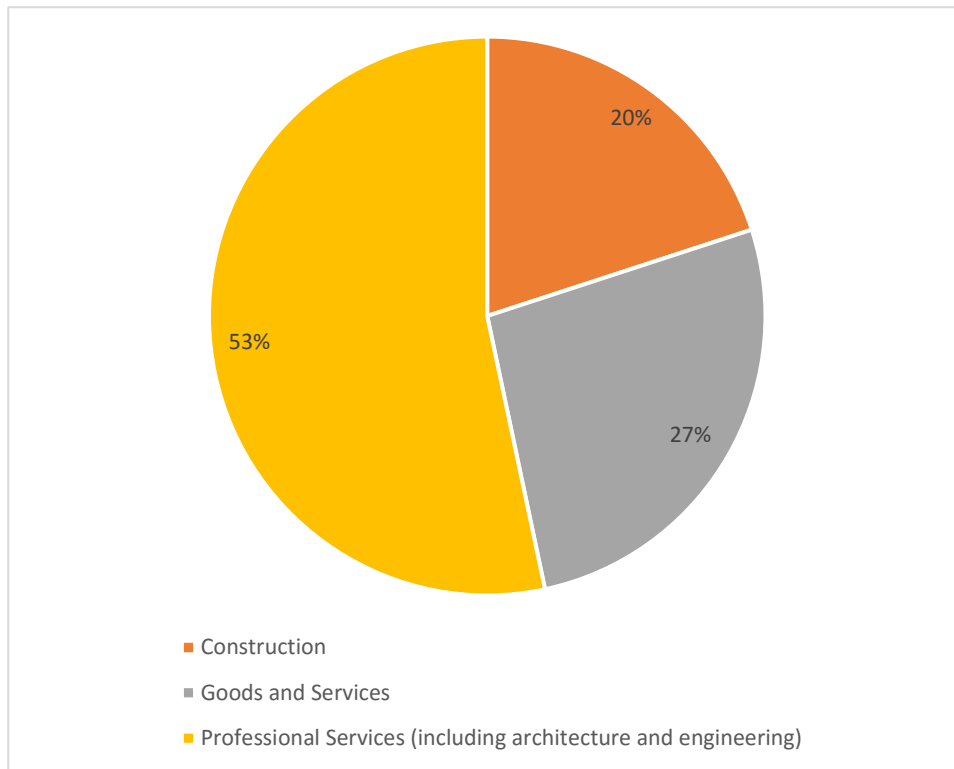


Chart 9.2 presents the gender of the business owners. Male-owned businesses represented 60.00% of respondents, and woman-owned businesses represented 40.00%

Chart 9.4: Respondents by Gender

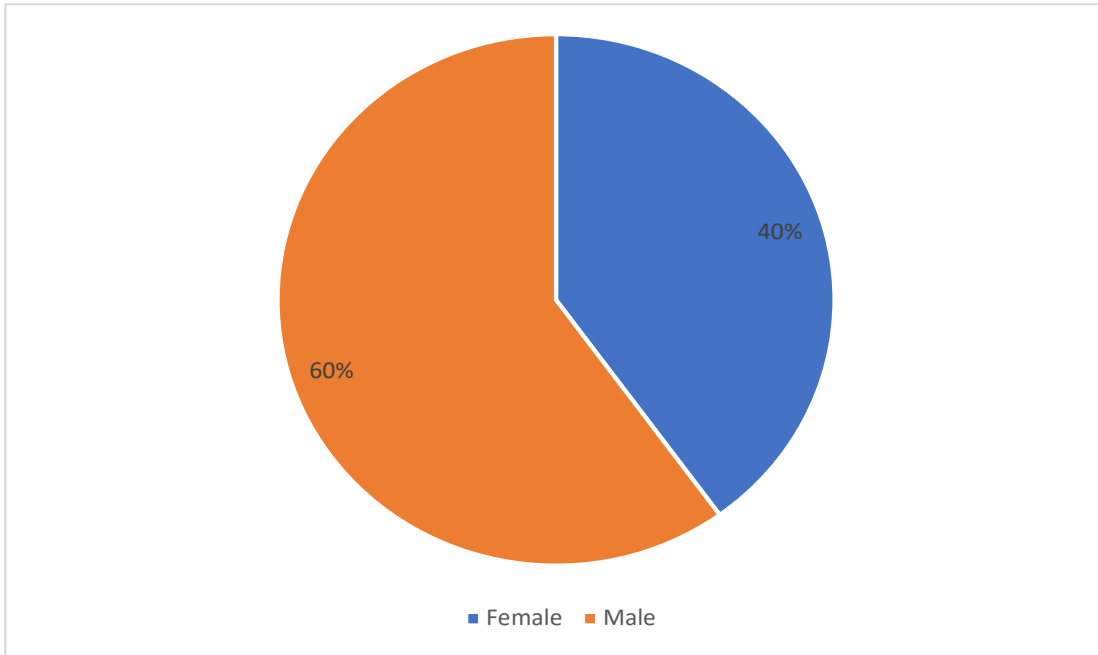


Chart 9.3 presents the ethnicity of the business owners. The majority were Caucasian American, representing 46.00% of respondents; African American, representing 20.00% of respondents; and Hispanic American, representing 13.00% of respondents.

Chart 9.5: Respondents by Ethnicity

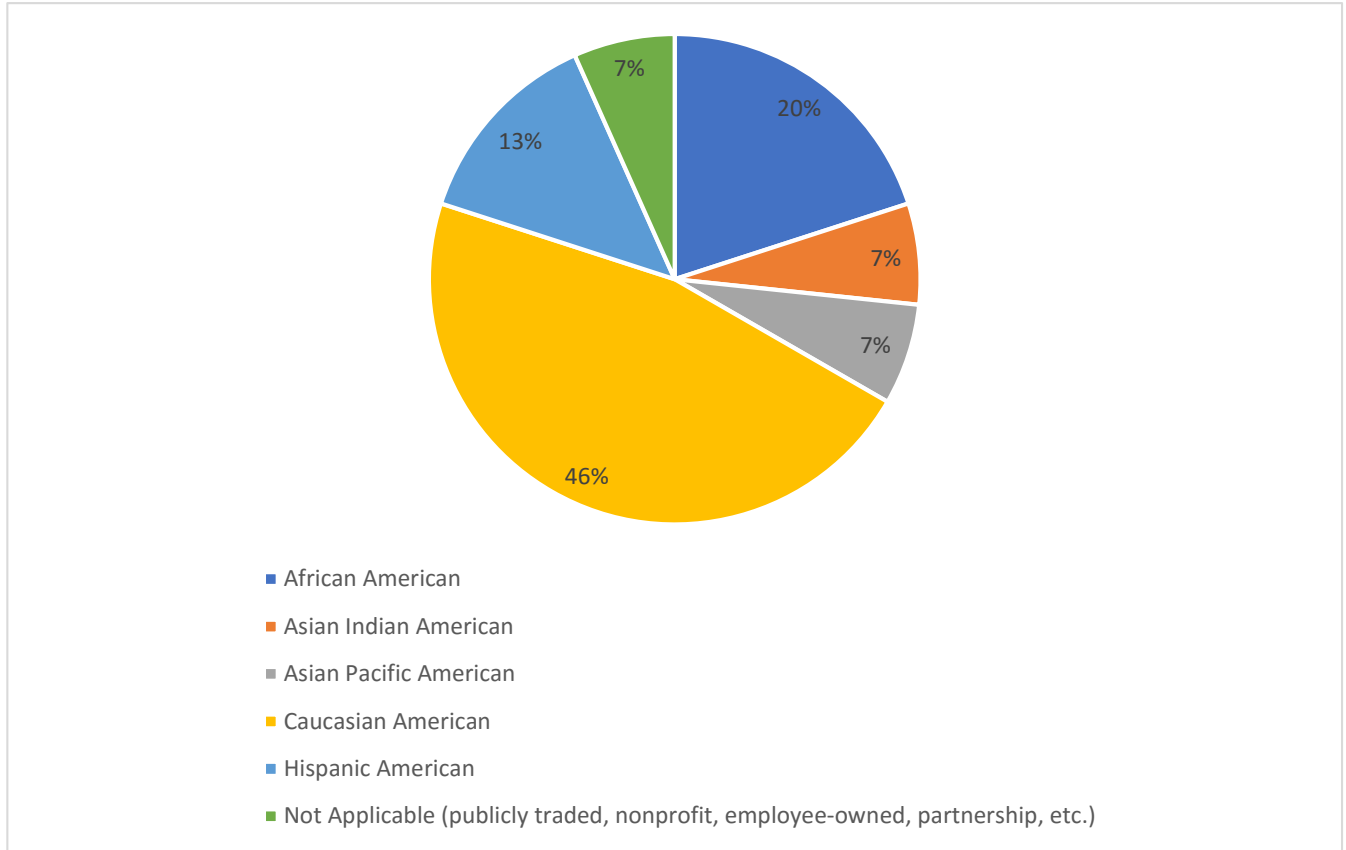


Chart 9.4 presents the businesses' certification status. The findings revealed that 33.00% had Small Business Enterprise certifications; 18.00% had Local Business Enterprise certifications; 15.00% had Minority Business Enterprise certifications; and 15.00% had Disabled Business Enterprise certifications. Of the other respondents, 11.00% had Woman Business Enterprise certifications; 4.00% had other certifications; and 4.00% had no certifications.

Chart 9.6: Respondents' Business Enterprise Certifications

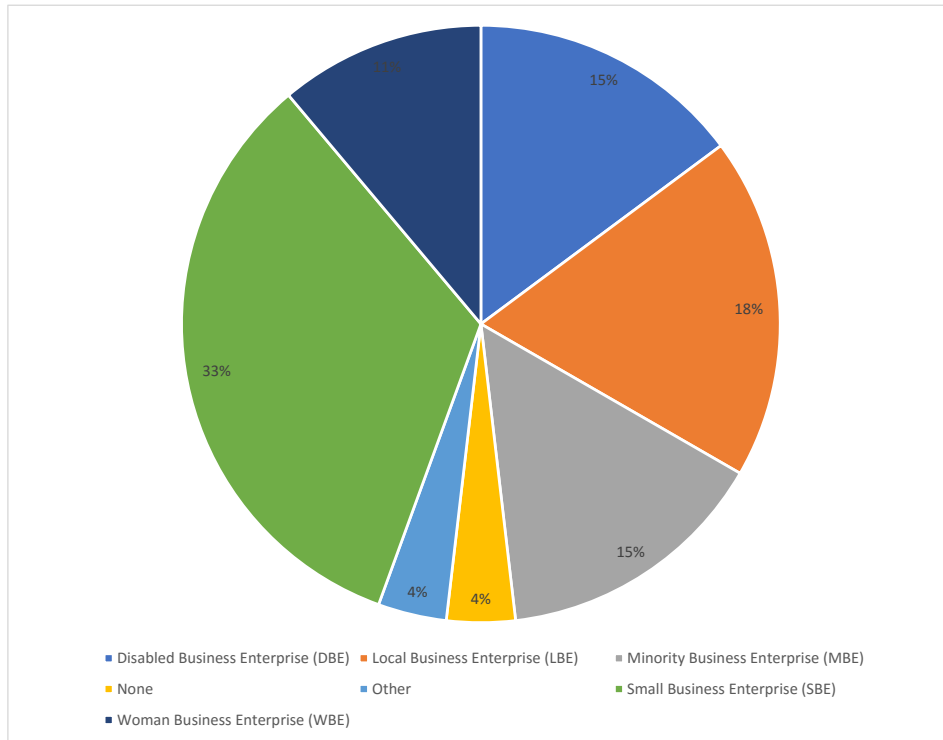
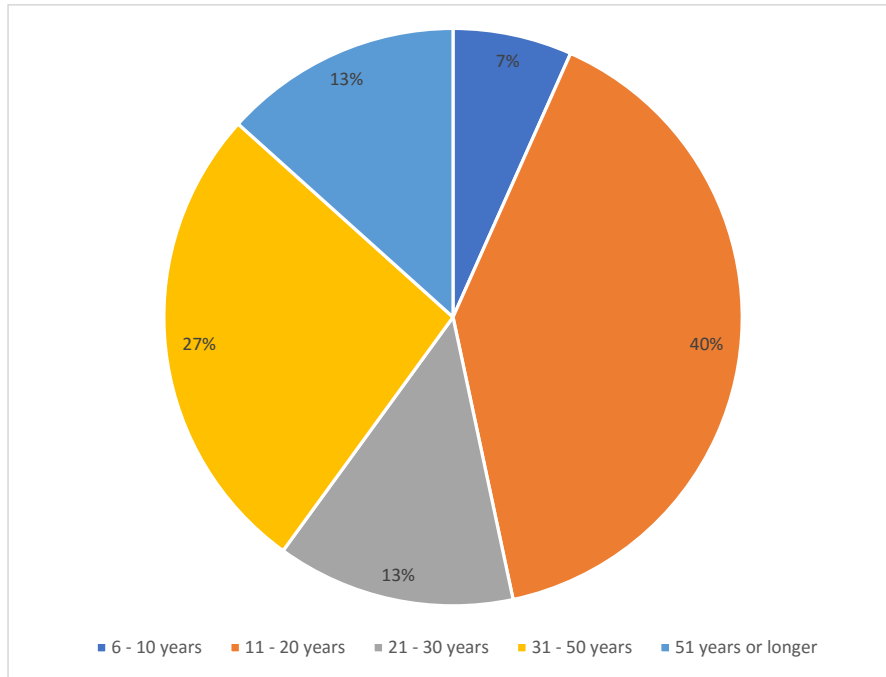


Chart 9.5 presents the years in operation of businesses that responded to the survey. None of the respondents had been in business for less than six years. The majority of the businesses had been in operation for 11 to 20 years and 40.00% for over 30 years.

Chart 9.7: Businesses by Number of Years in Operation



B. Overview of Business Practices

This section presents the business practices the business owners reported. The respondents reported on their experience navigating the City’s procurement process as both a prime contractor and subcontractor.

Chart 9.6 presents the number of bids, quotes, and proposals submitted to the City for construction, professional services, and goods and services prime contracts. The majority of respondents did not submit bids/proposals during the study period. For those that submitted bids/proposals, 20.00% submitted five to nine bids/proposals and 7.00% submitted one to four bids/proposals.

Chart 9.8: Prime Contract Quote, Bid, or Proposal Submittals

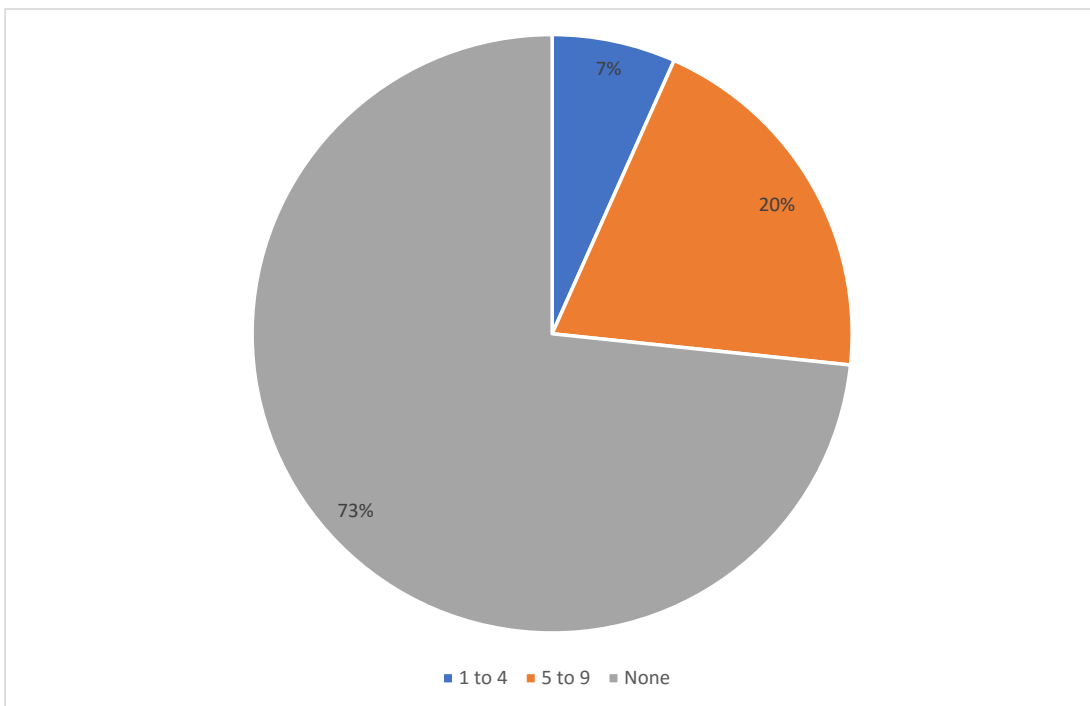


Chart 9.7 presents the number of bids and proposals the respondents submitted to the City and its prime contractors. The majority, or 87.00% of respondents, did not submit bids or proposals as subcontractors.

