

CITY OF MEMPHIS, TENNESSEE  
COMPREHENSIVE DISPARITY STUDY

FINAL REPORT

MARCH, 2010

**GRIFFIN & STRONG, P.C.**  
ATTORNEYS AT LAW & PUBLIC POLICY CONSULTANTS

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235 PEACHTREE STREET, N.E. • SUITE 400 • ATLANTA, GEORGIA 30303-1400

404.584.9777 • 404.584.9730 FACSIMILE

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## I. INTRODUCTION

During November 2007, the City of Memphis, Tennessee (“City”) contracted with Griffin & Strong, P.C. (“GSPC”) to conduct a comprehensive disparity study which included all City departments except Memphis Light, Gas & Water, Memphis Area Transit, and Memphis Housing Authority. The purpose of the disparity study is to determine if the City of Memphis still has a compelling interest in continuing the minority and women-owned business enterprise (“MWBE”) program for the City.

The study is designed to determine whether existing City efforts have eliminated active and passive discrimination; to analyze city procurement trends and practices for the five (5) year period beginning July 1, 2002 and ending June 30, 2007; and to evaluate various options for future program development.

Governmental entities, such as the City, have authorized disparity studies in response to City of Richmond v. J.A. Croson Co.<sup>1</sup> and the cases which followed, to determine whether there has been a compelling interest for remedial procurement programs, based upon ethnicity, race, and gender. The City adopted its current MWBE program in 1995 as a result of the findings in the 1994 Disparity Study, conducted by D.J. Miller & Associates.

### A. Objective

The principal objectives of this study are:

- to determine whether the City, either in the past or currently, engages in discriminatory practices in the solicitation and award of contracts, which, for the purposes of this Study have been categorized as Construction, Architecture and Engineering (“A/E”), Other Professional Services, Other Services, and Goods/Supplies;

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

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- to determine if a legally justified need continues to exist for any or all of the City's MWBE programs in accordance with the guidelines set forth by the Supreme Court and relevant subsequent cases; and
- to recommend modifications to the City's MWBE program based on the findings of this Study.

This study is based on procurement and procurement-related activity occurring during fiscal years 2003 through 2007, inclusive.

This study also includes an analysis of legal requirements for remedial procurement programs, a review of City policies and procedures, private sector analysis and statistical multivariate analysis.

### **B. Technical Approach**

In conducting this study and preparing our recommendations, GSPC followed a carefully designed work plan that allowed study team members to fully analyze availability, utilization, and disparity with regard to MWBE participation. The final work plan consisted of, but was not limited to, the following major tasks:

- establishing data parameters and finalizing a work plan;
- legal analysis;
- policy and procurement process review and race-neutral program analysis;
- collecting, organizing, and cleaning data;
- conducting market area analyses;
- conducting utilization analyses;
- determining the availability of qualified firms;
- analyzing the utilization and availability data for disparity and significance;
- conducting private sector analysis including credit and self-employment analysis;
- collecting and analyzing anecdotal information; and
- preparing a final report that presents race- and gender-neutral and narrowly tailored race- and gender-based remedies.



### C. Report Organization

This report is organized into the following sections, which provide the results of our analytical findings as to the utilization and availability of firms to perform work for the City. In addition to this introductory chapter, this report includes:

- Chapter II, which presents a legal overview of the *Croson* case law.
- Chapter III, which provides a review of the City's purchasing policy and remedial policy.
- Chapter IV, which presents the methodology used in the collection of statistical data from the City and the analyses of those data as it relates to relative MWBE utilization and availability and a discussion on levels of disparity for City prime contractors and subcontractors.
- Chapter V, which presents an analysis of discrimination in the private sector.
- Chapter VI, which provides the analysis of anecdotal data collected from the telephone survey, personal interviews, focus groups and a public hearing.
- Chapter VII, a summary of the findings and recommendations presented in this report.

**D. Project Team**

- Rodney K. Strong, Esq., CEO, Griffin & Strong, P.C.
- Delmarie A. Griffin, Esq., President/COO, Griffin & Strong, P.C.
- Michele Clark Jenkins, J.D., Senior Consultant, Griffin & Strong, P.C.
- Dr. Charlie Carter, Senior Economist, Griffin & Strong, P.C.
- Cicero Brooks, M.S., Data Analyst, Griffin & Strong, P.C.
- Charles E. Carpenter, Esq., Charles E. Carpenter, A Professional Corporation
- Anthony Brown, Esq.
- Anderson and Associates, P.A.
- CLG Management, LLC
- KMR Consultants, LLC
- Olympic Staffing, Inc.
- Trust Marketing & Communications

### About the Project Team—Griffin & Strong, P.C.

**Griffin & Strong, P.C. (GSPC)** is a professional corporation based in Atlanta, Georgia that is actively engaged in the practice of law, as well as governmental and private consulting. Since the firm’s inception in 1992, the public policy consulting division has been continuously directed and controlled by *Rodney K. Strong*. Attorney Strong has an extensive background in the area of public contracting with specific experience conducting disparity studies. *Charlie Carter*, Ph.D., served as Senior Economist for this study and had oversight of all quantitative aspects of the study. Dr. Carter has worked on a number of disparity studies and has served as expert witness in a number of legal cases.

### Other Members of the Project Team

**Charles E. Carpenter, A Professional Corporation** is a Memphis-based law firm. Mr. Carpenter has been in private practice for over twenty-five years. Mr. Carpenter has extensive experience in corporate and finance matters and serves as general counsel for major corporations in the public and private sectors. He has been listed among the Municipal Bond Attorneys in *The Bond Buyer’s Municipal Marketplace* (the “Red Book”) since 1992. Mr. Carpenter served as legal analysis consultant on this study, performed procurement policy and practices interviews, assisted in compiling anecdotal findings and was assisted by Anthony Brown, Esq.

Mr. Brown previously served as the Vice President for Business Diversity, Human Resources and Governmental Affairs for the Memphis-Shelby County Airport Authority (MSCAA). Mr. Brown is nationally recognized in the air transportation industry for his extensive knowledge and experience in Business Diversity, DBE Construction and Concessions Program Administration under FAA Regulations, and is much sought after as an advisor and presenter. Mr. Brown also had responsibility for oversight of Memphis Airport’s Disparity Study and all yearly and project goal setting.

**Anderson and Associates, P.A.** is a Florida-based law firm that specializes in providing legal services in the areas of real estate, business, mediation, public finance and eminent domain litigation as well as consulting services in the areas of community outreach, public involvement, minority/women/disadvantaged/small business enterprise development, disparity studies, diversity training and housing relocation assistance. Ms. Anderson, President, has been a member of the Florida Bar Association since 1989. Prior to starting the firm, Ms. Anderson served as Executive Administrator for the State of Florida Minority Business Advocacy & Assistance Office. For this study, Anderson & Associates provided supervision of data collection, provided Data Catcher tracking software, trained the data collectors on the use of the software, conducted anecdotal interviews and did the initial writing of the chapter.

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**CLG Management, LLC**, is a Florida-based firm led by Joan Gardenhire. Ms. Gardenhire has more than 23 years of experience focused on small, minority and disadvantaged business programs, EEO/affirmative action, business development and community development programs. On this project, CLG served as the Project Director.

**KMR Consultants, LLC**, is a Florida-based firm that specializes in developing and integrating private sector business practices into federal, state, and local governmental agencies. They offer their clients expertise, experience and an understanding of how sound business practices may be applied to government structures and operations. They also provide professional management consulting in public policy research and planning, project management and implementation, performance management studies, budgeting and accounting, organizational and technological assessments and information technology reviews,. Further, KMR's resource management capabilities include transactional administration, product procurement, invoicing and collection, and technical support reconciliation. For this study, KMR conducted anecdotal interviews and conducted research on race-neutral providers.

**Trust Marketing & Communications** is a Memphis-based firm and is the region's largest African American owned multi-disciplined marketing agency. Founded in 1991, it is a Certified Minority Business Enterprise (9-29-1466) and Certified Disadvantaged Business Enterprise (06-04-1556) wholly owned by native Memphians, Howard and Beverly Robertson. The Robertsons have over 60 years of combined marketing, public/media/community relations experience and are widely recognized and well respected in their fields. Trust Marketing coordinated focus groups and the public hearing for the City of Memphis study.

**Olympic Staffing, Inc.** is a Memphis-based full-service staffing firm that provides qualified staffing for various companies throughout the Mid-South, with technical, administrative, clerical, maintenance, medical, legal, and hotel staffing. They also maintain all personnel and management needs, and ensure compliance with workplace regulations. They provided the data collection and data entry personnel for this project.

## II. LEGAL ANALYSIS

### A. Background and Introduction

The purpose of this chapter is to provide the legal background for the Disparity Study. As such, it presents a broad overview of the legal principles and leading cases governing the use of race-specific and gender-specific programs utilized by the City and other public entities. It is not intended to provide legal advice, but rather will provide a context by which to understand the significance of the statistical, anecdotal and other investigative information provided in subsequent chapters of this study.

The City, through adoption of a Minority and Women Business Enterprise Procurement Program Ordinance (the “MWBE Procurement Ordinance”), seeks to ensure that public contracting opportunities are appropriately available to minority and women-owned businesses desiring to participate in City contracting opportunities. The current statement of policy of the MWBE Procurement Ordinance evidences the City’s strong commitment to its remedial nature: “Under all the circumstances and based on the factual predicate which has been established after careful study and review, the City of Memphis has a compelling interest to fully remedy the ongoing effects of past and present discrimination.” City of Memphis Code Section 2-325 (b).

The Supreme Court in City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), 709 S.Ct. 706, and Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 115 S.Ct. 2097 (1995) set forth opinions regarding the use of race conscious remedies. In the Croson decision the Court established "strict scrutiny" as the standard of review by which courts evaluate state and local programs that grant or limit government opportunities based on race. The Adarand decision subsequently extended the "strict scrutiny" standard of review to race conscious programs enacted by the federal government.

In rendering the Croson decision in January 1989, the U.S. Supreme Court held that the City of Richmond's minority business enterprise ordinance--which mandated that

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majority-owned prime contractors, to whom the City of Richmond had awarded contracts, subcontract 30% of their construction dollars to minority-owned subcontractors--violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. In a six-to-three majority decision, the Court held that state and local programs which use race-conscious measures to allocate, or "set aside," a portion of public contracting exclusively to minority-owned businesses must withstand a "strict scrutiny" standard of judicial review.

### **B. The Strict Scrutiny Test – Compelling Governmental Interest and Narrow Tailoring**

#### *Strict Scrutiny*

Strict scrutiny has two basic components: the public entity must establish race- or ethnicity-specific programs based upon a compelling governmental interest and narrowly tailor those programs to achieve the governmental interest. See also Tennessee Asphalt v. Farris, 942 F.2d 969 (6<sup>th</sup> Circuit 1991); Eason v. City of Memphis, 9 F.3d 477 (6<sup>th</sup> Circuit 1993); Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11<sup>th</sup> Circuit 1997); Associated General Contractors v. Drabik, 214 F.3d 730 (6<sup>th</sup> Circuit 2000).

#### *Compelling Interest*

The second prong to enacting a constitutionally valid MWBE ordinance which awards contracts is to show a compelling governmental interest. A compelling interest may be proven by findings of past discrimination. Rutherford v. City of Cleveland, 179 Fed. Appx. 366, 373-375, 2006 U.S. App. LEXIS 13736 (6<sup>th</sup> Circuit 2006). The strict scrutiny test was meant to better ensure that the means used to address the compelling goal of remedying past discrimination "fit" so closely that there is little likelihood that the motive for the racial classification is illegitimate racial prejudice or stereotype.<sup>2</sup> The Court in Ashton v. City of Memphis 49 F. Supp.2d 1051 (W. D. Tenn. 1999), noted that courts

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<sup>2</sup> Croson, 488 U.S. 469, 493, 109 S.Ct. 706, 721. See also, Adarand, 515 U.S. 200, 235, 115 S. Ct. 2097, 2117; Hopwood v. State of Texas, 78 F.3d 932, 951 (5<sup>th</sup> Cir. 1996).

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must “ensure that the government’s intent in using affirmative action is benign or remedial rather than illegitimate.” Ibid, at 1057 (cited favorably in Rutherford, 2006 U.S. App. LEXIS 13736, p. 32); see also Parents Involved, 127 S.Ct. 2738, 2007 U.S. LEXIS 8670, pp. 10-11.

The Courts have ruled that general societal discrimination is insufficient proof to justify the use of race-based measures to satisfy a compelling governmental interest.<sup>3</sup> Rather, there must be some showing of prior discrimination by the governmental actor involved, either as an "active" or "passive" participant.<sup>4</sup> As the Court noted in Tennessee Asphalt, “governmental entities are not restricted to eradicating the effects only of their own discriminatory acts.” 942 F.2d at 974.

The governing body should show a "sound basis in the evidence" of discrimination in order to justify any enactment of race-conscious legislation. Merely stating a "benign" or "remedial" purpose does not constitute a "strong basis in evidence" that the remedial plan is necessary, nor does it establish a *prima facie* case of discrimination. See Parents Involved, 127 S.Ct. 2738, 2007 U.S. LEXIS 8670, p. 11 and Johnson v. California, 543 U.S. 499, 505-506, 125 S.Ct. 1141, 160 L.Ed. 2d 949 (2005). Thus, the local government must identify the discrimination it seeks to redress.<sup>5</sup> Particularized findings of discrimination are required under Croson. See also Aiken v. City of Memphis, 190 F.3d 753 (6<sup>th</sup> Circuit 1999) (re: particularized findings in the context of fair employment plans).

### ***Anecdotal Evidence as a Means to Establish a Compelling Governmental Interest***

The majority decision in Croson implied that personal accounts of discrimination could carry evidentiary weight in determining whether discrimination exists but should be used to support other evidence and may compliment empirical evidence. In addition,

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<sup>3</sup> Id. at 496-97, 723. See Miller v. Johnson, 515 U.S. 900, 922, 115 S.Ct. 2475, 2491 (1995).

<sup>4</sup> Id. at 498, 724.

<sup>5</sup> Id. at 500-501, 725.

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anecdotal evidence of a governmental entity's institutional practices that provoke discriminatory market conditions is particularly probative. In Coral Construction Company v. King County, 59 F.3d 869 the Ninth Circuit U.S. Court of Appeals concluded that "the combination of convincing anecdotal and statistical evidence" was potent.<sup>6</sup> Also, the Ninth Circuit approved the combination of statistical and anecdotal evidence used by the City of San Francisco in enacting its MWBE ordinances.<sup>7</sup> Additionally, the Third Circuit U.S. Court of Appeals suggested the use of a combination of empirical and anecdotal evidence for establishing a prima facie case of discrimination.<sup>8</sup>

In O'Donnell Construction v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992), the Court reversed the denial of a preliminary injunction for the plaintiff because the District of Columbia failed to prove a "strong basis in evidence" for its MWBE program because so much of the evidence the District offered in support of its program was anecdotal. The Court opined that "anecdotal evidence is most useful as a supplement to strong statistical evidence--which the Council did not produce in this case".<sup>9</sup> Then, in Associated General Contractors of America v. City of Columbus, 936 F. Supp 1363 (S.D. Ohio 1996), vacated on other grounds, 172 F.3d 411 (6<sup>th</sup> Cir. 1999), the District Court found that no efforts were made to verify reports of discrimination.

Based on the foregoing, GSPC has determined that it would be helpful to include both anecdotal evidence and statistical evidence to support the outcomes of this Study.

### *Use of Statistical Evidence to Establish a Compelling Governmental Interest*

Croson additionally held that an inference of discrimination may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors . . . and the number of such contractors actually engaged

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<sup>6</sup> 941 F.2d at 919.

<sup>12</sup> Associated General Contractors of California, Inc. v. Coalition for Economic Equity, et al., 950 F.2d 1401 (9th Cir. 1991), cert. denied 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed. 2d 390 (1992).

<sup>11</sup> Eastern Contractors, 6 F. 3<sup>rd</sup> 990, 1003 (3<sup>rd</sup> Cir. 1993).

<sup>99</sup> O'Donnell, 963 F.2d 420, 427 (D.C. Cir. 1992).



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by the locality or the locality's prime contractors."<sup>10</sup> See also Aiken, at 1163. A predicate to governmental action is a demonstration that gross statistical disparities exist between utilization of certain firms based on race/gender and the percentage of those firms in the local industry "willing and able to do the work."<sup>11</sup> See Rutherford, 179 Fed. Appx. at 375-376. A number of lower court decisions have provided various guidelines for statistical analyses sufficient for satisfying the Croson factual predicate, in determining which firms are qualified, willing, and able, called the "availability" of firms.

### *Availability*

The method of calculating MWBE availability has varied study to study and there is no one way to establish availability. The data source for availability will be determined from the availability of data from the governing entity as well as the information available in the locale. In Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990 (3<sup>rd</sup> Cir. 1993), the Court stated that available and qualified minority-owned businesses comprise the "relevant statistical pool" for purposes of determining availability. The Court permitted availability to be based on census data for the metropolitan statistical area ("MSA") and local lists of the Office of Minority Opportunity. Although discussing availability within 49 C.F.R. § 26.45(b), the Court in Northern Contracting, Inc. v. Illinois Department of Transportation, 473 F.3d 715 (7<sup>th</sup> Cir. 2007) acknowledges that there is not just one way to measure availability, but does suggest measuring availability with more than just the governing entities' own registered and prequalified DBE's.<sup>12</sup>

The issue of availability also was examined by the Court in Contractors Association of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (11<sup>th</sup> Cir. 1997). Here, the Court opined that minority firms must be qualified, willing and able to provide the requested services. If the statistical analysis includes the proper pool of

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<sup>10</sup> Croson, 488 U.S. 469, 509, 109 S.Ct. 706, 730.

<sup>11</sup> Ensley Branch, NAACP 31 F3d 1548, 1565 (11<sup>th</sup> Cir. 1994).

<sup>12</sup> The Court said, "... it seems illogical that the regulations would refer to five different methods of calculating the relative availability of DBEs if any method other than strict reference to the list of registered and prequalified DBEs would be considered inappropriate."

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eligible minorities, any resulting disparity, in a proper case, may constitute prima facie proof of a pattern or practice of discrimination.

In an opinion by the Sixth Circuit in Associated General Contractors v. Drabik, 214 F.3d 730 (6<sup>th</sup> Circuit 2000), the Court of Appeals ruled that the state of Ohio failed to satisfy the strict scrutiny standard to justify the state's minority business enterprise act, by relying on statistical evidence that did not account for which firms were qualified, willing and able to perform on construction contracts. The court stated that "although Ohio's most compelling statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority-owned businesses...the problem is that the percentage of minority-owned businesses in Ohio (7% of 1978) did not take into account which were construction firms and those who were qualified, willing and able to perform on state construction contracts." *Id.* at 736. GSPC, in the present study separated firms into five (5) business categories and eliminated from the prime construction pool, those firms that only appeared on subcontractor lists.

### *Utilization*

In Croson, Justice O'Connor, in rejecting the City of Richmond's method for determining the effects of past and present discrimination on the awarding of contracts to minorities stated that "the proper statistical evaluation would compare the percentage of MBE's in the relevant market that are qualified to undertake city subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors."<sup>13</sup>

### *Disparity Index and Croson*

To demonstrate the under-utilization of MWBEs in a particular area, parties can employ a statistical device known as the "disparity index".<sup>40</sup> The disparity index is calculated by

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<sup>13</sup> Croson, 488 U.S. 469, 471

<sup>40</sup> See Contractors Assn. 6 F.3d 990, 1005 (3<sup>rd</sup> Cir. 1993) (Third Circuit joining the First, Ninth, and Eleventh Circuits in relying on disparity indices to determine whether a municipality satisfies Croson's evidentiary burden).

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dividing the percentage of MWBE participation in government contracts by the percentage of MWBEs in the relevant population of local firms. A disparity index of one (1) demonstrates full MWBE participation, whereas the closer the index is to zero, the greater the MWBE Under-utilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100, with 100 representing full MWBE utilization.

Courts have used these MWBE disparity indices to apply the "strong basis in evidence" standard in Croson. For instance, the Eleventh Circuit held that a 0.11 disparity "clearly constitutes a prima facie case of discrimination indicating that the racial classifications in the County plan were necessary" under Croson.<sup>14</sup> Based on a disparity index of 0.22, the Ninth Circuit upheld the denial of a preliminary injunction to a challenger of the City of San Francisco's MBE plan based upon an equal protection claim.<sup>15</sup> Accordingly, the Third Circuit held that a disparity of 0.04 was "probative of discrimination in City contracting in the Philadelphia construction industry."<sup>16</sup>

### *Statistical Regression Analysis*

The statistical significance of certain quantitative analyses was another issue that arose in the Webster case. The court indicated that the appropriate test should resemble the one employed in the Engineering Contractors case, wherein two standard deviations or any disparity ratio that was higher than .80 (which is insignificant), should be used. The Webster court criticized the Fulton County expert for failing to use a regression analysis to determine the cause of the disparity. The court likewise discredited the post-disparity study for failing to use regression analysis to determine if Under-utilization was due to firm size or inability to obtain bonding and financing. Recently, Rothe stated the need for a regression analysis as well.

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<sup>42</sup> Cone Corp., 908 F.2d 908, 916 (11<sup>th</sup> Cir. 1990).

<sup>15</sup> AGC v. Coalition for Economic Equity, 950 F.2d 1401, 1414 (9<sup>th</sup> Cir. 1991).

<sup>16</sup> Contractors Assn., 6 F.3d 990, 1005 (3<sup>rd</sup> Cir. 1993).

*Geographic Scope of the Data*

The Croson Court observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the disputed industry to draw conclusions about prevailing market conditions in their respective regions.<sup>17</sup> However, to confine the permissible data to a governmental entity's strict geographical borders would ignore the economic reality that contracts are often awarded to firms located in adjacent areas. Thus, courts closely scrutinize pertinent data related to the jurisdictional area of the state or municipality.

Generally, the scope of the statistical analyses pertains to the geographic market area from which the governmental entity makes most of its purchases. In addition, disparities concerning utilization, employment size, and formation are also relevant in determining discrimination in a marketplace. It has been deemed appropriate to examine the existence of discrimination against MWBEs even when these areas go beyond the political boundaries of the local jurisdictions.

Court decisions have allowed jurisdictions to utilize evidence of discrimination from nearby public entities and from within the relevant private marketplace. Nevertheless, extra-jurisdictional evidence must still pertain to the operation of an industry within geographic boundaries of the jurisdiction. Again, as the court wrote in Tennessee Asphalt, “[s]tates and lesser units of local government are limited to remedying sufficiently identified past and present discrimination within their own spheres of authority.” 942 F. 2d at 974.

*Passive Participation as a Compelling Governmental Interest*

Strict scrutiny requires a strong basis in evidence of either active participation by the government in prior discrimination or passive participation by the government in discrimination by the local industry. The Supreme Court in Croson opined that

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<sup>17</sup> Croson, 488 U.S. 469, 504, 109 S.Ct. 706, 727.

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municipalities have a compelling interest in ensuring that public funds do not serve to finance private discrimination. Local governments may be able to take remedial action when they possess evidence that their own spending practices exacerbate a pattern of private discrimination. Croson at 502.

Subsequent lower court rulings have provided more guidance on passive participation by local governments. In Concrete Works of Colorado Inc. v. The City and County of Denver, 36 F. 3<sup>rd</sup> 1513 (10<sup>th</sup> Cir. 1994), the Tenth Circuit held that it was sufficient for the local government to demonstrate that it engaged in passive participation in discrimination rather than showing that it actively participated in the discrimination. Thus, the desire for a government entity to prevent the infusion of public funds into a discriminatory industry is enough to satisfy the requirement. Accordingly, if there is evidence that the City is infusing public funds into a discriminatory industry, then the City has a compelling interest in remedying the effects of such discrimination, even though the City's involvement is passive.

In Adarand Construction v. Slater (hereinafter referred to as "Adarand VI") 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), the Tenth Circuit U.S. Court of Appeals addressed the constitutionality of the use in a federal transportation program of a subcontractor compensation clause which employed race-conscious presumptions in favor of minority and disadvantaged business enterprises. In addressing the federal government's evidentiary basis to support its findings of discrimination against minorities in the publicly funded and private construction industry, the court did not read Croson as requiring that the municipality identify the exact linkage between its award of public contracts and private discrimination.

The Court of Appeals concluded that the government's evidence had demonstrated as a matter of law that there was a strong basis in evidence for taking remedial action to

remedy the effects of prior and present discrimination. The Court found that Adarand had not met its burden of proof to refute the government's evidence.<sup>18</sup>

Since the strict scrutiny standards and evidentiary benchmarks apply to all public entities and agencies, it follows that the questions regarding passive participation in discrimination are relevant to all governmental units. The Court in Croson stated that "it is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice".<sup>19</sup>

*A Discussion of Rothe v. Department of Defense*

Although Rothe Development Corporation v. Department of Defense, 545 F.3d 1023 (Fed.Cir. 2008)<sup>20</sup> is not authoritative in the Sixth Circuit and therefore has no direct bearing on this disparity study, GSPC has chosen to discuss it here because of the widespread discussions that are taking place about this recent case and the impact it has had on federal programs.

In this case that originated in Texas, the Court of Appeals for the Federal Circuit examined a federal Department of Defense ("DOD") race-conscious program that covered procurement, research and development, military construction and maintenance contracts. The Court found that the program did not meet the "compelling interest" requirement of the traditional strict scrutiny test required to have a race conscious program.

In order to satisfy the compelling interest requirement government entities must have a "strong basis in evidence" to conclude remedial action is necessary. The Court criticized

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<sup>18</sup> Id at 1147, 1176

<sup>19</sup> See Croson 488 U.S. at 492 (citing Norwood v. Harrison 413 U.S. 455)

<sup>20</sup> Rothe Development Corporation v. Department of Defense, 545 F.3d 1023 (Fed.Cir. 2008)

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DOD for not have the requisite factual predicate to establish their race-conscious program and therefore found the DOD program unconstitutional.

The Court stated that, in determining availability, it cannot be assumed that all firms in the relevant market are qualified to do business with the qualifying entity without some criteria to weed out unqualified firms.<sup>21</sup>

In addition, this Court differed with other jurisdictions, including the 9<sup>th</sup><sup>22</sup> Circuit and 11<sup>th</sup><sup>23</sup> Circuit in determining disparity by comparing the contract dollars awarded to minority and woman-owned firms to the percentage of total marketplace *capacity* those firms could provide instead of the measure that other Courts of utilized, which is to compare the percentage of all contract dollars awarded to MWBE firms to the percentage of MWBEs available in the relevant market.<sup>24</sup>

The Sixth Circuit Court of Appeals, has not gone as far as the Rothe Court, but has stated that there should be consideration of the relative size of firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete.<sup>25</sup> Rothe suggests that a regression analysis could be employed, without changing the availability/utilization disparity analysis, “to determine whether there was a statistically significant correlation between the size of a firm and the share of contract-dollars awarded to it.”<sup>26</sup> Notwithstanding all that this court seems to require with regard to capacity, the Court admits that “...we recognize that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination.” GSPC has, in this study, categorized businesses into five (5) business categories and has adjusted its database to exclude those firms that show up only on subcontractor lists from its determination of prime contractor availability.

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<sup>21</sup> Rothe at 1072.

<sup>22</sup> Associated General Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401, 1414 (9<sup>th</sup> Cir. 1991), cert. denied, 503 U.S. 985 (1992) and Western States Paving Co., Inc. v.

<sup>23</sup> Cone Corporation v. Hillsborough County, 908 F.2d 908 (11<sup>th</sup> Cir. 1990)

<sup>24</sup> Rothe at 1072

<sup>25</sup> Drabik at 744

<sup>26</sup> Rothe at 104

Finally, with regard to pre-enactment evidence, the Rothe court stated that the evidence must be “reasonably contemporaneous”, should be nation-wide for federal programs, and the pre-enactment evidence must have been actively considered by the government entity in enacting any race conscious legislation.

### *Narrow Tailoring*

Once the government has established a compelling interest, it must show that the remedy fashioned is narrowly tailored to address the identified discrimination. “Narrow tailoring” means the remedy must fit the findings. The evidence showing compelling interest must be used to guide the scope and means of remedy employed. The Supreme Court has identified a number of factors which bear upon whether the remedy employed will pass the narrow tailoring test. Included in those factors is whether the government remedy provided for consideration of race-neutral alternatives, the flexibility and duration of relief, the availability of waiver provisions, the relationship of numerical goals to the relevant labor market and the impact of relief on the rights of third parties. United States v. Paradise, 480 U.S. 149, 171 (1987).

In Croson, the Court considered four factors:

- 1) whether the city had first considered race-neutral measures, but found them to be ineffective;
- 2) the basis offered for the goals selected;
- 3) whether the program provides for waivers; and,
- 4) whether the program applies only to MWBEs who operate in the geographic jurisdiction covered by the program.

As noted above, another important key to analyzing the validity of a race-based classification is the flexibility and duration of the program; that is, whether the program contains a sunset provision or other mechanisms for periodic review of its effectiveness. These mechanisms ensure that the program does not last longer than necessary to serve its intended remedial purpose. Furthermore, such mechanisms keep pure the relationship



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of numerical goals to the relevant labor market, as well as the impact of the relief on the rights of third parties.<sup>27</sup> In Ensley Branch NAACP v. Seibels, 31 F.3d 1548 (11<sup>th</sup> Cir. 1994), the Eleventh Circuit U.S. Court of Appeals also held that four factors should be taken into account when evaluating whether a race- or ethnicity-conscious affirmative action program is narrowly tailored:

- 1) the necessity for the relief and the efficacy of alternative remedies;
- 2) the flexibility and duration of the relief, including the availability of waiver provisions;
- 3) the relationship of the numerical goals to the relevant labor market; and
- 4) the impact of the relief on the rights of innocent third parties.<sup>28</sup>

Under the Croson framework, any race-conscious plan must be narrowly tailored to ameliorate the effects of past discrimination. “Narrow tailoring is imperative when a government pursues a compelling interest which triggers strict scrutiny analysis.” W. Tn. Chapter of Assoc. Build. & Contractors, et al. v. City of Memphis, 302 F. Supp.2d 860, 2004 U.S. Dist. LEXIS 2140, p. 11 (W.D. TN. 2004). Croson’s progeny provide significant guidance on how remedies should be narrowly tailored. “Generally, while ‘goals’ are permissible, unyielding preferential ‘quotas’ will normally doom an affirmative action plan.” Stefanovic v. University of Tennessee, 1998 U. S. App. LEXIS 1905 (6<sup>th</sup> Circuit 1998). The Eleventh Circuit has set forth four considerations in determining whether a plan is narrowly tailored:

- 1) consideration of race neutral alternatives,
- 2) flexibility of plan,
- 3) relationship of plan's numerical goals to relevant market, and
- 4) effect of plan on third parties.<sup>29</sup>

See also Rutherford, 2006 U.S. App. LEXIS 13736, p. 32.

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<sup>27</sup> Adarand, 515 U.S. 200, 238, 115 S. Ct. 2097, 2118.

<sup>28</sup> Ensley Branch, 31 F.3d 1548, 1569 (11<sup>th</sup> Cir. 1994); Webster v. Fulton County, GA at 1362.

<sup>29</sup> Peightal II, 940 F.2d 1394, 1406 (11th Cir. 1991). See also Engineering Contractors, 122 F3rd 895, 927 (citing Ensley Branch NAACP at 31 F.3<sup>rd</sup> 1548,1569).

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Post-Croson cases articulated the general guidelines listed below in construing the elements of the narrow tailoring prong:

- 1) Relief is limited to minority groups for which there is identified discrimination;
- 2) Remedies are limited to redressing the discrimination within the boundaries of the enacting jurisdiction;
- 3) The goals of the programs should be flexible and provide waiver provisions;
- 4) Race and/or gender neutral measures should be considered; and
- 5) The program should include provisions or mechanisms for periodic review and sunset.

MWBE programs must be designed so that the benefits of the programs are targeted specifically toward those firms that faced discrimination in the local marketplace. To withstand a challenge, relief must extend only to those minority groups for which there is evidence of discrimination. See, Tennessee Asphalt at 974. Consequently, MWBE firms from outside the local market must show that they have unsuccessfully attempted to do business within the local marketplace in order to benefit from the program.

The Sixth Circuit Court of Appeals in Associated General Contractors v. Drabik, affirmed the District Court's finding that the State of Ohio's minority business enterprise statute ("MBEA") was not narrowly tailored to remedy past discrimination. The Court found the statute lacked narrow tailoring because (1) the MBEA suffered from under-inclusiveness and over-inclusiveness, (lumping together racial and ethnic groups without identified discrimination); (2) the MBEA lacked a sunset date; and (3) the State failed to provide specific evidence that Ohio had considered race-neutral alternatives before adopting the plan to increase minority participation. 214 F. 3d 739.

Croson requires that there must be a "fit" between past/present harm and the remedy. The Third Circuit U.S. Court of Appeals, in Contractors Association of Eastern Pennsylvania, approved the District Court's finding that the subcontracting goal program was not narrowly tailored. Much of the evidence found on the discrimination by the City of

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Philadelphia was against Black "prime contractors" who were capable of bidding on City prime contracts. Moreover, there was no firm evidentiary basis for believing that non-minority contractors would not hire Black subcontractors.<sup>30</sup>

Court rulings have held that neutral measures must be considered, but not necessarily exhausted, in order for MWBE programs to be enacted. Moreover, some courts have held that such measures could be enacted concurrently rather than enacted before race- or gender-conscious measures. Cases such as Concrete Works, suggest the kinds of neutral measures considered by the courts.

Inherent in the above discussion is the notion that MWBE programs and remedies must maintain flexibility with regard to local conditions in the public and private sectors. Courts have suggested project-by-project goal setting and waiver provisions as means of insuring fairness to all vendors. Additionally, some courts have indicated that goals need not directly correspond to current availability if there are findings that availability has been adversely affected by past discrimination. Lastly, "review" or "sunset" provisions are necessary components to guarantee that remedies do not out-live their intended remedial purpose.

### **C. Intermediate Scrutiny – Gender Specific Programs**

The Croson decision failed to evaluate women-owned business ("WBE") programs. Subsequently, federal appellate courts addressed and set forth guidelines for evaluating gender-based affirmative action programs. Most of these courts have adopted an intermediate level of scrutiny, rather than the strict scrutiny analysis applicable to race-conscious programs. However, as demonstrated by the analysis below, it remains unclear how the review of evidence of discrimination for an intermediate level of scrutiny differs from strict scrutiny.

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<sup>30</sup> Contractor's Association of Eastern PA, Inc. v. City of Philadelphia, 91F.3d 586, (3d Cir. 1996)

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In Coral Construction Company v. King County, 941 F.2d 910 (9<sup>th</sup> Cir. 1991), cert. denied. 502 U.S. 1033, 122 S.Ct. 875, 116 L.Ed. 2d. 780 (1992), the Ninth Circuit U.S. Court of Appeals applied an intermediate scrutiny standard in reviewing the WBE section of the county's ordinance. In addition, the Third Circuit U.S. Court of Appeals applied an intermediate level of review in its ruling in Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990 (3<sup>rd</sup> Cir. 1993). However, the Court opined that it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the standard of discrimination necessary to satisfy the intermediate scrutiny standard; and if so, how much statistical evidence is necessary. Nonetheless, the Court struck down the WBE portion of Philadelphia's programs, finding that the City had no statistical evidence and insufficient anecdotal evidence regarding women-owned construction firms and gender discrimination.

The Eleventh Circuit U.S. Court of Appeals in Ensley Branch NAACP v. Seibels, addressed the issue in a Title VII action.<sup>31</sup> In this decision, the Eleventh Circuit rejected the argument that, based on Croson, the Supreme Court intended strict scrutiny to apply to gender-conscious programs challenged under the Equal Protection Clause. Since Ensley, the Supreme Court decided United States v. Virginia, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), thereby invalidating Virginia's maintenance of the single sex Virginia Military Institution (VMI). Rather than deciding the constitutionality of the VMI program under intermediate scrutiny, the Court held that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."<sup>32</sup> The Court then applied this "exceedingly persuasive justification" standard in invalidating the VMI program. Justice Rehnquist concurred only in the judgment, noting that "the Court . . . introduces an element of uncertainty respecting the appropriate test."<sup>33</sup> Justice Scalia dissented, suggesting that the majority had effectively adopted a strict scrutiny standard to judge the constitutionality of

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<sup>31</sup> 31 F.3d 1548, 1579 (11<sup>th</sup> Cir. 1994).

<sup>32</sup> U.S. v. Virginia at 529, 2274.

<sup>33</sup> Id. at 559, 2288.

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classifications that deny individuals opportunity on the basis of sex.<sup>34</sup> The majority, however, neither denied nor affirmed Justice Scalia's analysis.

It is not certain whether the Supreme Court intended the VMI decision to signal a heightening in scrutiny of gender-based classifications. However, it may be that the VMI case stands as unique because – like key, recent Supreme Court rulings - it involves an institution of higher learning. Nevertheless, recent Federal District Court cases, as in Engineering Contractors Assn. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11<sup>th</sup> Cir. 1997), continue to confine their analysis of WBE programs to traditional intermediate scrutiny.<sup>35</sup> Here the court noted, however, that the measure of evidence required for a gender classification is ambiguous. The court agreed with the Third Circuit's holding that intermediate scrutiny requires that evidence be probative, but added that "probative" must be "sufficient as well." 122 F.3d 895. See also Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 249 (6<sup>th</sup> Cir. 2006).

### D. Post-Enactment Evidence

In Croson, the Court stated that a state or local government "must identify that discrimination . . . with some specificity before they may use race-conscious relief."<sup>36</sup> However, the Court declined to require that all relevant evidence of such discrimination be gathered prior to the enactment of the program. Pre-enactment evidence refers to evidence developed prior to the enactment of a MWBE program by a governmental entity. Such evidence is critical to any affirmative action program because, absent any pre-enactment evidence of discrimination, a state or local government would be unable to satisfy the standards established in Croson. On the other hand, post-enactment evidence is that which has been developed since the affirmative action program was enacted and therefore was not specifically relied upon as a rationale for the government's race- and gender-conscious efforts. As such, post-enactment evidence has been another source of

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<sup>34</sup> Id. at 571, 2294.

<sup>35</sup> 122 F.3d 895, 907-08 (11<sup>th</sup> Cir. 1997).

<sup>36</sup> Croson, 488 U.S. 469, 504, 109 S.Ct. 706, 727.

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controversy in contemporary litigation, though most subsequent rulings have interpreted Croson's evidentiary requirement to include post-enactment evidence. Significantly, crucial exceptions exist in rulings from the local federal courts.

In West Tennessee Chapter of Associated Builders and Contractors v. Board of Education of the Memphis City Schools, 64 F.Supp.2d 714 (W.D. Tenn. 1999), the District Court faced the issue of whether "post-enactment evidence" was sufficient to establish a strong basis upon which a race conscious program can be supported. The late Judge Jerome Turner opined that although the court in Croson was not faced with the issue of post-enactment evidence, much of the language in the opinion suggested that the Court meant to require the governmental entity to develop the evidence before enacting a plan. Furthermore, when evidence of remedial need was developed after the enactment of a race-conscious plan, it provided no insight into the motive of the legislative or administrative body.

The Court concluded that admitting post-enactment evidence was contrary to Supreme Court precedent as developed in Wygant, Croson, and Shaw. The Court held that post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling. It is important to note that this opinion is not representative of the majority of case law on this issue, although it reflects a possible trend that warrants discussion and consideration. Obviously, the case has additional significance because Memphis is within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as is Memphis.

Associated General Contractors of Ohio v. Sandra Drabik, 50 F.Supp.2d. 741 (1999), is another relatively recent opinion wherein the District Court for the Eastern Division of Ohio stated that in order to support a compelling state interest for race-based preferences, challenged on equal protection grounds, evidence of past discrimination must be reasonably current. "Under *Croson*, the state must have had sufficient evidentiary justification for a racially conscious statute in advance of its passage; the time of a

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challenge to the statute, at trial, is not the time for the state to undertake fact-finding.” Ibid., at 738.

Moreover, the Court ruled that evidence of purported racial discrimination that was more than twenty (20) years old was too remote to form the basis for a compelling governmental interest justifying the enactment of a race-based affirmative action program.

Early post-Croson decisions permitted the use of post-enactment evidence to determine whether an MWBE program complies with Croson.<sup>37</sup> In Ensley, the Eleventh Circuit explicitly held that post-enactment evidence is properly introduced in the record and relied upon by District Courts in determining the constitutionality of government race and gender-conscious programs:

Although Croson requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the Supreme Court has never required that, before implementing affirmative action, the employer not have proved that it has discriminated. On the contrary, further finding of discrimination need neither precede nor accompany the adoption of affirmative action.<sup>38</sup>

Again, a federal case from Tennessee clouds the issue.

In In re: City of Memphis, 293 F.3d 345 (6<sup>th</sup> Circuit 2002), the Sixth Circuit U.S. Court of Appeals rejected the application for interlocutory appeal by the City of Memphis. Although the trial court certified an interlocutory appeal, neither party received notice of the certification until the 10-day period for filing the application for interlocutory appeal had expired. For the Court, the central question was “whether the District Court [could] restart the 10-day period by vacating its original certification order and then reentering the order.” Ibid., at 348. However, the case touched upon the issue of post-enactment evidence.

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<sup>37</sup> See, e.g. Contractors Assn., 6 F.3d , 990, 1003-04 (3<sup>rd</sup> Cir. 1993); Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992); Coral Constr., 941 F.2d 910, 921 (9<sup>th</sup> Cir. 1991).

<sup>38</sup> Ensley Branch, NAACP, 31 F.3d 1548, 1565 (11<sup>th</sup> Cir. 1994).

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In 1996, the City of Memphis adopted a Minority and Women Business Enterprise Procurement Program (“MWBE”), based upon findings from a disparity study covering the period from 1988 to 1992. The West Tennessee Chapter of Associated Builders and Contractors, Inc. and Zellner Construction Company, Inc. filed suit against the City of Memphis in January 1999, claiming that the City’s MWBE program violated the Equal Protection Clause of the Fourteenth Amendment. In response to the lawsuit, Memphis proposed to commission a new disparity study, covering the period from 1993 to 1998. The City asserted that the post-enactment study could be used as evidence to demonstrate a compelling governmental interest. Six months after the initiation of the lawsuit, the District Court ruled that Memphis could not introduce the post-enactment study as evidence of a compelling governmental interest and initially denied the City’s motion to certify an interlocutory appeal. In response to the City’s motion to reconsider, the District Court certified an interlocutory appeal, though notice of this decision was not rendered to the parties in a timely fashion. Ibid.

After deciding that it had jurisdiction to rule on the matter, the Sixth Circuit examined the issue of post-enactment evidence through its analysis of the three requirements for interlocutory appeal: 1) whether the order involves a controlling issue of law; 2) whether a substantial ground for difference of opinion exists regarding the correctness of the decision; and, 3) whether an immediate appeal may materially advance the ultimate termination of the litigation. Of the three requirements, the Sixth Circuit focused on the second. The appeals court observed that the District Court had relied upon the City’s assertion that substantial ground for difference of opinion existed regarding the value of post-enactment evidence. The Sixth Circuit rejected the City’s argument, stating that “[t]his issue...appears to have been resolved in this circuit.” Ibid.

The Sixth Circuit turned to the ruling in Drabik to imply that post-enactment evidence was inadmissible. “The City argues that the court in *Drabik* did not find that post-enactment evidence was inadmissible...Although *Drabik* did not directly address the admissibility of post-enactment evidence, it held that a governmental entity must have pre-enactment evidence sufficient to justify a racially conscious statute. It also indicates



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that this circuit would not favor using post-enactment evidence to make that showing.” Ultimately, the appeals court denied the City’s application for permission to appeal because “[e]ven if we concluded that there is a substantial difference of opinion, the issue presented in this case is not a controlling legal issue.” *Ibid.* at 351.

It is important to reiterate that the Court in In re: City of Memphis did not reject the validity of post-enactment evidence. The Court rejected the City of Memphis’ attempt to pursue an appeal of the trial court’s evidentiary ruling. Only at first blush does it appear that the 6<sup>th</sup> Circuit suggested that post-enactment evidence has little value. A clear reading of the case reveals that the court’s primary concern was the appropriateness of the City’s appeal. The Court’s tangential concern was whether a governmental entity could rely upon post-enactment evidence alone to justify a pre-existing statute and MWBE program. Indeed, the Court merely encouraged the City to continue its defense of the MWBE program with pre-enactment evidence gleaned from the initial disparity study. Furthermore, because this discussion of the admissibility of post-enactment evidence occurred in the dicta of the opinion, the case does not suggest a sea change in the Sixth Circuit over the last four years.

Therefore, a race and gender-conscious program implemented by the City may be supported by post-enactment evidence of discrimination. Although post-enactment evidence may not suffice to support the original intent of a governmental entity, it can prove helpful in other ways. See, i.e., Mark L. Johnson, “Legislate First, Ask Questions Later: Post-Enactment Evidence in Minority Set-Aside Litigation,” 2002 U. Chi. Legal F. 303 (2002). Specifically, post-enactment evidence seems necessary to determine the program’s success for narrow tailoring and continued need after the program’s initial term has expired. See Associated General Utility Contractors of MD v. Mayor of Baltimore, 218 F Supp. 2d 749, 620 (D. MD. 2002) (post-enactment evidence admissible on the issue of narrow tailoring and the use of race neutral alternatives).<sup>39</sup>

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<sup>39</sup> 91 F. 3d at 606

### E. Burdens of Production and Proof

The Croson Court struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past and present discrimination.<sup>40</sup> Since the Fourteenth Amendment only allows race-conscious programs that narrowly seek to remedy particularized discrimination, the Court held that state and local governments "must identify that discrimination . . . with some specificity before they may use race-conscious relief." The Court's rationale for judging the sufficiency of the City's factual predicate for affirmative action legislation was whether there existed a "strong basis in evidence for its [government's] conclusion that remedial action was necessary."<sup>41</sup>

Croson places the initial burden of production on the state or local governmental actor to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program is aimed at remedying identified past or present discrimination. A state or local affirmative action program that responds to discrimination is sustainable against an equal protection challenge so long as it is based upon strong evidence of discrimination. A municipality may establish an inference of discrimination by using empirical evidence that proves a significant disparity between the number of qualified MWBEs, the number of MWBE contractors actually contracted by the government, or by the entity's prime contractors. Furthermore, the quantum of evidence required for the governmental entity must be determined on a case-by-case basis and in the context and breadth of the MWBE program it advanced.<sup>42</sup> If the local government is able to do this, then the burden shifts to the challenging party to rebut the municipality's showing.<sup>43</sup>

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve

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<sup>40</sup> Croson, 488 U.S. at 498-506, 109 S.Ct. at 723-28.