Chart 9.9: Subcontract Bids and Proposals Submitted

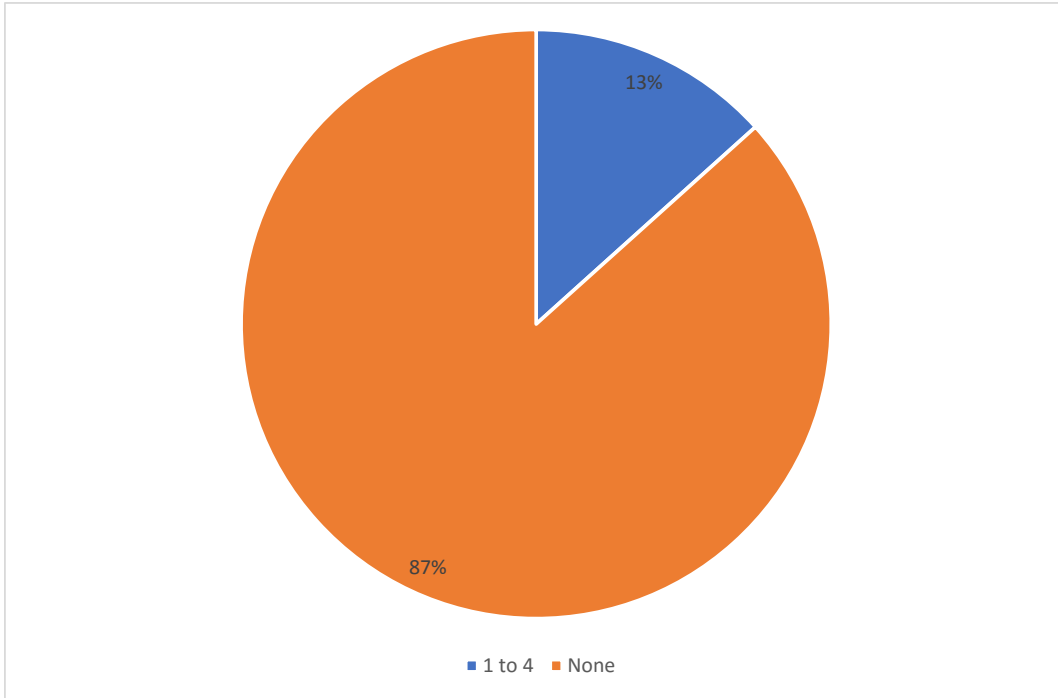


Chart 9.8 presents the number of prime contracts awarded during the study period to businesses that responded to the survey. The majority, or 80.00% of the respondents, had no prime contract awards, while 13.00% had one to four prime contract awards.

Chart 9.10: Prime Contract Awards

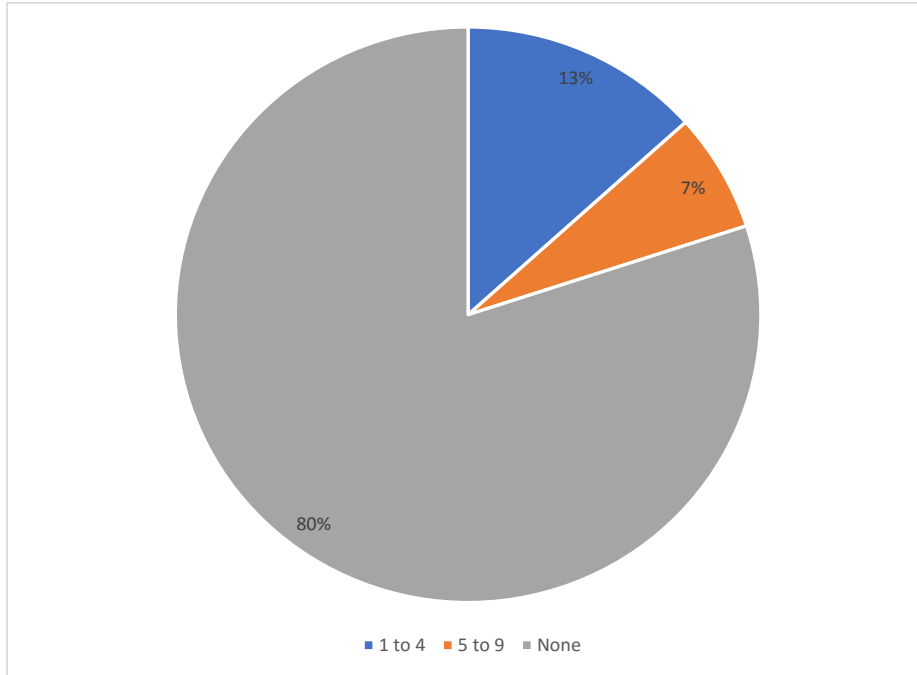


Chart 9.9 presents the number of subcontracts awarded to the respondents during the study period. The majority, or 87.00% of respondents, received no subcontract awards, while 13.00% received one to four subcontract awards.

Chart 9.11: Subcontract Awards

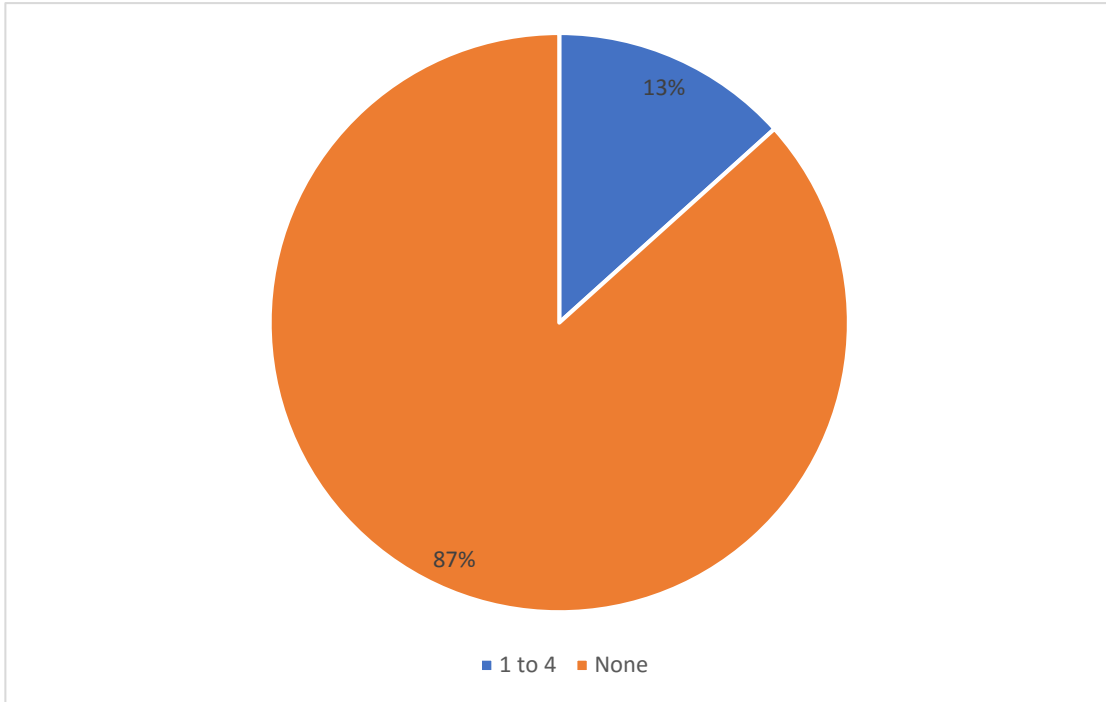


Chart 9.10 presents how often businesses that responded to the survey were asked by prime contractors to lower the price of a bid or proposal. The majority, or 87.00% of respondents, were never asked to reduce their price.

Chart 9.12: Subcontract Bid or Proposal Price Reduction Requested

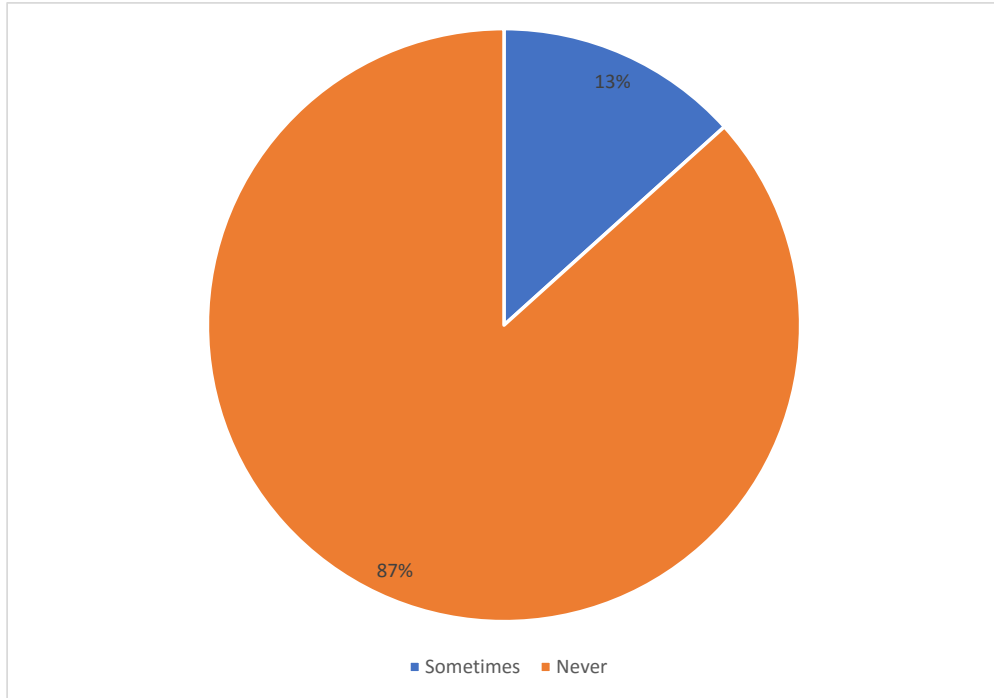


Chart 9.11 presents how often subcontractors were given insufficient lead time by prime contractors to submit a bid, quote, or proposal on City contracts. The findings revealed that 80.00% of respondents never experienced insufficient lead time to submit a bid, quote, or proposal; 13.00% sometimes experienced insufficient lead time; and 7.00% frequently experienced insufficient lead time.

Chart 9.13: Subcontract Bid or Proposal Price Reduction Requested

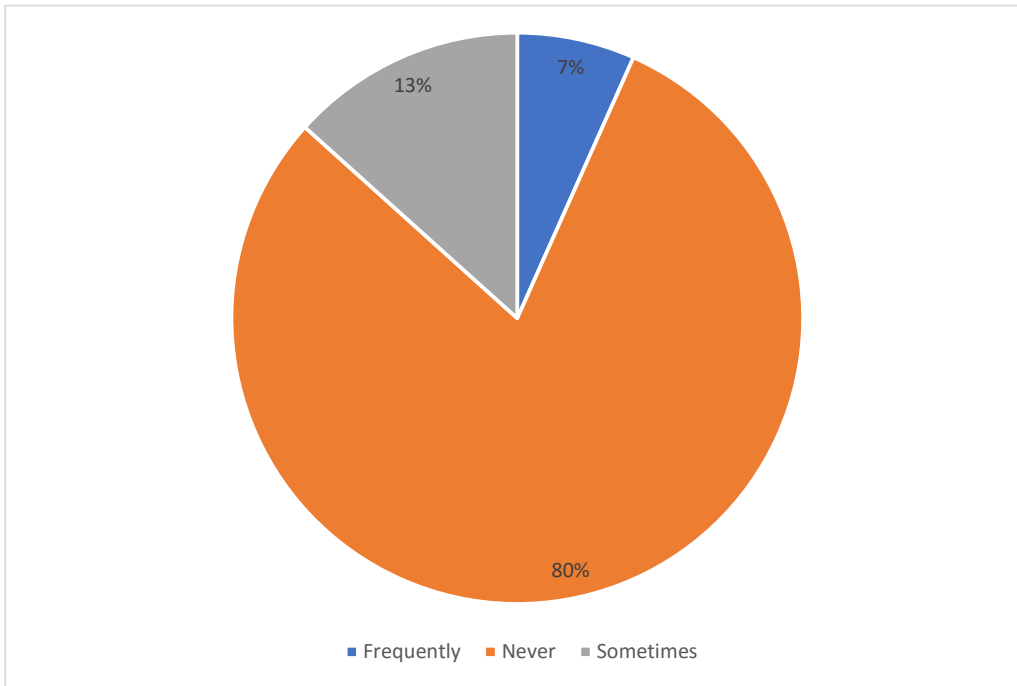


Chart 9.12 presents the frequency at which businesses that responded to the survey experienced prime contractors not paying invoices for work performed. The majority, or 93.00% of the respondents, received payment for their invoices from prime contractors.

Chart 9.14: Unpaid Invoices by Prime Contractors

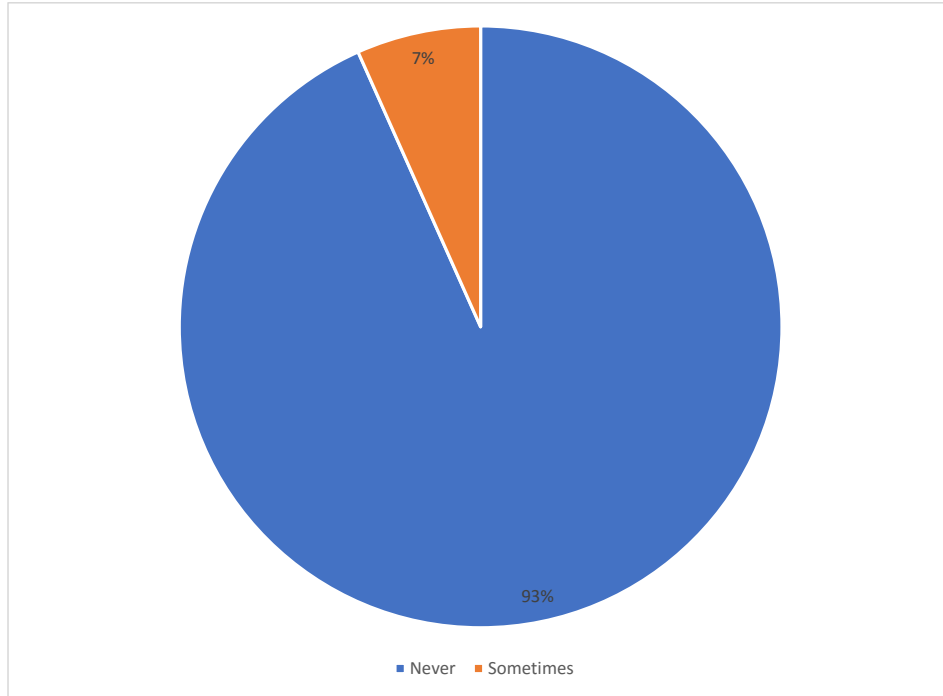


Chart 9.13 presents the frequency of City invoices paid more than 60 days late. The majority, or 73.00% of the respondents, received payments for their invoices before 60 days, while 20.00% of respondents sometimes received payments later than 60 days, and 7.00% of respondents frequently received payments later than 60 days.