<sup>41</sup> Id. at 500, 725 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277, 106 S.Ct. 1842, 1849, 90 L.Ed.2d 260 (1986)).

<sup>42</sup> See Concrete Works, 36 F.3<sup>rd</sup> 1513 (10<sup>th</sup> Cir. 1994).

<sup>43</sup> See Contractors v. Philadelphia, 6 F.3d 990, 1007.

this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.<sup>44</sup>

### F. The Continuing Significance of Disparity Studies

One of the most important Federal Court rulings in the last ten years emerged from the serpentine litigation referred to collectively as “Concrete Works.” Following a long-awaited bench trial, a Federal District Judge enjoined the City of Denver from enforcing its race- and gender-specific ordinance with regard to public contracting in the construction industry (Concrete Works III, see *infra*). The City of Denver appealed the verdict and the Tenth Circuit U.S. Court of Appeals ruled in Denver’s favor, issuing perhaps the most eloquent vindication of disparity studies to date.

The Court found the quantitative analyses to be both valid and “extensive” and the qualitative material to be compelling, if not “disturbing.” 321 F.3d at 981-987, 989-990. “[W]e conclude that Denver had a strong basis in evidence to conclude that action was necessary to remediate discrimination against [W/MBEs] *before* it adopted both the 1990 Ordinance and the 1998 Ordinance.” 321 F.3d at 991 (emphasis in original). The Court added that Denver’s evidence survived the challenge of CWC’s experts because “CWC [could not] meet its burden of proof through conjecture and unsupported criticisms of Denver’s evidence.” *Ibid*. The Court determined that the Trial Court erred when it did not give sufficient weight to Denver’s disparity studies, reversed the ruling of the Trial Court and remanded the case so that judgment would be entered on behalf of Denver.

The ramifications of the Tenth Circuit’s 2003 decision, what we might deem *Concrete Works IV*, are many and significant. First, the Court validated the use of disparity studies as the best tool available for governmental entities to reach the legal threshold for establishing an affirmative action program. In essence, a disparity study is the best means for accumulating viable statistical and anecdotal evidence in order to support the compelling governmental interest in remedying past and present race- and gender-based

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<sup>44</sup> Majeske v. City of Chicago 218 F.3d 820 (7<sup>th</sup> Cir. 2000)

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discrimination. Second, the Court opined that its peers in other parts of the federal judiciary misconstrued the legal framework established in *Croson*, thereby imposing an unnecessarily narrow approach to viewing the evidence generated by disparity studies. In effect, the District Court in *Concrete Works III* - as well as fellow Federal Courts in other states - incorrectly shifted the constitutional burden to Denver by forcing it to prove the “innocence” of its program. In reality, the heaviest burden rests with the opponents of the governmental programs - and critics of disparity studies - to demonstrate with extreme specificity the unconstitutionality of the remedial plan. Ultimately, the Tenth Circuit validated the indispensable role of disparity studies in supporting any remedial program.

### G. Outreach Race-Neutral Programs

Croson is generally read to permit race-neutral outreach programs, stating in pertinent part:

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city’s interests, and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.<sup>45</sup>

In Safeco, the 6th Circuit stated that “[o]utreach efforts may or may not require strict scrutiny” and cited as authority Allen v. Alabama State Bd. Of Education, 164 F.3d 1347

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<sup>45</sup> Croson, 488 US at 510.

(11th Cir.1999). In Allen, the U.S. Court of Appeals for the 11th Circuit opined extensively on the issue of outreach. In that case, the Alabama State Board of Education appealed a decision of the U.S. District Court for the Middle District of Alabama, which rejected a motion of the Board to vacate a 1987 consent decree. The consent decree was entered in order to terminate a civil rights class action lawsuit which challenged, under Title VI and Title VII of the Civil Rights Act of 1964 and 42 USC §1981, the Board's state teacher certification requirements. The Board argued that recent changes in Supreme Court Equal Protection jurisprudence rendered the consent decree unconstitutional. The 11<sup>th</sup> Circuit agreed that a change in equal protection law could result in a requirement that the District Court modify the consent decree. The Court analyzed whether the changes in the law subjected the provisions of the consent decree to strict scrutiny:

Adarand . . . the Supreme Court held that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.” Id. at 224. Adarand's strict scrutiny standard is plainly applicable where the government distributes burdens or benefits along racial lines, granting a preference or imposing a penalty to individuals because of their race. Adarand teaches us that strict scrutiny applies in such instances because the government has subjected individuals to unequal treatment based on race. Id. at 229-30 (“[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.”). (fn 2) By contrast, where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable. See Peightal v. Metropolitan Dade County, 26 F.3d 154, 1557-58 (11th Cir. 1994) (treating such recruiting and outreach efforts as “race-neutral”); Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1551-52 (M.D. Ala. 1995) (distinguishing between inclusive and exclusive race-conscious measures and holding inclusive techniques, which “seek to ensure that as many qualified candidates as possible make it to the selection process,” are not subject to the “traditional...equal protection analysis that courts have used for techniques of exclusion”).

In this case, under the consent decree, the Board may develop a new test to be used in making teacher certification decisions for African American and white candidates alike. The decree does not require the Board to impose a different passing grade for African American candidates or otherwise classify teachers based on race in grading the examinations. In this respect, the decree does not require the Board to act according to racial classifications, which takes this case out of Adarand. Instead, the Board must be conscious of race in developing the examination, choosing test items to minimize any racially disparate impact within the framework of designing a valid and comprehensive teaching examination. Nothing in Adarand requires the application of strict scrutiny to this sort of race-consciousness.

Further, to do so would imperil Title VII, which requires covered employers to ensure that their selection processes do not result in an unjustifiable discriminatory impact on African American candidates.<sup>46</sup>

The favorable citation of the Allen opinion by the 6th Circuit in Safeco is the last word in this circuit on the subject of “outreach” and indicates that the current interpretation of the Equal Protection Clause in this circuit is that “outreach” programs do not trigger “strict scrutiny” if they are carefully crafted.

In contrast, a jurisprudential difference of opinion exists in cases outside the 6<sup>th</sup> Circuit. In MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13 (DC Circuit 2001), the broadcasters petitioned for review of an Equal Employment Opportunity Rule promulgated by the Federal Communications Commission. The rule required that the broadcasters “establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice.” The rule was primarily an outreach program with some ancillary features which will be discussed infra. The D.C. Circuit explicitly disagreed with the prevailing view in the 6<sup>th</sup> and 11<sup>th</sup> Circuits, stating in pertinent part:

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<sup>46</sup> Allen, 164 F.3d at 1352.

With respect to minorities, the Broadcasters argue that the court should give strict constitutional scrutiny to the recruiting requirement. The Commission's position is that, unlike affirmative action in hiring, "affirmative outreach" in recruitment does not implicate equal protection concerns because it merely expands the applicant pool, and an individual applicant has no right to compete against fewer rivals for a job.

In Adarand Constructors, Inc. v. Pena, the Supreme Court held that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." 515 U.S. 200, 224 (1995). The question before the court today, therefore, is whether a government mandate for recruitment targeted at minorities constitutes a "racial classification" that subjects persons of different races to "unequal treatment." We expressly reserved this question in Lutheran Church- Missouri Synod v. FCC, 154 F.3d 487, 492 (1998), denying rehearing in Lutheran Church, 141 F.3d 344 ("Whether the government can encourage - or even require - an outreach program specifically targeted on minorities is, of course, a question we need not decide").

Among our sister circuits only one has heretofore considered the level of constitutional scrutiny applicable to affirmative outreach and even that decision has since been vacated. See Allen v. Alabama State Board of Education, 164 F.3d 1347 (11th Cir. 1999), vacated by 216 F.3d 1263 (11th Cir. 2000); cf. Safeco Ins. Co. of America v. City of White House, 191 F.3d 675, 692 (6th Cir. 1999) ("Outreach efforts may or may not require strict scrutiny"). In Allen the Eleventh Circuit held that "where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable." *Id.* at 1352; see also Sussman v. Tanoue, 39 F. Supp. 2d 13, 27 (D.D.C. 1999) (noting that program "does not create preferences in hiring based on race or gender, and therefore need not be examined under strict scrutiny"). In a footnote, the Eleventh Circuit observed that there is some suggestion in Adarand "that all race-based actions, whether or not they lead to unequal treatment, are subject to strict scrutiny. See Adarand, 515 U.S. at 227. Courts, however, have not accepted this broad reading of Adarand." 164 F.3d 1352 n.2 (citing Lutheran Church; Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998); Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 711 (9th Cir. 1997)).

We may assume, with the Eleventh Circuit, that Adarand requires strict scrutiny only of governmental actions that lead to people being treated unequally on the basis of their race. We nonetheless disagree with that court's (short-lived) conclusion that preferential recruiting "disadvantag[es] no one." Allen, *supra* at 1352.

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It must be noted that the 11<sup>th</sup> Circuit opinion in Allen that was vacated only related to the question of payment of attorneys' fees. 216 F.3d at 1263. Nevertheless, this split between the circuits was further exacerbated by a recent decision of the 11th Circuit. In Viridi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 U.S. App. LEXIS 11203 (11<sup>th</sup> Cir. 2005) the Plaintiff, an architect of Asian Indian descent, brought a claim against the DeKalb County (GA) School District alleging that they discriminated against him in the award of architectural contracts on the basis of race. Since 1991, the DeKalb County School District has operated a "Minority Vendor Involvement Program" (MVP), which was primarily an outreach program with several other non-compulsory features. The U.S. District Court for the Northern District of Georgia had granted summary judgment and that opinion was summarized as follows by the 11<sup>th</sup> Circuit:

In granting the Defendant-Appellees' motion for summary judgment on Viridi's facial challenge, the district court noted that the MVP did not expressly endorse any discriminatory behavior or contemplate any adverse action if the goals were not met.<sup>[fn7]</sup> Because the MVP did not direct government actors to withhold or confer benefits based on the race of the applicant, the district court concluded that Viridi's equal protection rights were not violated and that the MVP was not subject to strict scrutiny. We disagree.

The 11<sup>th</sup> Circuit proceeded to assert, contrary to its opinion in Allen, that:

It is well settled that "all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny". Grutter v. Bollinger, 539 U.S. 306, 326, 123 S. Ct. 2325, 2337 (2003) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227, 115 S. Ct. 2097, 2113 (1995)). To the extent that Defendants argue that the MVP did not contain racial classifications because it did not include set-asides or mandatory quotas, we note that strict scrutiny applies to all racial classifications, not just those creating binding racial preferences. The MVP includes racial classifications. It is therefore subject to strict scrutiny. See, Grutter, 539 U.S. at 326, 123 S. Ct. at 2337-38; acc'd, Eng'g Contractors Ass'n of South Florida Inc. v. Metro. Dade County, 122 F.3d 895 (11<sup>th</sup> Cir. 1997). Allen, supra at 267.

See also Viridi v. DeKalb County School District, 216 Fed. Appx. 867, 871-874, 2007 U.S. App. LEXIS 2564 (11<sup>th</sup> Circuit 2007).



## H. Equal Protection Clause Standards

The second preliminary matter that courts address is the standard of equal protection review that governs their analysis. The Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>47</sup> Courts determine the appropriate standard of equal protection review by examining the protected classes embodied in the statute. The courts apply *strict scrutiny* to review an ordinance's race-based preference scheme and inquire whether the law is narrowly tailored to achieve a compelling governmental interest. See, e.g., U.S. v. Taylor, 956 F.2d 572 (6<sup>th</sup> Circuit 1992). Conversely, gender-based classifications are evaluated under the *intermediate scrutiny* rubric, which provides that the statute must be substantially related to an important governmental objective.<sup>48</sup> Therefore, race-conscious affirmative action is subject to a much higher standard of judicial review than gender-conscious affirmative action.

## I. Local Business Preferences

The City's current MWBE Procurement Program contains a local business preference as follows:

(e) *Certification*. For purposes of contracting with the City of Memphis under this program, a minority or woman owned business enterprise must be located within the Memphis MSA (Crittenden County in Arkansas (AR), Desoto County in Mississippi (MS), and Fayette, Shelby and Tipton Counties in Tennessee (TENNESSEE)) and certified as a minority or woman owned business enterprise by the City of Memphis approved central certification agency.

The constitutional analysis applied to local business preferences is somewhat more complex than that applied to small business enterprise programs. Many municipalities have applied local business preferences over the last two decades (for example, the City

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<sup>47</sup> U.S. Const. amend. XIV, § 1.

<sup>48</sup> Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 3335. See Engineering Contractors Association of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (11<sup>th</sup> Cir. 1997) (Eleventh Circuit explaining U.S. v. Virginia, and the appropriate gender-based affirmative action equal protection analysis).

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of Oakland Local Business Enterprise (LBE) program started in 1979).<sup>49</sup> More common is the preference for small local businesses, which is an even more widespread practice. While called small business programs, these programs often set-aside contracts for bidding by local small business enterprises.

The Federal Court cases have generally upheld local business preference programs as meeting constitutional requirements. However, local business preferences should be distinguished from preferences for hiring local residents, which have been struck down on constitutional grounds. But LBE programs could be subject to some doubt on constitutional grounds. The three bases for constitutional challenges are the Equal Protection Clause, Dormant Commerce Clause and the Privileges and Immunities Clause.

### *Equal Protection Clause*

A challenge to an LBE program under the Equal Protection Clause of the 14<sup>th</sup> Amendment to the Constitution<sup>50</sup> is relatively simple, and the courts have upheld as valid local purchasing preferences based on the Equal Protection Clause. Current constitutional case law reflects that programs which favor local companies do not fall within those that are considered a suspect classification, and can be justified as having a rational basis under the Equal Protection Clause. See, Trojan Technologies v. Pennsylvania, 916 F.2d 903 (3<sup>rd</sup> Cir. 1990). In Trojan Technologies a challenge was made to the Pennsylvania Steel Products Procurement Act, as a "blatant attempt at economic protectionism," in violation of the Equal Protection Clause. That act was a state statute which required the purchase of steel produced in the State of Pennsylvania. The Federal Court found that the more favorable treatment Pennsylvania afforded domestic steel products as opposed to foreign steel was "rationally related to a legitimate governmental purpose," the support of one of the state's most important industries which contributed significant employment and tax revenue to the State.

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<sup>49</sup> See, e.g., City of Detroit's Detroit-Based Business Program (Executive Order No. 2003-4), City of San Francisco Minority/Women Local Business Enterprise Program (San Francisco Ordinance, CHAPTER 12D), City of Oakland Local Business Enterprise Program (City Ordinance 9739), City of New York Local Business Enterprise Program (New York Administrative Code § 6-108.1).

<sup>50</sup> U.S. Const. amend. XIV

*The Commerce Clause*

Objectors to LBE programs have also attempted to use the Commerce Clause found in Article One of the Constitution, which confers upon Congress the power to regulate interstate commerce.<sup>51</sup> When coupled with the Supremacy Clause of the Constitution granting to the federal government preemptive authority over conflicting state laws, the Supreme Court has ruled the Constitution contains "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."<sup>52</sup> Accordingly, some courts have determined a state statute is unconstitutional as it posed an undue burden on interstate commerce under what has become known as the Dormant Commerce Clause.<sup>53</sup> Generally, discrimination against interstate commerce in favor of local business or investment is *per se* invalid, except in a few class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."<sup>54</sup>

The Dormant Commerce Clause has been implemented and justified for economic and political reasons. It has been argued that the Dormant Commerce Clause "prohibits economic protectionism."<sup>55</sup> From a political standpoint, a state law that only harms interests from other states "is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."<sup>56</sup>

The Supreme Court has employed a two-part test for the Dormant Commerce Clause: (1) does the state regulation discriminate against interstate commerce on its face; or, (2) are

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<sup>51</sup> U.S. Const. art. 1, §8, cl.3, reading, "Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes ...").

<sup>52</sup> *S.-C. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) see also *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

<sup>53</sup> See *Big Country Foods, Inc. v. Bd. of Educ. Anchorage Sch. Dist.*, 952 F.2d 1173, 1177 (9th Cir. 1992)

<sup>54</sup> *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

<sup>55</sup> *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988).

<sup>56</sup> *S.C. St. Hwy. Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 n. 2 (1938)

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the burdens imposed on interstate commerce excessive relative to the alleged local benefits.<sup>57</sup> A statute that fails either part of this test (the “Pike test”) is invalid under the Dormant Commerce Clause. However, in regard to the Commerce Clause and LBE programs, there is an important exception called the "Market Participant" doctrine which allows a state to pass ‘protectionist’ legislation so long as the state is participating in the market as a buyer or seller of goods and services, rather than regulating the market.<sup>58</sup>

White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983), is a perfect example of the application of the “Market Participant” doctrine. In White, the Mayor of Boston issued an executive order requiring all construction projects, funded in whole or in part by City funds or Federal grant funds given to the City, to be performed by a work force at least half of which were residents of the City. In upholding the Mayor’s executive order the Supreme Court stated:

We hold that on the record before us the application of the Mayor's executive order to the contracts in question did not violate the Commerce Clause of the United States Constitution. Insofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). Insofar as the Mayor's executive order was applied to projects funded in part with funds obtained from the federal programs described above, the order was affirmatively sanctioned by the pertinent regulations of those programs. White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 214 (1983), See also, United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 127 S.Ct. 1786 (2007); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984).

Consequently, the Commerce Clause was not intended to prohibit a state from implementing regulations favoring its own citizens over others when acting as a market

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<sup>57</sup> Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

<sup>58</sup> S.-C. Timber Dev., Inc., 467 U.S. at 93 (holding that "if a state is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities").

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participant. The U.S. Supreme Court has ruled that governments enjoy unrestricted ability to select their trading partners.<sup>59</sup> Indeed, in light of "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal"...and that "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause."<sup>60</sup>

The U.S. Supreme Court has clarified, however, that the Market Participant doctrine does not allow a state to impose conditions "that have a substantial regulatory effect outside of that particular market."<sup>61</sup> Note that the line between market participant and market regulator has not always been clear. Nevertheless, under the Market Participant Exception, LBE programs should pass constitutional hurdles.

Finally, under the Commerce Clause the U.S. Supreme Court has ruled that when local preferences are required under Federal grants, there is no Dormant Commerce Clause issue, ruling that "where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce."<sup>62</sup>

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

### *Privileges and Immunities Clause*

The Privileges and Immunities Clause is found in Article Four of the U.S. Constitution and provides "The Citizens of each State shall be entitled to all Privileges and Immunities

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<sup>59</sup> Perkins v. Lukens Steel, 310 U.S. 113, 127 (1940).

<sup>60</sup> Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980).

<sup>61</sup> S.-C. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984).

<sup>62</sup> White v. Massachusetts Council of Construction Employers, Inc. 460 U.S. 204, 213 (1983).

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of Citizens in the several States.<sup>63</sup> The U.S. Supreme Court has identified the original purpose of the Privileges and Immunities Clause as prohibiting discrimination on the basis of state citizenship. Historically, the U.S Supreme Court has applied a two-part test under the Privileges and Immunities Clause: (1) did the state or local government violate a fundamental right, and (2) did the state or local government have a substantial reason for doing so.<sup>64</sup> Accordingly, not all forms of discrimination against citizens of other states are prohibited:

"Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those `privileges' and `immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 383 (1978)

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

One of the leading cases analyzing application of the Privileges and Immunities Clause in regard to a local hiring preference came in United Building & Construction Trades v. Camden.<sup>65</sup> In Camden a municipal ordinance required that at least 40 % of the employees of contractors and subcontractors working on City construction projects be Camden residents. The Court explained that “[a]s a threshold matter, then, we must determine whether an out-of-state resident's interest in employment on public works

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<sup>63</sup> U.S. Const. art. 4§2.

<sup>64</sup> Toomer v. Witsell, 334 U.S. 385, 395-96 (1948).

<sup>65</sup> United Building & Constr. Trades v. Camden, 465 U.S. 208 (1984).

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contracts in another State is sufficiently "fundamental" to the promotion of interstate harmony so as to "fall within the purview of the Privileges and Immunities Clause." Montana Fish & Game, supra, at 388. The Court devised a three-part test to evaluate the constitutionality of such an ordinance under the Privileges and Immunities Clause. The jurisdiction must document "substantial reason" for the preference; the jurisdiction must demonstrate that non-residents can be held partly responsible for the documented problem; and the proposed remedy must be narrowly tailored.

In examining the City of Camden's rationale for imposing a local hiring preference the Court noted with approval the City's interest in counteracting spiraling unemployment, the sharp decline in population, the dramatic reduction in the number of local businesses and arresting "middle class flight." The Court also recognized that the City stated it attempted to narrowly tailor the ordinance by allowing nonresidents access to 60% of the available positions. The Court explained that each inquiry under the Privileges and Immunities Clause should take into account that the states should have considerable leeway in analyzing local evils and prescribing appropriate cures. The Court appeared to differentiate the City of Camden's local preference restrictions from those found in other cases in which the Court invalidated local hiring preferences, as it did in Hicklin v. Orbec, 437 U.S. 518 (1978).

In Hicklin, the State of Alaska implemented a statute containing a resident hiring preference for all employment related to the development of the state's oil and gas resources. The Court struck down the overbroad Alaska statute as violating the Privileges and Immunities Clause by its attempt to "force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents." Id., at 531. The Camden Court stated it found no similar ripple effect to infect the Camden ordinance. It was limited in scope to employees working directly on city public works projects.

There were three significant elements of the Court's holding. First, the Camden Court ruled that the Market Participant exception does not apply to Privileges and Immunities

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analysis. Second, the Court ruled that the Privileges and Immunities Clause does apply to laws that discriminate on the basis of municipal residency, not simply state residency. Third, the Court ruled that only those rights fundamental to interstate harmony were protected by the Privileges and Immunities clause. In Camden the Court found that employment was a fundamental right under the Privileges and Immunities Clause, but direct public employment was not.<sup>66</sup> Hence employment by a city vendor was a fundamental right while employment by the City itself was not a fundamental right. All of these results would seem to operate against a constitutional finding sustaining an LBE program.

The application of Camden can also be seen in Hudson County Building and Construction v. Jersey City,<sup>67</sup> which involved a program requiring city vendors to make good faith efforts to hire 51 % city residents. The District Court again noted that there is no fundamental right to direct government employment, but there is a fundamental right to private employment with government contractors. Consequently the program did unduly burden out-of-state residents. While Jersey City provided data on unemployment and poverty in Jersey City, the evidence did not show “that out-of-state workers [were] a cause of unemployment and poverty within its borders.” Thus just reciting data on unemployment and poverty will not always be enough to overcome a Privileges and Immunities Clause challenge.

But note that Camden involved a preference for hiring city residents, not a local business enterprise program. Arguably there should be no distinction between public contracting and direct government hiring under the Privileges and Immunities Clause; that is, public contracts are like public jobs, public works and other government benefits that are owned by the residents. Public contracts are not a fundamental right for Privileges and Immunities Clause analysis. Consequently, the local business enterprise programs with local preference clauses stand a good chance of being found outside the purview of the Privileges and Immunities Clause.

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<sup>66</sup> McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) (upholding a municipal ordinance that required all Philadelphia city government employees to be residents of the city).

<sup>67</sup> Hudson County Building and Construction v. Jersey City 960 F.Supp. 823, 831 (Dist Ct D NJ 1996)



In addition, while local hiring programs may face challenge under the Privileges and Immunities Clause, the Supreme Court has held that the Privileges and Immunities Clause does not protect corporations.<sup>68</sup> Consequently a Privileges and Immunities challenge should only arise relative to an individual seeking to contract with a local government. But local contracting programs can and should have a clear statement of the economic basis of the program to protect it from challenge by an individual vendor on the basis of the Immunities Clause.

In conclusion, an LBE program should survive constitutional challenge on the basis of (1) a challenge under the Equal Protection Clause because LBE programs generally have a rational basis for their existence, (2) a challenge under the Dormant Commerce Clause based upon the Market Participant exception, and (3) a challenge under the Immunities Clause (a)because the clause does not apply to corporations, (b)public contracts are not a fundamental right and (c)an agency should be able to provide economic justification for an LBE program.

### ***Implications for an LBE Program***

In conclusion, an LBE program should survive constitutional challenge on the basis of (1) a challenge under the Equal Protection Clause because LBE programs generally have a rational basis for their existence, (2) a challenge under the Dormant Commerce Clause based upon the Market Participant exception, and (3) a challenge under the Immunities Clause (a)because the clause does not apply to corporations, (b)public contracts are not a fundamental right and (c)an agency should be able to provide economic justification for an LBE program.

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<sup>68</sup> Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177, 181, (1869); This result was reaffirmed by the Supreme Court *in Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, (1981).

**J. Conclusion of the Legal Analysis**

Despite the nearly eighteen years of litigation following the Croson decision, the law in the area of race-conscious remedies used to ameliorate inequities concerning MWBE utilization in the area of public contracting, is far from settled. Clearly, the law requires that such programs be reviewed periodically. What remains unclear is the applicable standard used to determine whether a race- and gender-conscious program has achieved its intended goal of eliminating identified discrimination, thereby negating the need for the continued use of race- and gender-conscious remedies, has not been addressed by the United States Supreme Court since Adarand IV. The various federal district and court of appeals decisions which address these issues have been reviewed to provide general guidance for conducting this study.

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### III. ANALYSIS OF PURCHASING POLICIES, PROCEDURES, AND THE MWBE PROCUREMENT PROGRAM

The purpose of this chapter is to provide a comprehensive review and analysis of the City of Memphis (hereinafter City) purchasing and contracting methods as they pertain to the Minority and Women Business Enterprise Procurement Program (City Code section 2-325).<sup>69</sup> This review will focus on whether there are purchasing policies, practices or procedures which may serve as barriers to minority and women-owned businesses as they pursue opportunities, or engage in commerce, with the City. To the extent that areas of concern are revealed, they will be discussed and recommendations for changes will be made as part of the comprehensive Disparity Study recommendations. The factual predicate for the MWBE Procurement Program was based upon the findings and recommendations of the 1994 D.J. Miller Disparity Study (Miller Study). The Miller Study made the following findings:

1. The City of Memphis' contracting activity reflected significant statistical disparity in most years across all procurement categories, as no MWBE utilization was evident. (Section VI-52)
2. The lack of adequate monitoring and reporting systems by which an agency can track MWBE participation and monitor the purchasing activity of the City of Memphis. (Section (ES-4))
3. Substantial anecdotal evidence of private sector discrimination indicated that bid irregularities are commonplace in the Memphis contractor community with majority contractors exercising use of their influence with purchasing agents to harass or interfere

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<sup>69</sup> Section 2-325 (b) contains the Statement of Policy which reads in relevant part: Under all the circumstance and based on the factual predicate which has been established after careful study and review, the City of Memphis has a compelling interest to fully remedy the ongoing effects of past and present discrimination against African Americans and female business owners in both the public and private sectors of its marketplace.

with the ability of minority contractors to win bids and perform work on contracts. (Section ES-6)

4. Historical research indicated thriving African American businesses during the late 1800s and early 1900s which were eliminated by the “political machinery” combined with discrimination in trade unions which impeded the ability of minorities and women to obtain training in construction and trades industries. (Section ES-2)

Based upon the above findings the City Council determined that a compelling interest was established which justified immediate and substantial remedial action in regard to increasing the participation of minority and women-owned businesses in City contracting.

#### **A. Methodology**

This section will discuss the steps taken to analyze and evaluate the City's contracting and purchasing policies, procedures, and programs. The analysis included the following steps:

1. Review of City contracting and purchasing policies and procedures currently in use.
2. Review of City ordinances, regulations, resolutions, and purchasing policies which relate to implementation of the MWBE Procurement Program.
3. Review relevant Tennessee State law provisions related to purchasing and the implementation of the MWBE Procurement Program.
4. Interview Director level City personnel and departmental purchasing managers to understand and review purchasing activity and implementation of the MWBE Procurement Program for the relevant period.

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5. Review year end reports encapsulating MWBE Procurement Program achievements for FY 2003 through FY 2006.
6. Analyze MWBE Procurement Program implementation to determine whether the procurement process as written and practiced is fair and open without presenting barriers to minority and women-owned businesses.
7. Analyze the existence and effectiveness of initiatives and outreach efforts as they relate to bidding opportunities, manner of source selection and subcontractor performance issues.

In completing the above tasks, we reviewed the following documents and information that directly impact the procurement of goods and services, construction contracting and the procurement of professional services:

1. The City of Memphis Purchasing Policies and Procedures
2. The Minority and Women Business Enterprise Procurement Program, City Code section 2-325
3. The City's Certification Application packet.
4. Minority & Women's Business Enterprise Program Report FY 2003
5. Minority & Women's Business Enterprise Program Report FY 2004
6. Minority & Women's Business Enterprise Program Report FY 2005
7. Minority & Women's Business Enterprise Program Report FY 2006
8. Departmental Organization Charts.
9. Departmental Listings Professional Services Contracts.
10. Sample Contracts for Professional Services
11. Sample Requests for Proposals and Qualifications.
12. A & E Consultant's Questionnaire
13. List of Registered Consultants, City of Memphis Engineering Department

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14. City of Memphis Webpage Minority & Women Business Enterprise Program
15. 1994 D.J. Miller Disparity Study for City of Memphis

There was a review of the following City of Memphis Charter Sections and Ordinances, and State of Tennessee laws specifically related to purchasing activities:

1. City Charter Section 51
2. City Charter Section 221
3. City Charter Section 222
4. City Charter Section 223
5. City Charter Section 224
6. City Charter Section 226
7. City Charter Section 502.1
8. City Code Section 60
9. City Code Section 341
10. City Code Section 344
11. City Code Section 838
12. City Ordinance 764
13. Tennessee Code Annotated section 12-4-106
14. Tennessee Code Annotated section 62-2-107

### **B. Interview Process**

Interviews were held with the Directors of all major City divisions with the exception of the Police, which provided its procurement manager. Interviews were also conducted with division procurement managers for a more detailed review of division purchasing activity. The interview instruments were designed to determine each relevant department's application of the City's ordinances, policies, programs and procedures. Interviews were held in Memphis beginning January 18, 2008 through February 26, 2008. Each interview was designed to last approximately one to one and



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one half hours and was held at the City of Memphis offices. The following persons were interviewed:

Chief Administrative Officer	City Attorney
Purchasing Agent	Director of Human Resources
Director of Housing & Community Dev.	Director of Public Services
Director, Fire Services	City Engineer
Director of Finance	Administrator, Building Design
Contract Compliance Officer	Deputy Comptroller
Fire Services Administrator	Police Services Budget Administrator
Assistant Purchasing Agent	Assistant Purchasing Agent
Deputy Director, Housing & Community Development (HCD)	

### C. Analysis of City of Memphis Procurement Process

**General Overview--** The City Purchasing Agent (PA) is empowered by City of Memphis Charter Section 222 to “make all purchases of supplies, materials and equipment required for use by said municipal government or personal services or labor.” The City’s Purchasing Policies and Procedures Manual (Purchasing Policy) establishes that the Purchases Services Center (PSC) under the control of the PA is to provide “centralized purchasing” for the procurement of all supplies, equipment and services required for city operation over \$2,500 in value. Departmental managers may make purchasing decisions independent of the PSC for goods or services under \$2,500. The PSC uses the Oracle Purchasing software allowing for the department to choose paperless requisition processing. The PA reports directly to the Assistant Director of Finance. The PSC employs eleven persons under the direction of the PA. The PSC staff includes two Assistant Purchasing Agents, three buyers, three clerks, two contracts specialists and one fixed assets coordinator. The PSC is responsible for maintaining an inventory of all City property, disposal of fixed assets and surplus goods, disposal of impounded or unclaimed vehicles or merchandise, the encumbrance of funds, and all amendments and change orders to City contracts. The PSC maintains an updated list of vendors, suppliers and contractors. The Mayor of the City of Memphis shall sign and execute all City contracts.

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**Purchases Over \$2,500** –All purchases over \$2,500 must be processed through the PSC. Purchase orders or contracts must be used for purchase obligations over \$2,500. The requesting division prepares specifications and quantities which are incorporated into a requisition. The requisition is signed by the appropriate Division Director and submitted to the PSC for execution. Where the purchase requisition is for \$2,500, but less than \$25,000, the PSC will solicit three verbal or written quotes and will process the order with the lowest bidder.<sup>70</sup> In the case of particular professional services, Tennessee law requires the selection of providers based upon qualification as opposed to lowest bid.<sup>71</sup> In cases where the City selects other than the lowest bidder, the Division will provide written justification for selection of the higher bid.

**Purchases over \$25,000 but less than \$50,000** -- Where the requisition is for purchases over \$25,000 but less than \$50,000, the PSC shall solicit written informal bids. The PSC will prepare a bid package including requisition, specifications, and list of bidders. The Division then reviews bid documents, selects the lowest qualified bid and returns the bid package to Purchasing with lowest bid selection. Upon receipt of the bid selection the PSC verifies availability of funds and creates a purchase order document with a purchase order number which is then signed by the Purchasing Agent. The PSC processes the order with the lowest bidder. Following delivery of the goods to the department, and verification of order quantity and quality, the bid package is filed by requisition number in Purchasing. Processed and completed bid packages are filed in Purchasing for one year then transferred to records management for a period of 5 years. In the event all informal bids exceed \$50,000, they will be rejected and the requisition closed.

**Procurement of Goods and Services over \$50,000 and Legal Notices**– A formal competitive bid process is used where the estimated cost of Goods and Services exceeds

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<sup>70</sup> Purchasing Policies & Procedures Manual, B-040

<sup>71</sup> Tenn. Code Ann. Section 12-4-106(a)(1) in pertinent part: Contracts by counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of the state, for legal services, fiscal agent, financial advisor or advisory services, educational consultant services, and similar services by professional persons or groups of high ethical standards, shall not be based upon competitive bids, but shall be awarded on the basis of recognized competence and integrity. The prohibition against competitive bidding in this section shall not prohibit any entity enumerated from interviewing eligible persons or groups to determine the capabilities of such persons or groups. See also, State of Tennessee Attorney General Opinion No. 08-16 (January 31, 2008)

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\$50,000. The Division prepares the Legal Notice to Bidders along with Bid Conditions and specifications. The Division also prepares a list of prospective bidders and forwards the bid package to the Division Director for approval. Following signature, the Division Director forwards the documents to the PSC.

At this stage of purchasing, a legal notice is required to be published. All Legal Notices are reviewed by Contract Compliance for approval of specifications for participation of minority and women-owned businesses, if applicable. The Assistant Purchasing Agent reviews the Legal Notice and assigns it to a Contract Clerk for publication in The Daily News. Legal Notices are published Tuesday and Wednesday of each week prior to the bid session. The Contract Clerk opens bids at 2:00 pm on the following Friday, at which time the Assistant Purchasing Agent reads aloud all bids in the Bid and Contract Session, which is held in the City Council Chambers. The Contract Clerk then forwards the bid responses and bid transmittals to the appropriate division. The Division reviews the bids to determine “lowest and best” then forwards an award recommendation to the Assistant Purchasing Agent. Any award recommendations other than the low bid must be justified in writing.

The Contract Clerk prepares and forwards all contracts to vendors for signature. The vendor then signs and returns the executed contract to the PSC, along with the appropriate insurance and bonding documentation, if required. Purchasing then reviews and forwards the contract and other documentation to the Legal Service Center for review and approval. Following legal review and approval the contract is forwarded to the Chief Administrative Officer (CAO) for review and signature by the Mayor.

The Mayor returns the contract through the CAO to Purchasing for distribution. Purchasing distributes executed copies of the contract to the vendor, the division and establishes a contract file in Purchasing. Purchasing keeps the contract file for one year, and then forwards the file to records management for retention for five years.

### **Contracts Exempt from the Competitive Bid Process and Sole Source Contracts –**

There are classifications of contracts that are exempt from the competitive bid process.

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They include contracts for artifacts and museum pieces, sole/single source items, Professional, Architectural and Engineering Services Contracts, Negotiated Contracts and Purchases from Governmental Agencies.<sup>72</sup> Where the professional services sought are architectural and engineering, State of Tennessee regulation stipulates that the selection process must be based upon qualification and may not be procured by competitive bid.<sup>73</sup>

**Prequalification & Licensing** – The Construction Department of the City does not pre-qualify firms to do business with the City. All firms that desire to participate on City construction projects are required to submit their qualifications and experience in order to be added to the list of eligible firms. The Construction Department then evaluates the firms on its list against project specifications. It is at that point that firms will be deemed appropriate to participate on a project by project basis.

In regard to licensing, Tenn. Code Ann. Section 62-2-107, requires plans, specifications and estimates be prepared by the appropriately qualified Tennessee registered design professionals for public works projects undertaken by the State, any city, county, town or other political subdivision when the projects are greater than \$25,000, or the project alters the structural, mechanical, or electrical systems. The size and complexity of the project generally determine whether the design professional used on a project is a City employee or whether the design is out-sourced.

**Construction Projects and MWBE Program Accomplishments** – The Construction Department maintains a list of approved architectural and engineering firms. Engineering firms are selected consistent with Tennessee state regulations. The Construction Department awards engineering professional services contracts based upon a number of factors including prior experience of the City with the firm, evaluation of relevant expertise and information submitted by the firm, capacity to perform the job within time parameters and the attempt by the department to more evenly spread the work

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<sup>72</sup> Purchasing Policies & Procedures Manual, Policy C-010.

<sup>73</sup> See footnote 2, Tennessee Code Annotated, section 12-4-106.

assignments among those on the list. There were MWBE firms on the list, along with other professional services firms.

#### **D. Bonding and Insurance Requirements**

**General Overview** -- The Purchasing Services Center is responsible for ensuring compliance with bond and insurance requirements. Minimum requirements for bid bonds and insurance are stated in the bid specifications. Except where required by law, the PA determines whether or not a bond is required on a bid for purchase contract under \$100,000. The Purchasing Policy also provides that the PA may waive any bonding requirements not required by law; however, bonds required in the bid specification cannot be waived for any bidder after the bid submission time.

**Bid bonds or deposits** may be required on bids for large expenditures to protect the interest of the City in the event the low bidder attempts to withdraw the bid or refuses to enter into a contract. Bid bonds are generally required on all construction contracts with an estimated cost in excess of \$100,000 or more. Bid Bonds are calculated at 5 % of the project amount. Should the successful bidder refuse to enter into a contract within 10 days following award, then the bid bond or deposit will be forfeited to the City.

**Performance bonds, labor and materials bonds** guarantee that work will be done according to specifications and in the time specified. Performance bonds are required to be equal to the total dollar value of the project. Labor and materials bonds protect the City against liens that might be granted to suppliers of labor and materials to the general contractor, in the event the contractor does not pay his subcontractors. In the case of City contractors, the bond provides protection to suppliers of labor and materials who cannot legally place a lien on public construction.

**Certificates of Insurance** are required on all construction type and professional services contracts. The Purchasing Department contacts the City's Risk Management Service Center to obtain the required type and limits of coverage for inclusion in the bid specifications.

**Professional Services Insurance Requirements**

Prior to commencing any work under an agreement with the City, the consultant shall deliver to the City insurance certificates confirming the existence of the insurance required by the Agreement. The name of the consultant's project shall also be referenced on the insurance certificate. The consultant is required to provide copies of insurance policies upon request. As respects all acts, errors or omissions in the performance of professional services, the consultant agrees to indemnify and hold harmless the City, its officials, employees, and agents from and against any and all claims, demands, defense costs, or liability of any kind or nature arising directly out of the consultant's negligent acts, errors or omissions in the performance of his or her professional services under the terms of this contract.

**a. Workers' Compensation:** The consultant shall maintain in force Workers' Compensation coverage in accordance with the Statutory Requirements and Limits of the State of Tennessee and shall require all sub-contractors to do likewise.

**b. General Liability:** Including coverage for Premises and Operations, Contractual Liability, Personal Injury Liability, Products/Completed Operations Liability, Broad-Form Property Damage (if applicable) and Independent Contractor's Liability (if applicable) written on an occurrence form.

**c. Automobile Liability:** To be taken out in the name of the consultant as Named Insured and the City as an Additional Insured, covering owned, non-owned, and hired vehicles with minimum limits.

**d. Professional Liability:** Consultants are generally required to secure professional liability coverage to insure against errors and omissions. The amount of coverage required is \$2 million dollars for each wrongful act, and consultant shall maintain such coverage for at least three (3) years from the termination of the agreement. While there is no written documentation to evidence the change, interview of City Risk Management Department personnel indicated that the City increased its Professional Liability Insurance aggregate coverage requirement from one million to two million dollars around 2006. The reason given for the million dollar increase in coverage requirement was to provide greater protection for the City in the event the consultant experienced more than one claim against its policy in a short period of time. The Risk Management Department also acknowledged that it was the department's practice to review each contract individually to assess the amount of risk then set contract insurance requirements rather than to apply one written policy to all situations.

**e. Property Insurance:** Consultant shall be responsible for maintaining any and all property insurance on his or her own personal property and equipment and shall require all subcontractors to do likewise.

## **2. Construction Contracts Insurance Requirements**

The Company shall indemnify, defend, save and hold harmless the City, its officers, employees, and agents, from and against any and all claims, demands, suits, actions, penalties, damages, settlements, costs, expenses, or other liabilities of any kind and character arising out of or in connection

with the breach of this Agreement by Company, its employees, subcontractors, or agents, or any negligent act or omission of Company, its employees, subcontractors, or agents, which occurs pursuant to the performance of this Agreement, and this indemnification shall survive the expiration or earlier termination of this Agreement. The provisions of this paragraph shall not apply to any loss or damage caused solely by the acts, errors, or omissions of the City, its officers, employees and agents.

**a. Worker’s Compensation --** The Company shall maintain in force Workers’ Compensation coverage in accordance with the Statutory Requirements and Limits of the State of Tennessee and shall require all subcontractors to do likewise.

<b>Employer’s Liability</b>	\$100,000	Each Accident
	\$500,000	Disease-Policy Limit
	\$100,000	Disease-Each Employee

**b. Automobile Liability:** Covering owned, non-owned, and hired vehicles with Limits of: \$1,000,000 Each Occurrence – Combined Single Limits.

**c. Commercial General Liability:** Comprehensive General Liability Insurance, including Premises and Operations, Contractual Liability, Independent Contractor’s Liability, and Broad Form Property Damage Liability Coverage.

\$1,000,000	General Aggregate
\$1,000,000	Products-Completed Operations
\$1,000,000	Personal and Advertising Injury
\$1,000,000	Each Occurrence (Bodily Injury & Property Damage)
\$ 50,000	Fire Damage any One Fire
\$ 5,000	Medical Expense any One Person

**d. Property Insurance:** The Company shall be responsible for maintaining any and all property insurance on their own equipment



and shall require all subcontractors to do likewise. The Company shall require all subcontractors to carry insurance as outlined above, in case they are not protected by the policies carried by the Company. The Company is required to provide copies of the insurance policies upon request.

#### **E. Negotiated and Sole Source Contracts**

Negotiated and sole source contracts shall be handled by the PA or their designee. The Purchasing Agent may negotiate sole source, lowest and best bid, and/or bid exempt items when needed. Prices may be negotiated when items are available only from one source making bidding impractical, or when items are bid exempted by city code or charter, or to obtain a reduction in price from the lowest and best bidder.<sup>74</sup>

#### **F. Prompt Payment and Non-discrimination Policy**

The City does not have a prompt payment requirement, nor does the City have a written non-discrimination policy in regard to its procurement operation, practices or procedures.

#### **G. Management & Technical Assistance Programs and Race Neutral Initiatives**

The City provides a wealth of services to MWBEs through its partnership with the Renaissance Business Center. The center provides management and technical assistance programs, classes and workshops covering nearly every facet of business operations. Classes are held on topics such as business plan development, sourcing financing, financial statement preparation, bidding, management of employees and human resources principles.

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<sup>74</sup> See, Purchasing Policies & Procedures Manual section C-040

**H. Minority and Women Owned Business Enterprise Procurement Program Analysis – Remedial Program**

**General Overview** --The Memphis City Council adopted two primary findings to support establishment of the MWBE Program: first, that construction, professional services and supply firms owned by MWBEs in the Memphis MSA were disproportionately under-utilized in City of Memphis contracts and in the Memphis private marketplace; and secondly, that the City of Memphis had been a direct and passive participant in the system of discrimination present in the private marketplace. As such, the City Council found that the City had a compelling interest in remedying the present and past effects of discrimination against African American and women business owners. Additionally, the City Council stated in the ordinance that its affirmative duty to remedy the effects of the past and present discrimination also extended to the development of initiatives which encouraged the development of local small businesses.

**Purchasing Policy and the MWBE Program** – Purchasing Policy C-050 states that “[i]t is the purchasing policy of the City of Memphis to make utilization of Minority and Women Business Enterprises an integral part of the City’s purchasing culture.” The policy further provides that the purchasing division will participate in outreach activities and work with Mid-South Minority Business Council to develop a MWBE trade directory. The Purchasing Policy requires that Purchasing will provide monthly expenditure reports to the Mayor and City Council including relevant overall divisional purchasing efforts based on ethnicity and gender. Currently, the Contract Compliance division reports on MWBE progress via its fiscal year end report. A substantial portion of the data is collected and recorded utilizing a manual process.

**Administrative Authority and the Contract Compliance Officer (CCO)** – The MWBE Program ordinance places responsibility for implementation on every City officer, director, manager and supervisor to assure that the intent and spirit of the act is carried out:

“It is the responsibility of every officer, director, administrator, manager, and supervisor of the City of Memphis to manage the daily administration of the provisions of this division and to

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assure that the intent of this division is carried out in all procurement activities and opportunities.” Memphis City Code section 2-325(d).

The ordinance then tasks the CCO, in conjunction with the Division of Finance, to enforce and administer the code. The CCO is specifically charged with the duties of establishing written procedures, providing MWBEs with information and assistance regarding City contracting opportunities, providing technical assistance and training, monitoring contracts for compliance with participation goals, assisting the Division of Finance with reporting procedures, monitoring the City’s progress and achievement of MWBE program goals, and interviewing MWBEs to ensure performance on joint venture contracts. The Office of Contract Compliance is contained within the Law Division and the Contract Compliance Officer reports directly to the City Attorney. The Office of Contract Compliance is staffed by two full-time employees, and has been subject to significant staff reductions in the last couple of years. The Contract Compliance Officer, an attorney, is also tasked with other duties. Consequently, the operation of the department is effectively carried out by one and one-half persons with the result that the office’s operation is seriously affected by the lack of human resources to carry out the mission of the office.<sup>75</sup>

**MWBE Overall Goal Setting, Project Goals and the MWBE Advisory Committee (Advisory Committee)** – The annual overall goals are approved by the City Council based upon a recommendation from the MWBE Advisory Committee.<sup>76</sup> It should be noted that the ordinance defines a minority person as “those persons, citizens of the United States and lawfully admitted resident aliens, who are African American (persons whose origins are in one of the Black regional groups of Africa).”<sup>77</sup> Consequently the original ordinance did not apply to non-African American Women. In June of 2006, the City Council amended the definition of women contained in the original ordinance

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<sup>75</sup> See attached Appendix K for a detailed description of the operations, functions, and organization of the City’s MWBE procurement program in the Contract Compliance Overview.

<sup>76</sup> The MWBE Advisory Committee is composed of the Contract Compliance Officer, the Director of Finance or designee, The City Engineer or designee, the City Attorney or designee, the Purchasing Agent or designee, the Director of Housing & Community Development or designee, and the Director of Information Services or designee.

<sup>77</sup> Memphis City Code section 2-325(c) Definitions

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because it was “vague.” The revised ordinance defined women as “those persons, citizens of the United States and lawfully admitted resident aliens, who are of the female gender.” (City of Memphis Ordinance # 5171, June 20, 2006).

The ordinance establishes the development of annual overall MWBE participation goals which shall be used as benchmarks for evaluating the performance of the program. In addition to overall annual goals, the MWBE program provides that the MWBE Advisory Committee “shall have the responsibility to decide whether a project participation goal is warranted on any given project.”<sup>78</sup> Notwithstanding the foregoing provision, section 2-327 (c) establishes a Construction Projects Goal Setting Committee<sup>79</sup> which shall “establish specific participation goals for each construction project, the cost of which is estimated to be in excess of \$100,000.”<sup>80</sup> The ordinance restricts construction project goals to 50 % or less of the total project contract amount.

Additionally, the ordinance sets forth a comparable framework for setting project goals regarding Professional Services contracts. It provides that the Professional Services Committee<sup>81</sup> shall review professional services contracts costing \$50,000 or more to determine whether a project goal is necessary for “ensuring MWBE participation.”<sup>82</sup>

Alternatively, there is no project goal setting committee or mechanism outlined in the ordinance for procurement of Goods and Non-professional services. The ordinance simply provides that the “purchasing agent or the soliciting division, will make good faith efforts to promptly identify and notify MWBEs, which are available to provide the needed goods or services, of contracting opportunities.”<sup>83</sup>

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<sup>78</sup> Memphis City Code section 2-327(b) Project participation goals

<sup>79</sup> The Construction Projects Goal Setting Committee is composed of the Contract Compliance Officer, serving as chairperson, the City Engineer or designee, and the City Attorney or designee. Memphis City Code section 2-327(c)(1)(a)

<sup>80</sup> Memphis City Code section 2-327(c)(1)(b)

<sup>81</sup> The Professional Services Review Committee shall consist of the CCO serving as chairperson, the Director of the User Division, the Director of Finance and the City Attorney, or the respective designee of each. Memphis City Code section 2-327(e)(1)(a).

<sup>82</sup> Memphis City Code section 2-327(e)(1)(b).

<sup>83</sup> Memphis City Code section 2-327(d)(1).

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In Memphis City Code Section 2-327 (a) the ordinance establishes that MWBE overall yearly goals are to be set for the procurement of construction-related services, goods and non-professional services and professional services. Section 2-327 outlines a six factor methodology for setting annual overall MWBE goals: (1)The number of minority and female owned businesses in the market area; (2) the availability of minority and female-owned businesses willing to do business in the market area; (3) the general availability of minorities and females having the requisite skill to manage and/or form businesses in the market area; (4) the percentage of MWBE businesses in the market area compared to the total number of businesses; (5) the availability of minority and female businesses in the relevant market area which an agency can reasonably add to its certification list; and (6) the degree of outreach and training the City is reasonably able to undertake as a means of making opportunity available to minority and female businesses.

For the City's fiscal year ending in 2007, the overall MWBE Program goals were as follows:

**Table 1**  
**MWBE Overall Annual**  
**Goals**  
**FY Ending 2007**

	<b>Construction</b>	<b>Goods &amp; Non- Professional Services</b>	<b>Professional Services</b>
<b>Minority</b>	<b>17%</b>	<b>17%</b>	<b>15%</b>
<b>Women</b>	<b>8%</b>	<b>20%</b>	<b>9%</b>
<b>Total Goal</b>	<b>25%</b>	<b>37%</b>	<b>24%</b>

**Certification and Local Preference Requirements** – The City contracts with the Mid-South Minority Business Council (MMBC) to make certification decisions of minority and women-owned business status. The ordinance in Section 2-325(c) defines factors

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used to evaluate whether a business entity is a valid minority or women-owned business. Factors include ownership of at least 51% of the business by a minority or woman, management and control of daily business operations by the applicant and the performance of a commercially useful function.<sup>84</sup> An MWBE is said to perform a “commercially useful function” where it performs a “distinct element of the work of the contract by actually performing, managing and supervising the work involved” with its employees. Id. Section 2-328(b)(3) provides that “if a MWBE subcontracts 50% or more of the work, the MWBE shall be presumed not to be performing a commercially useful function. The MWBE may present evidence to rebut this presumption to the City.”

For purposes of contracting with the City under the MWBE program a minority or woman-owned business enterprise must be located within the Memphis MSA. The City of Memphis contracts with the Mid-South Minority Business Council to perform the certification of MWBE businesses. In this capacity MMBC is the arbiter of who is approved as an MWBE without right of veto by the City. MMBC employs an appeals committee composed of representatives from participating companies and governmental partners to review challenges to certification decisions. The Director of Contract Compliance for the City sits on the MMBC appeals committee and participates on appeals panels on a rotating basis.

**Good Faith Efforts** – The ordinance in section 2-328(d) contemplates that there will be instances when a bidder may submit a bid on a construction project which does not meet the participation goals established for the project but submits the bid based upon good faith efforts to achieve the goal. The ordinance outlines seven factors used to evaluate the good faith efforts employed by the bidder as follows:

- (1) attendance at pre-bid conference, if held;
- (2) copies of written notification of the work to be performed sent to

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<sup>84</sup> The ordinance explains that owned, managed and independently controlled means that the minority or woman owner “shall have recognized ultimate control over all day-to-day operations by employees of the business, and by those with whom it does business. The ownership and control of the firm shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as related in its ownership documents.” Memphis City Code section 2-325(c) Definitions.

certified MWBEs in a timely fashion to allow participation; (3) a written statement showing economically feasible portions of work were selected to be performed by the MWBE; (4) a statement of efforts made to negotiate with MWBEs; (5) a statement of efforts made to assist MWBEs in obtaining bonding, insurance, etc.; (6) a statement showing all quotations received from MWBEs were submitted and reasons why any MWBE quotes were excluded; and (7) a statement explaining why the bidder considered any MWBEs contacted as not qualified. Memphis City Code section 2-328(d)(1-7).

The determination of whether a bidder has made good faith efforts is left to the judgment of the CCO, the Director of Finance and the Purchasing Agent prior to award of the project. Id.

**Exceptions and Waivers** – The ordinance grants to the CCO the authority to waive a construction project’s participation goals for a bidder when reasonable good faith efforts are shown. The CCO is also empowered to waive the MWBE good faith efforts requirements when based upon the advice of the User Division and the Purchasing Agent that the goods are available only from a sole source which is not an MWBE.<sup>85</sup>

**Post-Award Contract Compliance** – Contractors are required to submit monthly reports on a form developed by the CCO, which allows monitoring of performance against contract specifications. This process is used to implement the ordinance requirement that reports of progress shall be submitted by contractors. The contractor is also required to inform the User Division and the CCO of instances where a regularly scheduled payment was not made to the MWBE. At the completion of performance of a construction contract the contractor is required to submit a final schedule of participating MWBE subcontractors noting final contract amounts and all payments made to MWBE

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<sup>85</sup> Memphis City Code section 2-328(f)(2)(a).

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subcontractors. The collection of payment data by prime contractors to subcontractors continues to be collected on a manual basis. The failure to maintain an electronic data collection process for this information was noted in the 1994 Disparity Study. Little has been done to implement this recommendation nearly fifteen years later.<sup>86</sup>

**Non-Compliance by Bidders and Contractors** – The ordinance gives broad authority to the CCO in the event of noncompliance by a bidder or contractor. Penalties include declaration of the bidder’s bid as non-responsive, denial or revocation of an MWBE’s City certification for a period not to exceed one year, withholding up to ten percent of all future payments due a contractor pending the cure of the default, exclusion from bidding on City contracts for a period not to exceed one year, or termination of the contract by the City. Section 2-326 (a)(1-4) of the ordinance also requires that contracts with participation goals include language indicating that the penalties outlined above may be employed for breach of the MWBE program provisions.

**Graduation Clause and Sunset Provisions** – The MWBE program includes two provisions that directly support a finding that the ordinance is narrowly tailored. The graduation clause found in section 2-325(f) and the Sunset clause found in section 2-331. Certified MWBEs are graduated out of the program once their annual sales exceed the average sales for the industry for three consecutive years as determined by their federal tax returns and the four-digit SIC Code, U.S. Economic Census Data. The original ordinance has been extended by act of the City Council on several occasions for the stated purpose of the continued development of small and minority-owned businesses. On June 30, 2001 the City Council extended the ordinance through June 30, 2008. Most recently the ordinance was extended through June 30, 2009 in order to allow additional time for the City to complete its disparity study.

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<sup>86</sup> Memphis City Code section 2-328(e).



## I. Race and Gender Neutral Programs

### Introduction

Race- and gender-neutral programs are examined in this section to review the impact of such programs on business development in the City. These programs provide support for small business and include business development services, as well as procurement opportunities. The programs assessed in this chapter tend to be business development programs for all businesses, including small, minority and women-owned firms. Additionally, a larger segment of the community can participate, since race-neutral programs tend to focus on small and emerging businesses. Over the years and after numerous court cases, a number of governmental entities across the country have transitioned to providing more assistance to small businesses, as a means of providing assistance to its small, minority and women business enterprises, thereby avoiding the strict scrutiny application of race-based programs. Memphis had a number of providers of race- and gender-neutral business development services, which are examined in this section.

### Methodology

For this study, GSPC assessed business development service providers that have a presence in Memphis to appraise the various aspects of service offerings, as well as their impact on small and minority business viability in Memphis. Such programs can supplement and enhance business development and contract expenditure efforts advanced by the City of Memphis. The approach utilized to meet our objective included the following:

- Development of a questionnaire and cover letter advising providers of the disparity study, specifying information sought about their program and requesting performance reports;
- Identification of race-neutral providers from the City of Memphis staff, research on the internet, from review of the “City of Memphis Small Business

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Resource Guide”<sup>87</sup> and from other GSPC staff who were compiling statewide race neutral information;

- Obtaining approval of the instruments from the City of Memphis, then mailing the questionnaire to identified service providers;
- Completing follow-up telephone calls to ensure proper routing of the questionnaire and to answer questions posed by recipients;
- Clarifying responses during a subsequent telephone call at which time the team scheduled an in-depth telephone interview;
- Interviewing participants, at which time the team requested that they be allowed to conduct an onsite visit; and
- Conducting a site visit.

There were 43 organizations contacted, of which seven submitted completed questionnaires and five declined to participate. Twenty-five organizations did not respond, after repeated requests. The GSPC team compiled two spreadsheets. One spreadsheet tracked all activity related to contacting the race-neutral providers. The second spreadsheet tracked the written responses of those who responded by sending in a completed questionnaire.

Subsequent to reviewing the written responses, the team compiled a list of questions that needed clarifications and a checklist of necessary reports and documents to support the responses. The team then forwarded the request for additional information and questions to the responders in advanced of a scheduled telephone interview. The telephone interviews filled in information gaps. Additionally, the GSPC team researched the internet and the “Memphis Small Business Resource Guide” to obtain other relevant information pertaining to the organizations. There were also site visits conducted of the organizations to meet the staff, survey the business environment and to gather additional information.

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<sup>87</sup> City of Memphis Division of Housing & Community Development And Seedco, “Memphis Small Business Resource Guide”, (2003).

Finally, a compilation of this data was summarized to determine the impact of the race-neutral program on businesses in the City of Memphis marketplace.

### **Recommended Components of a Race-Neutral Program**

The GSPC Team identified five important components that should be pertinent to programs that would have an important impact on small businesses. The components are as follows:

- 1) **Policy or Mission:** A program with a written, well-defined policy and measurable goals is optimal for an organization that wants to assist small businesses, including minority/women business enterprises. Organizations without strong governmental partnerships primarily define the goals in a mission statement. The best policy or mission would be one that is approved by a governing board, is widely distributed and communicated with the organization and is integrated/implemented throughout the organization.
- 2) **Resources:** A program that is staffed and funded at a level that it can meet all of its program objectives has adequate resources. It is also important the program has internal support from the executive level, as well as external strategic partnerships to optimize its results.
- 3) **Outreach:** The program should focus efforts to increase the business community's awareness of how to start a business, how to do business, how to grow their business and how to stay in business. Additionally, the program should provide links on how to secure the resources to meet the aforementioned objectives. It is important that small company representatives have access to the decision makers for both the private and public business sectors. Matchmakers and mixers can help facilitate relationships. Additionally, businesses need a variety of tools and techniques to announce business opportunities that are geared to reach from the most rudimentary to the most sophisticated business owners.
- 4) **Technical Assistance:** Many of the businesses need in-depth assistance in marketing, project scheduling, estimating, accounting, bookkeeping and other

related topics. The program officials should consider all levels of businesses in the program, by conducting needs assessments. There are firms that can maximize opportunities simply by being listed in small business directories and marketing their firms, while others will need more assistance in penetrating the business marketplace. A sound program should target assistance to meet the needs of all of its clients.

- 5) **Reports:** It is important to access and collect data to measure the performance in meeting the program objectives. A critical component of collecting the data is documentation and a tracking system that identifies real businesses, rather than phantom numbers. Therefore, it is important that the numbers are integrated and linked to current business needs and participation.

Below is a summary of the programs of the race-neutral providers. The GSPC team reviewed programs to examine their program services, types of clients, eligibility criteria and outreach activities.

### **Tennessee Valley Authority**

The Tennessee Valley Authority (TVA) was created in 1933 by the federal government to facilitate economic development and create jobs. The Authority is the nation's largest public power provider to customers in seven states, including Tennessee, Arkansas, Northeast section of Mississippi, Kentucky, Alabama, North Carolina, Virginia and parts of Georgia. The organization's annual sales surpass \$9 Billion, and it buys over \$2 Billion in goods and services a year, including everything from complex electrical parts to janitorial services. TVA has at its core an economical development thrust.

In that vein, TVA has a Supplier Diversity and Development Program, which provides opportunities by promoting joint ventures, partnerships, and subcontracting opportunities to small, minority and women-owned businesses.

**Eligibility Criteria:**

The organization follows the Small Business Administration (SBA) guidelines to define small businesses and honors the procurement guidelines; however, TVA does not strictly follow federal regulations. They select suppliers that provide a competitive edge. TVA also strives to maintain diversity in its supplier base by identifying and providing contracting opportunities to small, minority, and women-owned Valley businesses that have the potential to do business with TVA in a competitive business environment. Their Diversity Policy is integrated in its management of the supply chain process. The supply chain process includes all TVA activities and processes and systems related to contract sourcing strategy, supplier relations and contracting for all TVA's products and services.

TVA's Supplier Diversity and Diversity Group in procurement are based in Chattanooga. Their supplier diversity effort is implemented in a team approach in Tennessee with three team members covering Nashville, Knoxville, Chattanooga and Memphis and a business support staff member managing e-mails. Headquartered in Knoxville, Tennessee, TVA maintains service centers, with one being the West Tennessee District Customer Service Center in Memphis, with customer service staff dedicated to supporting Memphis Light, Gas & Water and other distributor customers in West Tennessee. TVA also operates the Allen Fossil Plant which is located southwest of downtown Memphis.

**Policy:**

In relevant part, the Diversity policy, as it relates to businesses is as follows:

“TVA will maintain diversity in its supplier base. Supplier base diversity will be accomplished by identifying and providing opportunities for qualified small, minority-owned and women-owned businesses that have the potential to do business with TVA in a competitive business environment. In addition, TVA may assist diverse suppliers in qualifying for contracting opportunities by promoting joint ventures, partnerships and subcontracting relationships and in establishing education programs to aid in business development. TVA will promote the use of diverse preferred suppliers in subcontracting opportunities. Further, TVA shall foster the economic development of the Tennessee

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Valley by including Valley businesses in the preferred supplier base. TVA's commitment is to maximize participation through the beneficial business relationships with diverse and Valley firms who offer the best value to TVA." (Tennessee Valley Authority, (2008). Retrieved, April 15, 2007, from Management of TVA's Supply Chain Process, Website: <http://www.tva.com>).

### Performance Data:

TVA establishes procurement spending goals in accordance with the SBA guidelines and TVA's ability to achieve the goals. TVA provided documentation of actual expenditures for Fiscal Year 2007, with the targeted community in Memphis, Tennessee. Below is a summary of Fiscal Year 2007 expenditures for Memphis:

**Table 2**  
**TVA Expenditures for**  
**Fiscal Year 2007**

Category	Expenditure Amount	percentage
<b>Total Memphis Expenditures</b>	<b>\$12,335,500</b>	
<b>Memphis Minority Expenditures</b>	<b>\$1,690,651</b>	<b>13.7%</b>
<b>Memphis Woman-Owned Expenditures</b>	<b>\$494,266</b>	<b>4.01%</b>
<b>Memphis Small Business Expenditures</b>	<b>\$7,912,092</b>	<b>21.4%</b>

Source: Ella Clark, Supply Diversity Coordinator, TVA, April 14, 2008

- Including all states, TVA contracted more than \$2 billion in goods and services
- \$25M was spent with minorities

### Technical Assistance:

TVA offers support services through its Supplier Diversity and Development Office, including guidance through the inquiry and bid process and participation in outreach

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activities such as trade shows, business matchmaking, conferences, mentoring and advocacy. They maintain a supplier information e-mail box for potential suppliers to e-mail their capabilities and for them to express interest in doing business with TVA. Likewise, small businesses can find information on TVA's website regarding economic development, business development and procurement opportunities. The website also provides links to other MWBE support programs. Additional corporate information can be found on the TVA corporate webpage at [www.tva.gov](http://www.tva.gov).

TVA makes financial contributions to such organizations as Tennessee Minority Supplier Development Council (Corporate Sponsor), Mid-South Minority Business Council and the Memphis Chamber of Commerce and also participates in outreach activities and matchmaking events to market TVA's policy of supplier diversity. Managers with TVA also serve on various boards as a demonstration of commitment to community service, as well as furthering the cause of economic development. For example, the TVA Supplier Diversity and Development Coordinator serves on the Uniform Certification Advisory Board in Memphis.

### **Mentoring Program:**

Since 1997, TVA has maintained a mentoring program that provides support to small and diverse firms, in its efforts to strengthen its supplier diversity effort. Some of the goals for the mentoring program are to build relationships, create opportunities, and develop competitive suppliers. Yet the primary goal is to enhance the capabilities, capacity and competitiveness of the mentored firm while increasing expenditures with TVA and external partners. The Mentoring Program is generally structured around a 1 to 2 year commitment, but a given firm may participate as long as 6, but the timeframe cannot exceed the term of the supplier's contract. The mentored firms are classified into three categories: (1) new suppliers and startups; (2) advanced firms; and (3) mature firms. Eligibility to participate in the mentoring program is based on the recommendations of TVA, the Supplier Diversity and Development Department and procurement contract managers and agents. Mentors are qualified TVA managers, TVA customers and prime contractors, who demonstrate a commitment and the ability to assist the firms in the three

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categories. Furthermore, in order for a company to serve as a mentor, it must demonstrate financial health, financial management expertise and be located in the TVA's coverage area or have business ties in the area. The individual mentor, on the other hand, must possess good character and a desire to add value to a mentored firm by sharing lessons learned and practical experience, to be qualified to participate as a mentor.

A requirement for a firm to become a mentored firm is that it must be an active TVA supplier who has been in business for at least one year. This supplier must be in good standing with TVA with a commitment to quality, be willing to commit to 1 to 2 years in the Mentoring Program, complete a needs assessment, have clear goals and expectations and have a willingness to share the business, marketing financial and strategy plans for the firm. The mentored firms can benefit from a clearer understanding of the corporate requirements, exposure and access to corporate resources and the potential to form joint ventures and business alliances. At any given time, there may be thirty to fifty firms participating in the Memphis Program. In Memphis, there are two TVA contract managers, who are serving as mentors. Four Memphis firms graduated from the Mentor Program in 2007 and three Memphis firms are still participating in the program.

### **Loan Program:**

TVA has a Loan Program which was started in 1995. The low interest loans are available for TVA suppliers who have the ability to generate jobs and their growth will enhance the need for electric generation, improve the infrastructure and make equipment available. These loans are available through the Economic Development Department. Referrals from such organizations as the Memphis Chamber of Commerce as well as their own vendors provide the identity of businesses that would benefit from loans.

From 1995 to 2007, the organization awarded 25 loans in Memphis/Shelby County totaling \$10,770,643, creating or sustaining 2,864 jobs. The organization also reported that of the total amount, 13 loans amounting to \$2,092,143 were awarded to minority-owned or female-owned firms in Memphis/Shelby County, creating or sustaining 397 jobs. The loans to minority and women firms ranged from \$35,000 to \$429,000.



**Table 3  
TVA Loans  
Memphis/Shelby County  
1995-2007**

	<b>LOANS AWARDED 1995 - 2007</b>	<b>TOTAL AMOUNT OF AWARDS</b>	<b>JOBS CREATED/ SUSTAINED</b>	<b>LOANS AWARDED TO MWBE FIRMS</b>	<b>AMOUNT OF LOANS AWARDED TO MWBE FIRMS</b>	<b>JOBS CREATED/ SUSTAINED FOR MWBE FIRMS</b>	<b>RANGE OF LOANS TO MWBE FIRMS</b>
<b>Memphis/ Shelby County</b>	<b>25</b>	<b>\$10,770,643</b>	<b>2,864</b>	<b>13</b>	<b>\$2,092.143</b>	<b>397</b>	<b>\$35,000 to \$429,000</b>

Source: Ella Clark, Supply Diversity Coordinator, TVA, April 14, 2008

### **Renaissance Business Center**

The Renaissance Business Center (RBC) is an umbrella organization in Memphis that locates small business providers who assist small and minority business owners in developing the necessary skills and/or the management expertise to successfully compete and plan for the future growth of their companies. They are responsible for providing a “Memphis Small Business Resource Guide” which is a document to inform local area businesses of the facility and service offerings. The RBC is also a central point for businesses in need of data and financial resources from the public and private sector. Throughout the year, the RBC makes available an array of seminars, training and workshops where various topics are discussed such as, *How to Start A Business, How to Develop a Business Plan, Basic Accounting for Small Businesses, Tax Preparation, Cash Flow Analysis and Marketing and Advertising*. They also host insurance/bonding programs, a contractors’ licensing program and access to capital loan programs. Additionally, business owners are given the opportunity to explore the RBC library which is equipped with computers, internet access as well as business reference materials and literature.

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### **Eligibility Criteria:**

The Renaissance Business Center has service offerings to all businesses located in the Memphis area.

### **Performance Data:**

Through its member tenants, RBC serves over 3,800 clients annually. Of those 3,800 clients, 86% are minority-owned business enterprises and approximately 40% are women-owned business enterprises. In 2007, RBC accommodated 266 training workshops, 1,772 clients utilized the library for research and RBC funded 50 small business loans totaling 1.1 million dollars.

Below is a list of the tenants located in the RBC that provide business development services:

### **Memphis Area Minority Contractors Association**

Within the RBC is a program that is available for the members of The Memphis Area Minority Contractors Association. The association established a Contractors Assistance Program (CAP) to assist, small and minority contractors in strengthening their business skills. The goal was to help create more competitive contractors in the construction industry. The program participants can access one-on-one counseling, obtain assistance in obtaining their general contractor's license, training classes, financing, bonding and insurance and technical assistance.

### **Loan Program:**

The Memphis Area Minority Contractors Association offers a revolving loan fund called the Contractors Revolving Loan fund. This funding provides a short term line of credit to be used for purchase order financing.

**Tennessee Small Business Development Center**

The Tennessee Small Business Development Center (TSBDC) is a network of professional business consultants that provides technical support to small businesses throughout its operation via 12 centers and 2 satellite offices located in 14 cities throughout the State of Tennessee, including two centers in Memphis. The mission is to provide assistance to the small business community with start up, growth, expansion and development of successful and thriving businesses. The assistance provided by each TSBDC involved one-on-one business counseling and also training for small business owners. Each business is assigned a personal consultant who becomes familiar with the small business owner's current operation. The business owner receives guidance and assistance with the business owners' start-up, expansion or growth in such areas as marketing, finance, operations, management and business development. The business development training included sessions on writing business plans, starting and managing a small business, E-Commerce, buying and selling abroad, marketing and preparing financial statements.

**Eligibility:**

The center serves everyone, regardless of race or gender, free of charge or for a modest cost to cover material duplication expenses. More than 90% of the Memphis clientele are minority and women-owned, small businesses. The center utilizes SBA's definition of "small business" and recognizes unique problems that these small businesses encounter such as lack of sufficient capital, credit issues and lack of business training and education.

**Policy:**

TSBDC at Southwest Tennessee Community College (STCC) has a policy and procedures manual governing its operations. This document replicates policies and procedures of its primary funding source, the Small Business Administration (SBA). The center cited some examples of policies adopted from its funding agencies as:

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- Use of U.S. SBA Form 641 for small business requests for counseling
- Use of the SBA's definition of a small business
- Use of SBA's small business development center training standards, course schedule and procedures for entrepreneurial development
- Use of SBA's standard counseling procedures
- Use of SBA's small business set aside program guidelines
- Use of SBA's 8(a) program for small disadvantaged businesses program guidelines
- Use of SBA's standards and procedures for mentor protégé guidelines
- Use of SBA's eligibility standards and procedures for small business loan programs

The center's primary funding is obtained from an SBA grant. These funds are matched by the City of Memphis, totaling 25% of the center's operating budget with additional in-kind funding provided by the State of Tennessee.

### **Performance Data\*:**

Although TSBDC does not directly provide loan or grant money, in 2007 the center assisted small businesses in the preparation of proper documents, business plans and lending institution connections that resulted in over 39 client loans totaling more than \$1,143,000.00. TSBDC reported that they counseled a total number of 3,689 clients in 2006 for a total of 16,889 hours for new and existing businesses in areas such as ownership structure, business plans, banking, market research, sales, marketing, cash flow, human resources, customer service, government procurement and international trade. TSBDC has also conducted 767 training sessions with 12,628 attendees during the year of 2006 on the subjects of business start-ups, writing business plans, bidding on government contracts, increasing marketing and sales efforts, planning for business succession, understanding taxes, supervisory management training and other management topics. Through TSBDC's efforts, job and sales growth for their clients created 816 new jobs and 935 existing jobs were retained. TSBDC's clients generated \$48.2 million in incremental sales.

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Additionally, the TSBDC has a micro-loans program which is authorized to provide unsecured loans up to \$50,000.

\*Source: Southwest Tennessee Community College

Aside from its SBA partnership and staff, this Memphis-based TSBDC small business resource center partners with other business development programs in achieving results for area clients. A few examples of such affiliations cited include: two lending institutions that support SBA loan programs; Memphis Bio-works Foundation to promote technology training programs; STCC School of Business to provide opportunities for college professionals to work with small businesses in the Memphis area; International Trade Center (ITC), State of Tennessee's Business Enterprise Resource Office (BERO) and the U.S. Department of Commerce to promote interest in international trade and assist clients needing business plan development and technical assistance.

### **Technical Assistance:**

From a technical assistance perspective, the TSBDC provides three to four workshops and training classes per year. These courses include start-up, expansion and growth business development training for the area's small businesses. Additional training sessions are typically offered for special need and interest issues. Training classes and workshops are marketed via public service announcements via the newspapers and radio. Additional outreach availing information regarding the center's services, assistance and training are provided via the TSBDC at STCC website, [www.tsbdc.org](http://www.tsbdc.org).

The center provides support for various SBA programs including loan assistance, 8(a) program, and the mentor protégé programs. TSBDC also works with clients and provides assistance to those interested in working in Memphis area HUB zones. These clients receive counseling as to the tax advantages of situating their business in a HUB zone with economic emphasis placed on the number of jobs to be placed from the business and the benefits to the area being an attraction for the local community and disadvantaged neighborhood.

**The Small Business Administration**

The Small Business Administration (SBA) has a presence in the RBC. The organization administers business assistance programs for small disadvantaged businesses. These programs are the 8(a) Business Development Program and the Small Disadvantaged Business Certification Program. While the 8(a) Program offers a broad scope of assistance to socially and economically disadvantaged firms, Small Disadvantaged Business (SDB) certification strictly pertains to benefits in federal procurement. As such, 8(a) firms automatically qualified for SDB certification.

The SBA has implemented a Mentor-Protégé Program to allow starting 8(a) companies to learn the ropes from experienced businesses. The goal is to teach 8(a) and other small companies how to compete in the federal contracting arena and how to take advantage of greater subcontracting opportunities available from large firms.

The 8(a) Program has become an essential instrument for helping socially and economically disadvantaged entrepreneurs gain access to the economic mainstream of American society. Participation is divided into two phases over nine years: a four-year developmental stage and a five-year transition stage.

The Small Business Administration (SBA) also offers a Surety Bond Program, which provides a guarantee for bid, performance, and payment bonds issued by participating surety companies. In addition, the SBA offers a Historically Under-utilized Business Zone (HUBZone) Empowerment Contracting Program which is designed to stimulate the economic development and create jobs in the urban and rural communities by providing federal contracting preferences to small businesses. These preferences go to small businesses that obtain HUBZone certification, and hire employee who live in a HUBZone. Other important elements in securing the certification, requires the applicant firm to maintain a principal office within one of those designated areas, have ownership

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and control. The firm must also be owned and controlled by one or more U.S. citizens and at least 35 % of its employees must reside in a HUBZone.

### **Performance Data:**

For fiscal year of 2008, through the efforts of the Small Business Administration (SBA), the 8(a) Program awarded \$8.85 million contracts to Memphis firms, according to David Tiller, Public Information Officer, SBA Tennessee District Office.

### **Other Loan Programs:**

*Southeast Community Capital* has a special loan program established to provide financing to assist small, minority and women-owned businesses having difficulty qualifying for business loans because they are start-ups, provide non-traditional services and products or lack equity. Southeast Community Capital can provide loans from \$10,000 up to \$1,000,000. Southeast Community Capital acts as a manager and provides advisory services for the partners of the Memphis Business Opportunity Fund (MBOF). The City of Memphis Division of Housing and Development in alliance with MBOF has set aside funds totaling \$50 million.

The *Memphis Business Opportunity Fund (MBOF) Program* was established to support individuals who desired to start a business or those wishing to grow and expand their existing business in the Memphis City area. It also provides direct access to capital for the purpose of operating capital. The MBOF's primary goal is to maximize economic growth by increasing the number of viable small, minority and women-owned businesses in the City of Memphis by providing capital as well as technical assistance. Through the Southeast Community Capital, Inc., the MBOF has implemented a variety of financial management services, such as the SBA Micro Loans, Tennessee's Telecommunication Assistance Program, Southeast Community Capital's Revolving Loan Fund, The TennesSeed Fund 1 and the Southern Appalachian Fund. These funds are used as leverage to further businesses' access to debt and equity products not available in the Memphis market.

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This resource was designed to promote access to capital for small businesses by building outside relationships with organizations that provide private and public funding and lending programs within the Memphis area. MBOF has partnered with various financial institutions to form the MBOF such as Federal Home Loan Bank of Cincinnati, First Tennessee Bank, N.A., National Bank of Commerce and Union Planters Bank, N.A. By partnering with these financial institutions, a pool of \$50,000,000 has been set aside to provide capital for small, minority and women-owned businesses.

### **EmergeMemphis**

EmergeMemphis is a focal point for entrepreneurial activity in the Mid-South area. It serves as a general business and technology based incubator for 26 companies. Its goal is to accelerate the development of its member companies as well as to encourage each firm to stay informed of the high technology educational opportunities. Its main purpose is to graduate each company with the anticipation to grow financially and survive on its own where it can generate enough wealth and interest in the Memphis area.

#### **Eligibility Criteria:**

Prospective clients can be any firm that has a written business plan or concept and sufficient initial financing to cover the costs associated with joining the program. The founders and leaders must participate in an interview process to become a member of the EmERGE Memphis incubator program.

#### **Performance Data:**

EmergeMemphis assisted a company in getting \$5 million in venture capital funding to support the growth of their company. They have also assisted three companies with winning sales opportunities. Among the twenty-three resident companies, EmERGE Memphis supports six Technology and Web-based firms, two health care companies, three not-for-profits, two web application companies, one consumer products company, three marketing/interactive agencies, and entrepreneurs engaged in training//public speaking, public relations, strategic consulting and technology staffing.



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EmergeMemphis' current client base generates in excess of \$15 million of aggregate annual revenue. The current clients employ over 100 people with the graduates employing over 90 people, making the total jobs created to be 170. This gives a total cost per job created of \$28,000.

Additionally, as of June 24, 2008, 32 % of the 26 member companies/start-ups are African American or female-owned firms.

### **Technical Assistance:**

EmergeMemphis has covered the cost and provided various technical services to assist member companies with normally expensive services that they would otherwise have to endure. EmergeMemphis re-launched its website with a renewed focus on better branding of EmergeMemphis for more consistent and uniform name recognition of the organization. The incubator businesses that are located in the EmergeMemphis building benefit from their affiliation with EmergeMemphis. The project cost to EmergeMemphis was \$12,500. The organization also provides wireless communications capability throughout the building that is accessible from all offices, conference areas and immediate area. The \$2,500 cost is borne by EmergeMemphis. In addition, the organization has provided a VOIP phone system which allows internet-based phone service for the member companies.

### **Mentoring Program:**

Currently, EmergeMemphis houses more than 26 businesses where each firm receives assistance in business plan development, consulting, public relations, legal and financial assistance, networking, human resource, information technology and sales development. EmergeMemphis has allocated \$14,000 for internships where they hire part-time students/MBAs to help with a variety of projects such as marketing plan, website development, assisting member companies on an annual basis.

**Loan Program:**

EmergeMemphis does not have a loan program.

**Frayser Community Development Corporation  
And Riverview Kansas Community Development Corporation**

Frayser Community Development Corporation (Frayser CDC or CDC) provides services to the Memphis area community by making affordable homeownership opportunities available and communicated effectively to the public. Frayser assists families and individuals in securing affordable housing. The organization's primary responsibility is to provide homeownership, which is a family's first step towards increasing equity and wealth. This CDC produces newly constructed affordable housing in the Frayser community. Frayser has an informal local business preference that leads to attempts of recruiting vendors from within the neighborhood.

A similar organization, Riverview Kansas Community Development Corporation (RKCDC), was formed to improve the quality of life for community residents. The organization recently added business development as a component of focus. The business incubator allows for start-up small business development and the opportunity to lease office space at the RKCDC's facility of 51,000 square feet.

The services provided by RKCDC are funded by the City of Memphis, State of Tennessee, Shelby County, Tennessee, US government and private loans received from local Memphis banks.

**Policy:**

Policies of the CDCs were reported as promulgated and operational oversight is provided by the organizations' Board of Directors. Both Frayser and RKCDC have Affirmative Action policies and commercial non-discrimination policies.

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### **Eligibility Criteria:**

Eligibility for participation in the CDC programs is dictated by policies of their funding agencies, which focuses on the homebuyers' earned income levels. The focus is on the low and moderate income earner.

### **Performance Data:**

Since its inception, Frayser CDC has sold 35 homes and finds that most of its outcome measures and performance results consistently demonstrate patterns of growth and increase. They reported that in 2007, nine houses were sold.

As it relates to commercial economic activity, Frayser CDC hires construction contractors to renovate homes purchased in this community for resell, of which 94% are Minority Businesses and 4% are Women-Owned Businesses. Whereas, the participation level of minorities and women in RKCDC is reported to be one hundred percent (100%) Minority/Women Business participation, by ethnicity and gender, the participation level is ninety percent African American, eight percent Hispanic and two percent White Female.

### **Outreach:**

The CDCs provide outreach services to individuals in the Memphis area and more specifically target their respective communities, through counseling services and also consumer education. These services target community minority group members but rather are available to interested eligible Memphis homebuyers. Frayser also conducts outreach to the business community through their website.

### **Loan Program:**

RKCDC received Housing Preservation Grant funding to extend programmatic loans to rural, low-income residents of Fayette County for safety repairs. The terms of this loan program provide for a one percent interest rate and a maximum \$9,300 loan amount.

### **Other: A Race Conscious Program with Race Neutral Components**

One program that is worthy of examination for its impact on the small business community, is the Mid-South Minority Business Council (MMBC). While its business focus is on minority and women-owned business enterprises, it has all of the necessary components of a race neutral program.

### **The Mid-South Minority Business Council**

The Mid-South Minority Business Council was established as a part of the Memphis Area Chamber of Commerce in 1973. MMBC's principal mission is to grow the revenues of minority and women-owned businesses by increasing the volume that member corporations spend with minority suppliers. Additionally, MMBC processes and declares certification statuses for Minority/Women Business Enterprises, Disadvantaged Business Enterprises, Airport Concessionaire Disadvantaged Business Enterprises and Local Small Businesses in the Memphis/Shelby County area.

#### **Eligibility Criteria:**

While not totally race neutral because the MMBC is designed to assist Minority/Women Business Enterprises and Disadvantaged Business Enterprises, Local Small Businesses, defined as Shelby County resident small businesses, are eligible to participate in the MMBC activities.

#### **Performance Data:**

According to the MMBC, an increase of Annual Sales Revenue for 2007 of 9.76% and an increase of 23.28% for employee's growth was mainly due to the services and products that were offered by the MMBC to its MWBE clients.

**Table 4  
City of Memphis  
Sales and Employee Growth in 2007**

<b>Impact of Services Measured 2007</b>	<b>Annual Sales (Revenue) Growth %</b>	<b>Employee Growth %</b>
<b>Advertising/Marketing Promotional Services</b>	<b>5.38</b>	<b>16.35</b>
<b>Architecture/Engineering/Related Services</b>	<b>-1.15</b>	<b>0.80</b>
<b>Automobile Dealership</b>	<b>0.00</b>	<b>0.00</b>
<b>Cleaning/Janitorial Supplies/Services</b>	<b>89.63</b>	<b>117.80</b>
<b>Communication Equipment Services</b>	<b>9.99</b>	<b>3.80</b>
<b>Computer Supplies/Services</b>	<b>1.34</b>	<b>-2.94</b>
<b>Construction</b>	<b>6.11</b>	<b>5.67</b>
<b>Finance/Insurance</b>	<b>25.57</b>	<b>15.91</b>
<b>Food Services</b>	<b>25.56</b>	<b>13.13</b>
<b>Industrial Equipment/Supplies</b>	<b>-6.68</b>	<b>-10.59</b>
<b>Landscaping/Lawn Services</b>	<b>0.00</b>	<b>-2.12</b>
<b>Manufacturer</b>	<b>140.81</b>	<b>202.60</b>
<b>Medical Supplies/Services</b>	<b>77.84</b>	<b>5.56</b>
<b>Printing Services/Supplies</b>	<b>11.56</b>	<b>43.18</b>
<b>Products</b>	<b>-9.10</b>	<b>57.80</b>
<b>Professional Services</b>	<b>752.17</b>	<b>950.00</b>
<b>Retail/Wholesale Trade</b>	<b>43.88</b>	<b>3.57</b>
<b>Services 1 (General)</b>	<b>26.26</b>	<b>23.66</b>
<b>Services 2 (General)</b>	<b>25.63</b>	<b>18.04</b>
<b>Transportation</b>	<b>-24.46</b>	<b>-16.41</b>

Source: Luke Yancy III, President, Mid-South Minority Business Council, April 2008

Each year there have been approximately 12 firms enrolled with 150 firms that have graduated since MMBC's existence.

**Technical Assistance:**

MMBC established relationships with service providers to assist its members with opportunities to increase their revenues. Through partnering with public and private organizations, it has allowed business owners to strengthen the necessary skills that were relevant to their businesses. This partnership has also allowed the MMBC to host various

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monthly workshops such as Financial Planning, Bidding and Estimating, Financial and Debt Management, Presentations That Sell, Marketing and Communications, Member Orientations, How to Motivate and Keep Good Employees, Speakers Series to Generate Business Knowledge, Strategic Marketing for Building Successful Business, Closing the Deal, and Financial Packaging to obtain loans. Included in the technical assistance offering is training on PowerPoint, joint venture creation and communication skills.

### **Mentoring Program:**

To assist members of the MMBC, a training program was implemented called Memphis Business Academy (MBA). This executive training program was established for MWBE Presidents/CEOs to address strategic planning and marketing management techniques through various workshops such as workforce development. In addition, the Center for Emerging Entrepreneurial Development (C.E.E.D.) was formed in March 2007. C.E.E.D. was designed as an incubator to address the lack of minority businesses in certain industry segments. C.E.E.D. is a corporate adoption program that takes a business owner under wing to familiarize them with the ins and outs of their area within the industry and provides contract opportunities for the respective adoptee company. This allows the corporate adopters to give feedback and instructions which allows each business owner to sharpen their skills, so that they may be awarded larger contracts as they continue to improve their performance.

### **Loan Program:**

The MMBC has a Working Capital Loan Fund that was implemented for the purpose of providing access to working capital funds for MWBEs. The working capital loan fund is made available to MMBC members with working capital needs to assist in funding contracts from MMBC corporate members. The initial maximum loan amount is \$50,000 and as funding increases the amount available for loans can also increase. The eligibility for borrowers under the working capital loan fund is limited to:

- Ethnic/racial MBEs or those under a protected group as recognized by the federal government

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- Firms certified by MMBC's Uniform Certification Agency (UCA)
- Firms who have contracts with one of MMBC's corporate members
- Firms with a strong management team with proven experience in the business.

The term of the loan may not exceed 12 months; however, the loans may be renewed, subject to approval.

Other types of products available include real estate loans, equipment loans, working capital loans, business protection services, key main insurance, business interruption insurance and life insurance.

Unlike the MMBC working capital loan fund, which is designed to benefit member companies who have a contract with a corporate member, the MMBC Loan Services are available to all MWBE's that qualify, be they members or non-members.

### **J. MWBE Program Observations**

- 1. General observations and Communications Issues--** The following observations and comments were obtained during interviews with City Directors, managers and supervisors participating in the procurement process. Interviews with City personnel revealed that the Divisions are aware of the existence of the MWBE program and their responsibility to report accomplishments once a year, but felt detached from their responsibility to implement and grow the program. The divisions see the responsibility for carrying forward this program resting in Contract Compliance or Purchasing. Most division personnel did not know the annual goal established for the year, nor could they explain why project goals were or were not established for certain projects. Many division managers responded that they would be told by Purchasing or Contract Compliance when an MWBE goal was necessary and did not articulate knowledge of the existence of goal setting committees.

Division personnel seemed generally unaware of when goals were required to be established or what the Overall Annual MWBE goals were for any of the categories. Conversely, Division Directors were concerned and aware of their Division's MWBE yearly accomplishments.

**2. Perceived Limited Opportunities for MWBE Program Growth --**

Another common comment among division managers was that they felt somewhat at a loss as to identifying a means of increasing participation in their respective areas. Another common comment was that the division's ability to increase participation was hindered due to the lack of availability of MWBEs in many disciplines. The division managers expressed their opinion that additional assistance was needed in sourcing more minority and women owned businesses.

**3. Impact of Staffing Limitations --**

The Contract Compliance Office is comprised of two staff members. This staff is responsible for outreach, responding to public inquiries about the program, setting project and overall goals, analyzing bid requirements, monitoring compliance from current contracts, dispute resolution, collecting and reporting on data related to contract awards and expenditures and responding to the needs of the internal customers regarding interpretation, assistance and compliance.

**Summary:**

In summary, Memphis has a centralized purchasing process, with checks and balances, to ensure that the framework for being an open, fair and ethical government is in place. However, the Contract Compliance Office faces challenges in meeting the needs and requirements of the internal and external customers, because in part, of the lack of resources to accomplish all of the activities that would be required of the Contract Compliance Office.



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Additionally, Memphis has efforts that focus on business development for small businesses. Minority and women-owned businesses are actively participating in those programs, as well as in the other programs that are designated specifically for minority and women businesses. Outside of the Tennessee Valley Authority, the other assessed programs did not have significant procurement practices. Thus, there was little if any specific report of small business expenditures. On the other hand, the Small Business Development Center had an infrastructure for providing a tremendous level of technical assistance and was able to report their outputs.

The Mid-South Minority Business Council, however, has an emphasis on assisting small, minority and women-owned businesses, which is not purely race-neutral. This organization measures the revenue and employment growth of the firms that participated in their programs.

The race-neutral programs for the most part provide business development services such as technical assistance, mentoring and tenant space for office operations. Outside of the federal government's SBA program and a few loan programs offered through the Small Business Development Center, there was no aggressive, comprehensive loan program or reporting requirements for small business financing.

The reviewed programs had separate boards, funding and strategies and did not necessarily interface for the purpose of measuring impact or accomplishment of business creation, development and growth. While all of these programs were involved with businesses, in some manner, there were varying determinations of business impact and varying methodologies.