Chart 9.15: Unpaid Invoices by Prime Contractors

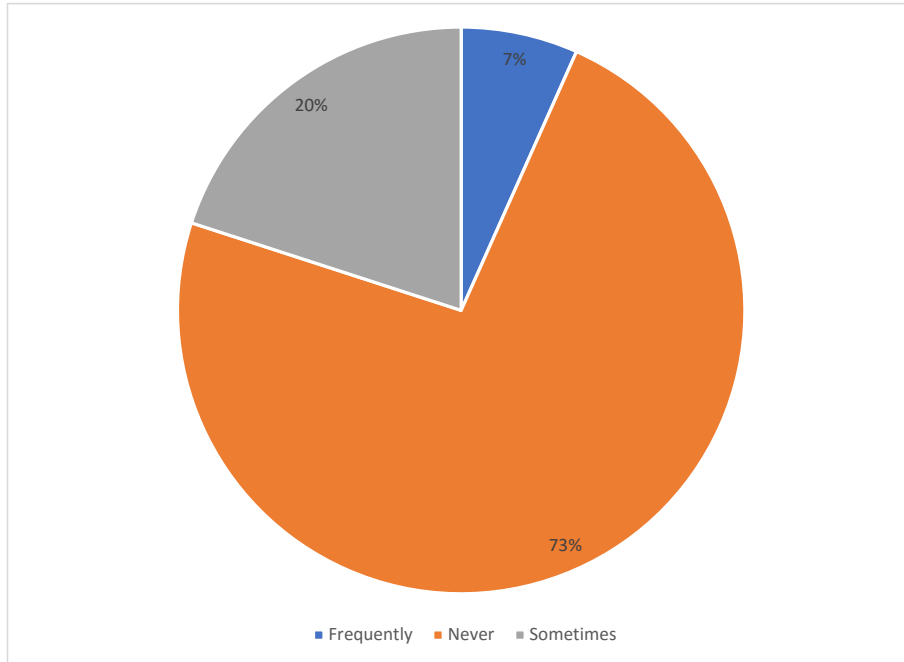


Chart 9.14 indicates that 40.00% of the respondents believe that the City has preferred contractors.

Chart 9.16: Perceived Prime Contractor Preference

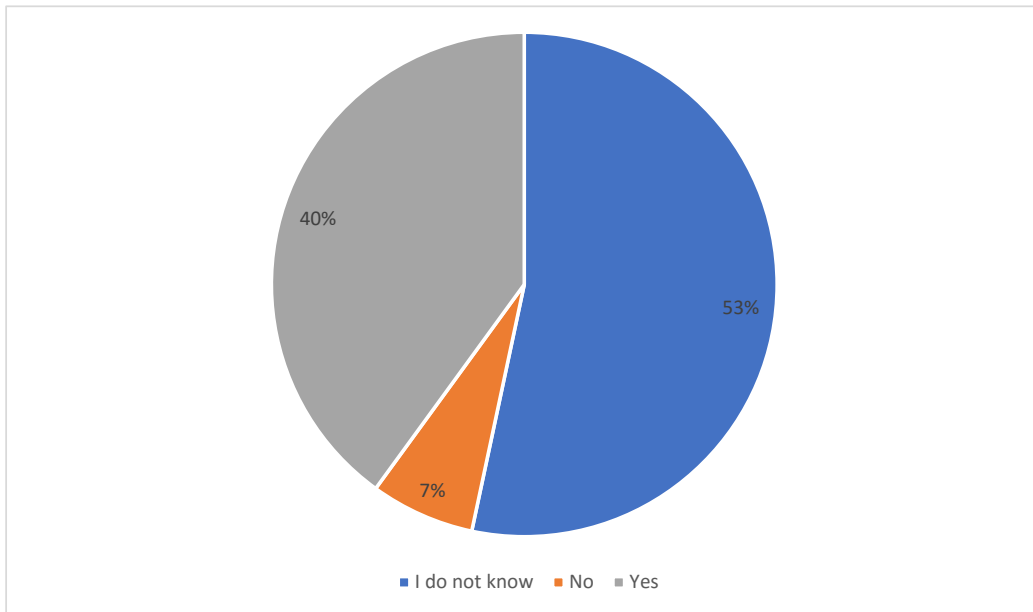
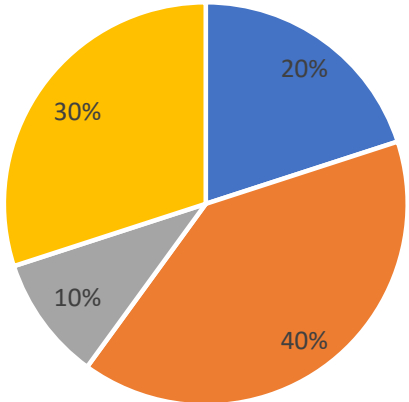


Chart 9.15 presents the types of preferential treatment respondents believe is extended to select businesses. The findings revealed that 40.00% of respondents reported that there are bid or proposal requirements that favor large businesses, 20.00% reported that preferred contractors receive advance bid or proposal notifications, and 10.00% reported that preferred contractors are allowed to waive certain project requirements.

Chart 9.17: Preferential Treatment to Preferred Contractors



- Advanced bid or proposal notification
- Bid or proposal qualification requirements favoring large businesses (eg: years in business, prior experience with the City of Berkeley)
- Waived project requirements (e.g.: bonding, insurance, etc.)
- Other



Chart 9.16 presents the respondents' perception of the appropriateness of bond waiver requirements. Of the 20.00% of construction companies who responded, 67.00% reported that the City's prime contract bond requirements are sometimes reasonable based on the project size and scope of work, and 33.00 % believe that the bonding requirements are not reasonable.

Chart 9.18: Bond Waiver Requirements Aligned with Scope of Work

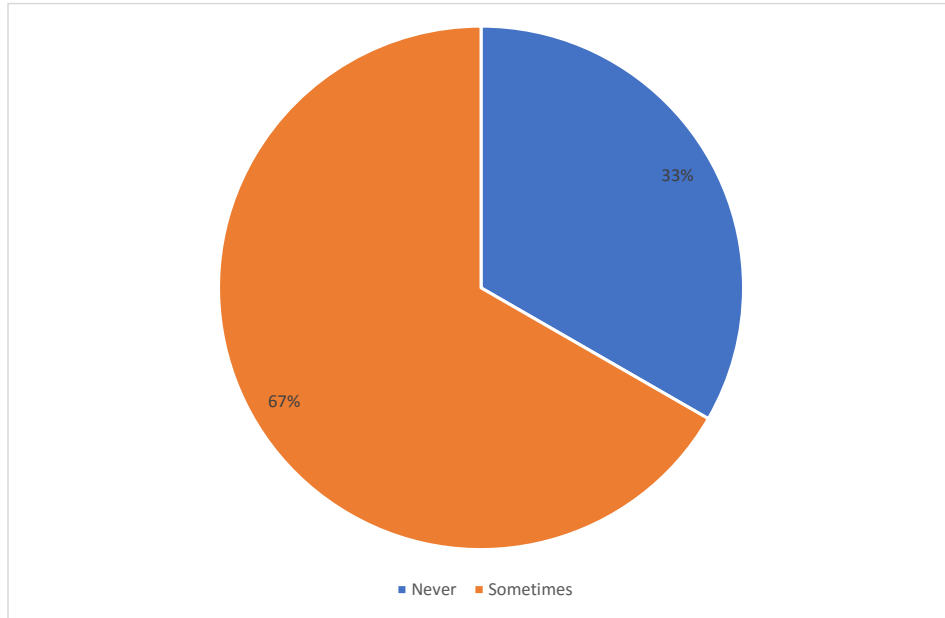
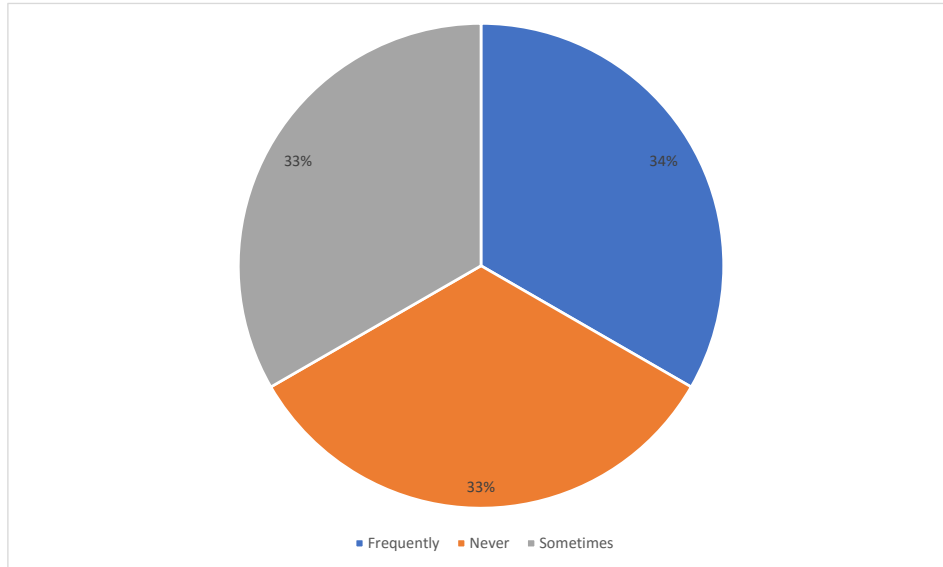


Chart 9.17 presents how frequently respondents were prohibited from bidding as a prime contractor due to the City’s bonding requirements. The findings revealed that 34.00% of respondents found the bonding requirements to be frequently prohibitive, and 33.00% of respondents found the bonding requirements to be sometimes prohibitive.

Chart 9.19: Prohibitive Bond Waiver Requirements



C. Summary

The eSurvey was distributed to the dataset of businesses in the market area, which included 1,647 firms.

Caucasian Americans were the majority of the respondents, representing 46.00% of the businesses. African Americans were the second largest ethnic group, representing 20.00% of respondents. Male-owned businesses accounted for 60.00% of respondents, and 15.00% of respondents had an MBE certification. Additionally, 15.00% had a WBE certification.

When describing issues navigating the City's procurement process, 20.00% of respondents reported insufficient time given by prime contractors for submitting bids, quotes, or proposals for subcontracts. Invoices received from the City over 60 days late were reported by 27.00% of respondents. Respondents also detailed the types of treatment preferred contractors received. The findings revealed that 10.00% of the respondents believe the City waives project requirements for preferred contractors; 20.00% believe that preferred contractors receive advance bid and proposal notifications; and 40.00% believe the City's bid and proposal requirements favor large businesses.

Information gathered from the eSurvey informed the race and gender-neutral recommendations set forth in *Chapter 10, Recommendations*.



CHAPTER 10: Recommendations

I. Introduction

This chapter presents recommendations to address disparities that were documented in *Chapter 7: Prime Contract Disparity Analysis* and *Chapter 8: Subcontractor Disparity Analysis*. *Chapter 3: Prime Contract Utilization Analysis* presented the statistical analysis of the utilization of available M/WBEs and non-M/WBEs on construction, professional services (including architectural and engineering services), and goods and services prime contracts that the City issued during the study period. A utilization analysis of available M/WBEs and non-M/WBEs on construction and professional services subcontracts was presented in *Chapter 4: Subcontract Utilization Analysis*. This chapter is organized into five sections: (1) *Introduction*, (2) *Efficacy of the Local Vendor Preference Program*, (3) *Disparity Analysis Findings*, (4) *Race and Gender-Conscious Recommendations*, and (5) *Procurement Program Enhancements*.

II. Efficacy of the Local Vendor Preference Program

The Local Vendor Preference Program (Program) was authorized June 7, 1983 by the Berkeley City Council as Resolution No. 51,813. The expressed purpose of the Program, as set forth in the Resolution, is to stimulate the local economy and create opportunities for local businesses and local female- and minority-owned businesses and businesses owned by people with disabilities. The 1983 policy authorizes a 5% bid preference to local business enterprises in the award of contracts for supplies, equipment, and nonprofessional services.²⁷⁸ The 5% preference applied to bids from \$100 to \$25,000. This regulation is explicit that it does not include construction or professional services.

Modifications to the Resolution approved by the City Council on May 25, 2021 expanded the upper limit of the 5% bid preference, from \$10,000 to \$250,000. The 5% bid preference on supplies, equipment, materials and other goods contracts was increased to \$100,000, and on nonprofessional services contracts, the bid amount eligible for the preference was raised to \$250,000. Additionally, the City Council proposed extending a preference to professional services businesses for contracts up to \$250,000 (or a higher amount), effective January 1, 2022. The modification also recommended outreach and training to local businesses, specifically minority-owned businesses, and tracking and reporting on the Program’s success in expanding contracting opportunities for local businesses.

Since the recent modification is outside the study period of January 1, 2016 to December 31, 2019, the analysis of the Program’s efficacy is limited to the study period.



²⁷⁸ “Supplies, Equipment, and Non-Professional Services” is referred to in the Study as “Goods and Services.”

A. Local Vendor Preference Program

1. Eligibility Requirements

To qualify for the 5% preference, the bidder must be a Berkeley-based business certified under the Program. Certification requires the completion of a vendor information application, possession of a taxpayer ID, a fixed office within the City of Berkeley, and a Berkeley business street address listed in the Department of Finance's Permits and License Tax files. The certification process is handled by the Department of Finance. Annual renewal of the application is required to maintain active status.

2. Local Preference Program Components

Businesses that complete the certification process become a certified local vendor. However, the City does not maintain a directory of certified local vendors. Certified local vendors may subscribe on the City's website to receive regular notifications of bid and proposal opportunities.

B. Utilization of Local Businesses

Since the Department of Finance does not maintain a list of certified local businesses and the contract records did not record the vendor's local business certification status, an analysis of the businesses that actually received the 5% preference could not be performed. Given the limitations of the data, this local business utilization analysis is limited to businesses with a Berkeley address that received payment on contracts for supplies, equipment, and non-professional services awarded during the study period. An additional analysis has been performed to present the utilization of Berkeley businesses on construction and professional services contracts, although these services are not within the Program.

While the dataset used for this analysis is a reasonable proxy for the actual certified businesses, it probably overstates the number of certified Berkeley businesses that received the 5% preference on one or more contracts for supplies, equipment, and non-professional services since it includes all Berkeley businesses. Table 10.1 shows the distribution of all contract dollars that businesses located within and outside the City of Berkeley received during the study period. The distribution includes contracts for supplies, equipment, and non-professional services eligible for the Program and construction and professional services contracts. The analysis shows that local businesses received less than 7% of the total dollars paid for supplies, equipment, and non-professional services and for construction and professional services during the study period.



Table 10.1: Distribution of Dollars Paid to Businesses Within and Outside Berkeley, All Industries

Location	Amount of Dollars	Percent of Dollars
City of Berkeley	\$17,510,737	6.79%
Outside of City of Berkeley	\$240,210,435	93.21%

Table 10.2 presents the distribution of dollars paid to Berkeley businesses for supplies, equipment, and non-professional services during the study period. Only 7.51% of these dollars were paid to Berkeley businesses for the services.

Table 10.2: Distribution of Dollars Paid to Berkeley Businesses for Supplies, Equipment, and Non-professional Services

Location	Amount of Dollars	Percent of Dollars
City of Berkeley	\$5,944,951	7.51%
Outside of City of Berkeley	\$73,168,649	92.49%

Table 10.3 presents the distribution of dollars paid to Berkeley construction businesses during the study period. Less than 1% of the construction dollars were paid to Berkeley construction businesses.