## IV. STATISTICAL ANALYSIS: CITY OF MEMPHIS AWARDS

*This DISPARITY STUDY examines whether there is a significant difference between the availability of businesses owned by women, ethnic minorities, and Non-minority Males, and the utilization of such firms by the City such that the presence of discrimination can be inferred.*

### **A. Introduction**

The statistical portion of this study examines the question of whether a significant disparity exists, that suggests the presence of discrimination, between the availability of businesses owned by ethnic or racial minorities, women, and Non-minority Males, and the utilization of such firms by the City. Data gathered and analyzed for this study cover the five (5) fiscal years of July 1, 2002 through June 30, 2007.

Sections A through E address the methodologies employed for data collection, data assessment, database setup, and data cleanup. Section F focuses on establishment of the relevant market in which the City already does business. Section G is an estimated measurement of the pool of available firms which are deemed to be ready, willing and able to do business with the City. Section H lays out the City's contracting, or utilization history for the five (5) year Study Period, and examines utilization for MBEs and WBEs in Construction, Professional Services including Architecture and Engineering ("A/E"), Other Professional Services, Goods/Supplies, and Other Services. Section I is an analysis of the availability of MBEs and WBEs as compared to the City's utilization of such firms, to determine if there is a disparity. Section J will determine whether the foregoing disparity suggests the presence of discrimination and Section K will provide a conclusion to the chapter.

## **B. Data Assessment**

The data assessment process was initiated with a series of meetings with officials of the various departments/agencies of City government. The objective of those meetings was to understand how the City's vendor system is organized and then to assess the availability and location of contract files, payment files, bidders lists, registered vendor lists, and the most current MWBE certified lists. It was also important for us to find out the volume of vendor information and whether needed data was available electronically or would have to be entered manually into databases. Other documents relevant to the statistical analysis were also requested (such as contract award tabulations and Purchase Order listings).

During the data assessment meetings with City officials, the Griffin & Strong, P.C. (GSPC) team also requested several of the available utilization reports and disparity studies already undertaken by the City, detailing contracting activities. The data assessment meetings also provided opportunities for the GSPC team to explain in greater detail the nature and types of information being sought in various procurement categories, which aided City personnel in their efforts to respond to the data requests.

## **C. Data Setup**

Subsequent to the data assessment effort, a general framework for the data collection effort was developed. A data collection sheet was created for the purpose of recording the specific data relevant to the statistical analysis of availability and utilization for the City. A detailed plan was developed in order to identify, hire, and train temporary workers for the collection of contract data to be used for verification of the electronic databases provided by the City.

***1. Identification of Subcontractor to assist in Data Collection***

During the data assessment phase of this project, the number of contracts that would require manual data collection was estimated. GSPC determined that the best method for collecting the data was to hire Anderson & Associates, a certified MBE, to assist GSPC's own quantitative team with collecting and organizing all manual and electronic data.

***2. Utilization of Data Catcher Software***

A data collection program was developed in a computer software program called "Data Catcher", where information was entered electronically right at the collection site.

**D. Data Collection**

GSPC undertook a census type data collection where every contract and payment file was reviewed. In addition, every contract was reviewed for Construction, Professional Services, including A/E, Other Professional Services, Other Services, and Goods/Supplies.

GSPC was provided, by the City, a wide range of data sources and types for its analysis, including:

- Prime Contract Awards (electronic)
- Prime Vendor Files (manual)
- Prime Payment Data (PO & non-PO) (electronic)
- Vendors Listings (electronic)
- Certified Lists (electronic).

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This approach consisted of physically examining the contract and bid files, reviewing, and recording award data and other information relevant to the statistical analyses into Data Catcher.

The objective was to research and collect utilization data (and other information relevant to statistical analyses) about all firms during the fiscal years 2003 through 2007. The data collectors pulled, reviewed and recorded all contracts and other data in Data Catcher, along with information related to bids.

### **E. Data Assignment, Cleanup and Verification**

After the completion of data collection, the data were electronically and manually “cleaned” to find duplicates, and fill in unpopulated fields. The cleanup phase also included the following four (4) tasks:

1. Assigning and verifying ethnicity, race & gender of each firm;
2. Assigning each firm to one or more of the five (5) business categories based upon the kind of work that the firm performs;
3. Assigning counties to the city, state & zip where each firm is located; and
4. Filling in any additional missing data on firms

File cleanup was first done electronically by linking information provided by the City to certain indicators, like commodity codes or cross-referencing information with other files to fill in missing fields. If the required functions were not completely performed electronically, GSPC sent the files back to the City for review to determine if more fields could be filled in electronically, or by information known to the City. If, after this process, there were empty fields, GSPC manually cross-referenced files to pick up

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information that was not picked up electronically, e.g., electronic cross-referencing will not match ABC Construction as being the same firm as ABC Construction, Inc.

### 1. Assignment of Race/Gender/Ethnicity

The City of Memphis uses “WBE” as synonymous to Female-owned, and “MBE” as synonymous to African American-owned.<sup>88</sup> In order to identify all other minority groups, GSPC utilized the Memphis Unified Certification List and the State of Tennessee vendor and certified lists to cross-reference against all data to assist in identifying other ethnic groups and additional African American and White Female firms.

In assignment of race/gender/ethnicity, priority is given to race/ethnicity, so that all non-Caucasian males and females were categorized according to their race/ethnicity and not by gender. So, unless there were indicators to suggest otherwise, either in the City’s databases or in the cross-referenced lists, all WBE’s were deemed to be White Females.

Where there is no ethnic or gender identification, a firm is deemed to be a Non-Minority Male firm.

Although firms from lists provided by the City include MBE (African American-owned firms only) and WBE (Female-owned firms) that have been certified through the City’s process of verifying their race/gender/ethnicity, GSPC undertook additional efforts to verify race/gender/ethnicity, particularly for non-African American MBEs. First, GSPC verified the race/gender/ethnicity contained in all of the City’s databases with the Memphis Unified Certification List.<sup>89</sup> Because the certification process requires firms to self-identify themselves, there was no need to contact firms directly to confirm race/gender/ethnicity. However, in order to pick up any errors in the records themselves, GSPC verified the ethnicities and genders of all its databases with the prime payees list from the State of Tennessee, which includes a certified MWBE list. Finally, GSPC verified race/ethnicity of its Master Vendor File with the identification of ethnicity and

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<sup>88</sup> See Chapter III, Section H discussion of the City’s MWBE program.

<sup>89</sup> See page 110 for an explanation of the Memphis Unified Certification list

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gender made by prime contractors of their subcontractors through a survey of prime vendors. If there were any conflicts in the racial/gender identities from any of the verifications, GSPC clarified the information either from discussions with the City, from a review of the firm's website, or by contacting the firm directly.

### **2. Assignment of Business Categories**

In order to place firms in the proper business categories, GSPC began with the vendor ID number which was already assigned to each firm by the City. This vendor ID was linked to the City's Commodity Code and the NIGP Code (National Institute of Government Purchasing) which identified the firm's primary line of business. The NIGP Code descriptions allowed GSPC to assign each firm to one of the five (5) business categories requested by the City. A list of commodity codes with the assigned business categories is attached as Appendix I. However, generally, (i) the Construction category includes those firms that perform construction services; (ii) the A/E category includes only architecture and engineering firms; (iii) the Other Professional Services category includes lawyers, doctors, accountants, banks, and other highly skilled services; (iv) the Other Services category includes non-professional services such as janitorial, landscape, and cleaning services; and (v) the Goods and Supplies category includes firms who provide a tangible product.

## F. Relevant Market Analysis

*The RELEVANT MARKET is the geographic area in which the City is currently doing business.*

### *Relevant Market Identification by Business Category*

The now commonly-held idea that the relevant market area should encompass at least seventy-five to eighty-five percent of the "qualified" vendors that serve a particular sector has its origins in antitrust lawsuits.<sup>90</sup> In line with antitrust precepts, United States Supreme Court, Justice Sandra Day O'Connor in Croson, specifically criticized Richmond, Virginia, for making Minority Business Enterprises (MBEs) all over the country eligible to participate in its set-aside programs.<sup>91</sup> The Court reasoned that a mere statistical disparity between the overall minority population in Richmond, Virginia, which was 50% African American, and the award of prime contracts to minority-owned firms, 0.67% of which were African American-owned firms, was an insufficient statistical comparison to raise an inference of discrimination. Justice O'Connor also wrote that the relevant statistical comparison is one between the percentage of Minority Business Enterprises in the marketplace [or *Relevant Market*] who were qualified to perform contracting work (including prime and subcontractors) and the percentage of total City contracting dollars awarded to minority firms. It should be noted that it is preferable, from an economic standpoint, to evaluate the largest and most exhaustive group of firms, even to 100% of all firms, but for this disparity study, GSPC utilized a benchmark of at least 75%.

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<sup>90</sup> D. Burman. "Predicate Studies: The Seattle Model," Tab E of 11-12 Minority and Women Business Programs Revisited. (ABA Section of Public Contract law, Oct. 1990)

<sup>91</sup> City of Richmond v. J.A. Croson Company, 488 U.S. 469, 709 S. Ct. 706 (1989)



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The relevant market has been determined for each of the major procurement categories:

- Construction
- A/E (Architecture, Engineering)
- Other Professional Services
- Other Services (Non-Professional services)
- Goods/Supplies.

For each procurement category GSPC measured the "relevant market" by the area where at least at least 75% of the *dollars* were spent during the Study Period.

Preferably, GSPC would have measured the relevant market by the area where at least 75% of the bidders were located because it more accurately defines the geographic area from which the City's offerors are from and is not limited to those who are successful bidders. However, the City's bidder data was not available for all business categories. Therefore, the alternative data to measure the geographic territory where ready, willing, and able firms are available, is payment data. There is no question that every firm that has been paid by the City, demonstrated themselves ready, willing, and able to do business with the City by actually performing compensable services for the City.

Relevant Market 5 summarizes the geographic area where at least 75% of prime payees are located. In analyzing the relevant market data, GSPC tabulated the percentage of usage county-by-county, beginning with the Memphis MSA, which includes the counties of Shelby, TN; Tipton, TN; Fayette, TN; DeSoto, MS; Crittenden, AR; Tunica, MS; Tate, MS; Marshall, MS. Table 5 demonstrates that the Memphis MSA constitutes the Relevant Market for both Construction and A/E.

If dollars received by firms doing business with the City that are located within the MSA did not reach the 75% benchmark, then GSPC began counting dollars going to firms located in the State of Tennessee, beginning with the counties that have the greatest amount of dollars going to firms that do business with the City and counting down to the

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counties that do the least amount of business, until the total percentage reaches at least 75%. In counting the counties within the State of Tennessee, when substantially all counties in the State have been included to reach the 75% benchmark, and the remaining counties are all of relatively equal usage, the market area will be deemed to include the entire state of Tennessee. Table 5 shows that the Relevant Market for Other Services is the State of Tennessee.

When, upon exhausting the firms within the counties of the State, the 75% benchmark had still not been attained, GSPC then analyzed the utilization of firms county-by-county in the neighboring states, beginning with those counties where the utilization was highest. Neighboring states are Arkansas, Mississippi, Missouri, Virginia, South Carolina, Georgia, Alabama, North Carolina and Kentucky. Using the prime payees as a measurement, none of the categories showed Tennessee and Neighboring States to be the Relevant Market.

In situations in which the firms within the surrounding states have been exhausted, but the 75% benchmark still has not been reached, it is appropriate to make the determination that the relevant market consists of the entire United States. For the business categories of Other Professional Services and Goods/Supplies, the Relevant Market is the United States.

**Table 5**  
**Relevant Market Analysis--Dollars**  
**City of Memphis Disparity Study**

Business Categories Locations	Construction			A/E			Other Professional Services		
	Amount	%	Cumulative %	Amount	%	Cumulative %	Amount	%	Cumulative%
Memphis MSA	\$190,516,912	78.75%	78.75%	\$22,702,978	84.09%	84.09%	\$49,589,969	20.29%	20.29%
Tennessee*	\$9,568,812	3.96%	82.71%	\$358,928	1.33%	85.42%	\$930,232	0.38%	20.67%
Neighboring States	\$37,062,621	15.32%	98.03%	\$1,790,927	6.65%	92.08%	\$23,836,833	9.75%	30.43%
U.S.	\$4,764,771	1.97%	100.00%	\$2,139,113	7.92%	100.00%	<b>\$170,011,432</b>	<b>69.57%</b>	<b>100.00%</b>
Outside U.S.	\$0	0.00%	100.00%	\$0	0.00%	100.00%	\$11,748	0.00%	100.00%
Unknown	\$0	0.00%	100.00%	\$0	0.00%	100.00%	\$0	0.00%	100.00%
Total	\$241,913,116	100.00%		\$26,996,946	100.00%		\$244,380,214	100.00%	
Business Categories Locations	Other Services			Goods/Supplies					
	Amount	%	Cumulative %	Amount	%	Cumulative%			
Memphis MSA	\$92,893,772	68.02%	68.02%	\$97,902,833	55.90%	55.90%			
Tennessee*	<b>\$9,691,471</b>	<b>7.10%</b>	<b>75.12%</b>	\$3,801,804	2.17%	58.07%			
Neighboring States	\$11,677,585	8.55%	83.67%	\$20,383,361	11.64%	69.71%			
U.S.	\$22,285,908	16.32%	99.99%	<b>\$52,900,659</b>	<b>30.22%</b>	<b>99.92%</b>			
Outside U.S.	\$9,735	0.01%	100.00%	\$141,129	0.08%	100.00%			
Unknown	\$0	0.00%	100.00%	\$0	0.00%	100.00%			
Total	\$136,558,471	100.00%		\$175,129,786	100.00%				

Griffin & Strong, P.C. (2009)

\*Tennessee includes the Memphis, MSA which is comprised of the following counties outside of the State of Tennessee: DeSoto, MS, Crittenden, AR, Tunica, MS, Tate, MS, and Marshall, MS

The detailed listing of each county for each procurement category is attached as Appendix A.

## G. Availability Analysis

*AVAILABILITY is the determination of how many “ready, willing, and able” businesses are qualified to work for the City according to their specific lines of business, categorized by race, ethnicity, and gender.*

### 1. Methodology

The methodology utilized to determine the availability of businesses for public contracting is crucial to understanding whether a disparity exists within the relevant market. Availability is a benchmark to examine whether there are any disparities between the utilization of MWBEs and their availability in the marketplace.

Croson and subsequent decisions give only general guidance as to how to measure availability. One common theme from the court decisions is that being *qualified* to perform work for a local jurisdiction is one of the key indices of an *available* firm. In addition, the firm must have demonstrated that it is both *willing and able* to perform the work.

The measures of availability utilized in this disparity study incorporate all of the criteria of availability required by *Croson*:

- The firm does business within an industry group from which the City of Memphis makes certain purchases;
- The firm's owner has taken steps to do business with the City and qualified itself to do such business by registering or certifying itself.
- The firm is located within a relevant geographical area such that it can do business with the City of Memphis;

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The following definitions are necessary for the estimation of availability:

Definitions:

Let:  $A$  = Availability Estimates

$A$  (*Asian*) = Availability Estimates for Asian Business Enterprises

$N$  (*Asian*) = Number of Asian Business Enterprises in the relevant market

$N$  (*MWBE*) = Number of Minority-owned Business Enterprises

$N$  ( $t$ ) = Total number of businesses in the pool of bidders in the procurement category (*for example, Construction*)

Availability, ( $A$ ), is a percentage and is computed by dividing the number of firms in each MWBE group by the total number of businesses in the pool of bidders for that procurement category,  $N$  ( $t$ ). For instance, availability for Asians is given by

$$A \text{ (Asian)} = N \text{ (Asian)} / N \text{ (} t \text{)}$$

and total availability for all MWBE groups is given by

$$A \text{ (MWBE)} = N \text{ (MWBE)} / N \text{ (} t \text{)}.$$

Once these availability estimates were calculated, GSPC compared them to the percentage of firms utilized in the respective business categories in order to generate the disparity indices which will be discussed later in this analysis.

### ***2. Measurement Basis for Availability***

There are numerous approaches to measuring available, qualified firms. GSPC has established a methodology of measuring availability based upon demonstrated interest. In determining whether a firm is ready, willing, and able, it cannot be presumed that simply because a firm is doing business in a relevant market, it desires, or is capable of, working for the City, particularly as a prime, which may require a particular capacity. However, a determination of availability for subcontractors, where all levels of work are available, to be made strictly based upon the existing vendor base of the City assumes that there are no discriminatory barriers associated with registration or certification, which GSPC is not prepared to find. GSPC measured Prime Contractor Availability by

## City of Memphis, Tennessee

utilizing the Master Vendor File (the contents of which is set forth below) but deleting those firms in the Master Vendor File that appeared only on subcontractor lists. In determining those firms to be included in the subcontractor availability pool, GSPC included the entire “Master Vendor File”.

Specifically, the Master Vendor File was developed by cross-listing and eliminating duplications from the following sources:

- a. City Data
  - (i) City’s Vendor Files (Study Period & current);
  - (ii) City’s Bid Tabulation (Study Period)
  - (iii) City’s Projects (Study Period)
  - (iv) City’s Purchases (Study Period)
  - (v) City’s Contracts (Study Period)
  - (vi) Subcontractors (indicated in returned Prime Surveys)
  - (vii) Subcontractors from data collected on site
  - (viii) Commercial Building Permit List<sup>92</sup> (current)
  - (ix) City’s PO and Non PO payment files (Study Period)
  - (x) City’s current MWBE List
- b. Non-City Data
  - (i) Memphis Unified Certification list
  - (ii) MAMCA List (Minority Contractors)
  - (iii) BDC List (Minority Contractors)
  - (iv) National Association of Minority Contractors (Memphis list only)

It should be noted that the Memphis Unified Certification list in b(i) above represents a list of firms that have been certified as to their race/gender/ethnicity or disadvantaged status by the Uniform Certification Agency. The Uniform Certification Agency was formed in 1994 under the auspices of the Mid-South Minority Business Council. The City, other public agencies in the Memphis area, and many major corporations in the

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<sup>92</sup> Only commercial building permits issued by the City on private projects are included.

## City of Memphis, Tennessee

Memphis area delegate the authority to conduct minority, women and disadvantaged business enterprise certifications to the Uniform Certification Agency.

### *3. Prime Availability Estimates*

Below are the Prime Availability Tables for the Study. The data contained in those tables are separated into the five (5) major business categories: Construction; Professional Services including A/E; Other Professional Services; Other Services; and Goods/Supplies. Tables 6–10 show the number of firms by race/gender/ethnicity as compared with the total number of firms.

The Prime Availability analysis has been provided from two perspectives, both based upon the firms contained in the Master Vendor File for the Study Period:

- i) Prime Availability within the Relevant Market, (which will be used to analyze the Disparity Indices<sup>93</sup>); and
- ii) Prime Availability in the Memphis MSA (in Appendix C)

The prime availability analyzed from the Master Vendor File including all unique prime vendors, but excluding firms from other origins (such as the building permit list) that perform traditional subcontractor work. This includes painters, electricians, plumbers, roofers, pavers and HVAC contractors.

The Memphis Prime Availability Table 6 below shows that, in Construction, African American-owned firms make up 15.17% of all construction firms, White Female-owned firms make up 3.18%. Asian American-owned firms are .29%, and Hispanic American

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<sup>93</sup> Disparity Indices are defined in Section IV-I below.

and Native American-owned firms have no availability in Construction as primes within the Relevant Market.

**TABLE 6**  
**MEMPHIS PRIME CONTRACTOR AVAILABILITY**  
**WITHIN THE RELEVANT MARKET**

**CONSTRUCTION – Memphis, TN MSA**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>105</b>	<b>15.17%</b>
<b>Asian American</b>	<b>2</b>	<b>0.29%</b>
<b>Hispanic American</b>	<b>0</b>	<b>0.00%</b>
<b>Native American</b>	<b>0</b>	<b>0.00%</b>
<b>White Female</b>	<b>22</b>	<b>3.18%</b>
<b>Total MWBE</b>	<b>129</b>	<b>18.64%</b>
<b>Non-Minority Male</b>	<b>563</b>	<b>81.36%</b>
<b>All Firms</b>	<b>692</b>	<b>100.00%</b>

Source: GSPC, P.C.(2008)

In A/E, Prime Availability 7 indicates that Non-Minority Male-owned firms make up about 71.43% of all available firms. African American-owned firms represent 18.49% of all firms and White Female-owned firms make up 6.72% of all available A/E firms. Other ethnic groups have minimal availability with 1 Asian American-owned firm, 3 Hispanic American-owned firms, and no Native American-owned firms.

**TABLE 7**  
**MEMPHIS PRIME CONTRACTOR AVAILABILITY**  
**WITHIN THE RELEVANT MARKET**

**A/E –Memphis, TN MSA**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>22</b>	<b>18.49%</b>
<b>Asian American</b>	<b>1</b>	<b>0.84%</b>
<b>Hispanic American</b>	<b>3</b>	<b>2.52%</b>
<b>Native American</b>	<b>0</b>	<b>0.00%</b>
<b>White Female</b>	<b>8</b>	<b>6.72%</b>
<b>Total MWBE</b>	<b>34</b>	<b>28.57%</b>
<b>Non-Minority Male</b>	<b>85</b>	<b>71.43%</b>
<b>All Firms</b>	<b>119</b>	<b>100.00%</b>

Source: GSPC, P.C.(2008)



As set out in the Prime Availability 8, African American-owned firms make up about 12% of Other Professional Services firms and White Female-owned firms make up 1.52%. Non-Minority Male-owned firms account for about 86%, while Asian American-owned firms have .47%, Hispanic American-owned firms, .12% and Native American-owned firms have no measurable availability in this category.

**TABLE 8**  
**MEMPHIS PRIME CONTRACTOR AVAILABILITY**  
**WITHIN THE RELEVANT MARKET**

**OTHER PROFESSIONAL SERVICES - US**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>103</b>	<b>12.03%</b>
<b>Asian American</b>	<b>4</b>	<b>0.47%</b>
<b>Hispanic American</b>	<b>1</b>	<b>0.12%</b>
<b>Native American</b>	<b>0</b>	<b>0.00%</b>
<b>White Female</b>	<b>13</b>	<b>1.52%</b>
<b>Total MWBE</b>	<b>121</b>	<b>14.14%</b>
<b>Non-Minority Male</b>	<b>735</b>	<b>85.86%</b>
<b>All Firms</b>	<b>856</b>	<b>100.00%</b>

Source: GSPC, P.C.(2008)

In Other Services, Prime Availability 9 shows that the availability of African American-owned firms is about 22%, White Female-owned firms make up 2.13%, Asian and Hispanic American-owned firms make up .11% and 22% respectively and Native American-owned firms 0.04%.

**TABLE 9**  
**MEMPHIS PRIME CONTRACTOR AVAILABILITY**  
**WITHIN THE RELEVANT MARKET**

**OTHER SERVICES – STATE OF TENNESSEE**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>624</b>	<b>22.90%</b>
<b>Asian American</b>	<b>3</b>	<b>0.11%</b>
<b>Hispanic American</b>	<b>6</b>	<b>0.22%</b>
<b>Native American</b>	<b>1</b>	<b>0.04%</b>
<b>White Female</b>	<b>58</b>	<b>2.13%</b>
<b>Total MWBE</b>	<b>692</b>	<b>25.39%</b>
<b>Non-Minority Male</b>	<b>2033</b>	<b>74.61%</b>
<b>All Firms</b>	<b>2725</b>	<b>100.00%</b>

Source: GSPC, P.C.(2008)

Goods/Supplies availabilities are reflected in Table 10 so that businesses owned by African Americans make up 12.20 with 481 firms and White Females own 1.45% of the firms with 57 firms. Non-Minority Males account for 86.15% of all availability with 3,397 firms. Other ethnic groups combined account for only .2%.

**TABLE 10**  
**MEMPHIS PRIME CONTRACTOR AVAILABILITY**  
**WITHIN THE RELEVANT MARKET**

**GOODS/SUPPLIES – U.S.**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>481</b>	<b>12.20%</b>
<b>Asian American</b>	<b>6</b>	<b>0.15%</b>
<b>Hispanic American</b>	<b>0</b>	<b>0.00%</b>
<b>Native American</b>	<b>2</b>	<b>0.05%</b>
<b>White Female</b>	<b>57</b>	<b>1.45%</b>
<b>Total MWBE</b>	<b>546</b>	<b>13.85%</b>
<b>Non-Minority Male</b>	<b>3397</b>	<b>86.15%</b>
<b>All Firms</b>	<b>3943</b>	<b>100.00%</b>

Source: GSPC, P.C.(2008)

Although the availability/utilization analysis is based upon Relevant Market availability, GSPC also took a look at the availability of local firms within the Memphis MSA. The Prime MSA Availability Tables are attached in Appendix C.

**4. Subcontractor Availability**

The subcontractor availability is based on the entire Master Vendor File and is more exhaustive than the prime availability. The premise is that there are less constraints (bond requirements, need for loans, etc.) to be a subcontractor and there are more opportunities for contracts at all capacity levels.

Table 11 shows the availability of firms in Construction in the Relevant Market, which is the Memphis MSA. Non-Minority Males dominate the available firms with 583 out of 720, which represents 80.97% of all available firms. African Americans have 112 available firms, equaling 15.56% with a significant drop to White Females with 22 construction firms, or 3.06%. Asian Americans represent .28% and Native Americans .14% of available construction firms with zero firms owned by Hispanic Americans.

**TABLE 11**  
**SUBCONTRACTOR AVAILABILITY**  
**BASED ON RELEVANT MARKET ANALYSIS**

**CONSTRUCTION – MEMPHIS MSA**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>112</b>	<b>15.56%</b>
<b>Asian American</b>	<b>2</b>	<b>0.28%</b>
<b>Hispanic American</b>	<b>0</b>	<b>0.00%</b>
<b>Native American</b>	<b>1</b>	<b>0.14%</b>
<b>White Female</b>	<b>22</b>	<b>3.06%</b>
<b>Total MWBE</b>	<b>137</b>	<b>19.03%</b>
<b>Non-Minority Male</b>	<b>583</b>	<b>80.97%</b>
<b>All Firms</b>	<b>720</b>	<b>100.00%</b>

Source: GSPC, P.C.(2008)

The Relevant Market for A/E is the Memphis MSA. African American firms comprised the largest minority group at 18.03%, or 22 available firms in the relevant market, followed by White Female firms at 6.56%, or 8 firms. Asian Americans owned 1 firm or .82% and Hispanic Americans owned 3 firms, or 2.46%. There are no available Native American-owned firms in the Memphis MSA to perform services in the area of A/E.

**TABLE 12**  
**SUBCONTRACTOR AVAILABILITY**  
**BASED ON RELEVANT MARKET ANALYSIS**

**A/E – MEMPHIS MSA**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>22</b>	<b>18.03%</b>
<b>Asian American</b>	<b>1</b>	<b>0.82%</b>
<b>Hispanic American</b>	<b>3</b>	<b>2.46%</b>
<b>Native American</b>	<b>0</b>	<b>0.00%</b>
<b>White Female</b>	<b>8</b>	<b>6.56%</b>
<b>Total MWBE</b>	<b>34</b>	<b>27.87%</b>
<b>Non-Minority Male</b>	<b>88</b>	<b>72.13%</b>
<b>All Firms</b>	<b>122</b>	<b>100.00%</b>

Source: Griffin & Strong, P.C.(2008)

In Other Professional Services, Table 13 below shows that Non-Minority Male-owned firms make up 85.90% of all available firms with 743 firms. African American-owned firms are the largest represented minority group with 104 firms, or 12.02%. White Female-owned firms have significantly less available firms with 13 firms, or 1.50% followed by Asian American owned firms with 4 firms and Hispanic owned firms with 1 firm. Again, there are no Native American-owned firms available to perform Other Professional Services.

**TABLE 13**  
**SUBCONTRACTOR AVAILABILITY**  
**BASED ON RELEVANT MARKET ANALYSIS**

**OTHER PROFESSIONAL SERVICES – U.S.**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>104</b>	<b>12.02%</b>
<b>Asian American</b>	<b>4</b>	<b>0.46%</b>
<b>Hispanic American</b>	<b>1</b>	<b>0.12%</b>
<b>Native American</b>	<b>0</b>	<b>0.00%</b>
<b>White Female</b>	<b>13</b>	<b>1.50%</b>
<b>Total MWBE</b>	<b>122</b>	<b>14.10%</b>
<b>Non-Minority Male</b>	<b>743</b>	<b>85.90%</b>
<b>All Firms</b>	<b>865</b>	<b>100.00%</b>

Source: Griffin & Strong, P.C. (2008)

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African American-owned firms provide a significant number of available firms in Other Services, as Table 14 below demonstrates, with 627 firms, making up 22.87%. All other ethnic groups are also represented with 3 Asian American, 6 Hispanic American and 1 Native American-owned firm. White Female-owned firms represent 2.19% with 60 firms. The largest available group is Non-Minority Male-owned firms with 2044 firms, or 74.57% availability.

**TABLE 14  
SUBCONTRACTOR AVAILABILITY  
BASED ON RELEVANT MARKET ANALYSIS**

**OTHER SERVICES – STATE OF TENNESSEE**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>627</b>	<b>22.87%</b>
<b>Asian American</b>	<b>3</b>	<b>0.11%</b>
<b>Hispanic American</b>	<b>6</b>	<b>0.22%</b>
<b>Native American</b>	<b>1</b>	<b>0.04%</b>
<b>White Female</b>	<b>60</b>	<b>2.19%</b>
<b>Total MWBE</b>	<b>697</b>	<b>25.43%</b>
<b>Non-Minority Male</b>	<b>2044</b>	<b>74.57%</b>
<b>All Firms</b>	<b>2741</b>	<b>100.00%</b>

Source: Griffin & Strong, P.C.(2008)

In Goods/Supplies, African American-owned firms have the largest minority availability with 482 firms and 12.21%. White Female-owned firms have 58 firms with 1.47% with a drop off to Asian American-owned firms with 6 firms, Native American-owned firms with 2 firms and Hispanic American-owned firms with zero firms. Non-Minority Male-owned firms are 85.11% availability with 3398 firms.

**TABLE 15**  
**SUBCONTRACTOR AVAILABILITY**  
**BASED ON RELEVANT MARKET ANALYSIS**

**GOODS/SUPPLIES – U.S.**

<b>RACE/ETHNICITY</b>	<b>#</b>	<b>percentage%</b>
<b>African American</b>	<b>482</b>	<b>12.21%</b>
<b>Asian American</b>	<b>6</b>	<b>0.15%</b>
<b>Hispanic American</b>	<b>0</b>	<b>0.00%</b>
<b>Native American</b>	<b>2</b>	<b>0.05%</b>
<b>White Female</b>	<b>58</b>	<b>1.47%</b>
<b>Total MWBE</b>	<b>548</b>	<b>13.89%</b>
<b>Non-Minority Male</b>	<b>3398</b>	<b>86.11%</b>
<b>All Firms</b>	<b>3946</b>	<b>100.00%</b>

Source: Griffin & Strong, P.C.(2008)

Although the availability/utilization analysis is performed with firms in the relevant market, because the City has a local subcontractor program, GSPC also isolated subcontractor availability in the MSA in Appendix D.

*Capacity*

In light of Drabik<sup>94</sup>, GSPC has further examined the availability pool in order to determine whether the firms in that pool have the capacity to perform contracts of the size offered by the City. Drabik suggests that one way to assess capacity is to put contracts into business categories with other like contracts. Specifically the Court stated that “the data does not distinguish minority construction contractors from minority businesses generally...” In this Study, GSPC has separated contracts into five (5) business categories: Construction, A/E, Other Professional Services, Other Services, and Goods/Supplies.

In addition Drabik adds that there should also be some “attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.” There was little data related to the capacity

<sup>94</sup> General Contractors of Ohio v. Drabik, 214 F.3d 730 (6<sup>th</sup> Cir. 2000)

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of the firms themselves, except the indication that certain firms only appeared on subcontractor lists and not on prime lists. Therefore GSPC deleted those firms only appearing on subcontractor lists from the pool of available prime contractors.

GSPC closely considered the size of the awards made by the City in order to determine if it is reasonable to believe that all the firms in the availability pool had the capacity to perform on a substantial majority of the City's awards. It was found that during the Study Period FY2004-2007, there were a total of 3810 awards (contracts and P.Os) made by the City.<sup>95</sup> Of those awards, only 101, or 2.6% of the awards were \$1 Million or more; 3,596 or 94% were under \$500,000 and 2,992 or 78.53% were under \$100,000.

**Table 16**  
**Contracts and P.O.s**  
**City of Memphis**  
**FY2004-2007**  
**(by threshold)**

\$50 Million+	2	.05%
\$5 Million-\$49 Million	16	.42%
\$1 Million-\$4.9 Million	83	2.18%
\$500k-\$999k	113	2.97%
\$100k-\$499k	604	15.85%
\$10k-\$99k	1695	44.49%
Under \$10,000*	1297	34.04%

For the period of 2003-2008, the average construction project in Shelby County, Tennessee was \$8,889,032 and the median project was \$500,000<sup>96</sup>. This is substantially larger than the size of awards made by the City which averaged \$187,126.<sup>97</sup>

Since the availability pool utilized by GSPC is comprised of commercial firms, doing business with the City or who are doing business in the relevant market in their respect

<sup>95</sup> GSPC eliminated the insignificant contracts under \$100 from the total of awards

<sup>96</sup> Reed Construction Data (2003-2008)

<sup>97</sup> Total of all contracts and P.O's from FY 2004-2007 (excluding under \$100) were \$712,951,415 divided by 3810 awards.

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business categories, it is clear that this pool of firms is capable of performing on the overwhelming majority of contracts for the City when it is considered that the average contract for the marketplace in which they work is five (5) times higher.



**H. Utilization Analysis**

*PRIME UTILIZATION is the percentage of actual payments made directly by the City during the Study Period to WBEs and MBEs in comparison to all actual payments made directly to all vendors by the City during the Study Period.*

**1. Prime Utilization**

The relevant payment history for the City has been recorded based upon the database provided by the City. In the Prime Utilization Tables below, the dollars and percentage of dollars spent in each of the five (5) major procurement categories have been broken out by race/ethnicity and gender for each year of the Study Period. The total of each race/ethnicity/gender group represented in the MWBE category will, when added to the White Male Category, equal the Total Column.

What stands out in the Total Expenditures Prime Utilization Table 17 below is the zero percentage utilization of Hispanic American, Native American, and Asian-American-owned firms throughout the Study Period. Also, with only 6.67% of all dollars expended, African Americans are the most utilized minority group during each year of the study.

**TABLE 17**  
**MEMPHIS DISPARITY STUDY**  
**UTILIZATION FOR: CITY OF MEMPHIS PRIME CONTRACTORS**  
**ALL BUSINESS CATEGORIES**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	\$	%	\$	%	\$	%	\$	%	\$	%
2003	\$6,192,307	6.29%	\$0	0.00%	\$6,854	0.01%	\$1,324	0.00%	\$733,642	0.75%
2004	\$6,754,654	5.47%	\$0	0.00%	\$456	0.00%	\$600	0.00%	\$893,905	0.72%
2005	\$16,121,900	8.12%	\$0	0.00%	\$5,809	0.00%	\$169	0.00%	\$990,263	0.50%
2006	\$10,756,039	6.29%	\$0	0.00%	\$1,242	0.00%	\$0	0.00%	\$425,025	0.25%
2007	\$9,240,115	6.42%	\$0	0.00%	\$2,673	0.00%	\$2,445	0.00%	\$1,941,079	1.35%
<b>TOTAL</b>	<b>\$49,065,015</b>	<b>6.67%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$17,034</b>	<b>0.00%</b>	<b>\$4,538</b>	<b>0.00%</b>	<b>\$4,983,914</b>	<b>0.68%</b>

FY	MWBE		NON-MINORITY MALE		TOTAL
	\$	%	\$	%	\$
2003	\$6,934,127	7.04%	\$91,538,354	92.96%	\$98,472,481
2004	\$7,649,615	6.20%	\$115,765,039	93.80%	\$123,414,654
2005	\$17,118,141	8.62%	\$181,357,894	91.38%	\$198,476,035
2006	\$11,182,306	6.54%	\$159,723,972	93.46%	\$170,906,278
2007	\$11,186,312	7.78%	\$132,686,496	92.22%	\$143,872,808
<b>TOTAL</b>	<b>\$54,070,501</b>	<b>7.36%</b>	<b>\$681,071,755</b>	<b>92.64%</b>	<b>\$735,142,256</b>

Source: Griffin & Strong, P.C. 2008

In the procurement category of Construction, Table 18 shows that there was no utilization of Hispanic American or Native American-owned firms during the Study Period. African American-owned firms had the largest utilization of minority groups with 8.35% followed by White Females with 1.24%.

**TABLE 18**  
**MEMPHIS DISPARITY STUDY**  
**UTILIZATION FOR: CITY OF MEMPHIS PRIME CONTRACTORS**  
**(CONSTRUCTION – MEMPHIS MSA)**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	\$	%	\$	%	\$	%	\$	%	\$	%
2003	\$2,619,969	7.72%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$143,444	0.42%
2004	\$1,417,861	3.37%	\$0	0.00%	\$0	0.00%	\$600	0.00%	\$324,216	0.77%
2005	\$4,881,083	10.18%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$448,053	0.93%
2006	\$4,354,245	10.66%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$2,100	0.01%
2007	\$2,628,215	10.25%	\$0	0.00%	\$0	0.00%	\$444	0.00%	\$1,449,286	5.65%
<b>TOTAL</b>	<b>\$15,901,373</b>	<b>8.35%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$1,044</b>	<b>0.00%</b>	<b>\$2,367,099</b>	<b>1.24%</b>

FY	MWBE		NON-MINORITY MALE		TOTAL
	\$	%	\$	%	\$
2003	\$2,763,413	8.14%	\$31,182,120	91.86%	\$33,945,533
2004	\$1,742,677	4.14%	\$40,372,966	95.86%	\$42,115,643
2005	\$5,329,136	11.11%	\$42,621,092	88.89%	\$47,950,228
2006	\$4,356,345	10.66%	\$36,503,783	89.34%	\$40,860,128
2007	\$4,077,945	15.90%	\$21,567,435	84.10%	\$25,645,380
<b>TOTAL</b>	<b>\$18,269,516</b>	<b>9.59%</b>	<b>\$172,247,396</b>	<b>90.41%</b>	<b>\$190,516,912</b>

Source: City of Memphis Actual pay from IFAS and Oracle and Griffin & Strong, P.C. (2008)  
 \*result is not measurable to the 100<sup>th</sup> place.

Table 19 below charts the utilization of A/E firms based on all dollars spent showing that 88.30% of all A/E spending went to Non-Minority Male-owned firms, with 10.61% going to African American-owned firms. 1.08% of A/E spending went to White Female-owned

City of Memphis, Tennessee

firms with zero dollars going to Hispanic American, Asian American, or Native American-owned A/E firms.

**TABLE 19**  
**MEMPHIS DISPARITY STUDY**  
**UTILIZATION FOR: CITY OF MEMPHIS PRIME CONTRACTORS**  
**(A/E – MEMPHIS MSA)**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	\$	%	\$	%	\$	%	\$	%	\$	%
2003	\$301,794	7.38%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$92,944	2.27%
2004	\$351,478	5.86%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$27,957	0.47%
2005	\$799,852	11.64%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$74,656	1.09%
2006	\$647,139	16.01%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$26,048	0.64%
2007	\$309,240	18.18%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$24,713	1.45%
<b>TOTAL</b>	<b>\$2,409,503</b>	<b>10.61%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$246,318</b>	<b>1.08%</b>

FY	TOTAL MWBE		NON-MINORITY MALE		TOTAL
	\$	%	\$	%	\$
2003	\$394,738	9.66%	\$3,693,312	90.34%	\$4,088,050
2004	\$379,435	6.32%	\$5,620,621	93.68%	\$6,000,056
2005	\$874,508	12.73%	\$5,997,055	87.27%	\$6,871,563
2006	\$673,187	16.65%	\$3,368,859	83.35%	\$4,042,046
2007	\$333,953	19.63%	\$1,367,310	80.37%	\$1,701,263
<b>TOTAL</b>	<b>\$2,655,821</b>	<b>11.70%</b>	<b>\$20,047,157</b>	<b>88.30%</b>	<b>\$22,702,978</b>

Source: City of Memphis Actual pay from IFAS and Oracle and Griffin & Strong, P.C. (2008)

In Other Professional Services, Table 20 shows that there was no utilization of Asian American, Hispanic American, or Native American-owned firms. African American-owned firms were utilized 3.09% and White Female-owned firms at .03%. Non-minority Male owned firms received 96.88% of all spending in Other Professional Services.

**TABLE 20**  
**MEMPHIS DISPARITY STUDY**  
**UTILIZATION FOR: CITY OF MEMPHIS PRIME CONTRACTORS**  
**(OTHER PROFESSIONAL SERVICES - US)**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	\$	%	\$	%	\$	%	\$	%	\$	%
2003	\$744,103	2.72%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$1,475	0.01%
2004	\$781,842	2.42%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$3,655	0.01%
2005	\$3,926,877	5.74%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$10,911	0.02%
2006	\$1,331,440	2.19%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$39,464	0.06%
2007	\$755,881	1.36%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$22,044	0.04%
<b>TOTAL</b>	<b>\$7,540,143</b>	<b>3.09%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$77,549</b>	<b>0.03%</b>

FY	MWBE		NON-MINORITY MALE		TOTAL
	\$	%	\$	%	\$
2003	\$745,578	2.73%	\$26,581,939	97.27%	\$27,327,517
2004	\$785,497	2.43%	\$31,476,564	97.57%	\$32,262,061
2005	\$3,937,788	5.76%	\$64,428,049	94.24%	\$68,365,837
2006	\$1,370,904	2.25%	\$59,505,644	97.75%	\$60,876,548
2007	\$777,925	1.40%	\$54,738,578	98.60%	\$55,516,503
<b>TOTAL</b>	<b>\$7,617,692</b>	<b>3.12%</b>	<b>\$236,730,774</b>	<b>96.88%</b>	<b>\$244,348,466</b>

Source: City of Memphis Actual pay from IFAS and Oracle and Griffin & Strong, P.C. (2008)

Table 21 shows that in Other Services, there is a continuation of zero percentage utilization of Hispanic American, Asian American, and Native American-owned firms. African American-owned firms were the highest utilized minority group at 14.31%, and

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White Female-owned firms a distant second at .31% utilization. Non-Minority Male-owned firms are utilized 85.38%.

**TABLE 21**  
**MEMPHIS DISPARITY STUDY**  
**UTILIZATION FOR: CITY OF MEMPHIS PRIME CONTRACTORS**  
**(OTHER SERVICES – STATE OF TENNESSEE)**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	\$	%	\$	%	\$	%	\$	%	\$	%
2003	\$1,311,960	11.24%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$21,077	0.18%
2004	\$2,587,761	12.66%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$222,427	1.09%
2005	\$4,031,857	16.23%	\$0	0.00%	\$0	0.00%	\$90	0.00%	\$42,360	0.17%
2006	\$3,179,902	14.73%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$16,143	0.07%
2007	\$3,570,920	14.86%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$13,171	0.05%
<b>TOTAL</b>	<b>\$14,682,400</b>	<b>14.31%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$90</b>	<b>0.00%</b>	<b>\$315,178</b>	<b>0.31%</b>

FY	MWBE		NON-MINORITY MALE		TOTAL
	\$	%	\$	%	\$
2003	\$1,333,037	11.42%	\$10,339,966	88.58%	\$11,673,003
2004	\$2,810,188	13.75%	\$17,631,035	86.25%	\$20,441,223
2005	\$4,074,307	16.40%	\$20,774,821	83.60%	\$24,849,128
2006	\$3,196,045	14.80%	\$18,392,363	85.20%	\$21,588,408
2007	\$3,584,091	14.91%	\$20,449,390	85.09%	\$24,033,481
<b>TOTAL</b>	<b>\$14,997,668</b>	<b>14.62%</b>	<b>\$87,587,575</b>	<b>85.38%</b>	<b>\$102,585,243</b>

Source: City of Memphis Actual pay from IFAS and Oracle and Griffin & Strong, P.C. (2008)

African American-owned firms received 4.88% of the spending in Goods/Supplies throughout the Study Period, White Female-owned firms received 1.13%, Native American-owned firms received .01% and both Hispanic American and Asian American-owned firms totaled zero percent throughout the Study Period.

**TABLE 22**  
**MEMPHIS DISPARITY STUDY**  
**UTILIZATION FOR: CITY OF MEMPHIS PRIME CONTRACTORS**  
**(GOODS/SUPPLIES - US)**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	\$	%	\$	%	\$	%	\$	%	\$	%
2003	\$1,214,481	5.66%	\$0	0.00%	\$6,854	0.03%	\$1,324	0.01%	\$474,702	2.21%
2004	\$1,615,712	7.15%	\$0	0.00%	\$456	0.00%	\$0	0.00%	\$315,650	1.40%
2005	\$2,482,231	4.92%	\$0	0.00%	\$5,809	0.01%	\$79	0.00%	\$414,283	0.82%
2006	\$1,243,313	2.86%	\$0	0.00%	\$1,242	0.00%	\$0	0.00%	\$341,270	0.78%
2007	\$1,975,859	5.34%	\$0	0.00%	\$2,673	0.01%	\$2,001	0.01%	\$431,865	1.17%
<b>TOTAL</b>	<b>\$8,531,596</b>	<b>4.88%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$17,034</b>	<b>0.01%</b>	<b>\$3,404</b>	<b>0.00%</b>	<b>\$1,977,770</b>	<b>1.13%</b>

FY	MWBE		NON-MINORITY MALE		TOTAL
	\$	%	\$	%	\$
2003	\$1,697,361	7.92%	\$19,741,017	92.08%	\$21,438,378
2004	\$1,931,818	8.55%	\$20,663,853	91.45%	\$22,595,671
2005	\$2,902,402	5.75%	\$47,536,877	94.25%	\$50,439,279
2006	\$1,585,825	3.64%	\$41,953,323	96.36%	\$43,539,148
2007	\$2,412,398	6.52%	\$34,563,783	93.48%	\$36,976,181
<b>TOTAL</b>	<b>\$10,529,804</b>	<b>6.02%</b>	<b>\$164,458,853</b>	<b>93.98%</b>	<b>\$174,988,657</b>

Source: City of Memphis Actual pay from IFAS and Oracle and Griffin & Strong, P.C. (2008)

\*result is not measurable to the 100<sup>th</sup> place.

Although prime availability/utilization analysis is run from utilization of all dollars, GSPC has provided the tables in all procurement categories which track utilization in the MSA. Those tables are attached as Appendix E.

## 2. Subcontractor Utilization

*SUBCONTRACTOR UTILIZATION is the percentage of awards made by Prime Contractors to MWBE Subcontractors, in comparison to awards payments made to all Subcontractors by their Prime Contractors during the Study Period.*

In order to determine subcontractor utilization by the City's prime awardees, it is necessary to calculate the percentage of subcontracting dollars paid to MWBE and Non-minority Male subcontractors as compared to all subcontracting dollars. Since the City only tracks subcontracting dollars allocated to MWBEs, GSPC relied on the City's data to determine the amount of subcontracting dollars that went to African American<sup>98</sup> and women-owned firms.

Since the City maintains little information about the amount of subcontracting dollars paid to Non-minority Male-owned businesses, it was necessary to use an alternative method to estimate the amount of dollars awarded to Non-minority Males. The method GSPC used relies on United States Bureau of Census data to determine the aggregate amount of subcontracting that occurs in the State of Tennessee. According to the 2007 Census of Construction Industries, out of the \$14,371 billion value in Construction work put in place in the State of Tennessee during 2007, 36.3% or \$5,216 billion was subcontracted. GSPC has designated this percentage the Census Data Point.<sup>99</sup> The Census Data Point allows GSPC to approximate the total dollars paid to subcontractors because the City did not maintain data on total dollars paid to Construction subcontractors during the Study Period.

GSPC applied this 36.3% Census Data Point to the total amount spent by the City in Construction during the Study Period in order to estimate the total amount of dollars that were awarded to subcontractors. GSPC then subtracted the MWBE awards reported by

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<sup>98</sup> The City of Memphis only certifies African Americans as MBEs.

<sup>99</sup> Derived from the Census of Construction Industries (2007) Department of Commerce, Bureau of the Census: Census of Construction Industries (2007)



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the City in order to estimate the amount of subcontracting dollars awarded to Non-Minority Male-owned firms.<sup>100</sup>

Subcontracting utilization was analyzed for all Construction expenditures in Table 23. The totals over the Study Period show that out of the \$103.3M total contract awards estimated subcontracting awards, based upon the 36.3% Census Data Point, African Americans represented 15.62% or \$16 Million, White Female-owned firms represented 1.42% or \$1.5 Million and Non-Minority Male-owned firms represented 82.9% or \$85.1 Million.

**Table 23**

**MEMPHIS DISPARITY STUDY**  
**SUBCONTRACTOR UTILIZATION**  
**CONSTRUCTION**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	\$	%	\$	%	\$	%	\$	%	\$	%
2003	\$6,584,965	22.48%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$470,099	1.60%
2004	\$3,872,063	11.29%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$563,703	1.64%
2005	\$4,476,751	13.56%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$269,479	0.82%
2006	\$1,095,271	18.31%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$156,005	2.61%
<b>TOTAL</b>	<b>\$16,029,050</b>	<b>15.62%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$1,459,286</b>	<b>1.42%</b>

FY	TOTAL MINORITIES AND WHITE FEMALE		NON-MINORITY MALE		TOTAL
	\$	%	\$	%	\$
2003	\$7,055,064	24.08%	\$22,237,882	75.92%	\$29,292,946
2004	\$4,435,766	12.93%	\$29,872,498	87.07%	\$34,308,264
2005	\$4,746,230	14.38%	\$28,261,765	85.62%	\$33,007,995
2006	\$1,251,276	20.91%	\$4,731,737	79.09%	\$5,983,013
<b>TOTAL</b>	<b>\$17,488,336</b>	<b>17.05%</b>	<b>\$85,103,882</b>	<b>82.95%</b>	<b>\$102,592,218</b>

Source: Griffin & Strong, P.C. (2009) and Minority and Women's Business Enterprise Program.  
Note: Data for FY 2007 was not available.

<sup>100</sup> The City's MWBE program includes only African American and Female-owned firms. See Appendix J for the race/gender/ethnicity for unique plumbing, painting, and mechanical firms in the Memphis Building Permit data, which are traditional construction subcontractor assignments. There is one Hispanic-owned firm in electrical; otherwise there are no other Hispanic, Asian or Native American-owned firms in any of those three subcontracting categories. GSPC can then assume that once MBE (African American-owned firms) and WBE firms are accounted for, that the remainder of firms is Non-minority Male-owned firms.

## I. Disparity Indices

*DISPARITY INDICES calculate the difference between the UTILIZATION of MWBEs by the City during the Study Period and the combined current and Study Period AVAILABILITY of MWBEs.*

This section of the report addresses the crucial question of whether, and to what extent, there is disparity between the utilization of MBEs/WBEs as measured against their availability in the City of Memphis marketplace.

### 1. Methodology

The statistical approach to answer this question is to assess the existence and extent of disparity by comparing the MWBE utilization percentages to the percentage of the total pool of MWBE firms in the relevant geographic area. The actual disparity derived as a result of employing this approach is measured by use of a Disparity Index (*DI*).

The Disparity Index is defined as the ratio of the percentage of MWBE firms utilized (*U*) divided by the percentage of such firms available in the marketplace, (*A*):

Let:  $U$  =Utilization percentage for the MWBE group  
 $A$  =Availability percentage for the MWBE group  
 $DI$  =Disparity Index for the MWBE group  
 $DI = U/A$

When the *DI* is one, which indicates that the utilization percentage equals the availability percentage, there is parity or an absence of disparity. In situations where there is availability, but no utilization, the corresponding disparity index will be zero. Finally, in cases where there is neither utilization nor availability, the corresponding disparity index is undefined and designated by a dash (-) symbol. Disparity analyses are presented separately for each procurement category and for each race/gender/ethnicity group. They are also disaggregated by year, for each year of the Study Period.

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The results obtained by a disparity analysis will result in one of three conclusions: over-utilization, under-utilization or parity. Under-utilization is when the Disparity Index is below one. Over-utilization is when the Disparity Index is over one. Parity is when the Disparity Index is one.

### *2. Prime Disparity Indices*

In Table 24, Construction, for the entire Study Period, there is under-utilization in all categories except White Females in 2007 and Non-Minority Male, where there is over-utilization.

In Table 25, A/E, for all study years, there was Under-utilization for all measurable minority-owned firms. Conversely there is an over utilization of Non-Minority Male-owned firms for all years.

In Table 26, the Other Professional Services business category, for all study years, there was under-utilization for all minority-owned firms; Non-Minority Male-owned firms were over-utilized in all years of the Study Period.

In Table 27, the Other Services category, for all years there is under-utilization in all categories except Non-Minority Male-owned firms, where there was over-utilization.

In Table 28, Goods/Supplies, all minority and female-owned firms for the entire Study Period were under-utilized.

**Table 24**  
**City of Memphis – MWBE Disparity Index**  
**BASED ON ACTUAL UTILIZATION AND AVAILABILITY WITHIN THE**  
**MEMPHIS MSA PRIME CONTRACTOR**

**CONSTRUCTION**

ETHNICITY/RACE/GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MSA (A)	DISPARITY INDEX (U/AM)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>				
AFRICAN AMERICAN	7.72	15.17	0.51	Under-utilization
ASIAN AMERICAN	0.00	0.29	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.42	3.18	0.13	Under-utilization
ALL MINORITIES	8.14	18.64	0.44	Under-utilization
NON-MINORITY MALE	91.86	81.36	1.13	Over-utilization
<b>FY 2004</b>				
AFRICAN AMERICAN	3.37	15.17	0.22	Under-utilization
ASIAN AMERICAN	0.00	0.29	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.77	3.18	0.24	Under-utilization
ALL MINORITIES	4.14	18.64	0.22	Under-utilization
NON-MINORITY MALE	95.86	81.36	1.18	Over-utilization
<b>FY 2005</b>				
AFRICAN AMERICAN	10.18	15.17	0.67	Under-utilization
ASIAN AMERICAN	0.00	0.29	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.93	3.18	0.29	Under-utilization
ALL MINORITIES	11.11	18.64	0.60	Under-utilization
NON-MINORITY MALE	88.89	81.36	1.09	Over-utilization
<b>FY 2006</b>				
AFRICAN AMERICAN	10.66	15.17	0.70	Under-utilization
ASIAN AMERICAN	0.00	0.29	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.01	3.18	0.00	Under-utilization
ALL MINORITIES	10.66	18.64	0.57	Under-utilization
NON-MINORITY MALE	89.34	81.36	1.10	Over-utilization
<b>FY 2007</b>				
AFRICAN AMERICAN	10.25	15.17	0.68	Under-utilization
ASIAN AMERICAN	0.00	0.29	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	5.65	3.18	1.78	Over-utilization
ALL MINORITIES	15.90	18.64	0.85	Under-utilization
NON-MINORITY MALE	84.10	81.36	1.03	Over-utilization
<b>TOTALS</b>				
AFRICAN AMERICAN	8.35	15.17	0.55	Under-utilization
ASIAN AMERICAN	0.00	0.29	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	1.24	3.18	0.39	Under-utilization
ALL MINORITIES	9.59	18.64	0.51	Under-utilization
NON-MINORITY MALE	90.41	81.36	1.11	Over-utilization

**Source: Griffin & Strong, P.C. (2008)**

Note: Data is based on the actual utilization and availability estimated from the Master Vendor List.

Note: (-) Denotes 'no utilization' and 'no availability'.

**Table 25**  
**City of Memphis – MWBE Disparity Index**  
**BASED ON ACTUAL UTILIZATION AND AVAILABILITY WITHIN THE**  
**MEMPHIS MSA PRIME CONTRACTOR**

A/E

ETHNICITY/RACE/GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MSA (A)	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>				
AFRICAN AMERICAN	7.38	18.49	0.40	Under-utilization
ASIAN AMERICAN	0.00	0.84	0.00	Under-utilization
HISPANIC AMERICAN	0.00	2.52	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	2.27	6.72	0.34	Under-utilization
ALL MINORITIES	9.66	28.57	0.34	Under-utilization
NON-MINORITY MALE	90.34	71.43	1.26	Over-utilization
<b>FY 2004</b>				
AFRICAN AMERICAN	5.86	18.49	0.32	Under-utilization
ASIAN AMERICAN	0.00	0.84	0.00	Under-utilization
HISPANIC AMERICAN	0.00	2.52	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.47	6.72	0.07	Under-utilization
ALL MINORITIES	6.33	28.57	0.22	Under-utilization
NON-MINORITY MALE	93.67	71.43	1.31	Over-utilization
<b>FY 2005</b>				
AFRICAN AMERICAN	11.64	18.49	0.63	Under-utilization
ASIAN AMERICAN	0.00	0.84	0.00	Under-utilization
HISPANIC AMERICAN	0.00	2.52	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	1.09	6.72	0.16	Under-utilization
ALL MINORITIES	12.73	28.57	0.45	Under-utilization
NON-MINORITY MALE	87.27	71.43	1.22	Over-utilization
<b>FY 2006</b>				
AFRICAN AMERICAN	16.01	18.49	0.87	Under-utilization
ASIAN AMERICAN	0.00	0.84	0.00	Under-utilization
HISPANIC AMERICAN	0.00	2.52	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.64	6.72	0.10	Under-utilization
ALL MINORITIES	16.65	28.57	0.58	Under-utilization
NON-MINORITY MALE	83.35	71.43	1.17	Over-utilization
<b>FY 2007</b>				
AFRICAN AMERICAN	18.18	18.49	0.98	Under-utilization
ASIAN AMERICAN	0.00	0.84	0.00	Under-utilization
HISPANIC AMERICAN	0.00	2.52	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	1.45	6.72	0.22	Under-utilization
ALL MINORITIES	19.63	28.57	0.69	Under-utilization
NON-MINORITY MALE	80.37	71.43	1.13	Over-utilization
<b>TOTALS</b>				
AFRICAN AMERICAN	10.61	18.49	0.57	Under-utilization
ASIAN AMERICAN	0.00	0.84	0.00	Under-utilization
HISPANIC AMERICAN	0.00	2.52	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	1.08	6.72	0.16	Under-utilization
ALL MINORITIES	11.69	28.57	0.41	Under-utilization
NON-MINORITY MALE	88.31	71.43	1.24	Over-utilization

Source: Griffin & Strong, P.C. (2008)

Note: Data is based on the actual utilization and availability estimated from the Master Vendor List.

Note: (-) Denotes 'no utilization' and 'no availability'.

**Table 26**  
**City of Memphis – MWBE Disparity Index**  
**BASED ON ACTUAL UTILIZATION AND AVAILABILITY WITHIN THE**  
**MEMPHIS MSA PRIME CONTRACTOR**

**OTHER PROFESSIONAL SERVICES**

ETHNICITY/RACE/GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MSA (A)	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>				
AFRICAN AMERICAN	2.72	12.03	0.23	Under-utilization
ASIAN AMERICAN	0.00	0.47	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.12	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.01	1.52	0.01	Under-utilization
ALL MINORITIES	2.73	14.14	0.19	Under-utilization
NON-MINORITY MALE	97.27	85.86	1.13	Over-utilization
<b>FY 2004</b>				
AFRICAN AMERICAN	2.42	12.03	0.20	Under-utilization
ASIAN AMERICAN	0.00	0.47	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.12	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.01	1.52	0.01	Under-utilization
ALL MINORITIES	2.43	14.14	0.17	Under-utilization
NON-MINORITY MALE	97.57	85.86	1.14	Over-utilization
<b>FY 2005</b>				
AFRICAN AMERICAN	5.74	12.03	0.48	Under-utilization
ASIAN AMERICAN	0.00	0.47	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.12	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.02	1.52	0.01	Under-utilization
ALL MINORITIES	5.76	14.14	0.41	Under-utilization
NON-MINORITY MALE	94.24	85.86	1.10	Over-utilization
<b>FY 2006</b>				
AFRICAN AMERICAN	2.19	12.03	0.18	Under-utilization
ASIAN AMERICAN	0.00	0.47	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.12	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.06	1.52	0.04	Under-utilization
ALL MINORITIES	2.25	14.14	0.16	Under-utilization
NON-MINORITY MALE	97.75	85.86	1.14	Over-utilization
<b>FY 2007</b>				
AFRICAN AMERICAN	1.36	12.03	0.11	Under-utilization
ASIAN AMERICAN	0.00	0.47	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.12	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.04	1.52	0.03	Under-utilization
ALL MINORITIES	1.40	14.14	0.10	Under-utilization
NON-MINORITY MALE	98.60	85.86	1.15	Over-utilization
<b>TOTALS</b>				
AFRICAN AMERICAN	3.09	12.03	0.26	Under-utilization
ASIAN AMERICAN	0.00	0.47	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.12	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.00	-	N/A
WHITE FEMALE	0.03	1.52	0.02	Under-utilization
ALL MINORITIES	3.12	14.14	0.22	Under-utilization
NON-MINORITY MALE	96.88	85.86	1.13	Over-utilization

Source: Griffin & Strong, P.C.

Note: Data is based on the actual utilization and availability estimated from the Master Vendor List.

**Table 27**  
**City of Memphis – MWBE Disparity Index**  
**BASED ON ACTUAL UTILIZATION AND AVAILABILITY WITHIN THE**  
**MEMPHIS MSA PRIME CONTRACTOR**

**OTHER SERVICES**

ETHNICITY/RACE/GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MSA (A)	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>				
AFRICAN AMERICAN	11.24	22.90	0.49	Under-utilization
ASIAN AMERICAN	0.00	0.11	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.22	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.04	0.00	Under-utilization
WHITE FEMALE	0.18	2.13	0.08	Under-utilization
ALL MINORITIES	11.42	25.39	0.45	Under-utilization
NON-MINORITY MALE	88.56	74.61	1.19	Over-utilization
<b>FY 2004</b>				
AFRICAN AMERICAN	12.66	22.90	0.55	Under-utilization
ASIAN AMERICAN	0.00	0.11	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.22	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.04	0.00	Under-utilization
WHITE FEMALE	1.09	2.13	0.51	Under-utilization
ALL MINORITIES	13.75	25.39	0.54	Under-utilization
NON-MINORITY MALE	86.25	74.61	1.16	Over-utilization
<b>FY 2005</b>				
AFRICAN AMERICAN	16.23	22.90	0.71	Under-utilization
ASIAN AMERICAN	0.00	0.11	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.22	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.04	0.00	Under-utilization
WHITE FEMALE	0.17	2.13	0.08	Under-utilization
ALL MINORITIES	16.40	25.39	0.65	Under-utilization
NON-MINORITY MALE	83.60	74.61	1.12	Over-utilization
<b>FY 2006</b>				
AFRICAN AMERICAN	14.73	22.90	0.64	Under-utilization
ASIAN AMERICAN	0.00	0.11	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.22	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.04	0.00	Under-utilization
WHITE FEMALE	0.07	2.13	0.03	Under-utilization
ALL MINORITIES	14.80	25.39	0.58	Under-utilization
NON-MINORITY MALE	85.20	74.61	1.14	Over-utilization
<b>FY 2007</b>				
AFRICAN AMERICAN	14.86	22.90	0.65	Under-utilization
ASIAN AMERICAN	0.00	0.11	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.22	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.04	0.00	Under-utilization
WHITE FEMALE	0.05	2.13	0.02	Under-utilization
ALL MINORITIES	14.91	25.39	0.59	Under-utilization
NON-MINORITY MALE	85.09	74.61	1.14	Over-utilization
<b>TOTALS</b>				
AFRICAN AMERICAN	14.31	22.90	0.62	Under-utilization
ASIAN AMERICAN	0.00	0.11	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.22	0.00	Under-utilization
NATIVE AMERICAN	0.00	0.04	0.00	Under-utilization
WHITE FEMALE	0.31	2.13	0.15	Under-utilization
ALL MINORITIES	14.62	25.39	0.58	Under-utilization
NON-MINORITY MALE	85.38	74.61	1.14	Over-utilization

Source: Griffin & Strong, P.C.

Note: Data is based on the actual utilization and availability estimated from the Master Vendor List.

Note: (-) Denotes 'no utilization' and 'no availability'.

**Table 28**  
**City of Memphis – MWBE Disparity Index**  
**BASED ON ACTUAL UTILIZATION AND AVAILABILITY WITHIN THE**  
**MEMPHIS MSA PRIME CONTRACTORS**

**GOODS/SUPPLIES**

ETHNICITY/RACE/GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MSA (A)	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>				
AFRICAN AMERICAN	5.66	12.20	0.46	Under-utilization
ASIAN AMERICAN	0.01	0.15	0.07	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.03	0.05	0.60	Under-utilization
WHITE FEMALE	2.21	1.45	1.52	Under-utilization
ALL MINORITIES	7.91	13.85	0.57	Under-utilization
NON-MINORITY MALE	92.09	86.15	1.07	Over-utilization
<b>FY 2004</b>				
AFRICAN AMERICAN	7.15	12.20	0.59	Under-utilization
ASIAN AMERICAN	0.00	0.15	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.05	0.00	Under-utilization
WHITE FEMALE	1.40	1.45	0.97	Under-utilization
ALL MINORITIES	8.55	13.85	0.62	Under-utilization
NON-MINORITY MALE	91.45	86.15	1.06	Over-utilization
<b>FY 2005</b>				
AFRICAN AMERICAN	4.92	12.20	0.40	Under-utilization
ASIAN AMERICAN	0.00	0.15	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.01	0.05	0.20	Under-utilization
WHITE FEMALE	0.82	1.45	0.57	Under-utilization
ALL MINORITIES	5.75	13.85	0.42	Under-utilization
NON-MINORITY MALE	94.25	86.15	1.09	Over-utilization
<b>FY 2006</b>				
AFRICAN AMERICAN	2.86	12.20	0.23	Under-utilization
ASIAN AMERICAN	0.00	0.15	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.05	0.00	Under-utilization
WHITE FEMALE	0.78	1.45	0.54	Under-utilization
ALL MINORITIES	3.64	13.85	0.26	Under-utilization
NON-MINORITY MALE	96.36	86.15	1.12	Over-utilization
<b>FY 2007</b>				
AFRICAN AMERICAN	5.34	12.20	0.44	Under-utilization
ASIAN AMERICAN	0.01	0.15	0.07	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.01	0.05	0.20	Under-utilization
WHITE FEMALE	1.17	1.45	0.81	Under-utilization
ALL MINORITIES	6.53	13.85	0.47	Under-utilization
NON-MINORITY MALE	93.47	86.15	1.08	Over-utilization
<b>TOTALS</b>				
AFRICAN AMERICAN	4.88	12.20	0.40	Under-utilization
ASIAN AMERICAN	0.00	0.15	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.01	0.05	0.20	Under-utilization
WHITE FEMALE	1.13	1.45	0.78	Under-utilization
ALL MINORITIES	6.02	13.85	0.43	Under-utilization
NON-MINORITY MALE	93.98	86.15	1.09	Over-utilization

**Source: Griffin & Strong, P.C.**

Note: Data is based on the actual utilization and availability estimated from the Master Vendor List.

Note: (-) Denotes 'no utilization' and 'no availability'.



### 3. *Subcontractor Disparity Indices*

The Subcontractor Disparity Index is listed in Table 29.<sup>101</sup> It shows, for Construction, over-utilization of African American-owned firms in years 2003, 2006 and 2007. Non-Minority Male-owned firms were over-utilized in 2004, 2005 and 2007. All other ethnic/gender classifications were under-utilized throughout the Study Period.

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<sup>101</sup> Only a construction disparity index was assessed because a Census Data Point was used to determine utilization for subcontractors and Census Data Point is only available for construction

**Table 29**  
**DISPARITY INDEX FOR SUBCONTRACTORS**  
**CONSTRUCTION**

ETHNICITY/RACE/GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (A)	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION FOR U/A
<b>FY 2003</b>				
AFRICAN AMERICAN	22.48	15.56	1.44	Over-utilization
ASIAN AMERICAN	0.00	0.28	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.14	0.00	Under-utilization
WHITE FEMALE	1.60	3.06	0.52	Under-utilization
ALL MINORITIES	24.08	19.03	1.27	Over-utilization
NON-MINORITY MALE	75.92	80.97	0.94	Under-utilization
<b>FY 2004</b>				
AFRICAN AMERICAN	11.29	15.56	0.73	Under-utilization
ASIAN AMERICAN	0.00	0.28	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.14	0.00	Under-utilization
WHITE FEMALE	1.64	3.06	0.54	Under-utilization
ALL MINORITIES	12.93	19.03	0.68	Under-utilization
NON-MINORITY MALE	87.07	80.97	1.08	Over-utilization
<b>FY 2005</b>				
AFRICAN AMERICAN	13.26	15.56	0.87	Under-utilization
ASIAN AMERICAN	0.00	0.28	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.14	0.00	Under-utilization
WHITE FEMALE	0.82	3.06	0.27	Under-utilization
ALL MINORITIES	14.38	19.03	0.76	Under-utilization
NON-MINORITY MALE	85.62	80.97	1.06	Over-utilization
<b>FY 2006</b>				
AFRICAN AMERICAN	18.31	15.56	1.18	Over-utilization
ASIAN AMERICAN	0.00	0.28	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.14	0.00	Under-utilization
WHITE FEMALE	2.61	3.06	0.85	Under-utilization
ALL MINORITIES	20.91	19.03	1.10	Over-utilization
NON-MINORITY MALE	79.09	80.97	0.98	Under-utilization
<b>TOTALS</b>				
AFRICAN AMERICAN	15.62	15.56	1.00	Over-utilization
ASIAN AMERICAN	0.00	0.28	0.00	Under-utilization
HISPANIC AMERICAN	0.00	0.00	-	N/A
NATIVE AMERICAN	0.00	0.14	0.00	Under-utilization
WHITE FEMALE	1.42	3.06	0.46	Under-utilization
ALL MINORITIES	17.05	19.03	0.90	Under-utilization
NON-MINORITY MALE	82.95	80.97	1.02	Over-utilization

Source: Griffin & Strong, P.C., 2008  
 Note: ("—") denotes division of zero by zero or no utilization and no availability  
 Note: Utilization percentages estimated using Census data point.

Note: Utilization percentages estimated using Census data point.

**J. Determining the Significance of Disparity Indices**

The determination that a particular ethnic or gender group has been over-utilized or under-utilized is not, standing alone, proof of discrimination. This section discusses the significance of the disparity indices.

It is expected that the observed ratio or disparity index is equal to 1.00. When the difference between the expected ratio and the observed ratio is substantially wide enough, it may suggest the presence of discrimination, even without the use of statistical testing.

In the present Study, GSPC determined that when the t-value is more than 1.10 the corresponding disparity index is wide enough to suggest the presence of discrimination in the over-utilization of a particular ethnic or gender group, and when the t-value is less than .80, the corresponding disparity index is wide enough to suggest the presence of discrimination in the under-utilization of a particular ethnic or gender group. Tables 30-35 below note those disparities that suggest that discrimination is likely in both prime contracting and subcontracting.

**Table 30**  
**City of Memphis – MWBE Disparity Index**  
**SIGNIFICANT FACTORS**  
**Prime Contractors**  
**CONSTRUCTION**

ETHNICITY/RACE/GENDER GROUP	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>		
AFRICAN AMERICAN	0.51	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.13	Under-utilization
ALL MINORITIES	0.44	Under-utilization
NON-MINORITY MALE	1.13	Over-utilization
<b>FY 2004</b>		
AFRICAN AMERICAN	0.22	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.24	Under-utilization
ALL MINORITIES	0.22	Under-utilization
NON-MINORITY MALE	1.18	Over-utilization
<b>FY 2005</b>		
AFRICAN AMERICAN	0.67	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.29	Under-utilization
ALL MINORITIES	0.60	Under-utilization
<b>FY 2006</b>		
AFRICAN AMERICAN	0.70	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.00	Under-utilization
ALL MINORITIES	0.57	Under-utilization
NON-MINORITY MALE	1.10	Over-utilization
<b>FY 2007</b>		
AFRICAN AMERICAN	0.68	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
WHITE FEMALE	1.78	Over-utilization
<b>TOTALS</b>		
AFRICAN AMERICAN	0.55	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.39	Under-utilization
ALL MINORITIES	0.51	Under-utilization
NON-MINORITY MALE	1.11	Over-utilization

Source:Griffin and Strong(2009)

**Table 31**  
**City of Memphis – MWBE Disparity Index**  
**SIGNIFICANT FACTORS**  
**Prime Contractors**  
**A/E**

ETHNICITY/RACE/GENDER GROUP	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>		
AFRICAN AMERICAN	0.40	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.34	Under-utilization
ALL MINORITIES	0.34	Under-utilization
NON-MINORITY MALE	1.26	Over-utilization
<b>FY 2004</b>		
AFRICAN AMERICAN	0.32	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.07	Under-utilization
ALL MINORITIES	0.22	Under-utilization
NON-MINORITY MALE	1.31	Over-utilization
<b>FY 2005</b>		
AFRICAN AMERICAN	0.63	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.16	Under-utilization
ALL MINORITIES	0.45	Under-utilization
NON-MINORITY MALE	1.22	Over-utilization
<b>FY 2006</b>		
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.10	Under-utilization
ALL MINORITIES	0.58	Under-utilization
NON-MINORITY MALE	1.17	Over-utilization
<b>FY 2007</b>		
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.22	Under-utilization
ALL MINORITIES	0.69	Under-utilization
NON-MINORITY MALE	1.13	Over-utilization
<b>TOTALS</b>		
AFRICAN AMERICAN	0.57	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.16	Under-utilization
ALL MINORITIES	0.41	Under-utilization
NON-MINORITY MALE	1.24	Over-utilization

Source: Griffin & Strong, P.C. (2009)

**Table 32**  
**City of Memphis – MWBE Disparity Index**  
**SIGNIFICANT FACTORS**  
**Prime Contractors**  
**OTHER PROFESSIONAL SERVICES**

ETHNICITY/RACE/GENDER GROUP	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>		
AFRICAN AMERICAN	0.23	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.01	Under-utilization
ALL MINORITIES	0.19	Under-utilization
NON-MINORITY MALE	1.13	Over-utilization
<b>FY 2004</b>		
AFRICAN AMERICAN	0.20	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.01	Under-utilization
ALL MINORITIES	0.17	Under-utilization
NON-MINORITY MALE	1.14	Over-utilization
<b>FY 2005</b>		
AFRICAN AMERICAN	0.48	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.01	Under-utilization
ALL MINORITIES	0.41	Under-utilization
NON-MINORITY MALE	1.10	Over-utilization
<b>FY 2006</b>		
AFRICAN AMERICAN	0.18	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.04	Under-utilization
ALL MINORITIES	0.16	Under-utilization
NON-MINORITY MALE	1.14	Over-utilization
<b>FY 2007</b>		
AFRICAN AMERICAN	0.11	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.03	Under-utilization
ALL MINORITIES	0.10	Under-utilization
NON-MINORITY MALE	1.15	Over-utilization
<b>TOTALS</b>		
AFRICAN AMERICAN	0.26	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.02	Under-utilization
ALL MINORITIES	0.22	Under-utilization
NON-MINORITY MALE	1.13	Over-utilization

Source: Griffin & Strong, P.C. (2009)

**Table 33**  
**City of Memphis – MWBE Disparity Index**  
**SIGNIFICANT FACTORS**  
**Prime Contractors**  
**OTHER SERVICES**

ETHNICITY/RACE/GENDER GROUP	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>		
AFRICAN AMERICAN	0.49	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.08	Under-utilization
ALL MINORITIES	0.45	Under-utilization
NON-MINORITY MALE	1.19	Over-utilization
<b>FY 2004</b>		
AFRICAN AMERICAN	0.55	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.51	Under-utilization
ALL MINORITIES	0.54	Under-utilization
NON-MINORITY MALE	1.16	Over-utilization
<b>FY 2005</b>		
AFRICAN AMERICAN	0.71	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.08	Under-utilization
ALL MINORITIES	0.65	Under-utilization
NON-MINORITY MALE	1.12	Over-utilization
<b>FY 2006</b>		
AFRICAN AMERICAN	0.64	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.03	Under-utilization
ALL MINORITIES	0.58	Under-utilization
NON-MINORITY MALE	1.14	Over-utilization
<b>FY 2007</b>		
AFRICAN AMERICAN	0.65	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.02	Under-utilization
ALL MINORITIES	0.59	Under-utilization
NON-MINORITY MALE	1.14	Over-utilization
<b>TOTALS</b>		
AFRICAN AMERICAN	0.62	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
HISPANIC AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.15	Under-utilization
ALL MINORITIES	0.58	Under-utilization
NON-MINORITY MALE	1.14	Over-utilization

Source: Griffin & Strong, P.C. (2009)

**Table 34**  
**City of Memphis – MWBE Disparity Index**  
**SIGNIFICANT FACTORS**  
**Prime Contractors**  
**GOODS/SUPPLIES**

ETHNICITY/RACE/GENDER GROUP	DISPARITY INDEX (U/A)	DISPARATE IMPACT OF UTILIZATION (U/A)
<b>FY 2003</b>		
AFRICAN AMERICAN	0.46	Underutilization
ASIAN AMERICAN	0.07	Underutilization
NATIVE AMERICAN	0.60	Underutilization
WHITE FEMALE	1.52	Overutilization
ALL MINORITIES	0.57	Underutilization
<b>FY 2004</b>		
AFRICAN AMERICAN	0.59	Underutilization
ASIAN AMERICAN	0.00	Underutilization
NATIVE AMERICAN	0.00	Underutilization
ALL MINORITIES	0.62	Underutilization
<b>FY 2005</b>		
AFRICAN AMERICAN	0.40	Underutilization
ASIAN AMERICAN	0.00	Underutilization
NATIVE AMERICAN	0.20	Underutilization
WHITE FEMALE	0.57	Underutilization
ALL MINORITIES	0.42	Underutilization
<b>FY 2006</b>		
AFRICAN AMERICAN	0.23	Underutilization
ASIAN AMERICAN	0.00	Underutilization
NATIVE AMERICAN	0.00	Underutilization
WHITE FEMALE	0.54	Underutilization
ALL MINORITIES	0.26	Underutilization
NON-MINORITY MALE	1.12	Overutilization
<b>FY 2007</b>		
AFRICAN AMERICAN	0.44	Underutilization
ASIAN AMERICAN	0.07	Underutilization
NATIVE AMERICAN	0.20	Underutilization
ALL MINORITIES	0.47	Underutilization
<b>TOTALS</b>		
AFRICAN AMERICAN	0.40	Underutilization
ASIAN AMERICAN	0.00	Underutilization
NATIVE AMERICAN	0.20	Underutilization
WHITE FEMALE	0.78	Underutilization
ALL MINORITIES	0.43	Underutilization

Source: Griffin & Strong, P.C. (2009)



**Table 35**  
**DISPARITY INDEX FOR SUBCONTRACTORS**  
**SIGNIFICANT FACTORS**

**CONSTRUCTION**

<b>ETHNICITY/RACE/GENDER GROUP</b>	<b>DISPARITY INDEX (U/A)</b>	<b>DISPARATE IMPACT OF UTILIZATION FOR U/A</b>
<b>FY 2003</b>		
AFRICAN AMERICAN	1.44	Over-utilization
ASIAN AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.52	Under-utilization
ALL MINORITIES	1.27	Over-utilization
<b>FY 2004</b>		
AFRICAN AMERICAN	0.73	Under-utilization
ASIAN AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.54	Under-utilization
ALL MINORITIES	0.68	Under-utilization
<b>FY 2005</b>		
ASIAN AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.27	Under-utilization
ALL MINORITIES	0.76	Under-utilization
<b>FY 2006</b>		
AFRICAN AMERICAN	1.18	Over-utilization
ASIAN AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
ALL MINORITIES	1.10	Over-utilization
<b>FY 2007</b>		
ASIAN AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.46	Under-utilization
<b>TOTALS</b>		
ASIAN AMERICAN	0.00	Under-utilization
NATIVE AMERICAN	0.00	Under-utilization
WHITE FEMALE	0.46	Under-utilization
ALL MINORITIES	1.27	Over-utilization

Source: Griffin & Strong, P.C. (2009)

**K. Conclusions for the City of Memphis: Disparity Analysis**

This Chapter has analyzed whether there is a significant difference between the availability of businesses owned by women, ethnic minorities, and Non-minority Males, as compared to the utilization of these groups such that suggests the presence of discrimination.

GSPC used the City’s prime payment file in order to determine the “Relevant Market” or the geographical locations where at least 75% of the firms that do business with the City, in each of five (5) business categories, are located. GSPC found that the Relevant Market for Construction and A/E is the Memphis MSA. The Relevant Market for Other Services is the State of Tennessee. The Relevant Market for Other Professional Services and Goods/Supplies is the United States.

GSPC used the Relevant Market in each business category as the boundary for determining those firms in the availability pool for prime contractors and subcontractors. The goal was to determine the percentage of firms by race/gender/ethnicity that is ready, willing and able, or “available” to do business with the City of Memphis. Those race/gender/ethnicity groups are indicated as firms owned by African Americans, Asian Americans, Hispanic Americans, Native Americans, White Females, and Non-minority Males.

GSPC then looked at the percentage of payments made to each race/gender/ethnic group for each year of the study to see if there was any disparity between the percentage of each race/gender/ethnic group used by the City and the percentage of those same firms that were available for the City to use.

The City’s current MWBE program defines MBEs as African Americans only. Therefore, the City does not track its utilization of other minority-owned firms. It was important for GSPC to identify those other minority firms. In order to do so, GSPC obtained information from other databases (i.e. Memphis Unified Certification list and

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State of Tennessee certified list) in order to properly assess the availability/utilization disparities of these firms in the Memphis, Tennessee area.

GSPC, having identified the race/gender/ethnicity of the firms available to perform services for the City of Memphis, found that the non-African American firms had limited availability and likewise, limited utilization. Nonetheless, in all business categories, for all years those ethnic groups, excluding African Americans were still under-utilized as both prime contractors and subcontractors.

With a subcontractor program in place to assist African American-owned firms and White Female-owned firms, African American-owned firms were significantly over-utilized in 2003 and 2006 as subcontractors, but still significantly under-utilized in 2004 and 2007. As prime contractors, African American-owned firms were significantly under-utilized in each procurement category during each year of the Study Period, except 2007 in A/E where the under-utilization was not significant enough to suggest the presence of discrimination.

Even with the subcontractor program, White Female-owned firms were significantly under-utilized for all business categories for all years as prime contractors and subcontractors, except for 2007 in Construction prime contracting where White Female-owned businesses were over-utilized. Non-minority Male-owned businesses were over-utilized in almost all categories for all years as prime contractors and have no significant disparities as subcontractors.

It can be surmised that without a subcontractor program for African American and White Female-owned firms, there would be significant under-utilization of those groups, as there is for other minority groups that are not included in the current MWBE program. It is also clear that although there is minimal over-utilization of African American-owned firms in subcontracting in some years because of the MWBE program, that the program has had no significant negative impact on Non-minority Male-owned firms.

## V. PRIVATE SECTOR ANALYSIS

*The PRIVATE SECTOR ANALYSIS seeks to answer the query: Has the City of Memphis been a passive participant in the continuation of private discriminatory practices in the Memphis area?*

The decision of the United States Court of Appeals for the Tenth Circuit in Concrete Works Construction Inc. v. City and County of Denver, 321 F 3d 950 (10<sup>th</sup> Circuit, 2003), suggests that a disparity study may examine the existence of private sector discrimination. This should be done to determine if the government has assisted or will continue to assist in perpetuating the discriminatory conduct of private actors by being a passive participant in a discriminatory design. In fact, Justice O'Connor, speaking for the Supreme Court in Croson said that a state “has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction”, and can even “use its spending powers to remedy private discrimination if it identifies that discrimination with the particularity required by the Fourteenth Amendment.”<sup>102</sup>

Therefore, GSPC sought to discover whether there is a pervasive pattern of private sector discrimination in the City of Memphis and its relevant market from which it can be inferred that the government has passively assisted in perpetuating the discriminatory conduct of private actors.

### A. Barriers to Entry and Disparity in Earnings

In the first instance it is important to determine whether there is a discriminatory barrier, making it less likely for certain groups to become self-employed business owners and also to investigate the effects of race/gender/ethnicity on their earning capacity. This section of the report relies on regression analyses to assess the effect of race/gender/ethnicity along with other economic and demographic characteristics on the

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<sup>102</sup> City of Richmond v. J. A. Croson Co., 488 U.S. 492

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individuals' likelihood of business formation as measured by self-employment. A non-linear regression technique called Probit is used in the analysis of individuals' probability of self-employment from Public Use Microdata Samples (PUMS).

The data used in the analysis are from the PUMS which is the measure of race/gender/ethnicity on entrepreneurship and revenue. PUMS is extracted from, census files and uses as a sample, in this case, 5% of the housing units and occupancy in the U.S.

The analysis examines the self-employment of MWBEs versus their non-minority male counterparts. The goal is to answer three questions about MWBE-owned firms versus their non-minority counterparts:

- 1) Are the self-employment rates different?
- 2) Is 2007 revenue different?; and
- 3) If all marketplace conditions were equalized, how would self-employment rates differ by race/gender/ethnicity?

Multivariate linear and binary logistic regression analyses are a set of statistical techniques that permit assessment of the relationship between a binary dependent such as self-employment or not self-employed variable to be explained, known as the dependent variable (DV or  $Y^{103}$ ) and several categorical variables known as independent variables (IV or Xs) such as race, education and other values.

A multivariate linear regression is suitable in assessing the effects of IV (such as age, level of education, race/gender/ethnicity) on a DV that can take on a wide range of values (such as the 2007 Gross Revenues from the phone survey). A variable that can take on a wide range of values is referred to as a "*continuous variable*."

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<sup>103</sup> Y is the dependent variable **being** predicted or explained, and y is the predicted or explained dependent variable. In other words (Y) relates to "actual" values, and (y or "y hat") relates to "predicted or explained" values (when the regression equation is calculated from the actual data).

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A binary logistic regression is suitable in analyses involving “*non continuous*” DV (or categorical yes or no DV) which takes on two possible values (self-employment classification such as 1 for self-employed and 0 for not self-employed). When the range of the dependent variable is confined to a yes or no response, it is referred to as a categorical dependent variable. For instance, the examination of the self-employment status of an Asian American in Memphis, TN MSA will either lead to a yes (being self-employed) or no (not self-employed).

### ***1. Binary Logistic Regression for an analysis of race/gender/ethnicity on the likelihood of being self-employed in the private sector in Memphis, TN MSA***

#### ***a. Binary Logistic Regression Model***

Binary Probit regression is a variation of ordinary regression such as the above one, useful to examine the relationship between a categorical dependent variable (yes/no or 1/0 dependent variable) and two or more independent variables hypothesized to have explanatory power on the yes/no or true/false value of the categorical dependent variable. The binary regression is suitable in assessing the odds that an MWBE is either self-employed (yes or 1), or not self-employed (no or 0). An example of an application of the binary regression is assessing the odds that a prime construction contractor will “win” or “not win” a contract hypothesizing some variables influencing the behavior of the contractor. Another example of its use is determining the odds that a borrower will default on a loan based on the borrower's credit score, debt and age.

GSPC's relies on the above-referenced approach to determine how the MWBE status of individual affects the odds of being self-employed relative to Non-minority Males while controlling for the effects of other socio-economic and demographic characteristics. Ultimately, we seek to examine how much the race/gender/ethnicity status of an individual will increase or decrease the odds of being self-employed or not self-employed thus affecting the rate of business formation in Memphis, TN MSA. Probit regression produces odds ratios (O.R.) associated with each independent variable (predictor value).

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The odds of the event is the probability of the outcome event occurring (self-employed or yes/1) divided by the probability of the event not occurring (not self-employed or no/0). The odds ratio (O.R) for a predictor tells the relative amount by which the odds of the outcome increase (O.R. greater than 1.0) or decrease (O.R. less than 1.0) when the value of the predictor is increased by 1.0 unit.

Mathematically, the multivariate logistic regression model is of the form:

$$\ln\left(\frac{p}{1-p}\right) = \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \dots + \beta_n X_n + e$$

Where “ln” stands for natural logarithm (natural log) and the ratio  $\left(\frac{p}{1-p}\right)$  represents the odds ratio and  $p$  is the probability of being self-employed.

As in a linear model:  $\beta_0$  is a constant value:  $\beta_1, \beta_2 \dots \beta_n$  are coefficients corresponding to the independent variables  $X_0, X_1, \dots X_n$  are independent variables or selected economic and demographic characteristics, such as level of education, ethnicity, race and gender, marital status. “e” is an error value or residual term to account for the variation in the dependent variable not explained by the independent variables.

### **b. Binary Logistic Regression Results and Findings**

A Probit model was used to determine whether minorities and White Females were less likely than Non-minority Males to be self-employed in the private sector. The model was used to estimate the relationship between the likelihood of being self-employed or not, hypothesizing some selected independents variables described below. Each MWBE member was treated as an independent event and the maximum likelihood of an individual being self-employed or not was estimated after transforming the dependent variable into a logit variable (the natural logarithm or natural log of the odds of the dependent variable self-employed (yes=1) or not self-employed (no=0)). The Probit regression technique was used to estimate the probability (odds) of self-employment using PUMS data restricted to:

- Memphis, TN MSA.
- Individuals employed in the private sector
- Individuals 18 years of age or older
- Employment statistics from PUMS in Construction, Professional Services, Goods & Services

The variables hypothesized to influence the odds of self-employment included the following:

- Ethnicity/race/gender: African American, Asian American, Hispanic American, Native American, Non-minority (White) Female, Non-minority Male;
- Property Values

Table 36 provides results of the Probit Analysis of the binary status of the population regarding self-employment in the Memphis MSA. Our purpose is only to evaluate the significance of two variables on the likelihood of self-employment-value of property owned and race/ethnicity of owner. Consistent with the finding for the individual business categories, we find a direct relationship between the likelihood of being self-employed and the median value of property owned by households. To quantify the direct effect of the Probit analysis to estimated incidence of self-employment, we have used the cumulative standard normal distribution to translate the Probit coefficients to self-employment probabilities for each race-ethnic-gender group. These results are displayed in Table 37. The Probit results show a high level of significance for all levels of property values except for the very high (over \$500,000) and highly significant for African Americans and White Females. Only Marginal significance is found for Asian Americans, but no significance for White Females, Native Americans, and Hispanic Americans.



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The Self-Employment Rate in Table 37 shows how propensities for self-employment are influenced by the level of property values held by Memphis' residents. The property values, median values of owner-occupied housing, begin with less than \$10,000 and continue to more than \$1,000,000. Subjecting data included in the Census 2000 Public Use Microdata Sample (PUMS) one-in-twenty Memphis households to Probit analysis, we address the question: What variables can seem to systematically predict the incidents of self-employment in the City of Memphis? We hypothesize that a major factor is the value of assets or property that a household owns. We purport that property value is a factor that influences rates of self-employment as the former serves as collateral used to finance business loans. Using the Probit model we estimate self-employment rates for each socio-demographic group and replications are available by each of 23 classes of property values and found rates for Non-minority Males to be significantly higher than any other group, even when controlling for property values. However, a direct relationship was evident between property values and rate of self-employment for all groups.

The incidents of self-employment in the Memphis MSA were lowest for African Americans (15.19%) and highest for Non-minority Males (25.4%). Since self-employment rates are directly related to the value of property owned, lower property values among African American limit their access to capital and thereby hinder their ability to gain capacity to bid for contracts issued by the City of Memphis.