Table 10.3: Distribution of Dollars Paid to Berkeley Construction Businesses

Location	Amount of Dollars	Percent of Dollars
City of Berkeley	\$771,732	0.61%
Outside of City of Berkeley	\$126,465,207	99.39%

Table 10.4 presents the distribution of dollars paid to Berkeley professional services businesses during the study period. For professional services contracts, 21.01% of dollars were paid to Berkeley businesses

Table 10.4: Distribution of Dollars Paid to Berkeley Professional Services Businesses

Location	Amount of Dollars	Percent of Dollars
City of Berkeley	\$10,794,054	21.01%
Outside of City of Berkeley	\$40,576,579	78.99%



Table 10.5 presents the distribution, of the total dollars paid to Berkeley businesses in the three industries by ethnicity and gender. Non-minority males received 58.90% of the dollars paid to Berkeley businesses during the study period. Caucasian females received 16.16% of the dollars paid to local businesses, Asian Pacific Americans received 22.99%, Asian Indian Americans received 1.51%, and Hispanic Americans received 0.45%. African Americans did not receive any dollars.

The findings show that M/WBEs received less than 50% of the dollars paid to Berkeley businesses.

Table 10.5: Dollars Paid to Berkeley Businesses by Ethnicity and Gender

Ethnicity and Gender	Amount of Dollars Paid to Berkeley Businesses	Percent of Dollar Paid to Berkeley Businesses
African American Females	\$0	0.00%
African American Males	\$0	0.00%
Asian Pacific American Females	\$268,362	1.53%
Asian Pacific American Males	\$3,757,075	21.46%
Asian Indian American Females	\$0	0.00%
Asian Indian American Males	\$264,410	1.51%
Hispanic American Females	\$69,417	0.40%
Hispanic American Males	\$8,805	0.05%
Native American Females	\$0	0.00%
Native American Males	\$0	0.00%
Caucasian Females	\$2,829,458	16.16%
Non-minority Males	\$10,313,211	58.90%
TOTAL	\$17,510,737	100.00%

Table 10.6 presents the distribution of dollars paid to local businesses by ethnicity and gender. This table illustrates that non-minority males received the majority of the dollars in most of the dollar ranges.



Table 10.6: Distribution of Dollars Paid to Berkeley Businesses by Ethnicity and Gender

Range	Ethnicity and Gender	Amount of Dollars Paid to Berkeley Businesses	Percent of Dollars Paid to Berkeley Businesses	Number of Berkeley Businesses	Percent of Berkeley Businesses
\$1,000,000 - \$2,999,999	Asian Pacific American Male	\$1,357,843	7.75%	1	0.61%
	Caucasian Female	\$1,721,055	9.83%	1	0.61%
	Total	\$3,078,898	17.58%	2	1.21%
\$500,000 - \$999,999	Asian Pacific American Male	\$1,197,182	6.84%	1	0.61%
	Non-Minority Male	\$2,829,014	16.16%	4	2.42%
	Total	\$4,026,196	22.99%	5	3.03%
\$250,000 - \$499,999	Asian Indian American Male	\$264,410	1.51%	1	0.61%
	Asian Pacific American Male	\$381,101	2.18%	1	0.61%
	Non-Minority Male	\$2,330,339	13.31%	7	4.24%
	Total	\$2,975,850	16.99%	9	5.45%
\$100,000 - \$249,999	Asian Pacific American Female	\$182,941	1.04%	1	0.61%
	Asian Pacific American Male	\$456,155	2.61%	1	0.61%
	Caucasian Female	\$459,376	2.62%	3	1.82%
	Non-Minority Male	\$2,295,567	13.11%	14	8.48%
	Total	\$3,394,039	19.38%	19	11.52%
\$50,000 - \$99,999	Asian Pacific American Female	\$60,421	0.35%	1	0.61%
	Asian Pacific American Male	\$273,635	1.56%	1	0.61%
	Hispanic Female	\$55,300	0.32%	1	0.61%
	Caucasian Female	\$334,864	1.91%	5	3.03%
	Non-Minority Male	\$1,089,146	6.22%	15	9.09%
	Total	\$1,813,366	10.36%	23	13.94%
\$25,000 - \$49,999	Asian Pacific American Female	\$25,000	0.14%	1	0.61%
	Asian Pacific American Male	\$25,100	0.14%	1	0.61%
	Caucasian Female	\$266,539	1.52%	5	3.03%
	Non-Minority Male	\$984,126	5.62%	27	16.36%
	Total	\$1,300,765	7.43%	34	20.61%
\$5,000 - \$24,999	Asian Pacific American Male	\$66,058	0.38%	1	0.61%
	Hispanic Male	\$8,805	0.05%	1	0.61%
	Caucasian Female	\$47,625	0.27%	3	1.82%
	Non-Minority Male	\$679,105	3.88%	49	29.70%
	Total	\$801,593	4.58%	54	32.73%
Under \$5,000	Hispanic Female	\$14,117	0.08%	1	0.61%
	Non-Minority Male	\$105,914	0.60%	18	10.91%
	Total	\$120,031	0.69%	19	11.52%
GRAND TOTAL		\$17,510,738	100.00%	165	100.00%



As noted in Table 10.7, 77.29% of the contracts awarded in all industries, and 58.90% of the dollars paid, were received by non-minority male-owned Berkeley businesses. For minority-owned Berkeley businesses, Asian Pacific Americans received 7.97%, Asian Indian Americans received 0.40%, and Hispanic Americans received 7.17%. Caucasian females received 7.17% of the contracts. African Americans and Native Americans received no contracts.

Table 10.7: Total Contracts Awarded to Berkeley Businesses by Ethnicity and Gender in All Industries

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 Pacific American Females	3	1.20%	\$268,362	1.53%
Asian Pacific American Males	17	6.77%	\$3,757,075	21.46%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	1	0.40%	\$264,410	1.51%
Hispanic American Females	17	6.77%	\$69,417	0.40%
Hispanic American Males	1	0.40%	\$8,805	0.05%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	18	7.17%	\$2,829,458	16.16%
Non-minority Males	194	77.29%	\$10,313,211	58.90%
TOTAL	251	100.00%	\$17,510,737	100.00%

As noted in Table 10.8, non-minority male Berkeley businesses received 85.31% of supplies, equipment, and non-professional services contracts awarded, and 87.89% of the supplies, equipment, and non-professional services dollars paid. Asian Pacific Americans received 0.56%, Hispanic Americans received 9.60%, and Caucasian females received 4.52% of the supplies, equipment, and non-professional services contracts. None of the supplies, equipment, and non-professional services contracts were received by African Americans, Asian Indian Americans, or Native Americans.



**Table 10.8: All Supplies, Equipment, and Nonprofessional Services Contracts
Awarded to Berkeley Businesses by Ethnicity and Gender**

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 Pacific American Females	1	0.56%	\$60,421	1.02%
Asian Pacific American Males	0	0.00%	\$0	0.00%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	17	9.60%	\$69,417	1.17%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	8	4.52%	\$585,231	9.84%
Non-minority Males	151	85.31%	\$5,229,882	87.97%
TOTAL	177	100.00%	\$5,944,951	100.00%

As noted in Table 10.9, non-minority males received 100.00% of the construction contracts awarded to Berkeley businesses.



Table 10.9: All Construction Contracts Awarded to Berkeley Businesses by Ethnicity and Gender

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 Pacific American Females	0	0.00%	\$0	0.00%
Asian Pacific American Males	0	0.00%	\$0	0.00%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	0	0.00%	\$0	0.00%
Non-minority Males	3	100.00%	\$771,732	100.00%
TOTAL	3	100.00%	\$771,732	100.00%

As noted in Table 10.10, non-minority male Berkeley businesses received 56.34% of the professional services contracts awarded, and 39.94% of the professional services dollars paid. Asian Pacific Americans received 26.76% of the professional services contracts, Asian Indian Americans received 1.41%, Hispanic Americans received 1.41%, and Caucasian females received 14.08% of the professional services contracts. None of the professional services contracts were awarded to African Americans or Native Americans.

Table 10.10: All Professional Services Contracts Awarded to Berkeley Businesses by Ethnicity and Gender

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 Pacific American Females	2	2.82%	\$207,941	1.93%
Asian Pacific American Males	17	23.94%	\$3,757,075	34.81%
Asian Indian American Females	0	0.00%	\$0	0.00%
Asian Indian American Males	1	1.41%	\$264,410	2.45%
Hispanic American Females	0	0.00%	\$0	0.00%
Hispanic American Males	1	1.41%	\$8,805	0.08%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Caucasian Females	10	14.08%	\$2,244,227	20.79%
Non-minority Males	40	56.34%	\$4,311,596	39.94%
TOTAL	71	100.00%	\$10,794,054	100.00%



C. Efficacy of the Local Vendor Preference Program

The data indicate that the three stated objectives of the Program—stimulate the local economy, create opportunities for local businesses, and create opportunities for local female and minority-owned businesses—have not been achieved despite the Local Vendor Preference Program having been in place since 1983. As noted in Table 10.1, businesses with a Berkeley address received less than 7% of the dollars paid during the study period, and M/WBEs received even less. The Program enhancements approved by the City Council on May 25, 2021 recognized the need for a more robust program. Procurement policy and procedures for achieving the stated objectives of the 1983 Resolution, as amended in 2021, are presented in the section below as race and gender-specific and race and gender-neutral recommendations.

III. Disparity Analysis Findings

The statistically significant findings of disparity in the prime contract dollars paid during the study period were calculated in compliance with the constitutional parameters set forth in *City of Richmond v. J.A. Croson* (Croson) and its progeny. The statistical findings of disparity summarized in this chapter are detailed in Chapter 7: Prime Contract Disparity Analysis and Chapter 8: Subcontract Disparity Analysis. These findings are further evidence of the failure of the Local Vendor Preference Program to achieve its objective to create contracting opportunities for local M/WBEs.

A. Number of Prime Payments

As shown in Table 10.11, 1,665 prime contracts paid by the City during the January 1, 2016 to December 31, 2019 study period were analyzed. These contracts included 113 for construction, 440 for professional services, and 1,112 for goods and services.

During the study period, the City paid \$257,721,172 to prime contractors. Prime contractor payments included \$127,236,940 for construction, \$51,370,633 for professional services, and \$79,113,600 for goods and services.

**Table 10.11: Total Prime Dollars Expended: All Industries,
January 1, 2016 to December 31, 2019**

Industry	Total Number of Contracts	Total Dollars Expended
Construction	113	\$127,236,940
Professional Services	440	\$51,370,633
Goods and Services	1,112	\$79,113,600
Total Expenditures	1,665	\$257,721,172



B. Prime Disparity Findings

The prime contract disparity analysis was performed at both informal and formal thresholds. The informal threshold, as defined by the City of Berkeley Purchasing Manual (Manual), is the same for each industry.

As set forth in the Manual, the formal prime contract threshold for each industry is over \$25,000. However, for the disparity analysis, the formal threshold had an upper limit for each industry because the outliers-large contracts that skew the statistical findings-were removed. The methodology defining the upper limits of the formal contract threshold for each industry is detailed in Chapter 3: Prime Contractor Utilization Analysis. Table 10.12 shows the upper limits for the formal prime contracts, as derived for the three industries.

Table 10.12: Formal Thresholds by Industry

Industry	Contract Threshold
Construction	Between \$25,000 and \$2,140,000
Professional Services	Between \$25,000 and \$450,000
Goods and Services	Between \$25,000 and \$350,000

Table 10.13 defines the disparity analysis outcomes, as shown in the disparity tables.

Table 10.13: Statistical Outcome Descriptions

P-Value Outcome	Definition of P-Value Outcome
< 0.05 *	The underutilization is statistically significant.
not significant	<ul style="list-style-type: none"> The underutilization of M/WBEs is not statistically significant. The overutilization of non-minority males is not statistically significant.
----	While this group was underutilized, there were too few available firms to determine statistical significance.
< 0.05 †	The overutilization is statistically significant.
**	This study does not statistically test the overutilization of minority or gender groups or the underutilization of non-minority males.



1. Construction Prime Contract Disparity Findings

Table 10.14 shows the construction prime contract disparity findings at the two thresholds: (1) formal contracts valued between \$25,000 and \$2,140,000 and (2) informal contracts valued \$25,000 and less. On formal construction prime contracts valued between \$25,000 and \$2,140,000, disparity was found for African American, Caucasian female, and woman business enterprises. On informal contracts valued \$25,000 and less, disparity was found for African American businesses. Disparity could not be detected by ethnicity and gender for other groups because there were too few construction contracts in the analysis.

Table 10.14: Prime Contract Disparity Summary: Construction, January 1, 2016 to December 31, 2019

Ethnicity/Gender	Construction	
	Contracts Valued \$25,000 and Less	Contracts Valued Between \$25,000 and \$2,140,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Pacific Americans	----	No Disparity
Asian Indian Americans	----	----
Hispanic Americans	No Disparity	No Disparity
Native Americans	----	----
Caucasian Females	----	<i>Disparity</i>
Minority Business Enterprises	No Disparity	No Disparity
Woman Business Enterprises	----	<i>Disparity</i>

(----) While this group was underutilized, there were too few available firms to determine statistical significance.



2. Professional Services Prime Contract Disparity Findings

Table 10.15 shows the professional services prime contract disparity findings at the two thresholds: (1) formal contracts valued between \$25,000 and \$450,000 and (2) informal contracts valued \$25,000 and less. On formal prime contracts valued between \$25,000 and \$450,000, disparity was found for African American, Asian Pacific American, Hispanic American, Caucasian female, minority business enterprise, and woman business enterprise prime contractors. On informal contracts valued \$25,000 and less, disparity was found for African American, Hispanic American, minority business enterprise, and woman business enterprise prime contractors.

Table 10.15: Prime Contract Disparity Summary: Professional Services, January 1, 2016 to December 31, 2019

Ethnicity/Gender	Professional Services	
	Contracts Valued \$25,000 and Less	Contracts Valued Between \$25,000 and \$450,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Pacific Americans	No Disparity	<i>Disparity</i>
Asian Indian Americans	No Disparity	No Disparity
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>
Native Americans	----	----
Caucasian Females	Underutilized	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>	<i>Disparity</i>
Woman Business Enterprises	<i>Disparity</i>	<i>Disparity</i>

(----) While this group was underutilized, there were too few available firms to determine statistical significance.

3. Goods and Services Prime Contract Disparity Findings

Table 10.16 shows the goods and services prime contract disparity findings at the two thresholds: (1) formal contracts valued between \$25,000 and \$350,000 and (2) informal contracts valued \$25,000 and less. On formal prime contracts valued between \$25,000 and \$350,000, disparity was found for African American, Asian Pacific American, Asian Indian American, Hispanic American, Caucasian female, minority business enterprise, and woman business enterprise prime



contractors. On informal contracts valued \$25,000 and less, disparity was found for African American, Asian Pacific American, Asian Indian American, Hispanic American, Caucasian female, minority business enterprise, and woman business enterprise prime contractors.

Table 10.16: Prime Contract Disparity Summary: Goods and Services, January 1, 2016 to December 31, 2019

Ethnicity/Gender	Goods and Services	
	Contracts Valued \$25,000 and Less	Contracts Valued Between \$25,000 and \$350,000
African Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Pacific Americans	<i>Disparity</i>	<i>Disparity</i>
Asian Indian Americans	<i>Disparity</i>	<i>Disparity</i>
Hispanic Americans	<i>Disparity</i>	<i>Disparity</i>
Native Americans	----	----
Caucasian Females	<i>Disparity</i>	<i>Disparity</i>
Minority Business Enterprises	<i>Disparity</i>	<i>Disparity</i>
Woman Business Enterprises	<i>Disparity</i>	<i>Disparity</i>

(----) While this group was underutilized, there were too few available firms to determine statistical significance.

C. Subcontract Disparity Findings

The subcontract disparity analyses were limited to the construction and professional services subcontracts issued by the prime contractors during the January 1, 2016 to December 31, 2019 study period. As detailed in Chapter 4: Subcontractor Utilization Analysis, the subcontract data were reconstructed by Mason Tillman, in collaboration with the City of Berkeley.