**TABLE 36**  
**FULL PROBIT ANALYSES**  
**Dependent Variable is Binary**  
**All Business Categories**  
**(N=80,748)**

Predictor	Coefficients	Standard Error	Absolute "T"-Value	P-Value
(Constant)	0.216	0.215	1.01	0.315
African American	-0.398	0.043	9.26	0.000
Asian American	-0.184	0.107	1.72	0.087
Hispanic American	-0.048	0.156	0.31	0.757
Native American	-0.349	0.350	0.42	0.313
White Female	-0.356.	0.038	9.37	0.000
<b>Property Value</b>				
Less than \$10,000	-1.077	0.310	3.47	0.001
\$10,001 to \$15,000	-0.969	0.311	3.12	0.002
\$15,001 to \$20,000	-0.827	0.308	2.69	0.037
\$20,001 to \$25,000	-1.118	0.322	3.47	0.001
\$25,001 to \$30,000	-1.261	0.309	4.08	0.000
\$30,001 to \$35,000	-1.108	0.262	4.23	0.000
\$35,001 to \$40,000	-1.058	0.245	4.32	0.000
\$40,001 to \$50,000	-1.253	0.228	5.50	0.000
\$50,001 to \$60,000	-1.092	0.224	4.88	0.000
\$60,001 to \$70,000	-1.015	0.223	4.55	0.000
\$70,001 to \$80,000	-1.000	0.223	4.48	0.000
\$80,001 to \$90,000	-0.965	0.223	4.33	0.000
\$90,001 to \$100,000	-1.167	0.226	5.16	0.000
\$100,001 to \$125,000	-1.070	0.221	4.84	0.000
\$125,001 to \$150,000	-1.000	0.220	4.55	0.000
\$150,001 to \$175,000	-1.927	0.227	4.20	0.000
\$175,001 to \$200,000	-0.965	0.224	4.31	0.000
\$200,001 to \$250,000	-0.773	0.222	3.48	0.001
\$250,001 to \$300,000	-0.672	0.226	2.97	0.003
\$300,001 to \$400,000	-0.438	0.225	1.95	0.052
\$400,001 to \$500,000	-0.171	0.235	0.73	0.463
\$500,001 to \$750,000	-0.308	0.242	1.27	0.204
\$750,001 to \$1,000,000	0.384	0.283	1.59	0.173
\$1,000,001 and More	0 (a)	(a)	(a)	(a)

Griffin & Strong, P.C. (2009)

**TABLE 37**  
**FULL RESULTS OF PROBIT REGRESSION ANALYSES**  
**Incidents of Self-Employment by**  
**Race/Gender/Ethnicity and Property Values**  
**(N=80,748)**

PROPERTY	BLACKS	WMALES	WFEMALE	ASIANS	HISPANIC	NATIVES
Less than \$10,000	10.38	19.49	11.12	14.69	18.14	11.31
\$10,001 to \$15,000	12.51	22.66	13.35	17.36	18.41	13.35
\$15,001 to \$20,000	15.62	27.09	16.6	21.19	25.46	16.85
\$20,001 to \$25,000	9.68	18.41	10.38	13.79	17.11	10.56
\$25,001 to \$30,000	7.49	14.69	12.71	10.93	13.79	8.23
\$30,001 to \$35,000	9.85	18.67	10.56	14.01	17.36	10.75
\$35,001 to \$40,000	10.75	20.05	13.14	15.15	18.67	11.7
\$40,001 to \$50,000	7.64	15.15	8.23	10.56	14.01	8.23
\$50,001 to \$60,000	10.2	18.94	10.93	14.46	17.88	10.93
\$60,001 to \$70,000	13.57	21.19	12.3	16.35	19.77	12.51
\$70,001 to \$80,000	11.9	21.77	12.71	16.61	20.33	12.92
\$80,001 to \$90,000	12.51	22.66	13.14	17.62	21.19	13.35
\$90,001 to \$100,000	8.85	17.11	9.51	12.71	15.87	9.68
\$100,001 to \$125,000	10.56	19.77	11.31	14.92	18.41	11.51
\$125,001 to \$150,000	11.9	21.77	12.71	16.61	20.33	12.92
\$150,001 to \$175,000	13.35	23.89	14.23	18.41	22.36	14.46
\$175,001 to \$200,000	12.51	22.36	13.35	17.62	21.19	13.35
\$200,001 to \$250,000	16.85	29.12	18.14	22.96	27.09	18.14
\$250,001 to \$300,000	19.77	32.28	20.9	26.11	30.85	21.19
\$300,001 to \$400,000	26.76	41.29	28.1	34.09	39.36	28.43
\$400,001 to \$500,000	36.2	46.02	37.83	44.43	46.41	38.21
\$500,001 to \$750,000	32.1	46.02	32.64	38.59	44.43	33
\$750,001 to \$1,000,000	28.43	43.25	30.15	36.32	41.29	30.5

Griffin & Strong, P.C. (2009)

**2. Multivariate Linear Regression for an analysis of Ethnicity/Race/Gender Effects on Individuals’ Self-employment Income in the Private Sector in Memphis, TN MSA.**

The objective of this section is to determine whether or not race/gender/ethnicity, combined with selected economic and demographic characteristics have an impact on individuals’ income derived from self-employment. The examination is conducted for businesses grouped in three categories (Construction, Professional Services, Goods & Other Services) operating in the private sector in Memphis, TN MSA, applying appropriate statistical techniques on Census data.

**a. Multivariate Linear Regression**

The aim is to compare the findings from the multivariate linear regression analysis to the self-employment statistics of Non-minority Males to determine how much more or how much less they make in the private sector in the Memphis, TN MSA. This analysis was conducted using census data.

The multivariate linear regression model is of the mathematical form of:

$$Y = \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \dots + \beta_n X_n + e$$

Where:

Y = the value of the dependent variable (DV), the variable that is being predicted or explained;

$\beta_0$  = the Y intercept, the value of Y when all (IVs or Xs) are zero. It is where the regression line intercepts the Y-axis,

$\beta$  = the various coefficients of the various IVs; in other words, the  $\beta$ s represent the weight of the Xs' effect on the DV. They are referred to as slopes, also known as beta coefficients for the independent variables  $X_i$ .  $B_1$  is the slope or beta coefficient for the independent variable  $X_1$ , and generally stated,  $B_n$  is the slope or beta coefficient for the independent variable  $X_n$ .

$X_1 \dots X_n$  = the various independent variables (IV) such as level of education of the firm's owner, race/gender/ethnicity, age, etc.

E = an error term (also known as residual) or variance in the DV unexplained by the IVs

**b. The Use of "Gross Revenue/Income" as Dependent Variable**

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Gary S. Becker, who is one of the pioneers in the field of economic discrimination research, used revenue differences to investigate discrimination against Non-Whites.<sup>104</sup> According to Emily P. Hoffman (1991), “Almost all modern economic investigation of discrimination follows from the germinal work of Gary S. Becker. In particular, Glen G. Cain examines the current evidence of discrimination in the United States according to Becker’s ideas. Cain tries to answer the question of how much discrimination exists. Both Becker and Cain acknowledge that economists cannot accurately answer the question; not only are there problems in precisely defining discrimination, but there are limitations in the data available from which to try to measure discrimination.”<sup>105</sup>

In his writing, “The Use and Limits of Statistical Analysis in Measuring Economic Discrimination,” Cain believes that researchers tend to focus on income and earnings because these variables are relatively easy to quantify.<sup>106</sup> Economists such as William A. Darity, Marianne A. Ferber and Carole A. Green have used earnings or revenue as the dependent variable in both race and gender discrimination investigations, and economic inequality studies.<sup>107</sup>

***c. Statistics, Hypothesis and Variables of Multivariate Linear Regression Analysis***

**i) Statistics of a Multiple Regression Model**

There are two types of statistics in a regression<sup>108</sup> analysis which will both be presented in the charts of the findings.

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<sup>104</sup> Becker, Gary. Second Edition. “The Economics of Discrimination.” The University of Chicago Press, Chicago, p.110.

<sup>105</sup> Hoffman, Emily. 1991, “Essays on the Economics of Discrimination.” W.E. UPJOHN INSTITUTE for Employment Research, Kalamazoo, Michigan, p. 7.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid. pp. 5-7.

<sup>108</sup> For a complete discussion, please see: “Linear Regression and Method of Least Square”, M.G. Bulmer, 1967, 1979 “Principles of Statistics, Dover Publication Inc, pp. 209-226

- (a) The statistics for the IVs (or independent variable) provides information about how important each such IV is in the model; and
- (b) The statistics for the regression model summarizes the strength of the relationship between the DV and the IVs.<sup>109</sup>

**ii) Hypothesis of Multiple Regression Model**

The hypothesis to be tested using the multivariate linear regression model is that there is no difference in the private sector self-employment income of MWBEs compared to that of non-minority male firms in Memphis, TN MSA.

The *null* hypothesis is  $H_0$  and the hypothesis of difference is known as the *alternate* or  $H_1$ .

The following definitions are necessary for the formulation of the null and alternate hypotheses. When we represent the 2007 Gross Income for MWBE business owners as “2007 GIMWBEs” and the 2007 Gross Income as “2007 GINON-MWBEs”, the null and the alternate hypotheses are generally written as follows:

$$H_0: 2007 \text{ GIMWBEs} = 2007 \text{ GINON-MWBE}$$

$$H_1: 2007 \text{ GIMWBE} \neq \text{GI NON-MWBE}$$

As indicated earlier, GSPC also conducted multivariate regression analysis of income using survey data. This survey of business owners included firms who actually worked for the City of Memphis during the Study Period. The results of this multivariate regression using survey data is reported in this section. It is worth noting that all industries were collapsed as the sample sizes from the responses were too small per business type to warrant meaningful analyses by individual category.

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<sup>109</sup> Both types of statistics should be carefully examined. (1) The statistics for the IVs includes unstandardized/standardized coefficients or beta weights, and results of “t-tests” for the coefficients to determine whether or not they are significantly different from zero. (2)The statistics for the DV includes the coefficient of determination or R-Square ( $R^2$ ) showing the strength of the linear relationship between the DV and the IVs. The *F*-statistics are used to evaluate the contribution of a subset of IVs (explanatory variables) , as well as the collective statistical significance of all IVs.

## City of Memphis, Tennessee

For both multivariate regressions using income from self-employment (census data) and income reported by firms who worked on City projects (survey data), when the analyses show that race/gender/ethnicity are found to affect the income, GSPC will reject the null hypothesis and accept the alternate hypothesis,  $H_1$ . In other words, when the result of the statistical test is significant at a 0.05 confidence level or 95 % confidence interval, we reject  $H_0$ , and we conclude that the probability of 2007 Revenue of MWBEs being different from 2007 Revenue of non-MWBE is due to chance is less than 5 in 100.

### iii) **Dependent Variable (DV) and Independent Variables (IV)**

The DV used in the examination of whether or not race/gender/ethnicity status has an impact on individuals' income is the 2007 gross revenue for business owners both minorities/White Females and Non-minority Males. The variables selected by GSPC as explanatory variables or independent variables believed or hypothesized to predict income included the following business and demographic characteristics:

- Number of years in operation,
- Ethnicity/ race and gender of the owner: African American, Asian American, Hispanic American, Native American, White Female, and Non-minority Male,
- The level of education of the owner: no schooling completed, nursery school to 4<sup>th</sup> grade, 5<sup>th</sup> grade to 12<sup>th</sup> grade, high school graduate, some college, Associates degree, Bachelors degree, Masters degree, professional degree, and doctorate degree,
- Bonding

### d. **Finding of the Multivariate Linear Regression Analysis**

#### i) **Results of Regression on 2007 Gross Income**

The results of the multivariate linear regression estimating the effects of each MWBE group when the statistical effects of the other business and demographic characteristics were "controlled for" or "neutralized" are displayed in the regression tables. The

## City of Memphis, Tennessee

regression tables show a list of sociological control factors, including race, ethnicity, and gender, as well as other factors like education, bonding, experience. In reading the Regression Analysis, the important column to focus on is the coefficients column which provides a positive or negative number which represents the direction of the effect of particular predictors on gross revenue controlling other factors.

In order to better understand how businesses are rewarded in both the public and private sectors in the City of Memphis and how race, gender and ethnicity impact revenues, we gathered information from actual business owners through a survey. GSPC contracted with Oppenheim Research to develop a telephone survey of business owners. Descriptive statistics from the survey are contained in Section VI-B.

While a number of the questions offered insight into the activities of local businesses in the Memphis MSA, pertinent to this study were such factors as number of years the business had been in operation, education of the business owner, bonding requirements and race-gender-ethnicity of the owner. More specifically, our desire was to determine the contribution of these variables to revenues separately for the public and private sector.

That is to say, business owners were asked to indicate their revenues separately for public vs. private projects. Our purpose was to quantify the separate effects of the selected variables on public as well as private sector revenues.

The statistical procedure was Ordinary Least Square (OLS), commonly called linear regression, where the variables to be explained are gross revenues from business in the private and public sector and gross revenues in the public sector alone. Since firms were asked to indicate whether their gross revenue fell within predetermined intervals, the dependent variables for both the public and private sectors were converted to dollars using the mid-point of the respective intervals. Our measure of business experience is determined by subtracting from the current year the stated year the business was founded. Thus, years in operation are the only continuous variable used in the regression analysis.



## City of Memphis, Tennessee

The functional form of the hypothesized relationship between the dependent variable (annual gross revenues and public sector revenues) and the set of hypothesized explanatory variables is important to the analysis. In many economic studies, assuming that revenues and the explanatory variables are related linearly is not appropriate. Thus we experimented with various functional forms and decided that a non-linear relationship best captured the relationship between the observed and expected values for the revenue variables. More specifically, we determined that the conventional log-linear model best captures the relationship where the natural log of revenues is regressed against the attributes.<sup>110</sup> The results of the OLS analysis for Gross Revenues are presented in Table 38 and for Government revenues are included in Table 39.

### a. Gross Revenues Regression

In the Gross revenues regression all predictors are correctly signed and are statistically significant at the normal level. Perhaps an interpretation of the coefficients will enhance understanding of the results. According to the gross revenues regression contained in Table 38, a unit increase in the number of years in business would increase the revenues of the typical firm included in the survey by 4.2 %. Translated to gross revenues, this means that gross revenues rise by \$14,545 per year in business operation. Similarly, those businesses that indicated that their firm was required to have bonding had on average 29.7 % more gross revenues on average than those that reported that their business did not require bonding. College educated business owners had greater gross revenues than those who had only a high school education and those owners with graduate degrees had greater gross revenues than those with only a college degree.

With regards to the important category of race and gender, the respective coefficients are used to quantify disparities in access to gross revenues within the Memphis market place. The number of Native American, Hispanic American, and Asian American-owned firms participating in the survey was too small to include in the regressions. However, White Females had no statistically significant influence on gross revenue. In other words, the

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<sup>110</sup>  $Y=e^{\alpha+\beta x}$ , where  $\alpha$  is revenue, and  $\beta$  represents the variable compared.

status of women doesn't appear to influence the level of gross revenue. On the other hand, the impact of race is highly significant as a determinant of gross revenue. African Americans in Memphis received, on average, 71 % less gross revenue than did similarly situated Non-minority Males. That means that, as an African American business owner in Memphis, gross revenues are on average \$247,267 per year less than Non-minority Males.

**TABLE 38**  
**Gross Revenue Regression**  
**Descriptive Statistics: All Businesses**

	Descriptive Statistics	
Values	Gross Revenues	Government Revenues
<b>Sample Size</b>	<b>445</b>	<b>324</b>
Mean Revenues	\$346,279	\$155,904
Mean Experience (years)	22.77	23.19
College Degree (%)	39.78	40.62
Graduate Degree (%)	15.06	16.92
Bonding (%)	35.51	37.54
African American( %)	44.49	41.85
White Female (%)	5.17	6.77

**b. Government (Public) Regression**

In the Government revenues regression, all predictors are correctly signed and are statistically significant at the standard level. Perhaps an interpretation of the coefficients will enhance understanding of implications from the results. According to the Government revenues regression estimates contained in Table 39, a unit increase, (one additional year) in years in business would increase the revenues of the typical firm included in the survey by 3.4 %. Translated to gross revenues, this mean that gross revenues rises by \$6,548 per additional year in business operation. Similarly, those businesses that indicated that their firm was required to have bonding had on average 60.4 % more gross revenues on than those that reported that their business did not require bonding. College educated business owners had on average 62.4 % more gross revenues than did those who had only a high school education and those owners with graduate

degrees had on average 72.6 % greater more revenues than those with only a college degree.

With regards to the important category of race and gender, the respective coefficients are used to quantify disparities in access to gross revenues within the Memphis market place. Again, the number of Native Americans, Hispanic Americans, and Asian Americans participating in the survey was too small to include in the regressions. However, White Females had no statistically significant influence on gross revenues. In other words, the status of women doesn't appear to influence the level of gross earning. On the other hand, the impact of race is highly significant as a determinant of gross earning. African American firms in Memphis received, on average, 44 % less gross earning than did similarly situated Non-minority Males. Translated to dollars, being an African American business owner in Memphis means that gross revenues are on average \$68,442 per year less than Non-minority Males.

**TABLE 39**  
**INFLUENCE OF SELECTIVE**  
**FACTORS ON GROSS REVENUE**  
**Dependent Variable: Ln Gross**  
**Revenues; All Businesses**  
**(N=445)**

Predictor	Coefficient	Standard Error	T-Statistic	Significance	Mean
CONSTANT	11.335	0.229	49.459	0.000	12.755
EXPERIENCE	0.042	0.007	6.039	0.000	22.770
COLLEGE DEGREE	0.986	0.173	5.685	0.000	0.398
GRADUATE DEGREE	1.659	0.238	6.970	0.000	0.151
BONDING	0.297	0.167	1.779	0.076	0.355
AFRICAN AMERICAN	-0.710	0.167	4.240	0.000	0.445
WHITE FEMALE	0.604	0.368	1.640	0.102	0.052

GSPC, P.C.(2009)

Data based on responses from Survey of Business Owners

**TABLE 40  
INFLUENCE OF SELECTIVE  
FACTORS ON PUBLIC  
REVENUES  
Dependent Variable: Ln  
Government Revenues; All  
Businesses  
(N=325)**

Predictor	Coefficient	Standard Error	T-Statistic	Significance	Mean
CONSTANT	10.636	0.280	37.924	0.000	11.957
EXPERIENCE	0.340	0.008	6.039	0.000	23.190
COLLEGE DEGREE	0.624	0.216	5.685	0.004	0.406
GRADUATE DEGREE	1.350	0.283	4.767	0.000	0.169
BONDING	0.604	0.203	2.971	0.003	0.375
AFRICAN AMERICAN	-0.439	0.207	2.211	0.035	0.419
WHITE FEMALE	0.165	0.402	0.682	0.410	0.068

GSPC, P.C.(2009)

Data based on responses from Survey of Business Owners

*i) Construction Sector*

The findings from the regression analysis on the construction industries in the Memphis MSA are provided in Table 41. The Telephone survey provided data on 103 unique construction firms. Of the six variables purported as predictors, only two were found to satisfy the required level of significance. Number of years of experience in the construction industry and race of the firm’s owner are the two variables that indicated a very high degree of statistical significance. To our surprise, whether or not a construction firm was bonded had no significance in securing contracts in the relevant market.

According to the results of the regression analysis, a construction firm owned by a Non-minority Male with one year of experience had an annual gross revenue of \$359,690. On the other hand, a similarly-situated construction firm owned by a member of the African American population reportedly earned only \$174,730 in the same year. Thus

African American construction firms are not able to secure construction contracts within the private sector of the Memphis MSA at the rate of Non-minority males.

**TABLE 41**  
**INFLUENCE OF SELECTIVE**  
**FACTORS CONSTRUCTION**  
**(Ln Gross Revenues);**  
**(N==103)**

Predictor	Coefficient	Standard Error	T-Statistic	Significance	Mean
<b>CONSTANT</b>	<b>12.768</b>	<b>0.369</b>	<b>34.647</b>	<b>0.000</b>	<b>13.158</b>
<b>EXPERIENCE</b>	<b>0.025</b>	<b>0.010</b>	<b>2.548</b>	<b>0.012</b>	<b>19.94</b>
<b>COLLEGE DEGREE</b>	<b>0.456</b>	<b>0.376</b>	<b>1.212</b>	<b>0.229</b>	<b>0.2913</b>
<b>GRADUATE DEGREE</b>	<b>.715</b>	<b>0.513</b>	<b>1.395</b>	<b>0.166</b>	<b>0.1165</b>
<b>BONDING</b>	<b>-0.174</b>	<b>0.337</b>	<b>0.515</b>	<b>0.608</b>	<b>0.6214</b>
<b>AFRICAN AMERICAN</b>	<b>-0.722</b>	<b>0.324</b>	<b>2.223</b>	<b>0.024</b>	<b>0.4175</b>
<b>WHITE FEMALE</b>	<b>0.165</b>	<b>0.402</b>	<b>0.682</b>	<b>0.410</b>	<b>0.068</b>
<b>TRADE SCHOOL</b>	<b>0.692</b>	<b>0.524</b>	<b>1.321</b>	<b>0.190</b>	<b>0.1165</b>

Griffin & Strong, P.C.(2009)  
 Data based on responses from Survey of Business Owners

*ii) PROFESSIONAL SERVICES*

The Telephone Survey provided sufficient data to enable Griffin and Strong to evaluate the influence of several variables considered important in determining the level of gross revenue in the professional services sector of the Memphis MSA. Those regression results have been presented in Table 42. While all variables contained their correct sign, only two were found to meet the required level of significance. African American providers of professional services earned an estimated \$47,098 which was 38 % less than the \$75,659 earned by Non-minority Males during the same year. It should not come as

entirely a surprise to find that possession of an advanced degree and experience proved to be significant predictors as to the level of professional services income. Normally these types of contracts are technical in terms of requirements and thus the principle provider must demonstrate the level of technical knowledge to perform. While African American professional consultants were less likely to earn the level of gross revenue as Non-minority Males, the negative sign of this coefficient satisfied the hypothesis that firms owned by African Americans earn less than their Non-minority Male counterparts.

**TABLE 42**  
**INFLUENCE OF SELECTIVE**  
**FACTORS**  
**PROFESSIONAL SERVICES**  
**(Ln Gross Revenues);**  
**(N==78)**

Predictor	Coefficient	Standard Error	T-Statistic	Significance	Mean
CONSTANT	11.234	0.541	20.774	0.000	12.547
EXPERIENCE	0.036	0.018	1.991	0.050	23.397
COLLEGE DEGREE	0.538	0.437	1.231	0.222	0.4487
GRADUATE DEGREE	1.591	0.463	3.439	0.001	0.2821
BONDING	-0.664	0.441	1.507	0.136	0.1923
AFRICAN AMERICAN	-0.474	0.400	1.183	0.241	0.3077
WHITE FEMALE	-.580	0.605	0.989	0.341	0.0897
TRADE SCHOOL	0.692	0.524	1.321	0.190	0.1165

Griffin & Strong, P.C.(2009)  
 Data based on responses from Survey of Business Owners

ii) *OTHER SERVICES:*

We analyzed the contribution of several factors on gross receipts of firms providing efforts in the Other Services. Experience and education of those firms in this business category proved to be instrumental at determining the level of gross revenues they earned in the Memphis marketplace. Being a member of the African American population had a negative effect on gross receipts of firms in this business sector albeit the variable was not statistically significant. More specifically, African American-owned firms earned gross revenue of \$25,874, 40 % less than the \$42,916 in gross revenue of their Non-minority Male counterparts in the MSA. White Female-owned firms were favored in the category, but the effect was not significant.

**TABLE 43**  
**INFLUENCE OF SELECTIVE**  
**FACTORS**  
**OTHER SERVICES**  
**(Ln Gross Revenues);**  
**(N==107)**

Predictor	Coefficient	Standard Error	T-Statistic	Significance	Mean
<b>CONSTANT</b>	<b>10.667</b>	<b>0.481</b>	<b>22.181</b>	<b>0.000</b>	<b>12.547</b>
<b>EXPERIENCE</b>	<b>0.050</b>	<b>0.015</b>	<b>3.375</b>	<b>0.001</b>	<b>23.397</b>
<b>COLLEGE DEGREE</b>	<b>1.030</b>	<b>0.334</b>	<b>3.083</b>	<b>0.003</b>	<b>0.4487</b>
<b>GRADUATE DEGREE</b>	<b>1.780</b>	<b>0.550</b>	<b>3.235</b>	<b>0.002</b>	<b>0.2821</b>
<b>BONDING</b>	<b>0.369</b>	<b>0.321</b>	<b>1.149</b>	<b>0.243</b>	<b>0.1923</b>
<b>AFRICAN AMERICAN</b>	<b>-0.474</b>	<b>0.400</b>	<b>1.183</b>	<b>0.241</b>	<b>0.3077</b>
<b>WHITE FEMALE</b>	<b>0.723</b>	<b>0.801</b>	<b>0.903</b>	<b>0.369</b>	<b>0.0897</b>

Griffin & Strong, P.C.(2009)  
 Data based on responses from Survey of Business Owners

iii) *GOODS/ SUPPLIES*

Our regression analysis using the 143 responses that classified themselves as suppliers of goods and supplies is provided in 340. All seven of the independent variables evaluated in this sector had the expected signs of the regression coefficients and four of the eight were statistically significant. More specifically, experience in business, college degrees, advanced degrees, and the race of the business owner were significant contributors to annual gross earning. African American business owners who sell goods and supplies were significantly less likely to earn revenue at the level of their non-minority male counterparts. The estimated annual gross revenue of \$42,150 received by African American goods and supplies providers were only 45 % as large as the \$76,803 earned by Non-minority Males.

Griffin & Strong, P.C.(2009)

**TABLE 44**  
**INFLUENCE OF SELECTIVE**  
**FACTORS**  
**GOODS/SUPPLIES**  
**(Ln Gross Revenues);**  
**(N==143)**

Predictor	Coefficient	Standard Error	T-Statistic	Significance	Mean
CONSTANT	11.249	0.381	29.488	0.000	13.264
EXPERIENCE	0.390	0.011	3.435	0.001	24.524
TRADE SCHOOL	1.591	1.220	1.305	0.194	0.014
COLLEGE DEGREE	1.552	0.311	4.994	0.000	0.4755
GRADUATE DEGREE	2.749	0.454	6.057	0.000	0.1329
BONDING	0.564	0.347	1.622	0.107	0.2098
AFRICAN AMERICAN	-0.600	0.317	1.896	0.060	0.2937
WHITE FEMALE	0.847	0.713	1.184	0.238	0.0420

Griffin & Strong, P.C.  
 Data based on responses from Survey of Business Owners



**B. Commercial Construction Utilization and Disparity Analyses in the Private Sector**

Two types of analyses were conducted in this section to evaluate discrimination in private sector market area. The first type of analysis assesses Minority and White Female-Owned Business (MWBE) utilization in the marketplace for the commercial construction industry to determine whether or not disparities exist between MWBE utilization and their availability. The second analysis conducted was a comparison of MWBE utilization in the private sector commercial construction industry with their utilization by City of Memphis for public sector construction for the period under review.

GSPC relied upon two data sources to analyze private sector commercial construction. The first data were derived from Building Permits issued by the City, restricted to the relevant market area in construction (Memphis, TN MSA). The second data were from Reed Construction Data (RCD) also restricted to the relevant market area (Memphis TN MSA). It is worth noting that there were no subcontracting awards for the Building Permits Data and the data items for subcontracting were too limited to conduct a meaningful utilization analysis from RCD.

**1. Reed Construction Data: MWBE Private Sector Commercial Construction Utilization Analysis of Prime Contractors**

This section examines the utilization of MWBE and Non-MWBE firms in the private sector commercial construction industry in Memphis, TN MSA using Reed Construction Data (RCD) displayed in Table 45. As the table shows, value of the private sector commercial construction projects awarded to prime contractors in Memphis, TN MSA amounted to \$1.16 billion during the period under review. White Female-owned construction firms were the only MWBE group who received private commercial construction projects, receiving \$8.78 million or .76% of the total awards. Non-Minority Male-owned firms received \$1.16 billion or 99.24% of all private commercial

construction projects. According to the Reed Construction Data, no ethnic minority received private construction contracts.

**Table 45**  
**City of Memphis**  
**Reed Construction Data (RCD)**  
**Private Sector Utilization of Prime Contractors in Memphis TN MSA**  
**By Race/Ethnicity/Gender Classification Based Upon Dollars Awarded and percentages**  
**(July 1, 2003 to December 31, 2007)**

**REED CONSTRUCTION PRIME CONTRACTORS IN MEMPHIS MSA**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	\$	%	\$	%	\$	%	\$	%	\$	%
2003	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$2,047,308	0.75%
2004	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%
2005	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%
2006	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$3,420,000	3.92%
2007	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$3,315,395	0.55%
<b>TOTAL</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>\$0</b>	<b>\$8,782,703</b>	<b>0.76%</b>

Source: Griffin & Strong, P.C. (2008)

FY	TOTAL MWBE		NON MINORITY MALE		TOTAL
	\$	%	\$	%	
2003	\$2,047,308	0.75%	\$269,190,150	99.25%	\$271,237,458
2004	\$0	0.00%	\$44,597,000	100.00%	\$44,597,000
2005	\$0	0.00%	\$160,923,000	100.00%	\$160,923,000
2006	\$3,420,000	3.92%	\$83,744,400	96.08%	\$87,164,400
2007	\$3,315,395	0.55%	\$595,415,395	99.45%	\$598,730,790
<b>TOTAL</b>	<b>\$8,782,703</b>	<b>0.76%</b>	<b>\$1,153,869,945</b>	<b>99.24%</b>	<b>\$1,162,652,648</b>

Source: Griffin & Strong, P.C. (2008)

Source: Griffin & Strong, P.C., derived from Reed Construction Data

<sup>1</sup>percentage of total project dollars awarded to prime contractors during the year

Note: Private commercial not-for-profit construction projects excluded from the analysis.

**2. Building Permits Data: MWBE Private Sector Commercial Construction Utilization Analysis of Prime Contractors<sup>111</sup>**

The dollar amounts of the prime private sector commercial construction projects for the Study Period by ethnicity/race/gender is displayed in Table 46. As shown, the value of the private sector commercial construction permits issued to contractors as primes for the five years (FY2003-2007) examined amounted to approximately \$72.3 million in Memphis, TN MSA. The private sector prime commercial construction projects executed by MWBEs amounted to .36 % of all project spending. By contrast, Non-minority Male-owned construction firms executed 99.64% of all projects.

No minorities, including White Females received any private sector prime commercial building construction projects during 2003-2005 in the Memphis MSA. African Americans received \$172,271 in construction dollars during 2007 which represented about one quarter (1/4) of a percentage of all dollars. White Females received about .13% of all construction dollars.

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<sup>111</sup> Commercial building construction permits do not include governmental projects, schools, hospitals, and the like.

Table 46

**CITY OF MEMPHIS, TN  
Building Permits Data for Private Sector Overall Utilization Analysis of  
Commercial Construction Prime Contractors in Memphis, TN MSA  
by Ethnicity/Race/Gender  
(Fiscal Year 2003 to Fiscal Year 2007)  
PRIME COMMERCIAL BUILDING PERMITS**

**(Dollars and Percentages)**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	\$	%	\$	%	\$	%	\$	%	\$	%
2003	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%
2004	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%
2005	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%
2006	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$80,000	0.25%
2007	\$172,271	0.92%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$10,388	0.06%
<b>TOTAL</b>	<b>\$172,271</b>	<b>0.24%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$90,388</b>	<b>0.13%</b>

Source: Griffin & Strong, P.C. (2008)

FY	TOTAL WMBE		NON-MINORITY MALE		TOTAL
	\$	%	\$	%	\$
2003	\$0	0.00%	\$1,809,681	100.00%	\$1,809,681
2004	\$0	0.00%	\$4,708,077	100.00%	\$4,708,077
2005	\$0	0.00%	\$14,928,601	100.00%	\$14,928,601
2006	\$80,000	0.25%	\$32,031,190	99.75%	\$32,111,190
2007	\$182,659	0.97%	\$18,569,289	99.03%	\$18,751,948
<b>TOTAL</b>	<b>\$262,659</b>	<b>0.36%</b>	<b>\$72,046,839</b>	<b>99.64%</b>	<b>\$72,309,498</b>

Source: Griffin & Strong, P.C. (2008)

Building Permits for traditional, subcontractor work i.e. electrical, mechanical, and plumbing for the Study Period are shown separately in Tables 47 through 49. Dollar amounts were not available, so number of permits issued was counted. For the Study Period, out of 737 electrical permits issued, 710 or more than 96% were issued to Non-Minority Males. A total of 17 or 2.31% were issued to African Americans during the Study Period and 9, or 1.22% were issued to White Females.

City of Memphis, Tennessee

In Mechanical the number of permits issued to African Americans was 15 or 1.94%, 2 or .26% to White Females, and none to any other minority group. Non-Minority Males represented 97.75% of all the permits issued for Mechanical during the Study Period.

For Plumbing permits, 12, or about 1.5% were issued to African Americans in total throughout the Study Period, with none to White Females or other ethnic minorities. 98.51% went to Non-Minority Males.

**Table 47**  
**Construction Subcontractors in Memphis, TN MSA**  
**by Ethnicity/Race/Gender**  
**(Fiscal Year 2003 to Fiscal Year 2007)**  
**PRIME COMMERCIAL BUILDING PERMITS**  
**(Numbers of Permits and Percentages)**

**ELECTRICAL**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	#	%	#	%	#	%	#	%	#	%
2004	7	1.78%	1	0.25%	0	0.00%	0	0.00%	5	1.27%
2005	6	4.76%	0	0.00%	0	0.00%	0	0.00%	2	1.59%
2006	4	3.28%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
2007	0	0.00%	0	0.00%	0	0.00%	0	0.00%	2	2.11%
<b>TOTAL</b>	<b>17</b>	<b>2.31%</b>	<b>1</b>	<b>0.14%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>9</b>	<b>1.22%</b>

FY	NON-MINORITY MALE		TOTAL
	#	%	
2004	381	96.70%	394
2005	118	93.65%	126
2006	118	96.72%	122
2007	93	97.89%	95
<b>TOTAL</b>	<b>710</b>	<b>96.34%</b>	<b>737</b>

Source: Griffin & Strong, P.C. (2008)

**Table 48**  
**Construction Subcontractors in Memphis, TN MSA**  
**by Ethnicity/Race/Gender**  
**(Fiscal Year 2003 to Fiscal Year 2007)**  
**PRIME COMMERCIAL BUILDING PERMITS**  
 (Numbers of Permits and Percentages)

**MECHANICAL**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	#	%	#	%	#	%	#	%	#	%
2004	11	2.48%	0	0.00%	0	0.00%	0	0.00%	2	0.45%
2005	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
2006	2	1.96%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
2007	2	3.23%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
<b>TOTAL</b>	<b>15</b>	<b>1.94%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>2</b>	<b>0.26%</b>

FY	NON-MINORITY MALE		TOTAL
	#	%	#
2004	431	97.07%	444
2005	165	100.00%	165
2006	100	98.04%	102
2007	60	96.77%	62
<b>TOTAL</b>	<b>756</b>	<b>97.75%</b>	<b>773</b>

Source: Griffin & Strong, P.C. (2008)

**Table 49**  
**Construction Subcontractors in Memphis, TN MSA**  
**by Ethnicity/Race/Gender**  
**(Fiscal Year 2003 to Fiscal Year 2007)**  
**PRIME COMMERCIAL BUILDING PERMITS**  
 (Numbers of Permits and Percentages)

**PLUMBING**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	#	%	#	%	#	%	#	%	#	%
2004	5	1.41%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
2005	1	0.28%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
2006	3	4.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
2007	3	12.50%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
<b>TOTAL</b>	<b>12</b>	<b>1.49%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>

FY	NON-MINORITY MALE		TOTAL
	#	%	#
2004	350	98.59%	355
2005	350	99.72%	351
2006	72	96.00%	75
2007	21	87.50%	24
<b>TOTAL</b>	<b>793</b>	<b>98.51%</b>	<b>805</b>

Source: Griffin & Strong, P.C. (2008)

**3. Private Commercial Construction Prime Contractor Utilization by Number of Projects**

Table 50 depicts the number and percentage of private commercial construction projects awarded to prime contractors in Memphis Tennessee from FY2003-FY2007. As shown, out of a total of 3,647 private commercial building construction permits issued to prime contractors, 9 permits were issued to minority and women owned construction firms representing only 0.25 % of total permits.

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A detailed analysis of the distribution of private sector commercial building construction permits indicated the following:

- African American-owned firms were issued six (6) permits or 0.16 % of total permits,
- Hispanic American, Asian American and Native American-owned construction firms were not successful in receiving private commercial building construction permits in Memphis, TN MSA from FY 2003 to FY2007,
- White Females were issued three (3) permits or .08% during the Study Period,
- Non-minority-owned construction firms were issued 3,638 permits or 99.75 permits of total permits for the time period examined.



**Table 50**

**Building Permit Data for Private Sector Overall Utilization Analysis of Commercial Construction Prime Contractors in Memphis TN MSA  
Number of Building Permits Issued by Ethnicity/Race/Gender  
(Fiscal Years 2003-2007)  
(Number of Permits & percentages)**

FY	AFRICAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		ASIAN AMERICAN		WHITE FEMALE	
	#	%	#	%	#	%	#	%	#	%
2003	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
2004	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
2005	0	0.00%	0	0.00%	0	0.00%	0	0.00%	1	0.11%
2006	5	0.60%	0	0.00%	0	0.00%	0	0.00%	1	0.12%
2007	1	0.13%	0	0.00%	0	0.00%	0	0.00%	1	0.13%
<b>TOTAL</b>	<b>6</b>	<b>0.16%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>3</b>	<b>0.08%</b>

FY	TOTAL MWBE		NON-MINORITY MALE		TOTAL
	#	%	#	%	
2003	0	0.00%	268	100.00%	268
2004	0	0.00%	875	100.00%	875
2005	1	0.11%	914	99.89%	915
2006	6	0.72%	825	99.28%	831
2007	2	0.26%	756	99.74%	758
<b>TOTAL</b>	<b>9</b>	<b>0.25%</b>	<b>3,638</b>	<b>99.75%</b>	<b>3,647</b>

Source: Griffin & Strong, P.C. (2008)

Table 51 below show the comparisons of Construction utilization among individual minority groups and Non-Minority males in the public sector through both actual payment and Reeds Construction Data and the private sector through building permit data. The table clearly establishes that the programs at the City have done a much better job at utilizing African Americans as primes at 8.36% versus 3.56% demonstrated through Reed Construction Data for the private sector and .16% shown through building permit data for the private sector.

## City of Memphis, Tennessee

This section of the report shows that both Building Permit data as well as Reed Construction reveals lack of participation of minorities with Memphis' private commercial sector. Only 8.1% of public construction contracts went to African-American and White Female firms while 92% went to Non-minority Males. Even less went to MWBEs in the private section with 6.23%.

**Table 51**

Memphis Disparity Study  
 Comparison of Public and Private Sector  
 Prime Contractor Utilization  
 (Memphis MSA)  
 July 1, 2002 to June 30, 2007

	African American (%)	Asian American (%)	Hispanic American (%)	Native American (%)	White Female (%)	Minority & White Female (%)	Non-(Minority - White Female) (%)
<b>Public Construction Prime Contractors (City of Memphis Actual Payments)</b>	7.72	0.00	0.00	0.00	0.42	8.15	91.85
<b>Private Construction Prime Contractors (Building Permits)</b>	0.16	0.00	0.00	0.00	0.08	0.25	99.75
<b>Private Construction Prime Contractors (Reed Construction Data)</b>	3.56	1.68	0.00	0.00	0.99	6.23	93.77

Source: Griffin & Strong, P.C. (2008)

### C. Lending Discrimination

There is a direct causal connection between access to capital and the ability to obtain and perform government contracts. During this research process an extensive amount of research was reviewed which indicated that commercial lending disparities continue to be a problem in Tennessee.

Dr. Timothy Bates, as early as 1993, reported that commercial banks have pronounced racial disparities in business lending. According to Dr. Bates' analysis of the commercial lending data from 28 metropolitan areas, discriminatory treatment by commercial banks of black and white business borrowers resulted in the average white loan recipient being awarded \$1.79 debt capital for every dollar of equity, while black borrowers receive, on average \$0.89, all other things being equal.<sup>112</sup> Dr. Bates found that the problem is compounded for minority owned businesses, which are located in minority neighborhoods. After controlling for demographic traits, education, skills, experience, and owner equity investment, black businesses located in minority neighborhoods received \$39,564 less than black businesses located in non-minority areas.<sup>113</sup>

A recent study conducted for the Maryland Department of Transportation<sup>114</sup> by Dr. David Blanchflower, former chair of the Department of Economics at Dartmouth College, on behalf of National Economic Research Associates suggests that Maryland follows the pattern Dr. Bates outlines.<sup>115</sup> Dr. Blanchflower's work used data from the 1993 National Survey of Small Business Finances (NSSBF). This survey is conducted by the Federal Reserve Board and the U. S. Small Business Administration every five years and is now called Survey of Small Business Finances (SSBF). Dr. Blanchflower, after isolating the South Atlantic region, where Maryland is located, analyzed the data. Dr. Blanchflower

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<sup>112</sup> Bates, T., (1993), "Banking on Black Enterprise".

<sup>113</sup> Ibid.

<sup>114</sup> Dr. Blanchflower's inferences statistics were based on data covering the South Atlantic Region of the 1993 National Survey of Small Business Finances (NSSBF), which includes North Carolina.

<sup>115</sup> National Economic Research Associates, (2001), "Utilization of Minority Business Enterprises by the State of Maryland".

## City of Memphis, Tennessee

concluded that loan denial rates for minority owned firms, and particularly for African American owned firms, are much higher, even when firm size and credit history are taken into consideration.

Similar to Dr. Blanchflower's analysis based on the 1993 survey data, Griffin and Strong, P.C. (GSPC) analyzed the 2003 Survey of Small Business Finances data (2003 SSBF)<sup>116</sup>, after isolating the East South Central Region where Tennessee is located. GSPC's analysis led to the same conclusions that Dr. Blanchflower's did with the 1993 NSSBF data: loan denial rates for minority owned firms, particularly African American-owned firms, are much higher, even when firm size and credit history are taken into account. Our review of the relevant literature leads to the conclusion that commercial lending discrimination remains a problem in Tennessee, in general, and in the Memphis, TN MSA, in particular.

### **1. Survey Results on Bond Denials**

GSPC conducted a telephone survey of 515 business owners which included questions regarding their experiences with discrimination in lending and bonding in the financial market place. 156 of the firms surveyed responded that they had applied for a business loan during the last three (3) years. 113 of those firms that applied for loans were approved, 41 were denied and 3 had no answer (or did not know).

Table 52 shows that Minority and White Female firm owners and Non-minority Male firm owners were equally likely to request bonding, but the denial rates were much higher for MWBEs compared to Non-minority Males. In effect, of the respondents to the bonding questions, 55.0 % of African Americans tried to secure bonding, 100 % of Native Americans said they requested bonding, and 45.1 % of Non minority Males requested bonding. The request rates for bonding for MWBE and Non-minority Males are theoretically in the same magnitude.

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<sup>116</sup> These Survey of Small Business Finances (SSBF) data are collected by Census Region only (not by individual States or MSAs, or counties/cities) and the East South Central Region includes Kentucky, Tennessee, Mississippi, and Alabama.

**Table 52**  
**CITY OF MEMPHIS**  
**Telephone Survey**  
**Requested Bonding**

	Total	African American	Asian American	Hispanic American	Native American	Non Minority	Non Minority	Disabled
<b>Responses</b>	129	20	2	4	1	49	51	2
<b>Row %</b>		15.5	1.6	3.1	0.8	38.0	39.5	1.6
<b>Yes</b>	48	11	0	0	1	12	23	1
<b>Column %</b>	37.2	55.0	0.0	0.0	100.0	24.5	45.1	50.0
<b>No</b>	76	8	2	4	0	36	25	1
<b>Column %</b>	58.9	40.0	100.0	100.0	0.0	73.5	49.0	50.0
<b>Don't Know</b>	5	1	0	0	0	1	3	0
<b>Column %</b>	3.9							

Source: Griffin & Strong, P.C. Telephone Survey of Business Owners in July 2008

A detailed analysis of the bonding denial rates showed that, in general, MWBEs were more likely to be denied bonding compared to non-minority Males as shown below:

- African American: 30.00 %,
- Asian American: 0.00 %,
- Hispanic American: 0.00 %,
- Native American: 100.00 %,
- White Female: 6.10 %,
- Non-minority Male: 3.90 %.

**Table 53**  
**CITY OF MEMPHIS**  
**Telephone Survey**  
**Denied Bonding**

	Total	African American	Asian American	Hispanic American	Native American	Non Minority	Non Minority	Disabled
Responses	129	20	2	4	1	49	51	2
Row %		15.5	1.6	3.1	0.8	38.0	39.5	1.6
Yes	12	6	0	0	1	3	2	0
Column %	9.3	30.0	0.0	0.0	100.0	6.1	3.9	0.0
No	101	13	1	3	0	39	44	1
Column %	78.3	65.0	50.0	75.0	0.0	79.6	86.3	50.0
Don't Know/No	16	1	1	1	0	7	5	1
Column %	12.4	5.0	50.0	25.0	0.0	14.3	9.8	50.0

Source: Griffin & Strong, P.C. Telephone Survey of Business Owners in July 2008

**2. Survey Results on Loan Denials**

The vast majority of MWBEs and non-minority Male firms who responded said they had requested commercial bank loans, except Asian Americans. In effect, 80.00 % of African Americans who responded said they had requested a loan, 100 % of both Native Americans and Hispanic Americans said they had requested a commercial loan, and 88.2 % of Non-minority Males had requested loans. When all business owners were equally likely to request commercial loan, the denial rates were higher for MWBEs compared to Non-minority Males.

The commercial loan denial rates supported the fact that MWBEs were more likely to be denied commercial loan compared to their Non-minority Male counterparts as shown below:

- African Americans: 40.00 %,
- Asian Americans: 0.00 %,
- Native Americans: 0.00 %,
- Hispanic Americans: 50.00 %,
- White Females: 12.20 %,
- Non-minority Males: 7.8 %.