1. Construction Contract Subcontract Disparity Findings

As indicated in Table 10.17, disparity was documented in the payments to African American and Asian Pacific American construction subcontractors.



**Table 10.17: Subcontract Disparity Summary: Construction,
January 1, 2016 to December 31, 2019**

Ethnicity/Gender	Construction
African Americans	Disparity
Asian Pacific Americans	Disparity
Asian Indian Americans	----
Hispanic Americans	No Disparity
Native Americans	----
Caucasian Females	No Disparity
Woman Business Enterprises	No Disparity

(----) While this group was underutilized, there were too few available firms to determine statistical significance.

2. Professional Services Subcontract Disparity Findings

As indicated in Table 10.18, disparity was identified in the payments to African American, Caucasian female, and woman-owned business enterprise professional services subcontractors.

**Table 10.18: Subcontract Disparity Summary: Professional Services,
January 1, 2016 to December 31, 2019**

Ethnicity/Gender	Professional Services
African Americans	Disparity
Asian Pacific Americans	No Disparity
Asian Indian Americans	----
Hispanic Americans	----
Native Americans	----
Caucasian Females	Disparity
Woman Business Enterprises	Disparity

(----) While this group was underutilized, there were too few available firms to determine statistical significance.

The documented discrimination is evidence that minority and woman-owned businesses have not received contracts commensurate with their availability and indicates that preference in the award of the City’s prime and subcontracts is being afforded to non-minority male-owned businesses. The preference afforded to non-minority male-owned businesses has resulted in a statistically significant disparity in the award of both prime and subcontracts to minority and woman-owned businesses.

To remedy the statistical disparity, race and gender-specific and race and gender-neutral recommendations are presented below in Sections IV and V.



IV. Race and Gender-Conscious Recommendations

The Study has documented the presence of disparity in all industries with most ethnic groups and woman-owned business enterprises. African Americans is the one group with a disparity in each industry at the informal and formal prime contract level and at the subcontract level.

The 1989 landmark decision of *City of Richmond v. J. A. Croson Co.* (Croson)²⁷⁹ allows local governments to enact race-conscious remedies when there is a strong basis in evidence of ongoing effects of past or present discrimination. Croson held, “where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.”²⁸⁰ And the Supreme Court in Croson found the local government has a compelling interest to remedy documented discrimination as granted by the 14th Amendment. Even in California, the 14th Amendment protection applies, despite Article 1, Section 31 of the State Constitution’s prohibition against preferences.

California voters approved a Civil Rights Initiative, Proposition 209, that amended the California Constitution on November 5, 1996. The amendment added Article 1, Section 31, which banned preferences based on race or gender in public contracting. The Ninth Circuit Court of Appeals has ruled that Proposition 209 does not violate the equal protection clause of the 14th Amendment because it does not serve “as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment.”²⁸¹ The statistically significant findings from the disparity analysis have documented that the City is affording preferential treatment to non-minority male-owned businesses in all industries in its award of prime contracts and has allowed, as a passive participant, preferential treatment to be afforded to non-minority males by its prime contractors in their award of subcontracts.

The California Supreme Court²⁸² has also acknowledged that the equal protection clause may, under rare circumstances, require the use of race and gender-conscious measures to remedy a public entity’s intentional discrimination. Further, the California Supreme Court also accepted the proposition that the local government has a compelling interest in providing a remedy for intentional discrimination. Given Article 31 of the California Constitution, which bans preferential treatment by local governments in the award of their contracts, recommendations are provided to address the documented preferential treatment of non-minority male-owned

²⁷⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁸⁰ *Id.* at 509.

²⁸¹ *Coalition for Economic Equity v. Wilson*, 122 F.3d at 708 (9th Cir. 1997).

²⁸² *Id.* at 336. See also *Hi-Voltage Wire Works Inc. v. City of San Jose*, 24 Cal.4th 537 (2000) (The California Supreme Court held that the governmental entity may adopt race conscious remedies as a remedy for that entity’s intentional discrimination.)



businesses in the award of City contracts. The preferential treatment of non-minority male-owned businesses in the award of City prime and subcontracts acts as a barrier to M/WBE participation and effectively discriminates against minority and women-owned businesses.

The proposed race and gender-conscious recommendations are predicated on the disparity findings and limited to the ethnic groups that were underutilized at a statistically significant level. Recommendations also include gender-based remedies for the female groups that were underutilized, albeit not at a statistically significant level. Findings of discrimination for WBEs only require statistical evidence of underutilization.

A. Race and Gender-Conscious Prime Contract Remedies

Prime contract remedies for the race and gender groups that have a statistically significant disparity should be implemented by the City. The recommended prime contract remedies should mitigate the adverse impact of the discrimination documented in the City’s utilization of prime contractors. The proposed remedies include bid discounts for bid prime contracts and evaluation points for prime contracts when the payment is not based on a bid.

1. Apply Bid Discount to Construction Prime Contracts

A 10% bid discount should be applied when ranking the prime contractor’s bid amount. To determine the lowest bidder during the evaluation process, the bid amount for eligible M/WBE bidders should be reduced by the discount percentage. The bid amount, as the basis for the contract award, should remain unchanged. The maximum discount should not exceed \$50,000. The ethnic group listed in Table 10.19 with statistically significant underutilization and woman business enterprises substantially underutilized are eligible for the bid discount.

Table 10.19: Groups Eligible for Construction Bid Discount

Ethnicity/Gender
African Americans
Caucasian Females
Woman Business Enterprises

2. Establish Evaluation Points for Professional Services Prime Contracts

Evaluation points for the groups with a disparity should be standard on professional services prime contracts. Evaluation points equal to 10% of the total points should be applied during the evaluation process to professional services prime contractors who are members of the minority and gender groups that were underutilized at a statistically significant level. Table 10.20 lists the groups with statistically significant disparity eligible for the evaluation points. Caucasian females were underutilized and are also eligible for the evaluation points.



Table 10.20: Groups Eligible for Professional Services Evaluation Points

Ethnicity/Gender
African Americans
Asian Pacific Americans
Hispanic Americans
Caucasian Females
Woman Business Enterprises

3. Apply Bid Discount to Goods and Services Prime Contracts

A 10% bid discount for groups with statistically significant disparity should be implemented on goods and services prime contracts. The bid discount should be applied when ranking the prime contractor’s bid amount during the evaluation process to determine the lowest bidder. The bid amount for eligible M/WBE bidders should be reduced by the discount percentage. The amount of the bid, as the basis for the bid award, should remain unchanged. The maximum discount should not exceed \$50,000. The eligible ethnic groups with statistically significant disparity and woman business enterprises are listed in Table 10.21.

Table 10.21: Groups Eligible for Goods and Services Bid Discounts

Ethnicity/Gender
African Americans
Asian Pacific Americans
Asian Indian Americans
Hispanic Americans
Caucasian Females
Woman Business Enterprises

4. Application of Bid Discounts and Evaluation Points

A Bid Preference Request form should be submitted with the bid proposal and statement of qualifications at the time of bid opening. A copy of the form should be reviewed on the day the bid or proposal is opened to promptly determine the businesses eligibility for the incentive. The findings should be applied to the ranking of bids and the assignment of evaluation points on proposals and statement of qualifications.

B. Race and Gender-Conscious Subcontract Remedies

Subcontractor disparity was documented in the award of construction and professional services subcontracts. As detailed in *Chapter 4: Subcontractor Utilization Analysis*, an extensive effort was undertaken to reconstruct the subcontracts awarded by the City’s construction and professional services (including architecture and engineering services) prime contractors. A collaborative effort between Mason Tillman and the City resulted in a reconstruction of both M/WBEs and non-M/WBE subcontract records for the City’s construction and professional services prime contracts.



African Americans had a statistically significant disparity on the construction subcontracts awarded by the City’s prime contractors. Although woman business enterprises did not have a disparity, they were underutilized, which meets intermediate scrutiny, the lower standard of review applied to gender-based remedial measures. MBE and WBE subcontract goals should be set to address the documented disparity. Also, subcontract goals should be set on professional services prime contracts for African American, Hispanic American, Caucasian female, and woman business enterprise subcontractors.

To meet the narrowly tailored standard, the subcontract goals should not exceed the availability levels of each eligible group. Table 10.22 shows the availability for each ethnic group with a statistical disparity, and woman business enterprises with either a statistical disparity or substantial underutilization.

Table 10.22: Subcontractor Availability Levels

Ethnic Group	Construction Availability Percentage	Professional Services Availability Percentage
African Americans	16.28%	14.08%
Asian Pacific Americans	5.50%	No Disparity
Caucasian Females	No Disparity	16.55%
Woman Business Enterprises	14.45%	29.78%

The recommended race and gender-specific goals, applied in combination with the enhanced race and gender-neutral program components, should facilitate the attainment of greater African American, Caucasian female, and woman business enterprise participation and eliminate the documented disparity. It is therefore recommended that the subcontract goals be equal to the availability of each eligible group.

1. Goal Setting

Subcontracting goals should be set on both construction and professional service prime contracts. The solicitation should specify the subcontract goals and the requirements for compliance with the goals. Goal attainment should be verified at bid opening and made a condition of the award.

Bid discounts should apply to eligible M/WBEs on all construction and goods and services bids. Preference points should apply to eligible M/WBEs on all proposals and statements of qualification. The preference points and bid discounts should be assigned during the evaluation process.

2. Require Subcontract Goal Attainment at Bid Opening

The M/WBE subcontract goal should be published in the prime contract solicitation. The contract goal should be met at bid opening with one or more of the eligible MBE and WBEs proposed to perform a commercially useful function.



Prime contractors who fail to meet either goal at bid opening but wish to be considered for an award must document that a good faith effort was made to meet the published goals. The good faith effort criteria allows flexibility in the evaluation of the Contractor's efforts to meet the contract specific goals. Therefore, a specific set of quantifiable good faith effort criteria should be adhered to.

The Office of Racial Equity shall determine whether the prime contractor met the goal or made the required good faith effort. If the good faith effort documentation is not submitted with the bid proposal or statement of qualifications or the documentation is not approved, the City should disqualify the submission. The next ranked response should be reviewed until a submission meeting the M/WBE goal is identified. If no response meets the M/WBE goal, the solicitation should be cancelled and re-advertised.

3. Implement Quantified Good Faith Effort Criteria

Good faith effort elements should be quantified to determine whether a prime contractor has provided sufficient evidence of a good faith effort to meet the MBE and WBE subcontract goals. The maximum score should be 100 points. To be considered a responsive bidder, the prime contractor must demonstrate a bona fide good faith effort that is sufficient to achieve a minimum score of 80% of the required points. The following are examples of good faith elements and recommended point assignments:

- **Advertising (5 points)**

Effort: Prime contractors should advertise opportunities for M/WBEs at least two weeks prior to bid opening through reasonable means, such as attendance at pre-bid meetings, advertising, and written notices. Contractors should be required to publish these opportunities in the general circulation media, minority-focused media, or trade-related publications at least twice unless City waives this requirement due to time constraints.

Documentation: The advertisement shall include the name and location of the project, location where plans and specifications can be viewed, subcontractor proposal due date, and items of work or specialties being solicited.

- **Bidder Outreach to Identify M/WBEs (15 points)**

Effort: Prime contractors should attempt to contact M/WBEs through personal, frequent, and persistent contact. The contractor is required to promptly return phone calls and emails.

Documentation: Prime contractors should provide a list of the names of the organizations or firms, persons contacted, and the dates of contact. They should also include copies of correspondence received from any organization or firm responding to the bidder's solicitation or initiating contact for the purpose of seeking subcontracting work. The contractor must contact at least three (3) firms/organizations or an amount sufficient to reasonably result in a viable subcontract.



Bidders must submit documentation of good faith efforts to contract with or to purchase significant material supplies from eligible firms within 48 hours of the bid opening. If a contractor or bidder fails to meet specified goals in the bid documents, the City must determine that the contractor has complied with all requirements of the solicitation documents and has made the required good faith effort.

- **Attend the Pre-bid Meeting (5 points)**

Effort: Attendance should be mandatory to comply with the good faith effort requirement. However, attendance may be optional if the participation goal is met.

Documentation: The contractor or the representative's name on the pre-bid meeting sign-in sheet and representative presence at the pre-bid meeting shall serve as documentation.

- **Provide Timely Written Notification (30 points)**

Effort: Prime contractors should solicit subcontract bids and material quotes from relevant eligible businesses in writing at least two weeks prior to bid opening. Relevant firms are those that could feasibly provide the services or supplies required for completing the scope of services provided in the bid document. In soliciting sub-bids, quotes, and proposals, the contractor will furnish the following information:

- Contractor's name, address, and telephone number.
- Project location and description.
- Solicited items of work services to be subcontracted or materials purchased, including a specific description of the work involved.
- Place where bid documents, plans, and specifications can be reviewed.
- Contractor representative to contact if more information is needed.
- Date and time when subcontractor/supplier quotes must be received by the contractor.

Documentation: Written notification must include verification of transmission date. Such verification may include copies of certified mail-return receipts, emails, and automated facsimile journals.

- **Contact Follow-up (10 points)**

Effort: Prime contractors should return phone calls, facsimiles, and emails promptly after the initial solicitation at least two weeks prior to bid opening. The follow-up should take the form of a phone call, facsimile, or email during normal business hours. Such contact shall be within a reasonable amount of time to allow the prospective subcontractor an opportunity to submit a competitive sub-bid.



Documentation: The list of subcontractors who were contacted by telephone, including results of that contact, should be documented with a telephone log, email print-out, automated facsimile journal, or facsimile transmittal document. Included should be names of the eligible businesses, telephone numbers, contact persons, and dates of contact.

- **Identify Items of Work (10 points)**

Effort: Prime contractors' subcontracts should be broken down into discrete items or packages that market area M/WBEs may find economically feasible to perform. Smaller portions of work or other assistance that could reasonably be expected to produce a level of participation sufficient to meet the goals should be offered to eligible prospective subcontractors. Prime contractors should not deny a subcontract to a qualified and competitive M/WBE solely because the M/WBE cannot perform the entire package unless unbundling would jeopardize scheduling or increase costs by more than five (5) percent.

Documentation: The list of the specific items of work solicited, including identification of eligible firms, in which such work was solicited.

- **Negotiate in Good Faith (15 points)**

Effort: Prime contractors should negotiate fairly with interested M/WBEs even if the selection of the M/WBE would increase costs. A contractor should not unjustifiably reject sub-bids, quotes, and proposals prepared by eligible businesses. However, the City should afford the contractor to choose a low bid if two or more quotes are received.

Documentation: Provide written statements of the names, addresses, and telephone numbers of subcontractors contacted by the contractor to negotiate prices or services. Include dates of the negotiations and the results. Document the quotes/proposals received from the eligible businesses. Lack of qualifications or significant price difference of five (5) percent or more will be considered just cause for rejecting eligible businesses. Proof of price differential must be made available to the City.

- **Offer Assistance in Financing, Bonding, Insurance, or Mentoring (10 points)**

Effort: Prime contractors should provide M/WBEs technical assistance with plans, specifications, and requirements of the contract in a timely manner to respond to a solicitation. In addition, the contractor should also advise and make efforts to assist interested businesses in obtaining bonds, lines of credit, or insurance required by the City, when applicable. A prime contractor may also receive 10 points for good faith effort by offering mentoring assistance.

Documentation: Provide written statements of the type of assistance offered. The contractor shall provide the name, contact person, and telephone number of the bonding company or financial institution offering assistance.



To claim points for mentoring, the prime contractor must submit a mentoring plan that is subject to the City's approval for one or more of the eligible businesses included as a subcontractor for the project. The mentoring plan outcomes should enhance capability to bid projects as a prime contractor and new skills in estimating projects, completing project schedules, hiring subcontractors, acquiring additional licenses or certification, accessing capital, and increasing bonding capacity.

4. Commercially Useful Function

Listed M/WBEs must perform a commercially useful function to be counted toward the goal. The determination that the eligible business can perform a commercially useful function must be made at the time of bid opening. Services should be considered useful if such services would be provided in the normal course of conducting the business assigned to the M/WBE subcontractor. The subcontractor must perform a distinct element of work and possess the skill and expertise as well as responsibility for managing and supervising the work.

The responsibility for demonstrating that the listed M/WBEs can perform a commercially useful function is the sole responsibility of the prime contractor. The commercially useful function requirement should apply to all procurement activity, including change orders, substitutions, and task orders. A business that performs a commercially useful function minimally does the following:

- Executes a distinct element of the contract scope of work.
- Carries out its obligations by performing, managing, and supervising the assigned work involved and, in the case of a supplier, warehousing its materials, supplies, and equipment.
- Performs work that is normal business practice for its industry.
- Completes its scope of work and does not further subcontract portions of the work greater than that expected to be subcontracted by normal industry standards.

a. Counting Participation Toward the M/WBE Goal

Subcontractor participation counted toward the goal should be performed by the listed M/WBE subcontractor unless the City approves a substitution during the term of the contract. Prime contractors should be required to submit a signed Letter of Intent to Subcontract form for every subcontractor used to meet the goal. Contractors that do not use the listed M/WBE subcontractor and fail to secure an approved substitution should not receive reimbursement for self-performing or having another contractor perform all or part of the listed M/WBEs work.

5. Substitution of Listed M/WBE Subcontractor

Substitution of an M/WBE listed in a prime contract should be approved in writing by the project manager and the Racial Equity Officer. To substitute an M/WBE, there must be due process. A substitution hearing must be granted upon a request from either the prime contractor or a subcontractor.



Conditions in which a substitution should be considered are when the subcontractor meets one or more of the following conditions:

- Becomes insolvent
- Fails to execute a written contract for the scope of work and price specified in the subcontractor's bid after a reasonable amount of time has been granted
- Fails to perform the subcontract scope of work in accordance with industry standards
- Fails to meet the agreed upon bond requirements
- Fails to comply with the work completion schedule and disrupts the progress of the project

A written request for substitution should be submitted to the project manager and the Equity Officer. The contractor should be copied on the request. The subcontractor should be afforded a hearing to present its written or oral statement of the facts. The hearing should be held within 48 hours of receiving the request for substitution. Prior to the hearing, the Equity Officer should attempt to mediate the dispute. The decision reached by the Equity Officer and project manager should be final and binding. If the prime contractor's request for a substitution is granted, the substituted M/WBE should be replaced with another M/WBE and approved by the Equity Officer. In the event the prime contractor's request for subcontractor substitution is denied, the prime contract must reinstate the subcontractor and document the percent of the subcontract that is equal to or greater than the amount listed in the prime contract.

6. Assess Penalties for Failing to Achieve M/WBE Subcontract Goals

Contract compliance reviews should occur throughout the term of the contract to ensure that M/WBEs listed on the bid perform the subcontract work unless a substitution is approved. Monetary penalties should be levied on prime contractors who fail to meet the M/WBE goals. The City should monitor payments monthly and request documentation of MBE and WBE monthly and final payments. The penalty should equal the M/WBE goal shortfall. As appropriate, it should be assessed during the project close-out and be withheld from the prime contractor's final payment.

C. M/WBE Program Components

1. Staff the Office of Racial Equity

The Office of Racial Equity (Office) was authorized by the City Council on July 28, 2020. The Office should have the authority and staff to implement an effective M/WBE program to promote minority and woman business enterprise utilization and eliminate the documented racial and gender disparity. The Office should report directly to the City Manager to ensure the autonomy necessary to fulfil its function.

The authorization states the purpose of the Office is to: (1) establish a common vision of racial equity across City departments, (2) create mechanisms for measuring racial inequity in all City



programs and services, and (3) initiate efforts by all City departments to implement best practices related to metrics, policies, and procedures to close racial inequities in the allocation and delivery of all City programs and services. These objectives align with the recommendations proposed herein to eliminate the discrimination in the award of prime and subcontracts documented in this study.

The Office should have the primary responsibility for the administration of the M/WBE Program, and it should be authorized to:

1. Establish written procedures, informal guidelines, and forms necessary to effectively implement Program requirements.
2. Monitor compliance with the requirements of the M/WBE Program.
3. Analyze projects to determine subcontracting components and identify potential M/WBE subcontractors in consultation with the City departments' staff and other staff with procurement responsibilities.
4. Review and approve bidder/proposer requests for M/WBE proposal credits and bid waivers.
5. Determine whether a bidder/proposer made good faith efforts to achieve the M/WBE subcontract goal.
6. Evaluate departments' requests for M/WBE waivers and make final determinations to grant or deny the waiver requests.
7. Serve as the point of contact and source of information for potential bidders and provide, upon request, the names and contact information of certified M/WBEs to reinforce and support outreach efforts by potential bidders.
8. Manage the certification of M/WBEs.
9. Develop and implement outreach to M/WBEs and provide technical assistance to aid the businesses in gaining the capacity to compete successfully for City contracts.
10. Provide notices to contractors of noncompliance and investigations of alleged violations of the M/WBE Program.
11. Participate in pre-solicitation planning and design review meetings to support the establishment of M/WBE goals, and identify opportunities for unbundling larger contracts into smaller solicitations.



12. Review requests for bids, proposals, and statements of qualifications to ensure the inclusion of the M/WBE policy and procedures and to remove artificial barriers to M/WBE participation.
13. Track the effectiveness of the M/WBE Program and analyze M/WBE prime and subcontract utilization data.
14. Produce quarterly reports quantifying M/WBE utilization on City contracts, contracts awarded based on good faith effort, and contracts advertised without goals.
15. Promote the M/WBE Program and its accomplishments through innovative initiatives, such as recognition programs and awards, annual reports, and newsletters.
16. Train City employees on the procedures and requirements of the M/WBE Program.

2. Position Descriptions for the Office of Racial Equity

The City Council funded two positions for the Office, an Equity Officer and a supporting Specialist. Sufficient staff to effectively execute the functions of the Office should be assigned. The staff should possess the requisite skills, knowledge, and abilities to implement and manage the complex requirements of a comprehensive M/WBE Program.

Below are descriptions of the Office's additional functions that should be filled with new hires or staff reassigned from other departments.

Executive Staff:

- Executive Assistant to the Equity Officer - provides confidential assistance to the Manager with responsibility to perform secretarial and administrative support duties. The Executive Assistant must demonstrate proficiency in Microsoft Office Suite, the capacity to handle sensitive information with discretion, and the ability to work with a variety of individuals with diverse interests and backgrounds.

Technical Staff:

- Contract Compliance Manager - assists the Equity Officer in managing the M/WBE Program, oversees pre-award compliance with the M/WBE Program requirements stipulated in the solicitation, and monitors post-contract compliance to ensure that the contract provisions are adhered to during the term of the contract. The Contract Compliance Manager must demonstrate proficiency in Microsoft Office Suite, have knowledge of construction and construction-related procurement processes, and the ability to work with the business community with diverse interests and backgrounds.



- Contract Compliance Specialist - monitors M/WBE contract compliance and M/WBE contractor and subcontractor participation, investigates complaints, ensures contracts are properly and legally executed, and conducts project site visits and reports. The Contract Compliance Specialist should also report verified data measuring the department's compliance with the contract goals and requirements. The position requires efficiency in Microsoft Office Suite, knowledge of construction and construction-related procurement processes, and the ability to work with public officials and the business community with diverse interests and backgrounds.

3. Create a Business Advisory Council

To support the Office of Racial Equity in eliminating the disparity in the award of both prime contracts and subcontracts to minority- and woman-owned businesses, the City should establish a Business Advisory Council. The Council should be appointed by the Mayor and City Council to advocate for the creation of M/WBE programs. The Business Advisory Council should serve as advisors to the Office of Racial Equity and report to the City Council. The Business Advisory Council should be responsible for:

- Increasing access to contracting opportunities for M/WBEs and local business enterprises.
- Reviewing and advancing initiatives that impact M/WBE and local business enterprise participation.
- Enhancing the notification process regarding prospective contract opportunities.
- Revising the on-call prequalification criteria.

The Business Advisory Council membership and guidelines should be published on the Office's webpage. The Business Advisory Council should include 10, but not more than 15, members, and each member should serve no more than two terms. Members should serve for staggered terms of three years.

4. Establish Reciprocal Certification Standards

Certification criteria must be established to ensure the eligibility of the businesses utilized to meet the M/WBE goal. The eligibility should require the business to be at least 51% owned and controlled by one or more women or persons who are minority group members. Minority group members should include African Americans, Asian Pacific Americans, Asian Indian Americans, Hispanic Americans, and Native Americans who are United States citizens.

The M/WBE should have a real, substantial, and continuing ownership, enjoying all the customary incidents of ownership, and sharing in the risks and profits commensurate with its ownership interest. The M/WBEs should also have control over all day-to-day operations of the business. The businesses should be headquartered, physically located, and licensed to operate in the City's market area and be in operation for a minimum of six months prior to applying for M/WBE certification.



Reciprocal certification should be accepted. Only entities that perform both desk and site audits to verify the owner's ethnicity, gender, and control of the business operations should be granted reciprocal status. The certification process of the reciprocal certification agencies should be reviewed at least biannually for compliance with the City's certification review and eligibility standards.

5. Produce an M/WBE Program Training Manual

An M/WBE Training Manual should be produced to describe the Program's mission, policy, and procedures and made available to all staff electronically. It should be downloadable from the Office of Racial Equity's webpage. The M/WBE Program Training Manual should standardize the delivery of the Program requirements within City departments. The manual should ensure that staff in all departments have the knowledge and skills to fulfill their M/WBE Program duties. The requirements set forth in the manual should become standard operating procedure in each department. The M/WBE Program Training Manual should also provide staff with clear guidance on its responsibilities to track and report the participation of M/WBEs. And it should be incorporated into the new employee orientation.

6. Conduct M/WBE Program Staff Training

The M/WBE Program Manager should conduct routine training based on the M/WBE Program Training Manual to ensure all personnel are knowledgeable about the M/WBE Program's requirements and capable of supporting its policies and objectives. The training program should minimally include:

- Annual training seminar - to inform staff of any changes to the M/WBE Program policy and procedures and to promote the Program enhancements.
- New employee training - to ensure that new employees understand the established policies and procedures. A printed copy of the M/WBE Program Training Manual should be provided to each new City employee.

7. Require Targeted M/WBE Business Outreach

When soliciting bids, proposals, and statements of qualifications for construction, professional services, and goods and services contracts, City departments should be required to adhere to the following outreach efforts:

- Conduct targeted outreach to M/WBEs before the request for proposals is released and host information meetings to notify the business community of upcoming opportunities.
- Actively solicit responses from race and gender groups that were found to have a disparity.
- Maintain an email log of all M/WBEs solicited for construction, professional services, and goods and services contracts.



8. Conduct an M/WBE Program Outreach and Marketing Campaign

Promotion of the race and gender-conscious and neutral components of the M/WBE Program should be executed through a comprehensive annual outreach and marketing campaign to encourage local businesses to apply for certification and respond to solicitations. The outreach campaign should communicate the goals and objectives of the Program to M/WBEs and the components of the robust M/WBE Program. The outreach and marketing objectives should require the Office, in collaboration with City staff having procurement authority, to:

- collaborate with minority and women business trade associations, chambers, and advocacy groups to publish contracting opportunities and recommendations resulting from this Study on their websites.
- provide networking opportunities at pre-bid and pre-proposal conferences and certification workshops.
- host marketing forums that allow M/WBEs to deliver technical presentations on their services to City staff with contracting authority. The forums should be industry-specific and held on a quarterly basis.
- promote the Local Vendor Preference program to increase awareness of the 5% bid discount to local businesses.
- enhance the City's digital presence by releasing a digital M/WBE business development newsletter with corresponding e-notifications to certified businesses regarding contracting opportunities. The digital newsletter should be used as a tool to keep business owners updated on important announcements. The newsletter should provide detailed information on upcoming projects, project status, and City announcements, including networking opportunities and workshops. The newsletter should be published on schedule at least quarterly and remain on the Office of Racial Equity's website for no less than 12 months.

V. Procurement Program Enhancements

1. Publish Prime Contractor Payments

Payments to prime contractors should be published on the City's website to allow prime contractors to track the City's payments of their invoices and the subcontractors to track their primes' payment. Prime contractor payment data should be updated weekly or bi-weekly on the same day of the week. The reported prime contract payment information should be searchable by contract number, project name, and prime contractor name. This system would enable subcontractors to track the disbursements to their prime contractors in real time and thereby eliminate the subcontractor's need to ask the City for the status of its prime contractor's invoice payment. This information will also allow the prime contractors to get real time status of their payment, thus eliminating the need to contract the City to inquire about payments.



2. Establish Prompt Payment Program

Standards requiring the City to pay its prime contractors within ten (10) businesses days from receipt of an undisputed invoice and requiring prime contractors to apply the same standard to subcontractor payments should be instituted. When an invoice is disputed, the fees that are not disputed should be paid within the ten-day period. The businesses should be notified of the dispute within five (5) days of the invoice being received and paid promptly until the dispute is resolved.

3. Give Five-day Notice of Disputed Invoices

Performance disputes can be a source of delayed invoice payments and adversely affect the ability of small businesses to perform. When the prime contractor's invoice is in dispute, the City should provide the contractor with an Invoice Dispute Notification detailing all items in dispute within five (5) days of receiving the invoice. Undisputed invoice amounts should be paid in a timely manner, but no later than fifteen (10) days after receipt. Disputed items should be resolved in a timely manner and thereafter paid within fifteen (15) days.

The prime contractor should have the same obligation to give notice to the subcontractor and provide an Invoice Dispute Notification detailing all items in dispute within five (5) days of receiving a disputed invoice. The prime contractor should pay the subcontractor within five (5) days of receiving payment from the City for both disputed and non-disputed invoices.

4. Establish Dispute Resolution Standards

Dispute resolution standards should be established to allow businesses to resolve issues relating to work performance and payment after a contract award. A dispute resolution process should apply to disputes between prime contractors and the City, as well as disputes between subcontractor and prime contractor. There should be provisions for an ombudsperson. A dispute resolution meeting should be mandatory in the event a dispute cannot be resolved by the ombudsperson within ten (10) working days.

The first step in the dispute resolution process should be the submission to the ombudsperson of an oral or written complaint by the aggrieved party. The ombudsperson would then aid the parties in resolving the dispute by investigating the claim and making initial contact with City, prime contractor, and, if relevant, the subcontractor. If the dispute is not resolved through these means within ten (10) working days, the ombudsperson will assist the aggrieved party in filing a request for a dispute resolution meeting. Any party that does not respond to requests by the ombudsperson will be placed on a suspension list until the matter is resolved.

The meeting would be the second step in the resolution process. Neither party may involve legal representation during this initial informal process to avoid significant legal costs for all parties. If the parties are not able to reach a mutually agreed upon resolution through meeting, the dispute may proceed to formal mediation or arbitration. A dispute must be taken to mediation before it can proceed to arbitration.



Arbitration should be the final step in resolving a dispute. The decision reached by the arbitrator is final and binding. The parties may not retain legal representation during the mediation or arbitration process.

5. Implement a Sheltered Market Rotation Program

A sheltered market rotation program for the award of small contracts would allow small businesses to compete with similarly situated businesses. The Local Vendor Preference Program should be expanded to require assignment of informal contracts less than \$25,000 to the sheltered market program. Small projects currently issued as purchase orders under large multi-year, on-call, and set-aside contracts should be awarded under the sheltered market program.

The sheltered market rotation would limit competition to M/WBEs and other similarly situated small businesses. Construction, professional services, and goods and services prime contracts valued less than \$25,000 should be awarded under the sheltered market. The awards would be made on a rotating basis. 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. Businesses could prequalify for the sheltered market program by responding to a request for qualifications.

Prequalification criteria would be based on the capacity needed to perform contracts in the sheltered market program. Prequalified businesses would be placed on a list based on the trade and professional service so assignments could be made based on qualifications.