**Table 54**  
**CITY OF MEMPHIS**  
**Telephone Survey**  
**Requested Commercial Bank Loan**

	Total	African American	Asian American	Hispanic American	Native American	Non Minority	Non Minority	Disabled
Responses	129	20	2	4	1	49	51	2
Row %		15.5	1.6	3.1	0.8	38.0	39.5	1.6
Yes	105	16	0	4	1	37	45	2
Column %	81.4	80.0	0.0	100.0	100.0	75.5	88.2	100.0
No	22	3	2	0	0	12	5	0
Column %	17.1	15.0	100.0	0.0	0.0	24.5	9.8	0.0
Don't Know/No	2	1	0	0	0	0	1	0
Know/No	1.6	5.0	0.0	0.0	0.0	0.0	2.0	0.0

Source: Griffin & Strong, P.C. Telephone Survey of Business Owners in July 2007

**Table 55**  
**CITY OF MEMPHIS**  
**Telephone Survey**  
**Denied Commercial Bank Loan**

	Total	African American	Asian American	Hispanic American	Native American	Non Minority	Non Minority	Disabled
Responses	129	20	2	4	1	49	51	2
Row %		15.5	1.6	3.1	0.8	38.0	39.5	1.6
Yes	21	8	0	2	0	6	4	1
Column %	16.3	40.0	0.0	50.0	0.0	12.2	7.8	50.0
No	101	11	1	2	1	40	45	1
Column %	78.3	55.0	50.0	50.0	100.0	81.6	88.2	50.0
Don't Know/No	7	1	1	0	0	3	2	0
Know/No	5.4	5.0	50.0	0.0	0.0	6.1	3.9	0.0

Source: Griffin & Strong, P.C. Telephone Survey of Business Owners in July, 2008

The findings of the survey data were consistent with the findings of the loan application analyses and the econometric loan denial probability models analysis presented earlier in this report. MWBEs were more likely to be denied bonding as compared to Non-minority Males. Additionally, in general, MWBE commercial loan denial rates were likely to be higher, compared to their Non-minority Male counterparts.

#### **D. Conclusions for the Private Sector Analysis**

This Chapter has analyzed the extent of discrimination within the private marketplace in the relevant market. The analysis relied upon three types of analyses to provide an assessment of the extent of disparities and discrimination in the private sector. The first approach was to determine if there was evidence that race and gender groups perceived self-employment differently in the Memphis MSA. In other words, do members of various socio-demographic groups consider success possibilities differently within the relevant market? This is quantified by developing and estimating a model of self-employment. The likelihood for self employment is very strongly correlated with the ownership of assets. Median value of housing in the Memphis was chosen as a surrogate for the amount of wealth owned by households. For households in general, almost two-thirds of net worth is represented by equity in their residence. We therefore use median value of housing along with binary zero-one set of variables for the alternative demographic groups to quantify the contribution of race, gender, and ethnicity on likelihood for self-employment. By determining how these propensities vary by wealth class, we found measurable disparities in self-employment after controlling for differences in wealth.

Probit analysis, a widely-accepted statistical method available for quantifying the effects of categorical variables such as race, ethnicity and gender on self-employment rates were implemented on Census PUMS. The results were impressive and consistent. Self-employment was significantly lower for African Americans than for Non-minority Males. The significance was left unaltered after controlling for disparities in wealth. All other racial, gender and ethnic groups exhibited self-employment rates that pale in comparison to those of Non-minority Males. All groups show positive relationship between self-employment incidence and wealth, although the gradient becomes steep at the high end of the wealth distribution.



## City of Memphis, Tennessee

Secondly, GSPC relied upon the responses from almost 500 businesses within the Memphis MSA to determine the contribution of several predictors on the amount of revenue they earned. Businesses surveyed provided a rich data source to analyze the effects of predictors such as number of years in operation, whether or not the business was required to be bonded to conduct business in the area, level of education of the business owner, race-gender and ethnicity of the owner. Regression analysis was conducted to quantify the effects of selected factors on gross revenues. We determined the separate effects of race, gender, and other factors on annual gross revenue. African Americans earned far less than Non-minority Males in the private sector in all four sectors. African Americans earned approximately 45% less than Non-minority Males in each of the business categories.

Third, building permits issued by the City and Reed commercial construction data reveal the same results as the Telephone Survey and PUMS data. Minority and women-owned business participation in private and public construction was miniscule in comparison to their respective availabilities. According to our analysis of these two data sources, Minority and White Female-owned businesses received 8.15% of Memphis public contracts, 0.25% of the city's prime private construction contracts. The lack of participation in the private construction sector is perhaps the most obvious evidence of discrimination. African American-owned businesses and businesses owned by other ethnic minorities and women usually rely on the public sector for contracts when opportunities are limited in the private construction market.

The final analysis was prepared to gain an understanding of the extent to which there were obstacles to access to lending within the market. Data limitations precluded a detailed investigation of variations in lending difficulties encountered by the various ethnic minorities and women. However, national studies, surveys, and information gathered from responses regarding lending from the Telephone Survey suggest that businesses owned by minorities and women in Memphis encountered difficulties in securing business credit.

## VI. ANECDOTAL EVIDENCE

This chapter presents the results of the analysis of anecdotal research for the City of Memphis (City) disparity study. Anecdotal evidence is designed to explain, interpret, and support statistical findings. Courts have ruled that the combination of statistical findings of disparity and anecdotal evidence provides the best evidence for demonstrating the existence of historical discriminatory practices. Anecdotal evidence does not rely solely on quantitative data. It also utilizes qualitative data to describe the context of the environment as well as the climate in which all businesses and other entities applicable to our study operate.

Anecdotal evidence is a widely accepted research tool that is based upon observations, interviews, and surveys. The collection and analysis of anecdotal data are performed to determine whether under-utilization of minority- and women-owned firms results from objective, nonbiased bidding and purchasing procedures or from discriminatory practices. It is used in conjunction with research tools to foster clarity and support for findings.

The following sections present our approach to collecting anecdotal data, the methods employed in collecting these data, and the quantitative and qualitative results of the data collected.

### A. Methodology

The blueprint for collecting and analyzing anecdotal evidence for this study was identified by the U.S. Supreme Court in *City of Richmond v. J.A. Croson*, 488 U.S. 469, 109 S.Ct. 706 (1989), a landmark case for government-sponsored affirmative action programs. Specifically, race-conscious programs must be supported by strong documentation of discrimination, including evidentiary findings that go beyond the

demographics of a community. Anecdotal evidence can bolster the empirical data of contract expenditures to explain whether or not minority business creation, growth, and retention are negatively impacted by discrimination. In *Croson*, the Court held that anecdotal accounts of discrimination could help establish a compelling interest for a local government to institute a race-conscious remedy. Moreover, such evidence can provide a local entity with a firm basis for fashioning a program that is narrowly tailored to remedy identified forms of marketplace discrimination and other barriers to minority and women business participation in contract opportunities.

Our experience conducting disparity studies has shown that anecdotal data collected through multiple methods provide more comprehensive information than methodologies using a single-pronged approach. For this reason, we used a combination of surveys, focus groups, public hearing and face-to-face interviews to collect anecdotal information and to identify issues that were common to businesses in the market area. We were also able to draw inferences from these data as to the prevalence of obstacles perceived as limiting the participation of minority-owned and woman-owned business enterprises in City of Memphis procurement transactions. The focus of the telephone survey, face-to-face interviews, focus groups and public hearings was to identify the respondents' experiences in conducting business with the City. We solicited participation and responses from businesses that have done, or attempted to do, business with the City between the years 2003 and 2007.

### **B. Telephone Survey**

During the months of July and August, 2008, GSPC team members telephone-surveyed firms listed in the master vendor database to solicit responses from business owners and representatives about their firms and their experiences doing business in the City of Memphis and in the Memphis MSA. We attempted to collect data in proportion to the distribution of MWBEs and non-MWBEs in the relevant market area. Our statistical model showed that we needed about 500 responses to achieve a confidence interval of 95% with a 5% margin of error. In addition to meeting the goal of 500 completed

## City of Memphis, Tennessee

interviews, targets were provided for each business category and gender/ethnic group. This was done to eliminate any biases in the response data by ensuring appropriate representation from all business categories, ethnicities and genders. To this end, Trust Marketing, Inc., a local Memphis minority-owned firm and Oppenheim Research Services attempted to contact business owners or knowledgeable representatives from over 1,521 firms in our master vendor database. At least five attempts were made per interview candidate and we interviewed representatives from 515 firms--exceeding the goal of 500--that provided goods and services like those generally purchased by the City.

The data utilized in this analysis came from telephone surveys using a random sample drawn from the Master Vendor File. The Interviewees consisted of the following demographic makeup:

**Table 56 – Telephone Survey  
Demographics**

<b>Race/Ethnicity</b>	<b>Number</b>	<b>%</b>
<b>African American</b>	<b>294</b>	<b>57</b>
<b>Asian American</b>	<b>9</b>	<b>2</b>
<b>Hispanic American</b>	<b>7</b>	<b>1</b>
<b>Native American</b>	<b>5</b>	<b>1</b>
<b>White Female</b>	<b>72</b>	<b>13</b>
<b>White Male</b>	<b>118</b>	<b>23</b>
<b>Other</b>	<b>5</b>	<b>1</b>
<b>No Response</b>	<b>5</b>	<b>1</b>

<sup>117</sup>  
Griffin & Strong, P.C. (2009)

In assessing the sufficiency of results, disparity study surveys are commonly plagued by sample size limitations, especially in the case of attempting to gather a representative sample from minority populations where low minority population numbers pose problems. (For example, Native American-owned business populations in most municipalities are insufficient in number to permit a valid and representative sample). This problem is compounded when analyses are stratified further by business type.

<sup>117</sup> See Appendix H for the Xtabs by Ethnicity for the telephone survey.

Insufficient sample sizes can pose problems for the statistical confidence one can have in the results. Although our goal is to report data samples that can satisfy the 95 % confidence level, this does not mean that data should not be reported when lower survey participation levels reduce confidence intervals slightly, especially when extreme due diligence has been exercised in attempting to meet the 95 % standard. Table 57 reveals that the effort was, indeed, diligent for this study and shows the disposition of the telephone canvassing efforts. According to the phone call log, the following results were obtained:

**TABLE 57  
CITY OF MEMPHIS  
TELEPHONE SURVEY  
DISPOSITION OF TELEPHONE CALLS**

CM	AM	BS	CB-OQ	DS	FF	DUP	FR	IE	NA	WR	NU	SP CB	Total
515	60	4	83	287	14	23	100	121	18	152	144		1521
													0
<b>515</b>	<b>60</b>	<b>4</b>	<b>83</b>	<b>287</b>	<b>14</b>	<b>23</b>	<b>100</b>	<b>121</b>	<b>18</b>	<b>152</b>	<b>144</b>	<b>0</b>	<b>1521</b>

Oppenheim Research Services, 2008

**Key**

CM=Complete

AM=Answering Machine

BS=Busy Signal

CB=Callback-Over Quota

DS=Disconnect

FM=Fax Machine

FF=Final Fax

DUP=Duplicate

RF=Refusal

FR=Final Refusal

IE=Ineligible

NA=No Answer

### **C. Focus Groups and Public Hearing**

A total of two focus groups were conducted in Memphis during the month of May 2008. The focus groups were conducted at the Renaissance Business Center. Focus groups were voice recorded after all participants agreed to be recorded. The focus groups were facilitated by GSPC team members with assistance provided by Trust Marketing staff.

GSPC conducted one public hearing with owners and representatives of firms located in Memphis. The public hearing was held May 19, 2008. There were a total of twenty-six speakers at the public hearing. The GSPC project manager facilitated the public hearing with assistance provided by GSPC team members. Coordination of the hearing and administrative support were provided by Trust Marketing, Inc. Each attendee was given an agenda that included the purpose of the public hearing and the public testimony process. Speakers were given a public hearing testimony form for completion and instructed to submit prior to being called to testify. All testimony was video recorded.

### **D. Personal Interviews**

The personal interview guide used in interviewing businesses included questions designed to establish a business profile for each business. Interviewers gathered information concerning the primary line of business, ethnicity of owner, organizational status, number of employees, year business established, gross revenues, and level of education. The guide also included questions trying to glean information as to firms' experiences attempting and conducting business with the City (both directly and as a subcontractor); and experiences related to the certification program, as well as instances of discrimination experienced by the firm while attempting to do business with the City. The interviewers made no attempt to prompt or guide responses from the participants, although follow-up questions were asked to obtain further clarification or information as necessary. At the conclusion of the interviews, each participant was asked to sign an

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affidavit attesting that their responses were given freely and were true and accurate reflections of their experience with the City.

The personal interviews were conducted during the months of July and August, 2008. The one-on-one interviews were conducted with a cross-section of the community in Memphis. Study participants were randomly selected from GSPC's Master Vendor Database. Over 1800 firms were invited to participate in the process. Team members Anderson & Associates, KMR and GSPC mailed, e-mailed, telephoned or faxed confirmation letters to all firms that agreed to be interviewed. The interviews were conducted either at the firm owner's office, at a location designated by the firm owner, or over the phone as requested by the firm owner. Interviews ranged in length from 15 to 90 minutes.

### **E. Demographics**

The survey instruments created for this study contained items requesting information on business demographics, companies' experiences when attempting to do business with the City, and experiences related to capital access and access to insurance and bonding to support business activities.

With the telephone survey (Appendix B), we reached a broader segment of the population in a more cost-effective and time-efficient manner than possible through face-to-face interviews. However, the face-to-face interviews—which are structured settings where an interviewer uses an interview guide (Appendix G) to solicit input from participants—provided more latitude for additional information gathering on issues that are unique to the respondents' experiences.

#### **1. Telephone Survey Demographics**

The businesses that participated in the telephone survey were mainly professional services (32.0%), followed by construction (24%), with specialty construction representing 14.9% of all participants, followed by general/personal services (23.0%) and

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goods (22%). Building construction participants accounted for 9.0% of the firms surveyed.<sup>118</sup>

Of the firms surveyed, the majority were corporations (46%) followed by sole proprietors (35%). Twelve% of participants were organized as limited liability corporations. Non-MWBE firms were the largest percentage of corporations (52 %) as compared to African American firms, which were the largest percentage (76 %) of sole proprietor respondents.

A majority of the business owners surveyed has completed some college education, attained a college degree, or completed postgraduate studies. This was true for 80% of the respondents. African American-owned firms that participated in the telephone survey had college exposure ranging between 50 – 65% as compared to non-MWBEs (31 to 40 %). The participating firms generated varying levels of revenue, resulting in a good cross section for our data analysis.

### *3. Focus Group and Public Hearing Demographics*

A total of 22 companies participated in two focus groups.<sup>119</sup> The firms represented the following industries:

- Building Construction
- Special Trade Contractor
- Professional Services
- Architecture and Engineering
- General/Personal Services
- Supplies/Equipment

The breakdown of the firms' participation by race and gender is provided below in Table 58.

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<sup>118</sup> Total may exceed 100 % due to rounding.

<sup>119</sup> Eleven firms were confirmed to attend the Construction Focus Group however only three firms actually attended. The local GSPC team member was informed that an official with a local advocacy organization expressed some discouragement in regards to the City's previous study and cited a lack of confidence for change from the current study to association members who had confirmed their attendance. This had a negative impact on focus group attendance and attendance at the Public Hearing.



**TABLE 58  
CITY OF MEMPHIS  
FOCUS GROUP PARTICIPANTS  
MAY 20, 2008**

<b>Number of Firms that Participated</b>	<b>Race/Gender of Ownership of Firm</b>
<b>0</b>	<b>Hispanic male owned firms</b>
<b>0</b>	<b>Hispanic woman owned firm</b>
<b>16</b>	<b>Black male owned firms</b>
<b>4</b>	<b>Black woman owned firms</b>
<b>1</b>	<b>Asian American male owned firms</b>
<b>1</b>	<b>Asian Indian American male owned firm</b>
<b>0</b>	<b>White woman owned firms</b>
<b>0</b>	<b>White male owned firms</b>
<b>2</b>	<b>Unidentified</b>

Twenty-six public hearing participants represented the following industries:

- Building Construction
- Special Trade Contractor
- Architecture and Engineering
- Professional Services
- General/Personal Services
- Supplies and Equipment

The breakdown of the participants by race and gender is provided below in Table 59.

**TABLE 59  
CITY OF MEMPHIS  
PUBLIC HEARING PARTICIPANTS  
MAY 19, 2008**

Number of Firms that Participated	Race/Gender of Ownership of Firm
0	Hispanic male owned firms
0	Hispanic woman owned firm
15	Black male owned firms
8	Black woman owned firms
1	Asian American female owned firms
0	Native American male owned firm
1	White woman owned firms
1	White male owned firms
4	Unidentified

#### 4. Personal Interview Demographics

A total of 1,847 firms were called to participate in the personal interviews, of which 36 firms were interviewed. The reasons for non-participation include:

- Wrong or bad telephone numbers; telephone numbers disconnected
- Cancellations of scheduled interviews;
- Lack of interest;
- Length of interview;
- Schedule conflicts with no availability for alternative scheduling;
- Concern that input would not be taken seriously; and
- No-shows for scheduled interviews

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Of the 36 representatives interviewed, the ethnic and gender breakdown is as follows:

18 African Americans (50%)

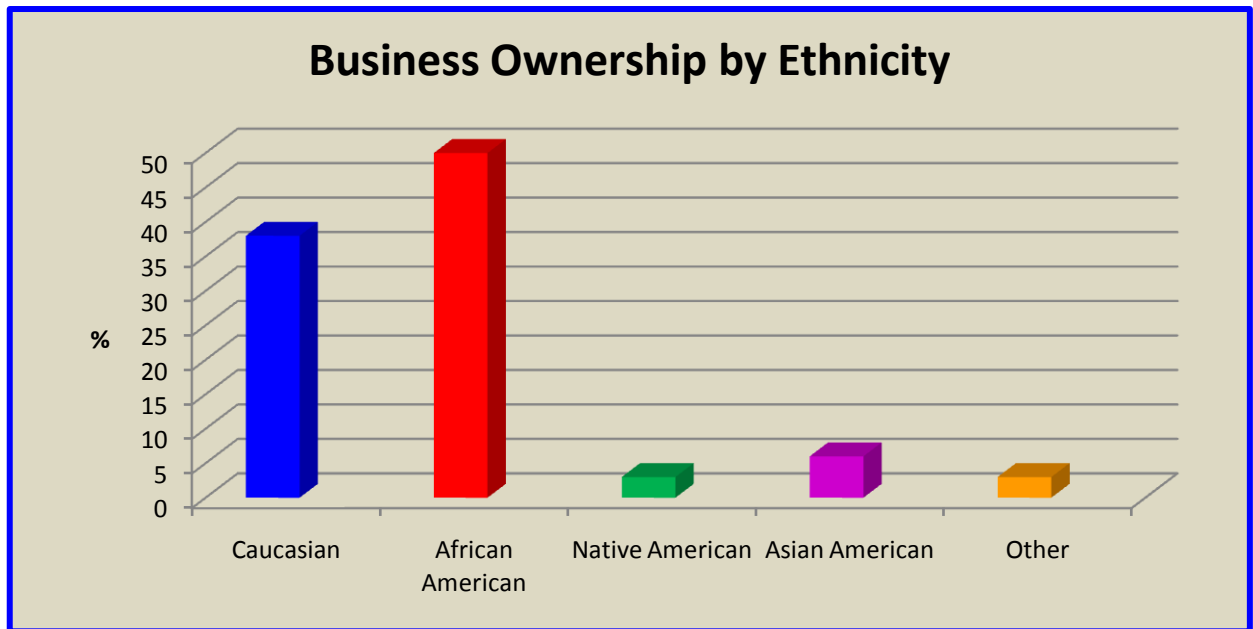
10 White Males (one of them was also disabled) (28%)

5 White Females (14%)

2 Asian Americans (5%)

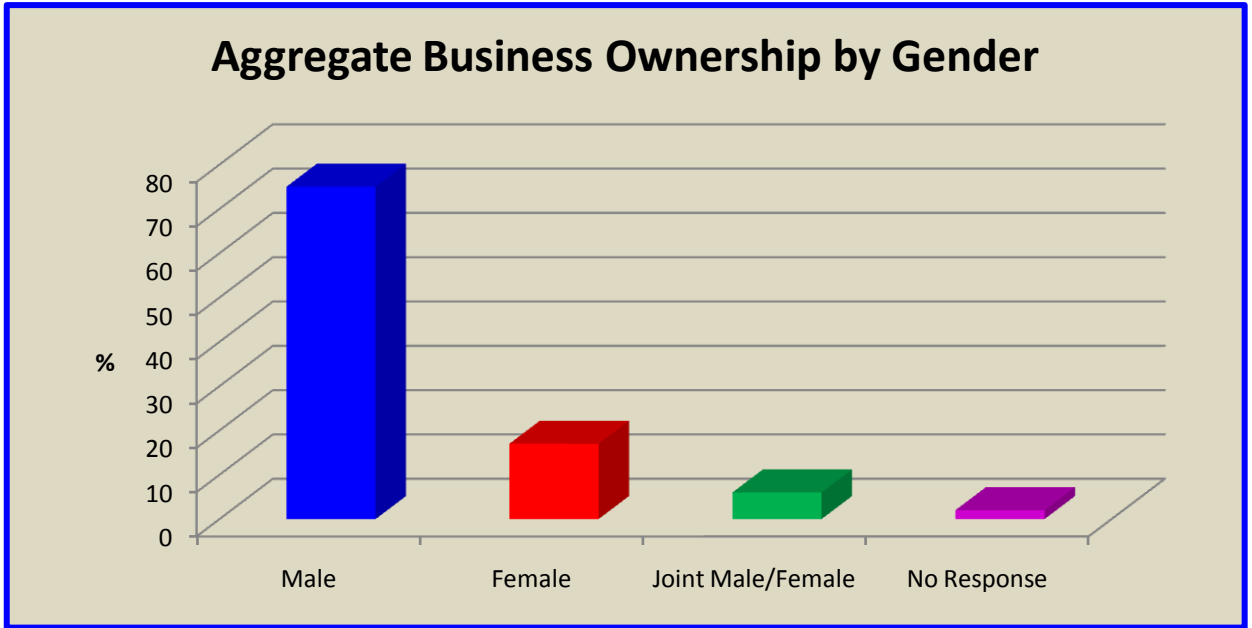
1 Native American (3%)

**Figure 1**  
**CITY OF MEMPHIS**  
**PERSONAL INTERVIEW PARTICIPANTS**  
**BY ETHNICITY**



Interview attempts found Caucasian business owners contacted were least willing to participate in this study and no Hispanic contractors were interviewed, although contacts were made for interview arrangements among businesses of Hispanic background. The single consenting Hispanic contractor canceled an arranged interview appointment.

**Figure 2**  
**CITY OF MEMPHIS**  
**PERSONAL INTERVIEW PARTICIPANTS**  
**BY GENDER**



The collective anecdotal sample showed male business ownership as most dominant among City contractors. Female business ownership among sampled owners represented 17% of the total sample as compared to 75% of businesses owned by males and 6% of businesses with joint female and male ownership. This sample reflected a 77% difference in male versus female business owners.

Table 60 below provides a breakdown of the participants by business category:

**Table 60**  
**CITY OF MEMPHIS**  
**PERSONAL INTERVIEWS**  
**BY BUSINESS CATEGORY**  
**JULY AND AUGUST, 2008**

Number of Participants	Business Categories of Participants
13	Construction
3	Professional Services: Architects, Engineers and Construction/Program Management Supplier
3	Goods & Supplies
3	Other Professional Services
9	Services
5	Other – non-Profits, etc.

**F. Barriers to Doing Business with the City of Memphis**

In the normal course of business, entrepreneurs will face barriers when establishing and operating a business enterprise. Particular factors also may emerge that prevent a business from being selected for a contract or purchase order. In this section, we review participant responses concerning barriers they faced in the procurement process and factors that frequently prevented them from winning contracts or purchase orders with the City specifically or reflect a perception or experience with the business community in general.

As in the telephone survey, questions in the focus groups, public hearing and personal interviews were designed to gather business owners’ experience or perceptions about the City’s procurement process and their experiences doing business with the City.

**1. Telephone Survey Results**

The telephone survey included questions designed to solicit interviewee experiences with the City during the procurement process. Inquiry was made about barriers faced by firms

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that may prevent the company from bidding or attaining success in conducting business with the City.

In analyzing the telephone survey, we reviewed the results to identify high levels of “yes” responses to our inquiries about perceived barriers to doing business. In performing this analysis, we noted that more than half of all respondents responded “no” to each barrier category that we asked about. Firms that perceived barriers complained about competing with large companies (28%); informal network (23%); and selection process (22%).

- Lack of experience 5%
- Lack of personnel 6%
- Contract too large 8%
- Prequalification requirements 10%
- Performance bond requirements 12%
- Bid bond requirements 13%
- Financing 12%
- Insurance requirements 9%
- Bid specifications 10%
- Limited time to prepare bid or quote 11%
- Limited knowledge of purchasing/contracting policies and procedures 12%
- Contract too expensive to bid 10%

Looking at the “yes” votes by race/ethnicity and gender, we find the following distributions for the three greatest barriers cited above.

### Competing with large companies

- 39% of African Americans;
- 14% of Hispanic Americans;
- 11% of Asian Americans;
- 0% of Native Americans;
- 29% of Women; and
- 14% of non-MWBES.

Informal network

- 31% of African Americans;
- 14% of Hispanic Americans;
- 11% of Asian Americans;
- 20% of Native Americans;
- 23% of Women; and
- 12% of non-MWBEs.

Selection process

- 27% of African Americans;
- 14% of Hispanic Americans;
- 11% of Asian Americans;
- 0% of Native Americans;
- 24% of Women; and
- 15% of non-MWBEs.

**2. Experiences as a Subcontractor**

Twenty-two percent (or 113 of 517 respondents) of the survey participants bid or performed work as subcontractors on a City project during the Study Period. Thirty-one percent (162 of the 517 respondents) bid or performed as a subcontractor or subconsultant for private sector work during the Study Period. Of the respondents, 17 % have served as a subcontractor on a project for the City. Asians, Hispanic and Native Americans have served as subcontractors two percent or less on private sector projects. Thirty-seven percent of respondents have served as a subcontractor in the private sector.

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More than half of the respondents indicated they have not been asked to be a subcontractor by a prime contractor or prime consultant in the public and private sector. Of those asked, 27% have been asked 1-10 times.

Another area of concern among survey participants (46%) was a feeling that non-minority prime contractors change their bidding procedures when they are not required to hire minority or women-owned businesses as subcontractors. Twenty-eight percent neither agreed nor disagreed with this statement. Forty percent of respondents felt that prime contractors sometimes will include a minority or woman subcontractor on a bid to meet the “good faith effort” requirement, and then drop the company as a subcontractor after winning the award.

The telephone survey inquired as to whether double standards in qualifications and performance make it more difficult for minority and women-owned businesses to win bids or contracts. Less than ten percent of non-MWBE subcontractors agreed or strongly disagreed to this comment. Slightly more than a third of MWBE subcontractors shared that sentiment.

Other problem areas mentioned by subcontractors, but not at the same frequency as the points noted above, included the general perception that MWBEs tend to be viewed by the general public as less competent than non-minority male businesses.

### **3. Discrimination**

Nineteen percent of the participating firms indicated that they had experienced any discrimination in their business dealings with the private sector, whereas seven percent indicated they had experienced discrimination from the City. Of those firms that noted discriminatory experiences, respondents were more likely to cite “other” than verbal, written statement or action taken against the company by the City. More than fifty percent of these respondents indicated this discrimination occurred during the bidding



process (before the contract award), whereas 20 percent of these firms indicated it occurred post contract award.

#### **4. Focus Group Results – Professional Services**

*Outreach and Access to Contract Opportunities: This section focuses on issues regarding the firms' success in accessing governmental and private sectors contract opportunities. It also examines the perceived practices that exist for obtaining sufficient information to be able to consider bidding or submitting proposals.*

- According to participants at the focus group, the businesses participating in this focus group are among the premiere Memphis businesses in their respective categories. They cited awards, recognitions and designations their businesses have received as well as business experience amassed across the country. The focus group included the state's largest African American owned business in terms of gross revenues (according to the Black Business Association). While the majority of these businesses do significant and profitable business with Shelby County, the State of Tennessee and/or the federal government, less than 20% of the businesses present had done business with the City of Memphis in the past four years.
  
- *An African American male said that his business had won projects and awards all across the country, yet he has so little confidence in his company winning business for the City of Memphis he “doesn't even try anymore.” He said “Clearly, it's a waste of our time and energy, especially when the outcome is totally predictable.”*

- *An African American male said that while the current administration had been “alright,” the lack of encouragement and minority business opportunity in the city had made him very open to a change in administration. He said that in the room full of successful minority companies in the focus group there should be people “testifying” about doing lots of business with the City. Instead the majority of owners hadn’t done business and are negative about the prospect of doing business.*

### **5. Certification Process**

A question about whether or not notices were sent to city-certified businesses led to passionate and extended discussion about the certification process. While nearly all business owners present were certified by federal and/or state agencies or certified by the Uniform Certification Agency (Memphis Minority Business Council), few were clear about having the recognized certification for city business procurement. Frustration, disappointment and misunderstanding were expressed by African American business owners tired and angered by having to spend time, energy and resources “proving” their minority business status to various government agencies that obviously do not communicate, interact or recognize each other’s certifications.

- *An African American male business owner asked why or how his minority business enterprise could successfully pass the rigorous, extensive scrutiny and requirements to become a state and federal government vendor yet not be recognized by his own local city government.*
- *An African American male expressed his frustration at having to spend time, money and resources “trying to prove*

*that I am what I am” and that his business is not a front for a majority company.*

- *Another African American male said that he believes the certification process is designed to “bog you down in paperwork and process” in order to discourage minority businesses to even pursue business with the City of Memphis.*
  
- *An Asian American and an Indian American business owner present expressed a similar, yet different dilemma. While they are certified by federal, state and county governments as minority business entities and do considerable business with them, they are not certified by the City of Memphis (where both their businesses are headquartered) as minority businesses. They expressed tremendous frustration with this certification inconsistency.*

#### ***6. Contract Compliance/MWBE Program***

In terms of the biggest interference with their ability to do business with the City, some expressed that minority participation goals have “no teeth” and there is apparently no consequence for not meeting stated goals.

- *An African American male expressed that there is a middle management, “good ole boy” network of veteran city employees who defy and ignore compliance goals for minority business participation in order to keep doing business with longtime majority vendors with whom they are comfortable and close.*

- *It was also suggested that the aforementioned actions are strengthened by the City Purchasing Department which is not empowered to enforce compliance standards, giving city agencies “free reign” to make their own purchasing decisions on their own terms.*

## **7. Focus Group – Construction**

### *Obstacles in the Procurement Process*

Construction professionals included in the focus group expressed that they do not regularly receive information about procurement opportunities with the City of Memphis, but gained via word-of-mouth, networking, searching public notices or the City websites.

- *An African American woman said that prime contractors give them short notice to bid and it takes a couple of work days to put the bid together. After they submit the bid, the prime will not respond back to let them know if they were too high or too low.*
- *An African American male owner stated that the procurement process was not a major problem when it comes to being a prime contractor but as a subcontractor it is a problem.*

### 8) *Bonding and Bidding*

When asked their opinions concerning their ability of doing business with City, the group responded by commenting on the rigorous process regarding bidding and bonding. Specifically, the African American construction professionals expressed extreme frustration and dissatisfaction with the time, money and energy consumption when dealing with the bidding process; it was said in many instances to be “a complete waste of time.”

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- *An African American female stated that the time and money effort that goes into the bidding and bonding process seems worthless because your efforts don't benefit you in the end.*
- *An African American male construction owner stated that small businesses can't bid on these contracts because of the inability to get a bond that size and the inability to cash flow the project.*

### 9) *Negative Business Experiences*

A few of the construction professionals have had countless experiences with the City concerning jobs that were declared negative experiences overall. They expressed that the majority construction professionals in the Memphis area were extremely competitive for business and appear unwilling to assist with information about the City or other concerns.

- *An African American male contractor related an experience in particular with the City on a paving job. The contractor stated that "the job included a six-lane street using the City's resources. However, when the paving job was in process the unavailability of the City's asphalt and incompatibility of hours ... created frustrations and difficulty" on the contractor's end. As a result, the street appeared to be unprofessionally done and he did not receive his full expected payment. The contractor said that he was "not at all pleased with the outcome of the project due to costly difficulties caused by the City."*

### 10) *Certification Process*

A question concerning the certification process led to extended discussion. All of the construction professionals were well aware of the process and are currently certified with the City. However, opinions about the lengthiness of the process openly expressed frustration.

11) *Access to Capital*

- An African American male stated that access to capital for cash flow for your work is a big problem.
- An African American woman stated that she would not do any business with Regions Bank because of a situation where they had a contract and the bank refused to grant them capital.

12) *Prompt Payment*

The majority of the companies present said that it is reasonable to be paid within 30 days. The majority also stated that if they are the prime or have a micro contract with the City, they are paid on time. However, if they are a subcontractor, it depends upon who is the prime contractor – generally, subcontractors are not paid timely.

- *One African American male said he's usually paid in 45 to 60 days, but the City pays on time which is within 30 days. He went on to say that he has had some projects as a prime and some as a subcontractor. As a subcontractor, he tends to wait longer for payments, 45 to 60 days.*
- *An African American male said the City said they were not happy with the paving job he performed as a prime and paid him half of the money he was contracted for. He said that he was not happy with the paving job but it was because of the City. He said the City supplied the asphalt but they kept running out of a specific type of asphalt. In the essence of time he used other types from the City and the street looked like a checkerboard.*

13) *Other observations*

- While some of the construction professionals are currently in the process of “rebuilding” their company and starting over, others are just trying to keep up with the pace of the City and their own expectations for their construction business. All strongly agree that business could be one hundred % better with the City and individually.
- An African American male declared that “working in the construction field is difficult as is but when you are in a city that creates more obstacles and not enough help is even more frustrating. From many other negative experiences, the City of Memphis seems to be working against the minority business community than with us.”

Attendance Disappointing

Those in attendance expressed their disappointment that more construction firms did not participate in the focus group. Some were curious about other disparity studies conducted in the area as well as the previous study conducted. They expressed hope that this particular study provides some justice for the minority community of construction professionals with the City of Memphis and that the City will make positive changes as a result.

14) *Personal Interview Results*

- A White male who has owned a service firm for 14 years stated that the factor that most frequently prevented him from winning City contracts is that he is not aware of the bid opportunities. He knows that the services are performed in the City, but he does not know how to reach the decision makers to let them know about his services.
- An African American subcontractor observed that during emergencies, contractors are called on without competition to perform the work. When he asked staff from

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the City and Shelby County why he has not received an invitation and how could he get on the list to receive emergency contracts, he has received no response.

- An African American contractor stated that he does not know how to access City opportunities. He concluded that aside from lacking contract opportunities, he sees a need for firms to have a mentor.
- One African American service provider observed that majority firms like his can receive one account valued at \$300,000 to \$400,000 a month from companies like FedEx. He explained that these type accounts allow for a firm to grow and have an office in mint condition; to look the part. He said, these white guys have been given the opportunity before they were qualified and now they are qualified. “African Americans are not afforded the same opportunities to grow,” he said.
- A White male engineer stated that the City selects firms based upon qualifications. He stated that the City tries to move work around, and that they have been successful with City work and in getting work with private developers. He credited the success of his firms to access to resources and the ability to bring their staff in from other cities that they are located in. “We get our fair share of contracts,” he said.
- An African American contractor reported that to do business with the Housing and Community Development Department, you have to have insider knowledge. The contractor stated that there is no outreach by the City in soliciting bids; “You must register your business on the website,” he said.
- An African American contractor reported that on a recent bid he checked the records after the bids were in and found out he was the only bidder, but he did not receive the award. He believes that the process was unfair and was never offered an explanation. The owner testified that he has never been encouraged to bid, and has never been successful in being awarded a contract. He observed that the sizable awards go to the same companies, and the same few primes and subcontractors get the work. Therefore, he believes that he does not receive serious and fair consideration from the City.
- A White male engineer stated that the City does not make enough of an effort to encourage bidding. He said, “You are on your own.” He explained that staff in



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his firm monitor the website; meets with City staff; and receives Request for Proposals that are sent to them. He went on further to report that the City's website is very difficult to navigate. He said, "You have to go to 4 or 5 links to find the RFPs. You have to go the department links. It's sort of painful." Whereas, he praised the State of Tennessee's website, which has a direct link to all contract opportunities on "Doing Business with the State."

- An African American contractor reported that sometimes when he gets RFQs from the City, the information is late in reaching him and the City staff cannot give him information regarding the project. He cited one recent incident, where he received the RFQ one day after the quote was due.
- Two African American contractors reported that they do receive solicitations to do business from the City.
- One African American male in a service business reported that the City has improved over the past year in sending out emails of bid opportunities, whereas another African American male who owns a service business reported that he does not have access to bid opportunities. He admitted that he is not registered as a vendor, nor has he pursued MBE certification.
- An African American male contractor noted that he is not able to secure private sector contracts. He described his attempt to bid with the larger corporations such as FedEx, International Papers, etc. on 4 or 5 occasions, but he has not been successful. He has been actively involved in Mid-South Minority Business Development Council, where they have introduced his company to the larger companies. However, neither he nor his peer group gets contracts with these private sector firms. He explained that if there were no MWBE goals, primes "would keep all they can and keep the profit. They have the money to go after the business and wine and dine; I don't have it."
- African American general contractors reported that they do not receive invitations to bid on private sector projects; therefore, 99% of their work is tied to the government sector. "The private sector does not set goals as a requirement for minority participation," one of them explained. They reported that "large entities like FedEx did not invite them to bid for years; when they complained to the

FedEx leadership, they received disparaging remarks. However, approximately 18 months ago, there is an African American subcontractor that is doing some work on their large construction project.”

- An African American in the service industry reported that the City has not made an attempt to encourage him to bid on City contracts, and when he has called to ask questions about the procurement process, he has had to leave telephone messages and e-mails that get no response. He reported that when he does talk to someone at the City, “The staff sends you in circles and so you never get your goal accomplished in getting through the process.” He also stated that the City sometimes pre-set bid rates in his industry which are too low and makes the process uncompetitive.
- A White male service provider has not bid with the City in four to five years, because the City had not sent him an invitation to bid during those four to five years. When he asked why he was not invited to bid, he was told that his database information was lost. Once he entered his registration data into the new database, a pre-bid conference was held, but he did not get the information in a timely manner. He received three days notice and could not attend.
- One African American contractor, which is not certified as an MBE, said that he has seen the City help others, but he has not been provided any assistance or information on contract opportunities. He would like to receive mail or telephone contacts on opportunities.
- A White female agreed. She would like for the City to call vendors, because the City has never made an attempt to encourage her to bid on any of their procurements.
- An African American professional consultant reported that the City staff goes out of their way to encourage him to bid on their procurements. They even encourage him to bid when they see him in meetings and have been instrumental in helping him learn the process.
- A White male service provider has received proposal announcements. He said that the City has been very helping in answering questions and helping to understand the specific requirements.

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- A White male business man expressed uncertainty about the bidding process. He was not sure if the City mailed out bids, or if it was his responsibility to search for bid opportunities on the website. He said that his firm is not getting e-mails for the services they provide, although they have received calls from time to time from various departments during his 14 years in business. Recently, they received a call to bid the Liberty Bowl project and were successful in bidding the project. While they have gotten work, he is still unsure about the bidding procedures.
- This White male also commented that the City's website is difficult to navigate. He described having great difficulty finding where to look for bids. He said other agencies in Memphis will send e-mail notifications that match your service commodity code and a link on the e-mail notice will send you straight to the invitation to bid. He further explained that the recent notice he received from the City about E-procurement was troublesome when he tried to log on. However, when he called the City staff for help, he received immediate assistance.
- A White female expressed a concern that she sometimes selects the option of "no bid" on Oracle, the City's new electronic procurement system. She is hoping that their WBE firm doesn't get purged out of the system, because of this election, but she is not sure. The only training offered on Oracle was a manual that the City recently sent to all of their vendors. She said that the book was about 80 pages, and it took time and care to get registered. She suggested that business owners, who are less skilled on computers, may not be able to successfully register.

*Unfair Advantage: This section addresses the perception that majority firms have about MWBE programs and firms that have MWBE certification status. They perceive that some of these firms have an advantage over majority businesses. This section also notes when firms have a perception that some firms are given advantages over other firms.*

- A White male in the service industry stated that he noticed that few primes comply with the laws of working with minority businesses on subcontracting. He went on to explain that the general opinion of prime contractors is that they are being forced to do business with people who are not qualified for the work specified. He said, “In Memphis there is a big problem of minority and non-minority polarization that has developed throughout the years. It has not been resolved for the best interest of the City,” he said.
- A White male stated that he is at a disadvantage, because his firm is not an MBE. The MBE status “is a vital thing; it raises their profile and awareness within City government and with so many people being cognizant to use MWBEs, often that’s the driving force that plays into the selection. With all things being equal, it is an edge.” He acknowledged, however, that “in this community, it’s difficult for MWBEs to get plugged into the traditional network of established businesses that have done business with the City for years.”
- Another White male stated that the City is leaning more toward MWBEs. He said, “I think we are on a level playing field. I didn’t have any advantage and I don’t have any advantage now. I don’t think it’s fair.” He spoke of a WBE competitor, who he feels has an advantage. He went on to say, “the City looks more favorably at these businesses, otherwise why is it on the bid sheet?” He went on further to say, “When I go head to head with these businesses, I’m at a disadvantage. I think I don’t receive a call or get an invitation because the City knows I am not a minority owned business. They will throw it to a minority, the disabled or disadvantaged.”

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- A White male engineer commented about the value of certification. He stated that certified MWBEs have an advantage, because they have been legitimized by the MWBE certification process. He acknowledged that these firms face special challenges because they often lack the skill sets to run a business, lack access to a good banking relationship, lack the long track record of doing business, and they lack skilled employees because they do not have the resources to hire recruiters.
- An administrator from a White male owned professional services firm stated that his firm has not been encouraged to do business with the City.

*The Good Ol' Boy Network: This section discusses the perceived advantages and preferences realized by non-minority male insiders to contracting systems. The good ol' boy network in this context is a network of Non-minority Males who have established power and influence that is unwritten and rarely acknowledged, but it is credited for effecting high-level decisions that inure to their group.*

- A White male acknowledged that he believes there is a good ol' boy network that is based on personal relationships. However, he followed up by saying “the good ol' boy network is in place, but I'm not a good ol' boy.” He has been in business for 25 years and does an average \$1 million in gross sales.
- A White male stated that he believes that there is an informal network that gives an advantage to select businesses. He said that he is not a member of the network and joked that if he knew how it operated in the City, he would become a part of it. His firm has been in business for 14 years and does on average \$2 million in gross sales.
- A White male acknowledged an informal network, and said, “It's not what you know, it's who you know; this is not always bad, because sometimes the City staff and those outside the City will only come to us.”
- A White female said, there are different departments in the City that like us, and I'm sure there are other departments that like others. The Purchasing Department, however, does not have a bias.

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- An African American male who has been in a service business for 12 years thinks that the City favors some businesses over others. In his assessment, the City prefers businesses close to downtown. “It’s who you take out to lunch. I don’t have the relationships with the City and I don’t play politics that well. He went on to say that the Good Ol’ boy network is alive in Memphis.
- Another African American male said he believes that there is an informal network that gives an advantage to majority businesses. He said, “Friends hire each other and each other’s friends, but they have to be qualified.”
- An African American female contractor stated that there is favoritism in contract awards that favors White male contractors. She also stated that after the White male, there is a preference for African American males. She reflected on the times that she sent her African American male employee to private residential jobs to negotiate a contract. “They don’t even want an African American female to attend the meetings. I do attend and take notes like a secretary,” she said.
- Seven African American contractors stated that Memphis has a deeply entrenched Good Ol’ Boy Network whose members are the movers and shakers and they dictate what happens in business. They reported that they are, “fishing buddies, church members, golfing partners, in financial institutions or are lodge brothers.” One of them added, “They like to work with subcontractors that they know.”
- Another African American male contractor agreed and added, “In some cases, it is all about who you know rather than your ability to do the job. Knowing City personnel can help you get opportunities.
- A White male professional services industry firm said that it is evident that there is an informal network that helps select businesses since many City officials have gone to jail for accepting favors from them.
- A White female stated that she believes the City favors some companies over others, because there are lots of investigations going on regarding City procurements.
- An African American in the service industry stated that the City favors some companies over others and it is based upon whoever is in familiar situations with

higher level officials. He went on to state, “It’s 100% unfair, because it is not based on your abilities and qualifications, but on who you know.”

- An African American service provider reported that a majority company representative called and wanted to do business with his firm; however, when he learned that the owner was Black, he called and said that the job was already completed. He believes that there is an “informal fraternity of insiders,” who consistently receive opportunities.
- A White male supplier stated that there is an informal network that gives an advantage to select businesses. He said, “There have been bartering off the record where Whites control politics and allow small guys to get a few paychecks, while they siphon most of the benefits and profits.”
- A White male in the service business is not aware of an informal network and is not aware of any special challenges to small, minority or women-owned businesses. He has also not observed any practices that demonstrate an unwillingness of primes to utilize MWBEs in the private or public sectors.
- A White male in the supply industry stated that he does not feel that there is an informal network that gives advantages to select businesses, and he is not aware of any unwillingness to utilize small, minority and women owned businesses in the private or public sectors. He surmised by stating, “The City is a pleasure to work with. After 15 years of working with the City, everything comes down to price.”
- An African American contractor reported that often White contractors have insider information on changes to policies and procedures before the information is announced publically. The contractor even suggested that White contractors know the City’s budget for housing renovation projects. ““We’re on the outside in the blind,” the contractor said.
- An African American subcontractor has not been very successful winning City bids. He said that majority contractors use the same subcontractors most of the time.
- A White male in the service industry for 19 years said that the City prefers firms that will do the “dog and pony show.”

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- A White male supplier stated that he is aware of unscrupulous companies that do poor quality work with substandard materials; however, they stay on the vendor's list and are allowed to get City business. He considers this practice favoritism by the City for these firms.