Qualified M/WBEs and LBEs would be placed on a rotation list according to their prequalification date and specialty. Businesses with the same prequalification date and specialty would be placed alphabetically according to the owner's last name. Whenever two or more businesses are appended to the rotation list, the placement should follow the same procedure. After a business on the rotation list receives a work order, its name should be placed at the end of the list.

The Office of Racial Equity should approve all contracts less than \$25,000 not awarded through the Sheltered Market Program. Any exemption to exclude an informal contract from the program should be approved by the Office of Racial Equity before an award.

6. Pay Mobilization to Subcontractors

When mobilization costs are paid to construction prime contractors at the inception of a project, the fee is a percentage of the total contract amount. Subcontractors that work on the job site incur mobilization costs as well. The mobilization payment defrays the cost of setting up the job site. When the prime contractor receives a percentage of the total project costs as the mobilization payment to begin work on the project, the subcontractor should be paid the same percentage when it is scheduled to mobilize. Provisions for the payment of mobilization to the subcontractor should be stipulated in the prime contract and the provision should require payment from the prime contractor within five (5) days of commencing work on the job site.



7. Enhance the Local Vendor Preference Program

Modifications to the Local Vendor Preference Program are recommended to maximize participation of Berkeley businesses in the program, monitor the program's implementation, and promote its objectives.

a. Modify the Local Vendor Preference Program Certification Form

To certify, Berkeley businesses are required to submit a Vendor Information Application, including Products and Services List, a Taxpayer ID, and Certification Form W-9. The form should be offered in more languages than English to accommodate local business owners who do not speak English. The Vendor Information Application should also capture the race and gender of the business owner and assign each certified business a number to identify the firm's status as a certified vendor eligible on bids submitted for the bid preference.

b. Publish a Local Vendor Preference List

A list of the certified vendors should be published on the City's website and used by the departments to identify local businesses when purchasing goods, supplies, and non-professional services. The awarding department should be responsible for applying the bid reference to certified vendors during the evaluation process. Each department should publish all contracts awarded to a certified vendor to promote the value of the Program for a Berkeley business owner.

c. Extend the Vendor Preference Program to Professional Services and Construction Contracts

Resolution 51,813 applies the bid preference to businesses that offer supplies, equipment, and non-professional services. The efficacy of the Local Vendor Preference Program would be enhanced by extending the bid discount to construction and professional services businesses. An expanded Local Vendor Preference Program would therefore increase the contracting opportunities for the entire Berkeley business community.

d. Increase the Bid Discount from Five to Eight Percent

The Local Vendor Preference Program currently offers a 5% bid discount. The bid discount should be increased from 5% to 8% so Berkeley businesses can receive greater access to the City's small contracts.

8. Unbundle Large Contracts

- Multi-year contracts should be unbundled into smaller projects to increase the number of businesses participating at both the prime contracting and subcontracting levels. Large prime contracts reduce the number of prime contract opportunities and center the control of subcontracting with a few prime contracts with the large dollar contracts.



- Competitively awarded contracts should not be extended through change orders or amendments unless the modification is required to complete the scope specified in the original contract. New specifications or additional work with the same specifications should be put out to bid to allow more contractors to perform the City’s prime contracts.
- The use of large, multi-year prime contracts not only limits opportunities for minority, woman-owned and local businesses to be awarded prime contracts, it places the control of the subcontract awards within the purview of a limited number of prime contractors.
- Conditions that are conducive to unbundling large construction and professional services contracts include the following:
 - Projects with phased delivery of the work
 - Projects conducted at multiple locations
 - Specialty work, such as signage, public art, demolition, trucking, traffic studies, and surveying
 - On-call and set-aside procurements

9. Provide Debriefing for Unsuccessful Bidders

Contracts that are not awarded as low bid should include a debriefing option. A debriefing is a means whereby a contractor who responds to a solicitation for a proposal or statement of qualifications can secure information that might inform future submittals.

A debriefing session should be offered to all unsuccessful bidders. The option should be published on the Finance department’s webpage and included in the Notice of Intent to Award. The Notice of Intent to Award should be sent to all proposers before the contract is authorized for award. The solicitation should state that a debriefing session is optional. The procedures for scheduling the debriefing session should be set forth in the solicitation and the Intent to Award notice. The debriefing session should be scheduled no later than 15 days from the date of the request.

The debriefing session should be managed by the Finance department and the user department’s project manager should provide the debriefing. The reviewers scores should be made available at the debriefing or before, if requested. A record of the documents provided, and the information discussed at each debriefing session, should be maintained by the awarding department as part of the contract file.

10. Reevaluate the Use of On-call Contracts

This procurement method is an example of the contract bundling that removes a significant percent of contracts from the competitive process and creates a process conducive to the application of preferential treatment. On-call procurement is utilized by the departments to buy construction services, professional services, and goods and services, although there is no procurement process defined in the Purchasing Manual. There were 101 prime contracts coded in the IBM and Tyler Munis ERP datasets as either “on-call” or “as needed” (hereafter on-call). Table 10.23 shows the City departments that awarded on-call contracts during the study period. Public Works awarded the most on-call contracts. A total of 57 of the 101 on-call contracts were



awarded by a division of Public works. The departments of Parks, Recreation, and Waterfront awarded 16 on-call contracts, and Planning awarded 10. Most of the contract records stipulate the awarding department and division. Only 10 did not specify the department.

Table 10.23: On-Call Contracts by Department, All Industries, January 1, 2016 to December 31, 2019

Department	Divisions	Number of On-Call Construction Contracts	Number of On-Call Professional Services Contracts	Number of On-Call Goods and Services Contracts
City Manager and Administration		0	0	1
Fire Department	Chief and Administration	0	0	5
Berkeley Public Library	Main Branch	1	0	0
Planning and Development	Building and Safety	0	1	0
Planning and Development	Land Use	0	9	0
Parks, Recreation & Waterfront		0	0	3
Parks, Recreation & Waterfront	Marina	0	0	1
Parks, Recreation & Waterfront	Administration	0	3	9
Public Works		0	0	1
Public Works	Corporation Yard	0	1	0
Public Works	Electrical	1	0	0
Public Works	Engineering	0	25	2
Public Works	Facilities Management	0	0	4
Public Works	Administration	0	11	1
Public Works	Streets	0	0	1
Public Works	Transfer Station	0	1	0
Public Works	Transportation	0	9	0
Police Department		0	0	1
Not Specified		0	8	2
TOTAL (101)		2	68	31

Most on-call contracts were awarded for professional services. Professional service on-call contracts represent 18.96% of the 101 contracts awarded and 33.79% of the dollars paid. There were two on-call contracts awarded for construction and \$16,389,180 of the dollars paid. On-call goods and services contracts awarded represent 4.04% of the 101 on-call contracts and 5.29% of dollars expended during the study period.

Most of the on-call professional services contracts and 73.36% of the dollars were paid to non-M/WBEs, while 50.00% of the construction contracts and 16.75% of the dollars expended for construction services were received by non-minority males. Additionally, 50.00% of the on-call contracts and 83.25% of the dollars expended for construction contracts were received by Caucasian females. Most of the on-call goods and services contracts and 53.58% of the dollars were awarded to non-M/WBEs.

As shown in Table 10.24, over 50% of the on-call contracts received total payments of \$500,000 and greater and 36.77% of the on-call contracts received \$1,000,000 or more.



**Table 10.24: Size of On-Call Prime Contracts, All Industries,
January 1, 2016 to December 31, 2019**

Range	Ethnicity and Gender	Amount of Dollars Awarded	Percent of Dollars Awarded
\$1,000,000 - \$2,999,999	Asian Pacific American Male	\$ 1,357,843.27	6.52%
	Caucasian Female	\$ 1,721,055.40	8.26%
	Caucasian Male	\$ 4,580,119.87	21.99%
Total		\$ 7,659,018.54	36.77%
\$500,000 - \$999,999	Asian Indian American Male	\$ 899,785.26	4.32%
	Asian Pacific American Male	\$ 602,748.77	2.89%
	Caucasian Male	\$ 2,836,579.70	13.62%
Total		\$ 4,339,113.73	20.83%
\$250,000 - \$499,999	Caucasian Female	\$ 282,676.74	1.36%
	Caucasian Male	\$ 2,858,670.71	13.72%
Total		\$ 3,141,347.45	15.08%
\$100,000 - \$249,999	Asian Pacific American Female	\$ 182,940.61	0.88%
	Caucasian Female	\$ 206,140.94	0.99%
	Caucasian Male	\$ 3,577,042.82	17.17%
Total		\$ 3,966,124.37	19.04%
\$50,000 - \$99,999	Caucasian Male	\$ 771,476.43	3.70%
Total		\$ 771,476.43	3.70%
\$25,000 - \$49,999	Asian Pacific American Male	\$ 72,127.98	0.35%
	Caucasian Female	\$ 48,301.00	0.23%
	Caucasian Male	\$ 469,430.80	2.25%
Total		\$ 589,859.78	2.83%
\$5,000 - \$24,999	Caucasian Female	\$ 43,447.89	0.21%
	Caucasian Male	\$ 314,198.44	1.51%
Total		\$ 357,646.33	1.72%
Under \$5,000	Asian Pacific American Male	\$ 2,600.00	0.01%
	Caucasian Male	\$ 4,900.46	0.02%
Total		\$ 7,500.46	0.04%
GRAND TOTAL		\$ 20,832,087.09	100.00%

As shown in Table 10.25, the purchase orders issued to the on-call contractors to perform the specific task under their on-call contract were relatively small in dollar value. More than 76.53% were under \$25,000. These disaggregated purchase orders are tied to the 101 on-call contracts.



Table 10.25: Purchase Orders Issued Under On-Call Contracts, All Industries, January 1, 2016 to December 31, 2019

Range	Number of POs	Percent of POs
\$500,000 - \$999,999	1	0.26%
\$250,000 - \$499,999	4	1.02%
\$100,000 - \$249,999	28	7.14%
\$50,000 - \$99,999	25	6.38%
\$25,000 - \$49,999	34	8.67%
\$5,000 - \$24,999	127	32.40%
Under \$5,000	173	44.13%
GRAND TOTAL	392	100.00%

Table 10.26 shows the payments for all on-call contracts analyzed during the study period. Of the 101 on-call contracts in all industries, 88 on-call contracts (87.13%) were awarded to non-minority males, representing \$15,412,419 (73.98% of the dollars). Asian Pacific Americans received \$2,218,261, which represented 5.94% of the on-call contracts, Caucasian females received \$2,301,622 (5.94%), and only one on-call contract was received by an Asian Indian American. African Americans, Hispanic Americans, and Native Americans did not receive a single on-call contract.

Table 10.26: On-Call Prime Contractor Utilization, All Industries, January 1, 2016 to December 31, 2019

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Pacific Americans	6	5.94%	\$2,218,261	10.65%
Asian Indian Americans	1	0.99%	\$899,785	4.32%
Hispanic Americans	0	0.00%	\$0	0.00%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	6	5.94%	\$2,301,622	11.05%
Non-minority Males	88	87.13%	\$15,412,419	73.98%
TOTAL	101	100.00%	\$20,832,087	100.00%

Table 10.27 shows the number of contracts awarded and dollars paid by ethnicity and gender for construction on-call contracts. The two on-call contracts for construction went to a non-minority male and Caucasian female. While Caucasian females received only one on-call contract, it represented \$48,301, or 83.25% of the dollars paid by the City.



**Table 10.27: On-Call Construction Prime Contractor Utilization,
January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Pacific Americans	0	0.00%	\$0	0.00%
Asian Indian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	0	0.00%	\$0	0.00%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	1	50.00%	\$48,301	83.25%
Non-minority Males	1	50.00%	\$9,716	16.75%
TOTAL	2	100.00%	\$58,017	100.00%

Table 10.28 shows the number of unique professional services vendors awarded on-call contracts during the study period. Of the 268 professional services vendors analyzed, 52, or 19.40% of vendors, received on-call contracts, representing 35.72% of all professional services dollars.

**Table 10.28: Unique On-Call Vendors, Professional Services,
January 1, 2016 to December 31, 2019**

Number of Unique Vendors	Number of Unique Vendors with On-Call Contracts	Percentage of Unique Vendors with On-Call Contracts	Dollar Amount of All Contracts	Dollar Amount of All On-Call Contracts	Percentage of Dollar Amount of All Contracts
268	52	19.40%	\$ 51,370,632.52	\$ 18,349,772.81	35.72%

Table 10.29 shows the number of contracts awarded and dollars paid by ethnicity and gender for professional services on-call contracts. Non-minority males received 59, or 86.76% of the on-call professional services contracts, representing \$13,053,134, or 71.14% of the dollars. Only four on-call professional services contracts were paid to minority business enterprises. Asian Pacific Americans received three, or 4.41% of the on-call contracts, and Asian Indian Americans received one, or 1.47% of the on-call contracts. African Americans, Hispanic Americans, and Native Americans did not receive a single on-call contract.

**Table 10.29: On-Call Professional Services Prime Contractor Utilization,
January 1, 2016 to December 31, 2019**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Pacific Americans	3	4.41%	\$2,143,533	11.68%
Asian Indian Americans	1	1.47%	\$899,785	4.90%
Hispanic Americans	0	0.00%	\$0	0.00%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	5	7.35%	\$2,253,321	12.28%
Non-minority Males	59	86.76%	\$13,053,134	71.14%
TOTAL	68	100.00%	\$18,349,773	100.00%



Table 10.30 shows the number of unique goods and services on-call contracts awarded during the study period. Of the 692 goods and services on-call prime contracts, 27, or 3.90% of the vendors, received on-call contracts, representing 3.06% of all goods and services dollars.

Table 10.30: Unique On-Call Vendors, Goods and Services, January 1, 2016 to December 31, 2019

Number of Unique Vendors	Number of Unique Vendors with On-Call Contracts	Percentage of Unique Vendors with On-Call Contracts	Dollar Amount of All Contracts	Dollar Amount of All On-Call Contracts	Percentage of Dollar Amount of All Contracts
692	27	3.90%	\$ 79,113,600.21	\$ 2,424,297.33	3.06%

Table 10.31 shows the number of contracts awarded and dollars paid by ethnicity and gender for goods and services on-call contracts. Non-minority male-owned businesses received 28, or 96.92% of the on-call goods and services dollars, and 90.32% of the on-call contracts. Three of the 31 on-call contracts (3.08%) went to Asian Pacific Americans, representing 9.68% of the dollars. African Americans, Asian Indian Americans, Hispanic Americans, Native Americans, and Caucasian females did not receive a single on-call contract.

Table 10.31: On-Call Goods and Services Prime Contractor Utilization, January 1, 2016 to December 31, 2019

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian Pacific Americans	3	9.68%	\$74,728	3.08%
Asian Indian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	0	0.00%	\$0	0.00%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	0	0.00%	\$0	0.00%
Non-minority Males	28	90.32%	\$2,349,569	96.92%
TOTAL	31	100.00%	\$2,424,297	100.00%

11. Enhance Contract Management

The City's data was not entered consistently in the Tyler Munis ERP system. Some contract records did not have all fields populated. Certain fields should be made mandatory in the system to standardize the data collected. Fields that were missing for many contract records, such as department name and division, should be mandatory and consistently recorded in every contract record at the time the record is set up in the system. In the initial set up, the system should also capture the ethnicity and gender data of vendors at the time the contract is recorded. Each contract record should have a unique identifier and any purchase orders issued against a contract should reference the contract number in a separate field. Modifications to contracts should be captured in a unique field and linked by contract number to the original contract instead. The contract record should also include an industry classification using NAICS codes.



12. Track Subcontractor Participation after Contract Award

Each prime contract should contain a project work plan or schedule of values that stipulates the phase of the work and the item of work to be performed or supplies to be delivered by each subcontractor listed on the Subcontractor Utilization Plan. In each invoice or request for payment, the prime contractor should report the subcontractor year-to-date payment and current invoice amount and percentage of participation. The subcontractor should verify payment amounts.

Utilization of an electronic tracking system would allow the reporting to occur in real time and enable the Office of Racial Equity to monitor participation through the payments to all subcontractors in accordance with the project delivery schedule.

13. Enact Utilization Reporting Standards

The Office of Racial Equity should submit to City Council a quarterly utilization report and an annual review, summarizing M/WBE utilization. The departments with authority to award a contract should be required to submit a monthly utilization report to the Office of Racial Equity. The report should list the prime contracts for which a minority or woman-owned business submitted a bid, the amount of the bid discount assigned to each bid, the evaluation points assigned to the professional service proposals, and statements of qualification.

The total dollars awarded to each ethnic and gender group should also be reported. The ethnicity and gender of the subcontractors used on each construction and professional service prime contract should be reported. Quarterly utilization reports of all departments should be compiled and verified by the Office of Racial Equity Manager describing the prime contract awards and prime purchase order payments. Meaningful reporting requires capturing actual subcontractor utilization by ethnicity, gender, and certification status.

The fourth-quarter report should include an assessment of the program activities as well as the departments' exemplary practices and achievements. The utilization report should be posted on the Office of Racial Equity's webpage.

14. Track and Verify Subcontractor Participation on Construction and Professional Services Contracts

The City houses prime contracts on an online portal called "Records Online,"²⁸³ but not all records downloaded from this online portal contained subcontractor data. Construction prime contractors are required under California Public Contracts Code §4104 to list all subcontractors that perform more than 0.5% of the prime bid. The City should ensure that all subcontractors are listed on the prime contractor's bid and require that all subcontractors are listed on proposals and statements of qualification for professional services as a condition of a responsive submission.



²⁸³ <https://www.cityofberkeley.info/recordsonline/paFiles/cqFiles/index.html>

15. Implement a Subcontractor Payment Verification Program

Purposeful and effective monitoring of all subcontractor participation after contract award on the City's construction and professional service prime contracts requires reliable data. The departments do not formally track subcontractors.

For accurate, verifiable, and seamless tracking and reporting of subcontracting activity, a comprehensive digital system should be established to capture all subcontractor awards and payments. An electronic system that tracks all subcontracts from prime contract award through contract close out would support a more reliable monitoring and reporting process. The data listed in the bids and proposals should be tracked through all phases of a contract. All subcontractors listed on bids, proposals and statements of qualification should be recorded at the time of the award and their participation should be tracked for the duration of the contract. Tracking of goal attainment should require prime contractors to submit proof of payment of their subcontractor's prior invoice with their payment application through an electronic compliance monitoring system.

A subcontract monitoring system should be incorporated into a relational database application to allow for linking the subcontractor data to the appropriate prime contract. The certification status of the prime contractors and all first-tier subcontractors, the subcontract award, payment amounts, and change orders should be captured in real time through the term of the project. Tracking payments and change orders are essential to ensuring the reliability and integrity of the City's remedial programs.

A data-tracking application with a cloud-based interface would allow virtual submission of the required subcontract data by both the prime contractors and subcontractors, thereby eliminating the need for the City to enter the information into the system. Automated data entry forms should be designed to capture the information required to produce utilization reports. The required information should be entered into the tracking system directly by the prime contractor and subcontractor. Customized queries designed in the contract monitoring system would analyze the data to identify any omissions in the forms or contradictions in the subcontract data entered by the prime contractor and subcontractor.

Standard reports should be designed to analyze the inputted data. Queries necessary to generate the reports should be designed to run automatically. The reporting module should be designed so the user would simply select and print the named report.

The online subcontractor payment verification program should allow subcontractors to notify the City in real time the status of invoice payments due from their prime contractor. Prime contractors should be required to submit verification of subcontractor payments in an electronic format. The prime contractor's compliance with the payment verification program should be mandatory. In addition, the prime contractor should be required to report previous subcontractor payments as part of its regular billing to the City. Each subcontractor listed as paid for the



previous billing cycle should be contacted electronically by the Office of Racial Equity to verify that the payment was received. This verification procedure would avoid reliance on self-reporting by prime contractors.

Any discrepancy in the payment reported by the prime contractor and subcontractors should be resolved before additional prime contractor payments are made. Payment verification requirements should be published on the City's webpage and in solicitation and contract documents.



Appendix A: Anecdotal eSurvey

City of Berkeley, California Availability Study Anecdotal eSurvey

In 2019, the City commissioned a Disparity Study to determine how successful the City of Berkeley has been in achieving its goals of equity and inclusion in awarding contracts to local businesses. The City of Berkeley has a commitment to provide economic opportunity for City residents and businesses.

This survey is designed to gather in-depth information from local businesses about their experiences making bids and proposals to, and working on projects for, the City of Berkeley.

For additional information about Mason Tillman or the study, we can be reached at (510) 835-9012 or via email at BerkeleyDisparityStudy@mtaltd.com.

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City of Berkeley, California Availability Study Anecdotal eSurvey

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Please complete the following information:

Business Name: *

First Name of Owner: *

Last Name of Owner: *

Phone: *

Email Address: *



Business Address: *

City: *

State: *

Zip Code: *

Fax:

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City of Berkeley, California Availability Study Anecdotal eSurvey

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1. What type of services or products do you provide? *

- Construction
- Professional Services (including architecture and engineering)
- Goods and Services

2. What is the gender of the majority owner of your business? *

- Male
- Female
- Not applicable (publicly traded, nonprofit, employee-owned, partnership, etc.)

3. What is the ethnicity of the majority owner of your business? *

- African American
- Asian Pacific American
- Asian Indian American
- Hispanic American
- Native American
- Caucasian American
- Not Applicable (publicly traded, nonprofit, employee-owned, partnership, etc.)
- Other

4. What certifications does your business have? *

- None
- Small Business Enterprise (SBE)
- Disabled Business Enterprise (DBE)
- Minority Business Enterprise (MBE)
- Woman Business Enterprise (WBE)
- Veteran Business Enterprise (VBE)
- Service Disabled Veteran-owned Business (SDVOB)
- Local Business Enterprise (LBE)
- Other



5. How long has your business been in operation? *

- Less than 2 years
- 2 - 5 years
- 6 - 10 years
- 11 - 20 years
- 21 - 30 years
- 31 - 50 years
- 51 years or longer

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City of Berkeley, California Availability Study Anecdotal eSurvey

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6. How many bids, quotes, or proposals has your business submitted for a City of Berkeley prime or subcontract in 2019?

Prime Contractor * Subcontractor *

- | | |
|-----------------------------|-----------------------------|
| <input type="radio"/> None | <input type="radio"/> None |
| <input type="radio"/> 1-4 | <input type="radio"/> 1-4 |
| <input type="radio"/> 5-9 | <input type="radio"/> 5-9 |
| <input type="radio"/> 10-14 | <input type="radio"/> 10-14 |
| <input type="radio"/> 15+ | <input type="radio"/> 15+ |

7. How many City of Berkeley prime or subcontracts has your business had in 2019?

Prime Contractor * Subcontractor *

- | | |
|-----------------------------|-----------------------------|
| <input type="radio"/> None | <input type="radio"/> None |
| <input type="radio"/> 1-4 | <input type="radio"/> 1-4 |
| <input type="radio"/> 5-9 | <input type="radio"/> 5-9 |
| <input type="radio"/> 10-14 | <input type="radio"/> 10-14 |
| <input type="radio"/> 15+ | <input type="radio"/> 15+ |

8. Have you experienced any of the following when pursuing a City of Berkeley contract in 2019?

Prime contractor asked your business to lower the price of a bid, quote, or proposal. *

- Frequently
- Sometimes
- Never

Given insufficient time by the prime contractor to prepare a bid, quote, or proposal. *

- Frequently
- Sometimes
- Never



Prime contractor listed your firm as a subcontractor and won the contract, but your services were not used. *

- Frequently
- Sometimes
- Never

The City of Berkeley required your company to meet higher performance requirements than were needed to perform the contract. *

- Frequently
- Sometimes
- Never

The City of Berkeley cancelled a contract when your company was the lowest bidder. *

- Frequently
- Sometimes
- Never

The prime contractor reduced your scope of work without consulting your company. *

- Frequently
- Sometimes
- Never

The prime contractor would not pay an invoice for work performed. *

- Frequently
- Sometimes
- Never

The City of Berkeley paid your invoice 60 or more days late *

- Frequently
- Sometimes
- Never

The City of Berkeley would not pay an invoice for work you provided. *

- Frequently
- Sometimes
- Never



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9. Have you ever requested a debriefing with the City of Berkeley when you were an unsuccessful bidder? *

- Yes
- No

11. How helpful was the information provided in the debriefing for preparing a response to a future City of Berkeley solicitation? *

- Very helpful
- Somewhat helpful
- Not helpful
- Not applicable

Multi-Year Contracts

12. Has your company been awarded a multi-year contract in which multiple City of Berkeley departments utilize the contract to purchase goods or services? *

- Yes
- No

Highly Used Contractors

14. Do you think that there are highly used prime contractors that the City of Berkeley prefers to use?

- Yes
- No
- I do not know

15. Please specify the type of special treatment that highly used contractors receive (check all that apply):

- Advanced bid or proposal notification
- Bid or proposal qualification requirements favoring large businesses (eg: years in business, prior experience with the State of Rhode Island)
- Approval of multiple change orders/amendments
- Waived project requirements (e.g.: bonding, insurance, etc.)
- Other



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Bonding

Have you ever applied for a bond waiver from the City of Berkeley? *

- Yes
- No

In 2019, did you receive a bond waiver from the City of Berkeley on a construction contract valued under \$25,000? *

- Yes
- No
- I don't know what a bond waiver is

On how many construction contracts have you received a bond waiver? *

- 0
- 1
- 2-5
- 6-10
- 11 or more

If your bond waiver request was denied, what reason was given for the denial? *

NA

Are the City of Berkeley's prime contract bonding requirements reasonable based on the project size and scope of work? *

- Frequently
- Sometimes
- Never



How often have the City of Berkeley's bonding requirements prohibited you from bidding as a prime contractor? *

- Frequently
- Sometimes
- Never

How often have you been required to bond your subcontracts? *

- Frequently
- Sometimes
- Never

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Pre-qualification Lists

16. Is your business pre-qualified by the City of Berkeley to provide professional services (including architecture and engineering) or construction services?

- Yes
- No

17. In 2019, did the City of Berkeley deny your business pre-qualification status? *

- Yes
- No

19. In 2019, did you bid on a contract that required your business to be pre-qualified? *

- Yes
- No

20. In 2019, were you awarded a contract that required pre-qualification status? *

- Yes
- No

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Local Business Enterprise Program

21. Are you currently certified as an LBE? *

- Yes
 No

22. Has your company benefitted from the City of Berkeley's LBE program? *

- Yes
 No

23. How many contracts has your company been used as a subcontractor to meet an LBE goal? *

- 0
 1
 2-5
 6-10
 11 or more

24. Is there an expedited LBE certification process available to respond to the City of Berkeley's proposal? *

- Yes
 No

25. Was your LBE certification application expedited? *

- Yes
 No

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Susan Wengraf
Councilmember District 6

CONSENT CALENDAR
January 18, 2022

To: Honorable Mayor and Members of the City Council
From: Councilmember Wengraf (Author), Councilmember Harrison (Co-Sponsor),
and Councilmember Hahn (Co-Sponsor)
Subject: Resolution Reaffirming the City of Berkeley's Commitment to Roe v. Wade

RECOMMENDATION

Adopt a Resolution reaffirming the City of Berkeley's commitment to Roe v. Wade, honoring the 49th anniversary of its passage and reiterating Berkeley's resolve to be a safe harbor for women asserting their constitutional right to access reproductive health and safe abortion services. It is essential that the City of Berkeley be a model for other cities and re-state their support for women to be able to exercise their constitutional rights and continue to have access to critical health care services, including abortion.

FINANCIAL IMPLICATIONS

None

BACKGROUND

Forty-nine years ago, on January 22, 1973, the U.S. Supreme Court announced its decision in Roe v. Wade, a challenge to a Texas statute that made it a crime to perform an abortion unless a woman's life was at stake. The case had been filed by "Jane Roe," an unmarried woman who wanted to safely and legally end her pregnancy. Siding with Roe, the court struck down the Texas law. In a ruling, the court recognized that the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (Roe v. Wade, 1973).

Roe has come to be known as the case that legalized abortion nationwide. At the time the decision was handed down, nearly all states outlawed abortion. Roe rendered these laws unconstitutional, making abortion services safer and more accessible to all women throughout the country.

However, in recent years, reproductive health, including the right to choose, has been under relentless attack. The Trump administration shut down reproductive health services for women in every way possible — in presidential budgets, health care reform bills, tax reform legislation, and federal resolutions and regulations, as well as by nominating anti-abortion judges to the Supreme Court. Access to care at health centers, including many serving people who have nowhere else to go for basic health services, has been restricted.

This year, the U.S. Supreme Court is reviewing a direct challenge to the long-standing legal protections of abortion services under Roe v. Wade. Should the Court overturn Roe or allow a pre-viability ban to remain in place, people in over half of the states in the country – over 36 million women and other people who may become pregnant - will lose access to abortion care. It is already happening. People in Texas have lost the protections under Roe when Senate Bill (S.B) 8 went into effect on September 1, 2021. If Roe v. Wade is overturned or gutted, 26 states are likely to ban abortion, increasing the number of out-of-state patients who would find their nearest clinic in California from 46,000 to 1.4 million – a nearly 3,000 percent increase.

In 2019, Governor Newsom signed a [Proclamation on Reproductive Freedom](#) reaffirming California's commitment to protecting women's reproductive choices. The Governor has advanced investments to expand access to reproductive and sexual health care and signed multiple bills protecting reproductive freedom, including [SB 374](#) earlier this year and [SB 24 and AB 1264](#) in 2019.

January 22, 2022 will mark the 49th anniversary of the decision that effectively legalized abortion in the United States. The City of Berkeley has consistently passed resolutions in continued support of access to all reproductive healthcare services and all reproductive healthcare providers. The City also adopted a Resolution against proposed funding cuts to the Title X Family Planning program, the only federal program dedicated solely to providing low income women and men with comprehensive family planning and related preventive health services. On October 12, 2021, the Berkeley City Council adopted a Resolution "Denouncing Texas Anti-Abortion Law (SB8) and Re-affirming the City's Commitment to Reproductive Health."

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

N/A

CONTACT PERSON

Councilmember Susan Wengraf, Council District 6, 510-981-7160

Attachments:

1: Resolution

RESOLUTION NO. ##,###-N.S.

REAFFIRMING THE CITY OF BERKELEY'S COMMITMENT TO ROE V. WADE AND
ACCESS to SAFE REPRODUCTIVE HEALTH SERVICES

WHEREAS, Prior to 1973, the year when Roe v. Wade was enacted, women faced significant obstacles to safe reproductive health services, resulting in widespread loss of life and serious illness; and

WHEREAS, The right to safe, legal and accessible abortion continues to be undermined by legal challenges, threatening the health and safety of women's lives, including the most marginalized women: low-income women, women of color, refugee and immigrant women; and

WHEREAS, The City of Berkeley is in full support of the State of California's resolve to uphold women's equality and liberty by protecting their reproductive freedom, educating Californians about their rights to reproductive freedom, welcoming women to California to fully exercise their reproductive rights and acting as a model for other states that want to ensure full reproductive freedom for women.

NOW THEREFORE, BE IT RESOLVED BY THE CITY OF BERKELEY that we RECOGNIZE AND CELEBRATE THE 49th ANNIVERSARY OF ROE V. WADE and praise the perilous and self-sacrificing work of the healthcare providers who face threats and violence for providing safe and legal health services to women throughout the Bay Area.

NOW FURTHER BE IT RESOLVED that the City of Berkeley re-affirms its commitment to the human rights afforded to all women under Roe v. Wade, regardless of socioeconomic, ethnic, racial, cultural or religious background, age or sexual orientation and to opposing any laws or regulations that pose a threat to abortion, reproductive rights, sexual freedom and/or self-determination.