*Restrictive Contract Specifications and Unclear Bidding Procedures are addressed in this section to highlight the problem when the specifications are too rigid and appear to eliminate competition in the bidding or selection process. This section also addresses the perception that entities fail to clearly publish specifications and criteria to evaluate bids and proposals.*

- A general manager representing a WBE service firm reported that the new Oracle system that is now in place at the City has sent her only three e-bids, which seems low, in comparison to what she received in the past. She stated that the City's bid documents are sometimes too vague in their requirements. For example, she recently received an invitation to bid, while it did give a maximum amount that would be ordered over the contract term, it did not give a maximum quantity per shipment. The bid documents also stated that there would be split shipments to various locations, but it did not give number of lots, quantities per lot or how many would be ordered at one time. They submitted a bid; however, she said, "I'm praying that it doesn't come back to haunt us."
- An African American male contractor reported that the City has specified equipment requirements for his line of business, which has precluded him from submitting a bid.
- An African American service provider said that getting City bid information is difficult often because the bid documents are provided a few days before they are due. He said, "The RFP/RFQ sometimes is not descriptive enough to allow you to prepare a solid bid; often the staff is not available when contacted."
- A White male supplier reported that the City's specifications are too stringent, but the process is becoming fairer.
- A White male supplier stated that the City's specifications need to be defined better on equipment and supplies.



*Retaliation: This section examines the extent that the business environment has channels of open communication, access to the process, avenues to launch concerns and no fear of retaliation. Such codes and processes may foster a productive organization.*

- A White male stated that he has a perception that if you fight the City, somebody in the organization can hold it against you.
- A White female stated that she does not think the City would retaliate if you complained or appealed a decision, as long as you are professional. She reflected on a time when her estimator made a mathematical error on a bid. They were allowed to explain the error, which was corrected, and they won the bid.
- An African American contractor expressed strong fear of retaliation from staff in Housing and Community Development. “If you challenge them, you won’t get a contract,” the contractor said. The contractor reported that she experienced retaliation from the Department, which is why she believes she is not getting many contracts now.
- An African American contractor reported filing a suit against the City regarding the bidding process related to the Convention Center. He stated that he had to drop the lawsuit when his first month’s legal fees were \$25,000. He expressed a fear of retaliation from the City or County, if he challenged one of their contract awards.
- Seven African American contractors described City contract administration staff that had been employees at the City for a long time. One African American contractor said, “They will inspect your job and break you. They will make you move a toilet one sixteenth of an inch.” Another African American contractor explained his fear of retaliation by explaining the he feels retaliation would be the by-product for lodging a complaint with the City, depending on the majority company affected by the complaint. He said, “The ‘good ol’ boy network’ could inflict severe pain through the news media and suppliers.”

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- An African American contractor stated that he received plenty of contracts from the City in 2001-2002, but once he complained about something, his work was suspended.
- An African American in the service field stated that he has never appealed a contract award, but he believed if a complaint were lodged against the City, his company would be retaliated against, “because of the many strained relationships that exist in and about City government.”
- An African American subcontractor reported that a majority contractor who joint ventured with a minority contractor sued the City challenging the MBE participation on the Cook Center Convention Center. The award was going to a company that did not have a similar commitment to MBE participation. This majority contractor was reported to later received a telephone call from someone for him to back off, and when he did not, accusations of inferior work and other attempts to destroy his company was launched. He was later cleared of the charges.

*Contract Compliance is identified as the government’s efforts to assist MWBEs to garner and maintain contract opportunities. The programs, to be effective, should have an avenue to encourage contract opportunities and assist in business growth. This section also examines whether the program provides for compliance with its MWBE policies and whether there are procedures to ensure that program objectives are met.*

- An African American male in a service business praised the City’s Contract Compliance Office for auditing and monitoring contracts to make sure majority firms are doing business with minorities.
- Eight African American contractors reported that if there were no MBE goals, then minorities would get no work and the only way for minorities to get work is to have goals. Similarly, another African American contractor reported that most primes include MWBEs only on public sector jobs. He also added, “They tend to pay minorities cheap and keep the major profit for their company.”
- An African American contractor expressed that he does not believe the City cares about compliance, as long as the job gets done. “They don’t care if the MBEs are

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on it or not.” To expound, the contractor said, White contractors will call their firm and even return their calls, but they won’t use them.”

- An African American contractor reported that she is aware that White contractors will state on paper that they are utilizing MBEs for a certain dollar amount; however, they are not using those MBEs. The contractor said, “Sometimes they find a token black and give them \$7,000 to \$10,000. I drive by the projects and watch their progress, and there are no minorities. They are keeping it White. All the White contractor has to say is that they attempted to use minorities; that’s all.”
- Seven other African American contractors also criticized the effectiveness of the good faith or best effort clause in the bid documents. They said, “White contractors send certified mail and spend time documenting that MBEs cannot do the job or are not responsive, and this is acceptable.”
- An African American contractor stated that White contractors overstate their MWBE participation in the bid to get the contract, and then they lower the amount after the award of the contract. He spoke of a majority contractor winning a bid, where a WBE site contractor was listed for \$1 million dollars, when in fact the scope of work was approximately \$400,000; nobody at the City questioned it.
- An African American subcontractor agreed that majority contractors are inflating their MWBE participation on bid documents to win contracts.
- An African American subcontractor gave the Contract Compliance Office a 90 % grade in terms of having aggressive MWBE language and compliance. He stated that if a goal is set, then the City is serious about compliance. Additionally, an African American general contractor stated that inserting MBE goals in projects is very helpful to MBEs.

*Procurement Participation Programs is named as the government’s efforts to assist MWBEs and DBEs. This section addresses MWBEs and DBEs’ perception of the program effectiveness.*

- An African American in the service industry stated that without MWBE goals, majority firms would not use minority businesses. He said, “Those big companies

that make the money also make the rules of the community. Therefore, minorities always seem to be on the losing end.”

- Two African Americans in the service industry reported that though they are certified as MBEs, it does not help them get any contracts. One of them, who has 30 years experience in the industry, said that majority primes claim that “they cannot find qualified MWBEs to do the business,” as a practice to get around having to use small, minority owned firms.
- An African American male reported that MBE certification helps him get contracts with the City and other organizations. He said certification is a basic requirement to doing business.
- One African American contractor reported that he submitted a bid on a City project; however, after the bid was opened, he never received any follow-up or feedback from the City.
- One African American subcontractor surmised that less than 1 % of the contracts are going to African American businesses in Memphis. He stated that there was more participation for African Americans in 1958 on Beale Street than there is now in 2008.
- An African American contractor reported that he submitted bids on approximately 40 projects in 2008; however, he recalled one bid that was never opened and no explanation was offered by the City.
- A White male engineer said that “the private sector does not always have the use of minority owned firms as a prerequisite,” as a note to differences he had observed in the utilization of small minority and women owned firms in the private versus the public sector.
- A White female stated that she thinks primes will use small, minority and women-owned firms, even if there were no MWBE goals. She reported that there should be less government and more free enterprise.
- A White female stated that she does not know what it [certification] qualifies her for, although she was encouraged to get certified by staff from the City and County. They have been certified for 3 years, but this WBE firm has been doing

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business with the City for over 15 years. She stated however, that she believes without the MWBE goals primes would be hesitant to use small firms and would go with the “big boys” like the big manufacturer, instead of the small woman-owned firm like hers.

- An African American male stated that being on the vendors list and getting MBE certification puts his firm in the position to do business. He feels that the City’s selection process is fair. He currently has contracts with the City of Memphis.
- A female contractor stated that the “round robin” selection process that the housing department utilizes is unfair. The process should be a rotation process where participating firms should receive an equal amount of contracts; where an assigned number will come up with some regularity and predictability. However, the owner has noticed that their firm does not get as many contracts, and when they get a contract the amount is much smaller (generally ranging around \$1,000) than other male contractors (their contracts ranges around \$15,000). She stated that their number has come up, because others that should be behind her on the list are getting contracts, when her firm is not.

*Availability: This section discusses the notion that there are not enough minority firms that are available in terms of being present in number, qualifications and on a vendors list or certification list to signal that they desire do business and are ready to do business.*

- An African American firm complained of the lack of available African American firms that are established with sound business systems and practices such as legal counsel, accounting, etc. He described the typical business as part-time, shell businesses without the proper level of equipment, supplies, office space, etc.
- A White male representing a publicly traded engineering firm stated that every now and then, the City requires MWBE participation, where there is no availability. He pointed to the construction industry to illustrate the prevalence of the problem. In professional services, he said “we are able to satisfy the MWBE goals”. He cited the \$2 million subcontracts that his firm reportedly has with MWBEs in Memphis.

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- Two African American general contractors complained that there is a low availability of African American subcontractors to cover all of the construction divisions; therefore, they have to get bids from majority subcontractors who “high ball” the bid or will not bid them at all, and the African American general contractors lose contract opportunities.
- An African American subcontractor observed that there are not enough African American General Contractors with the right level of licenses required to do larger projects; a large majority of them have limited licenses. He went further to point out that there is no new entrepreneurial growth in the past 20 years. He said that we would be hard pressed to find 3 substantial (disregarding Mom and Pop operations) African American contractors in any trade in Memphis. He said that this lack of African American businesses is due to lack of opportunities. He also credited the limited license impediment where the license upgrade is based on the balance sheet; the inability to get a bond; lack of generational wealth where a business owner can use their own or a family member’s credit standing to help the business and lack of capital.

Staff and Business Development Programs: *This section addresses the interplay between staff resources and abilities and the organization’s accomplishment of program goals and objectives, and how the outputs are perceived by the business community.*

- A White male reported that the City’s staff is prompt, courteous and responsive.
- An African American male stated that staff is readily available to assist.
- A White female stated that the procurement and selection process is good and can’t be tampered with; she was very complimentary of the staff. Their response time was reported as being anywhere from same day to next day. They were credited for being effective when they did the following:
  - Explained insurance requirements to a WBE
  - Answered questions about specs on a library project for a White male
  - Assisted a White male who had problems logging onto E-Procurement
- An African American contractor reported that staff is very helpful, but they just don’t know how to help him, when he calls with questions about an RFQ.

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- A White male engineer was very complimentary of City staff. He reported that the City staff is courteous, responsive and knowledgeable. He said, “We see them a lot, because we are a downtown firm. We work in their membership associations, so we feel that we can go to them. They are open about answering questions.”
- While another White male engineer said that the City needs to improve in the responsiveness of the individuals working with the City on questions related to RFPs.

*Access to bonding: This section addresses concerns with performance bond requirements that are often required to do business with the government. Surety bonds protect project owners against financial loss, and in the case of public construction projects, protect taxpayer dollars if the contractor defaults. Bonding requirements were generally noted as being very difficult for the businesses to acquire and created a barrier to doing business.*

- An African American male in the service industry said that the bonding requirements are high. He said, “I can get it, but the requirements are kind of high.” He has had to rely on the prime consultant, where he is a subconsultant, to reduce the bonding amount for him.
- An African American female contractor reported that bonding is a problem for her firm, because you have to have a high credit score, collateral. She reported that the City requires bonds on \$50,000 projects and the City Schools has required bonds on a \$14,000 project.
- Three African American subcontractors reported that the City’s bonding requirements are too high and it is an impediment to his doing business with the City, while an African American general contractor agreed that this is one of the biggest obstacles facing MBEs that majority firms do not face.
- An African American contractor reported that sometimes the general contractors will require the subcontractors to get a bond on large jobs. Another African American contractor stated that the bonding requirements are too stringent and what he has in the way of bonding is usually not accepted by the majority firm.

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- On the other hand, a White supplier, who can also install his work, reported that the general contractors often waive bonding requirements for him.
- Another African American contractor observed that his business is like most minority businesses who struggle to secure finances and bonding to keep their businesses afloat.
- An African American in the service industry reported that the bonding requirements have been challenging for his business.
- Similarly, a White female contractor stated that bonding poses a challenge and has interfered with her ability to bid or provide quotes to the City.

*Price: This section examines the perceived impact of pricing strategies that charges customers different prices for the same product or service. A seller charging competing buyers different prices for the same commodity or discriminating in the provision of allowances may hurt competition by giving favored customers an edge in the market that has nothing to do with the superior efficiency of those customers.*

- A White male who has owned a wholesale supply business for 25 years, reported that his is the second largest business of this type in Memphis. He explained that he is a competitive bidder, unless he has to bid against the same large distributors whom he has to buy from. When he can determine that his distributors are bidding, he will often elect not to bid. In reference to his distributor, he said, “I know that they sell cheaper to the City than they sell it to me. He went further by reporting that the City will outsource the bid to distributors outside of Memphis, and because the larger distributor deals in volume, they can offer the item at a discount to the City.
- A White female in the supply and service business agreed that she cannot compete with larger manufacturers or distributors. She said, “They can bid lower than us; we are their salesmen.”
- Two African American contractors reported that some White male subcontractors will not submit bids to their firms or they bid a higher price to the African Americans than they submit to their majority competitors. One of those



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contractors described how this process hindered him two years ago on a City School Project. When the bids were opened, he learned that the auditorium seating supplier gave him a bid that was 10 % higher than he quoted the majority contractor, who listed the same supplier. The African American firm lost the bid.

*Fronts: This section discusses the practice where White males find loopholes or identify female or ethnic minority accomplices to gain the status of Minority or Woman Business Enterprise from a certifying entity for the purpose of qualifying for contracts that are targeted toward assisting Minority and Women business owners.*

- Several African American business owners observed that the City’s outsourcing of MWBE certification to a non-profit organization is not good for legitimate MBEs. It is his perception that the organization allows White female fronts to become certified as WBEs, and the competition is really with White males.
- Another African American contractor reported that the City allows “fronts” to participate in the MWBE Program. He stated that the City allows these firms to get contracts, even though the owners do not have the professional licenses to qualify the firm. He suggested that there is a firm that does not have such a license that is fronting as an MWBE.
- An African American general contractor complained that prime contractors have sold 51% of their companies to their wives.
- An African American contractor reported that site visits for certification are not thorough. He reported that he is aware of White male contractors loaning equipment to front MWBE applicants until the site visits are complete. After the site visits, the equipment goes back to the White contractor.
- An African American in the service industry reported that wives and women are front companies, and he believes that the contractor that built the FedEx Forum awarded contracts to women businesses that were fronts for their husbands.
- A White female contractor found that the City’s practices and procedures are positive. She says that the City is open to new contractors, because she has participated as a subcontractor on more than 100 projects. She added, “it’s too numerous to count.” Therefore, she praised the certification process, because “the

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set aside in the City of Memphis allows me to help prime contractors meet their goals.” She added, however, that she hoped this (the goals) was not the only attraction for primes.

- An African American male stated that he is not certified and certification is a prerequisite to doing business with the City, County and Memphis Light, Gas and Water. He believes that there is a stigma attached to the label of MBE and that the certification process is lengthy, over burdensome and a lot of scrutiny. “I would have to spend money to keep up with all the certifications every year; take people out to lunch, while I have 4 or 5 families depending on me to bring in the business, so I have made the business decision to not spend money chasing City contracts.
- An African American subcontractor said that there is a bias toward White Females owned companies that are managed by White males. He cited that “prejudice” against his race is the most frequent factor that prevents him for winning City contracts.

*Contract Bundling is noted as a problem when the projects are packaged into one large contract. This practice places the project out of the reach of small business and relegates them to the status of a subcontractor. This section provides comments on the impact of large contracts and contract bundling on small firms. The method of packaging contracts for bid may determine the capability of MWBEs to participate.*

- A White female who represents a WBE service firm stated that any contract over \$60,000 to \$80,000 would be too large for them to handle. They would bid the smaller orders.
- Two African American contractors reported that they have not had City contracts in 4 to 5 years. They reported that it is the size of the contracts that prevents them from bidding City work.
- Another African American contractor agreed, reporting that the City contract requirements are too massive for MWBEs.

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- An African American male owns a consulting firm that requires a state license. He said that because he owns a firm with 5 staff members, including the owners, the size of his firm prohibits him from getting City contracts.
- An African American contractor reported that several companies have a monopoly in his line of business. He credits this monopoly to their volume. “They can keep minorities from being considered favorably for opportunities with the City of Memphis,” he said.

*Denial of Contract Award is identified when an MWBE believed they qualified for a contract that was denied to them.*

- An African American subcontractor said that he has submitted bids on private sector projects and got no consideration or even an opportunity to discuss his bid. He added, “But I consistently see majority contractors come back and offer lower prices than my bid.” He concluded that he is treated this way because of his race.
- Eight African American contractors agreed that they are not invited to bid on the private sector opportunities, because of discrimination based upon their race.
- Some African American contractors reported that when the construction contract to build the FedEx Forum was awarded, it went to a large company that had no local MWBE participation, while the other large contractor that had substantial local MBE participation, and was lower in their bid, did not get the contract. They also stated that it was only after local African American MBEs picketed and protested the project that some of the MBE subcontractors got some contracts.
- Referencing the same department, another African American contractor said that he was the low bidder, and then the bid was cancelled by the Housing Department. He attributed this behavior to discriminatory behavior from the City towards his company, because of his race.

*Predatory Business Practices: This section examines the practice in which a dominant business creates or implements a plan or practice that is incompatible with the policy of fostering an environment for the creation, growth and expansion of these small, minority and women owned firms. The business activities can be categorized as abusive, unethical or illegal.*

- An African American contractor reported that he was informed that he was the low bidder on an uptown project. He was awarded the contract and found out that another subcontractor was performing the work.
- An African American male contractor reported that he submitted a bid with a prime Contractor; however, when the prime got the award, his firm was switched out and replaced by a majority subcontractor. He said, "The majority contractor was not even a part of the bid."
- An African American contractor reported that bigger companies bid lower, than his company, and then make up the differences in change orders, later, to the City.
- An African American subcontractor reported that it is common practice in City bidding for subcontractors to submit blank bid amounts, as compared to other subcontractors who will write in their bid amounts. After bid opening, when the numbers are known, the primes will write in the amount needed for the preferred subcontractor to be selected over others. This practice is keeping MBEs out.
- An African American subcontractor also reported that Primes will send bid notices to MBEs that they know cannot do the bid, and then send a bid form to the preferred contractor.

*Frustration with Process: This section addresses the emotions and outcome of a feeling of dissatisfaction resulting from unfulfilled needs or unresolved problems. Often, these feelings are preceded by attempts or desires to accomplish a goal.*

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- An African American male in a service industry stated that he is not certified, because he does not see the benefit to those like him who are certified. An African American female contractor stated that she is not certified for the same reason. She said, “I know so many who are certified, and they don’t get any more contracts than I do. They are struggling too.”
- An African American contractor reported that the Mayor stated that he wanted MBEs on the Cook Convention Center, but after submitting their credentials, they still got no work. The contractor concluded, “It’s who you know.”
- An African American contractor claimed he submitted over 26 to 50 bids to the City but has been successful 7 to 8% of the time. He said, “My interest has waned. You bid so much and don’t get it, that it becomes discouraging.” He recently appealed a bid on a City project, and claimed that the City cancelled the bid.

*Access to Capital: This section identifies the ability of business owners to secure the finances to start, operate and grow their businesses. Barriers that force small business firms to turn to long-term or high interest debt financing can undermine the growth, expansion and competitiveness of the firms.*

- An African American male who is in a service industry described one of his biggest obstacles as lack of financing.
- Two African American subcontractors said that the biggest factor that interferes with their ability to secure contracts with the City of Memphis is their inability to secure financing.
- Another African American general contractor agreed and added this is a challenge that is not faced by their majority counterparts.
- An African American contractor reported that most MBEs want the business, but do not have the resources to perform the job. He said, “I just need a chance. I need backing financially to sustain the business operations. Companies need equity to keep operations afloat.”

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- A White female contractor noted that her biggest challenge is in the growing phases and expenses in growing. She has to consider ways of providing benefits for her employees.

*Prompt Payment Provides commentary on whether payment to vendors is taking place in a timely manner based on the ordinance.*

- An African American male contractor reported that the City has a slow payment process that does not keep pace with the market. In agreement, a White male in the supply field stated that the City payments are a “little slow.”

*Stereotypical Attitudes is highlighted as the motivation behind actions that are based upon preconceived notions about how an individual will behave based upon its identification with a particular group.*

- An African American male business owner stated that it is his perception City staff have an attitude of “why don’t you know that”, which is intimidating for an African American business owner who needs to be able to ask questions.
- An African American contractor noticed that primes show an unwillingness to use small, minority firms. “They think that you can’t perform, he said. He went on to explain that in the public sector, if it is a requirement, “they will use minority contractors,” but he countered by saying that in the private sector, the primes would not utilize small minority businesses if there were no goals.

*Insurance Requirements: This section addresses the requirement in specifications and contracts for insurance. Insurance Requirements is highlighted as a barrier when the limits are unnecessary or excessive and not related to the risk that the governmental body or the prime must bear.*

- An African American male in the service industry said that the insurance requirements are high. He said, “I can get it, but the requirements are kind of

high.” He has had to rely on the prime consultant, where he is a subconsultant, to reduce the insurance amount for him.

### ***1. Public Hearing Results***

A public hearing was held in City of Memphis Council Chambers for the disparity study on May 19, 2008. GSPC team members facilitated the hearing. Procurement barriers and business development issues were discussed by the participants. Below is a summary of concerns expressed by participants. The following comments either addressed the City of Memphis specifically or the comments reflected a perception or experience with the business community in general.

*Obstacles in the Procurement Process were noted as excessive procedures that create problems in the business owners’ attempts to comply with the requirements of the procurement process.*

- An African American male business owner in the printing business said he did business with the City approximately five years ago. Although he successfully completed the business, afterward he was told that he could not get more business because he did not have a physical location. Further, he was told that he needed a particular kind of insurance to bid on City printing. While attempting to secure the required insurance, the insurance company told him that he could not secure the insurance because he didn’t have a physical plant. “So I guess what I’m saying is that sometimes the requirements are set too difficult for minorities although we may meet the price. We can meet the quality. We can meet other requirements, but there may be one thing that is out there that eliminates us.”
- An Asian Indian-American female who owns an engineering design consulting business encountered her first hurdle with the City when attempting to amend the City ordinance allowing her to be considered a woman-owned business. After great support from several council members, the ordinance was finally amended to include all women in June of 2006. After being presented with an opportunity in 2008 to work on a City project, her company was unable to accept the terms of

the wage ordinance requirement. She stated her company exceeded the requirements even though it was a small business. A requirement of submitting reports every two weeks and reporting confidential information on her employees became too burdensome. She had no choice but to turn down the work to protect privacy. "I did not turn down City work because of some arbitrary issue or because we could not perform the work. I could not in good conscience sign the agreement that would require me to submit reports to the City with my employees' personal information that may be made available to the public."

She stated that she has not been able to contract as a prime with the City due to these "unreasonable circumstances." On other City projects where she was a sub-consultant she was not required to provide social security numbers of employees.

Prompt Payment *tends to consistently and constantly be identified as a huge problem for MWBE and small businesses.*

- An African American female restaurant owner has done some catering for the City before. She admits that she finds difficulty in receiving or finding information about how to go about doing business with the City. Another problem she encountered after doing business with the City was not receiving her pay promptly.

"Being a small business, the only problem I have is that a lot of times they don't pay you at the time that you deliver the food. The money is given to you maybe a month or so later."

She was never given a reason from the City as to why she could not be paid at the time of delivery. With that said, she was unknowledgeable about the City's purchasing policy and details about time of payment. Specifically, after speaking with a Councilman about the incident, the Councilman then put in an invoice and the money was delivered at that time.

- An African American male who owns a technology business who has been in business for the last 13 years and has a contract with the City for the last 10 or 11 years comments that there have been times where receiving prompt



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payment for his work was a definite problem, which for a small business is very difficult to go without for some period of time. “We have gone 60 or 90 days for our payments and I am talking about in the tens of thousands of dollars. Now, for a small business to get through this is virtually impossible.”

*Favoritism is noted when firms have a perception that some firms are given advantages over other firms.*

- An African American male landscape architectural professional with 24 years experience outlined his firm’s credentials and experiences, attempting to do business with the City of Memphis.

*“We do 65 % of our work outside of the Memphis area. That is not by design but by the need to survive and make money. The enforcement of the present procurement policy appears to be very lax. I do not see the inclusion of African Americans. The last park project I received in this city was in 1999. I believe that Legends Park, which is the old Dixie Homes site, has a lot of opportunity for landscaping architecture that could have been an opportunity for our firm. And we went after the project very hard. It’s amazing we can do three Hope VI projects in Chattanooga from a landscape architecture respect and can’t get one on Memphis, TN. I find that quite disheartening.”*

- An African American male who owns a technology business discussed the barriers that a minority has to go through just to get business with the City of Memphis. Having been in business for the last 13 years and a contract with the City for the last 10 or 11 years this business owner has experienced certain financial situations that were unfair.

*“We backed out of the deal because what they were asking us to do and the amount of money that they wanted to pay us with all these other things we had; it was just financial suicide to do this. It didn’t make good business sense. It didn’t make good logic sense. We had the contract for four or five years and had done a good job with the City and now here is another*

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*company that came in that subcontracted and, by the way, [they] wanted to pay [us] less for the services that we were doing.”*

Insurance Requirements is highlighted, as a barrier when the limits are high, unnecessary or excessive and not related to the risk the governmental body must bear.

- An African American male who owns a technology group business commented about the paperwork minority owned businesses have to complete in order to prove that they are in fact a minority owned business. He says it is time consuming and seems irrelevant. The insurance requirements the City has for small businesses were also a big concern for the business owner who thinks that these problems could be reshaped with some basic common sense. “If I knock a printer over is it going to tear up a million dollars worth of stuff? If my person has a wreck on the way here, is the City going to be held liable for that? But I got to do it and it’s an expense to me.”

Disseminating Information is noted as a problem from information about the bidding process to communications with a contract in place.

- An African American male independent representative of an insurance company identifies his problem with the City being unable to receive the opportunity of showing the insurance company’s products. ...He stated that there has not been an opportunity to come in and discuss with the City the company’s present programs. Further, he admits that he normally finds out about opportunities by doing independent research.

*“When I’m interested in a product, a project, I have to go to the resources that will get me to that next level. It can be the good-old-boy way of networking or it can be a formality... I’ve made attempts in the past to get to the next level, but I was always stopped before getting to the contact person, I believe.”*

- A White female who owns a janitorial supply and equipment firm states that she has been on the bid list as a registered vendor with the City for 13 years.

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Three years ago the City told her that they could no longer do business together; they were now purchasing their products from a West Memphis, Arkansas firm. She was unaware of any bid, but did see a letter stating that all shops had to do business with a firm in West Memphis, Arkansas; she was not given any notification stating exactly when bids would be accepted.

After calling the purchasing department to verify the specifics she was told she would receive further notice on the renewal of the contract; however, no callbacks were made on the City's end.

Another incident that she experienced with the City was a contract regarding the Liberty Bowl. Again, she was notified that her contract would not be renewed, but she would have to deal with a new company that is taking over management. "So I'm assuming they already have supplies lined up which leaves me in a position that though I have a contract with the City and though I have ten thousands of dollars worth of dispensers at the Liberty Bowl, I won't be allowed to go after that business."

### **G. Conclusion of the Anecdotal Section**

Overall, the anecdotal findings revealed a perception that small, minority and women-owned business enterprises are encountering some degree of difficulty in doing business in Memphis, depending on the size of the firm and their ethnicity. Small firms cannot compete with large firms and it is the large firm that is their closest competitor. The City's contracts are reported to be too large for them, which create barriers in doing City business, along with bonding and insurance requirements. While African Americans reported similar barriers, in addition there is the perception that they are prevented from growing their businesses because of discrimination and retaliation by the City and the majority business community, because of their race. They also stated that their progress was further hampered by the certification of WBE fronts, which are utilized and manipulated to meet MWBE goals. The African Americans' perception of race and

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disadvantages was somewhat acknowledged by numerous Whites who were interviewed, who sometimes admitted that African Americans face different challenges because of race.

Another factor that was perceived as a huge barrier is that the business community is fertile ground for the “good ol’ boys” in the private sector, evidenced by extremely limited invitations or awards for MBEs, especially for African Americans. These limited opportunities are reported to create an environment for over-reliance on the public sector for contract opportunities. Notwithstanding the aforementioned, the “good ol’ boy” network is said to control the City contracts and allow large contracts to be awarded with insufficient MBE participation on large public projects.

Additionally, there were a number of comments that indicated a strong distrust of local government, regardless of the ethnicity or gender of the interviewee. They pointed to as support for their ill feelings recent press coverage and legal activity surrounding government officials and government contracts. Also, other factors creating distrust of the local government are unclear bidding documents, restrictive specifications, complicated E-procurement websites and changes in vendor registration systems without a program in place to ensure that prior vendors were aware or trained to use the system.

There was a general overwhelming agreement that the staffs in Purchasing and Contract Compliance were professional, available, and responsive and provided assistance when asked.

There was substantive discussion about the need for an independent minority business organization to truly advocate and represent the interests of minority business in Memphis. The “independent” aspect of this organization would particularly be in terms of funding in that the organization would not receive funds from local or county governments.

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- *An African American male said that an independent group would not run the risk of “biting the hand that feeds it.”*
- *Another African American male stated that existing local minority business organizations cannot and do not advocate strongly or effectively challenge public and private entities to “do the right thing.”*

Many who participated in the professional services focus group were clear to point out that their participation in the focus group should not be interpreted that they have confidence that “things will change.” Some said that they were curious about another disparity study and others said that they were requested to attend; however, hopes were definitely not high that either the focus group or the study would affect a change in the status quo.

Finally, the participants in the anecdotal phase of the study requested an avenue for ensuring smaller contracts, outreach, networking, mentoring assistance with bonding and insurance requirements, and contract compliance to ensure that the intent and goals of the MWBE program are being met.

## VII. FINDINGS AND CONCLUSIONS

This chapter presents the findings and conclusions resulting from the disparity study conducted for the City of Memphis related to procurement of Construction, A/E, Other Professional Services, Other Services, and Goods/Supplies. GSPC has been careful to remain cognizant of the foundational case law of Croson and its progeny in this evolving area of jurisprudence. GSPC believes that it has utilized methodologies that will be acceptable to the courts in the Sixth Circuit to support any resultant program.

As outlined in the Legal History section of this Study, the courts have indicated that for a race-based or gender-based preference program to be maintained there must be a clear evidentiary foundation established for the continuation of existing programs. Generally, this evidence should also have been reviewed as part of the implementing jurisdiction's decision-making process related to the race-conscious program in order for it to be relevant in any subsequent legal action. Thus, GSPC presents its summary of findings and conclusions to the City for deliberative review and discussion.

### A. STATISTICAL ANALYSIS FINDINGS

#### **FINDING 1: Overall MWBE Utilization**

Throughout the Study Period, the City spent \$54.1 million with MWBEs within the relevant market across all procurement categories at the prime level. Payments to WBEs represented \$4.98 million or .68% of total City spending of \$735.1 million for the Study Period.

**FINDING 2: Relevant Market**

The relevant market for each procurement category is the area in which 75% or more of the dollars were spent during the Study Period. The relevant markets for this Study by procurement categories are:

- Construction – Memphis, TN MSA;
- Professional Services (A/E) – Memphis, TN MSA
- Other Professional Services – United States
- Other Services – State of Tennessee
- Goods/Supplies – United States

**FINDING 3: City MWBE Prime Utilization and Availability**

The dollar value of MWBE prime utilization during the Study Period in the relevant market by the City is shown below:

- 49 MWBEs received \$18.3 million in Construction contract dollars on City projects, which represent 9.59 % of the total dollars spent by the City on Construction.
- 19 MWBEs received \$2.7 million in prime A/E dollars which represent 11.7 % of total A/E dollars spent by the City on A/E.
- 62 MWBEs received \$7.6 million in Other Professional Services dollars, which represent 3.1 % total dollars spent by the City on Other Professional Services.
- 243 MWBEs received \$15.0 million in Other Services dollars, which represent 14.62 % of dollars spent by the City on Other Services.

- 212 MWBEs received \$10.5 million in Goods/Supplies dollars, which present 6.0 % of total dollars spent by the City on Goods/Supplies.

**FINDING 4: MWBE MSA Prime Availability within the Relevant Market**

**Table 61**

<b>Business Category</b>	<b>African American %</b>	<b>Asian American %</b>	<b>Hispanic American %</b>	<b>Native American %</b>	<b>White Female %</b>	<b>MWBE Firms %</b>
<b>Construction</b>	<b>15.17%</b>	<b>.29%</b>	<b>0.00%</b>	<b>0.00%</b>	<b>3.18%</b>	<b>18.64%</b>
<b>Professional Services – A&amp;E</b>	<b>18.49%</b>	<b>.84%</b>	<b>2.52%</b>	<b>0.00%</b>	<b>6.72%</b>	<b>28.57%</b>
<b>Other Professional Services</b>	<b>12.03%</b>	<b>.47%</b>	<b>.12%</b>	<b>0.00%</b>	<b>1.52%</b>	<b>14.14%</b>
<b>Other Services</b>	<b>22.90%</b>	<b>.11%</b>	<b>.22%</b>	<b>.04%</b>	<b>2.13%</b>	<b>25.39%</b>
<b>Goods/Supplies</b>	<b>12.20%</b>	<b>.15%</b>	<b>0.00%</b>	<b>.05%</b>	<b>1.45%</b>	<b>13.85%</b>

Source: Master Vendor Database

**FINDING 5: Disparity in MWBE Prime Utilization**

MWBEs were under-utilized across all procurement categories during the Study Period. However, the under-utilization of the following MWBE groups was determined to be significant enough to suggest the presence of discrimination:

- Construction Prime Contractors: African American, Asian American, and White Female-owned firms;
- A/E: African American, Asian American, Hispanic American, and White Female-owned firms;
- Other Professional Services: African American, Asian American, Hispanic American, and White Female-owned firms;



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- Other Services: African American, Asian American, Hispanic American, Native American, and White Female-owned firms;
- Goods/Supplies: African American, Asian American, Native American, and White Female-owned firms.

It is also significant that Non-Minority Male-owned firms were over-utilized in all procurement categories during the Study Period.

### **FINDING 6: Comparison with 1994 Disparity Study**

The data showed increases in the absolute and relative value of MWBE utilization since the 1994 Memphis Disparity Study, as indicated by the following:

- MWBE Construction prime contracting utilization increased from \$5.3 million out of \$85.4 million total dollars spent during the 1994 Study Period, which represents 6.2% participation, to \$18.3 million in MWBE participation out of \$190.5 million total dollars spent, which represents 9.6% of total construction dollars spent during the current Study Period. Therefore, MWBE participation increased 3.4% in the current Study Period over the totals in the 1994 Study Period.
- MWBE Professional services including A/E utilization grew from \$202,609 during the 1994 Study Period, to \$10.3 million, or 3.86% of the total during the current Study Period.
- MWBE Other Services and Goods/Supplies utilization grew in percentage terms from about 5.85% in the 1994 Study Period to 9.2 % during the current Study Period.

**FINDING 7: MWBE Construction Subcontractor Utilization and Disparity Analyses**

As Table 35 indicates, African American-owned firms have significant over-utilization as construction subcontractors, and Hispanic American, Asian American, and White Females were statistically significantly under-utilized as construction subcontractors.

**FINDING 8: Subcontractor Anecdotal Perceptions**

Major concerns in anecdotal testimony regarding experience as a subcontractor were changes in bidding procedures when they are not required to hire MWBEs and inadequate good faith efforts by prime contractors. Of the MWBEs who responded to our telephone questions about experiences as a subcontractor, key issues noted were as follows:

- a group of payment issues: payment delayed (36%), untimely release of retainage (22%), and not paid per contract (20%).
- double standards in qualifications and performance (56% of MWBE respondents);
- never served as subcontractor in the private sector (64% of MWBE respondents).

**FINDING 9: Project Goal Setting for MWBE Subcontractor Utilization**

- The City’s MWBE Ordinance speaks to establishing annual overall MWBE participation goals which shall be used as benchmarks for evaluating the performance of the program. The City’s ordinance describes the methodology establishing annual overall goals however it does not specifically address how to establish project specific goals nor to establishing separate goals for primes and subs.

**B. Findings for Private Sector Analysis**

**FINDING 10: Disparities in Self-Employment and Revenue Earnings**

In general, findings from the U.S Bureau of the Census Public Use Micro Sample (PUMS) 2000 data indicate that there were disparities in entry into and earnings from self-employment by women and minorities after controlling for education, age, wealth, and other variables. When self-employment rates were stratified by race and by business type, trends varied within individual race-by-type cells, but disparities persisted, in general, for African Americans, Asian Americans, Hispanic Americans, and Non-minority women. When group self-employment rates were submitted to analysis of disparity due to minority status, findings supported the conclusion that disparities for these four groups (of adequate sample size to permit interpretation) were likely the result of some customer discrimination; that is, an unwillingness on the part of some sectors of the private marketplace to do business with firms owned by women and minorities.

**FINDING 11: Regression Analysis**

Self-employment findings were supported by analyses of the telephone survey of vendors. After adjusting for impact of non-MWBE factors, such as number of employees, age of company, owner's experience, and owner's education level, the analyses showed that MWBE firms had significantly lower 2007 revenues than similar Non-minority Male firms. The consistency of the lower 2007 revenues of MWBE firms for the all-industries analyses and for African Americans and White Females among the different industry grouping analyses, further strengthens the evidence that the disparities are due, at least in part, to the race and/or gender status of the firms.

**FINDING 12: Private Sector Utilization in the Memphis Construction Industry**

The utilization of MWBE firms on private commercial construction in the City of Memphis in comparison with MWBE utilization by the public sector and Reed Construction Data for prime contractors is shown in Table 62. MWBE utilization was substantially higher for the public sector than for the private marketplace. Moreover, the public sector used many more MWBEs, particularly in proportion to its spending, than did the private sector commercial construction market.

**TABLE 62  
CITY OF MEMPHIS  
COMPARISON OF PUBLIC AND PRIVATE SECTOR  
PRIME CONTRACTOR UTILIZATION**

	African American (%)	Asian American (%)	Hispanic American (%)	Native American (%)	White Female (%)	Minority & White Female (%)	Non-Minority Male (%)
<b>Public Construction Prime Contractors (City of Memphis Actual Payments)</b>	8.35	0.00	0.00	0.00	1.24	9.59	90.41
<b>Private Construction Prime Contractors (Building Permits)</b>	0.16	0.00	0.00	0.00	0.08	0.25	99.75
<b>Private Construction Prime Contractors (Reed Construction Data)</b>	3.56	1.68	0.00	0.00	0.99	6.23	93.77

Source: Griffin & Strong, P.C. (2008)

Source: City of Memphis Building Permits, Reed Construction Data, Utilization Analysis.

**FINDING 13: Disparities in Loan Denials**

An econometric analysis of small business lending in the region containing Memphis from the National Survey of Small Business Finance (NSSBF) found evidence of disparities in loan denial rates for African Americans and White Females after controlling for variables representing firm assets and creditworthiness, raising an inference of discrimination in lending.

**FINDING 14: Disparities in Interest Rates**

Data from the NSSBF showed that when a loan is approved the interest rates charged to MWBES were all higher than that of Non-minority Males with the exception of Asian Americans, with Hispanic American having the highest rate charged of 20.9 %.

**C. Anecdotal Findings**

**FINDING 15: Anecdotal Evidence**

The following presents findings based on the review presented in Chapter VI.

**1. Perceptions of Discrimination**

There were not a large number of specific incidents of discrimination by the City reported in either the anecdotal testimony or survey responses. The primary concern regarding discrimination in the anecdotal testimony was the impediments to opportunity resulting from informal networks and discrimination in the private sector.

Nineteen percent of the participating firms indicated that they had experienced discrimination in their business dealings with the private sector. Whereas seven percent indicated they had experienced discrimination from the City.

## 2. Barriers to Doing Work with the City

Major concerns in anecdotal testimony regarding barriers to work with the City were the advantages possessed by large and incumbent vendors, an informal network, and the selection process. Of the MWBEs who responded to our telephone questions about barriers to doing business, key issues noted were as follows:

- financing (17% of MWBE respondents);
- limited knowledge of purchasing/contracting policies and procedures (14% of MWBE respondents);
- bid and performance bond requirements (16% of MWBE respondents);
- time allotted to prepare bids and quotes (12% of MWBE respondents);
- expenses associated with bid preparation (11% of MWBE respondents);
- prequalification requirements (11% of MWBE respondents);
- insurance (11% of MWBE respondents); and
- bid specifications (11% of MWBE respondents).

### **FINDING 16: Limited Information**

There were anecdotal reports of inadequate pre-bid information on projects. One of the key concerns reported in the survey was the availability and accessibility of information about pending projects (25% of 337 MWBE respondents).

**FINDING 17: Disparity Analysis**

Although the City has improved MWBE prime participation since the 1994 Disparity Study, there still remains significant disparity between the utilization and availability of MWBEs. The subcontractor analysis indicates that MWBEs have done well. This portion of the analysis indicates that the current subcontracting program has been successful during the Study Period; although that assessment must be tempered somewhat by the data limitations which were previously noted. Yet even in this area, based on the qualitative evidence in the anecdotal chapter and the quantitative private sector evidence, an inference of discriminatory exclusion from private sector construction can be drawn. Detailed statistical evidence also supports the claim that customer discrimination against MWBEs persists even after controlling for both individual and firm characteristics. This combined evidence suggests that absent affirmative measures the City would be a passive participant in a pattern of exclusion of MWBEs.

**D. Procurement Findings**

**FINDING 18: Vendor Lists**

Currently, Purchasing (which reports to the Assistant Director of Finance) maintains an updated list of vendors, suppliers and contractors in Oracle Purchasing Software. There are no specified written guidelines concerning how vendors are placed on individual buyer lists. There is no written policy for soliciting MWBEs for small purchases.

**FINDING 19: Department Purchase Orders**

For purchases of goods and services under \$2,500 department managers may make purchasing decisions. For purchase over \$2,500 but less than \$25,000 Purchasing solicits three verbal or written quotes and process the order with the lowest bidder. The department purchasing policies thus vary in their support for utilizing MWBE firms.

**FINDING 20: Post-Bid Information**

A number of MWBEs complained about lack of information on projects, in particular, a lack of understanding as to why they are not securing opportunities with the City when their bids or proposals for City business have been rejected.

**FINDING 21: Contract Compliance Program Staffing**

The Contract Compliance Office is comprised of two staff members. Their focus is goal setting, compilation of the annual MWBE performance report. However the Contract Compliance does not monitor project nor are there consequences for Primes who do not report the information they are suppose to report.

**FINDING 22: Program Awareness**

City personnel revealed that the Departments are aware of the existence of the MWBE program and their responsibility to report accomplishments once a year, but felt detached from their responsibility to implement and grow the program. The departments see the responsibility for carrying forward this program resting in Contract Compliance or Purchasing. Most division personnel did not know the annual goal established for the year, nor could they explain why project goals were or were not established for certain projects. Many division managers responded that they would be told by Purchasing or Contract Compliance when an MWBE goal was necessary and did not articulate knowledge of the existence of goal setting committees.

Division personnel seemed generally unaware of when goals were required to be established or what the Overall Annual MWBE goals were for any of the categories. Conversely, Division Directors were concerned and aware of their Division's MWBE yearly accomplishments.



**FINDING 23: Antidiscrimination Rules**

The City does not have a formal commercial nondiscrimination component in its MWBE program.

**FINDING 24: MWBE Program Data**

At present, prime contractors are not required to list all subcontractors and the value of their subcontracts, including MWBE firms, in their bid submissions. The City is still behind with regard to tracking MWBE spending. In particular, the City still does not have a good source of subcontractor utilization and availability data. There is no central filing system within the Construction/Architect/Engineering Division – project managers keep their own project files.

**FINDING 25: Data Management**

- Oracle system does not track vendor by vendor id number and does not tie commodity codes to vendor
- Contract and subcontract data is not electronic
- No tracking of subcontractor payments
- There is a breakdown of reporting construction/architect/engineering contract and payment information to the Compliance office

**FINDING 26: Management and Technical Services**

The City provides management and technical services to small and MWBE firms secured primarily through a partnership with the Renaissance Business Center. The center provides management and technical assistance programs through classes and workshops covering many facets of business operations.

**FINDING 27: Access to Capital, Bonding, and Insurance**

The City does not maintain a financial assistance or bonding program. It has partnered with local financial assistance programs in the Memphis MSA.

**FINDING 28: Payment Policy**

The City does not have in place a policy to address prompt payment. Therefore there may be inconsistencies in how vendors are paid and in what time frame.

**FINDING 29: MWBE Certification**

To be certified for the City’s MWBE program the owner must be a minority person as “those persons, citizens of the United States and lawfully admitted resident aliens, who are African American (persons whose origins are in one of the Black regional groups of Africa).”<sup>120</sup> The definition for women includes non-minority females and the minority or woman owned business enterprise must be located within the Memphis MSA. At present the City contracts with the Mid-South Minority Business Council (MMBC) to make certification decisions of MWBE-owned business status. In this capacity MMBC is the arbiter of who is approved as an MWBE without right of veto by the City.

The City has taken steps towards establishing its own LBE certification process, certification list, and size standards for certification. However at the time of this study this program has not been implemented.

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<sup>120</sup> Memphis City Code section 2-325(c) Definitions

**FINDING 30: MWBE Web Site**

The City includes the following information on its Web site: vendor registration, MWBE certification information, answers to questions about RFPs.

**FINDING 31: Performance Measures**

At present, the City provides limited tracking of MWBE certification and MWBE utilization. It is therefore difficult to measure the results of increased outreach or the attainment of goals. It is recommended that, along with the institution of goals, there be put in place a system for tracking the attainment of those goals, as well as incentives for procurement personnel that are responsible for reaching the desired goals.

**E. Recommendations for Prime Contracting**

**RECOMMENDATION 1: Annual Aspirational MWBE Goals**

This study provides evidence to support the establishment of a moderate program to promote MWBE utilization in the MSA. This conclusion is based primarily on disparities in current MWBE utilization, substantial disparities in the private marketplace, evidence of discrimination in business formation and revenue earned from self-employment, and some anecdotal evidence of discrimination. The City should tailor its minority participation programs to remedy each of these specific disparities.

The City should be commended for its efforts to establish flexible annual aspirational goals rooted in its own estimates of MWBE availability. Table 63 provides guidance on setting initial annual goals for an MWBE program. These MWBE goals by business category are annual goals, not rigidly set project goals. Goals were set at 80% of the availability determined by this study in each business category for each race/gender/ethnicity category.

**TABLE 63**  
**Recommended Race And Gender- Specific Annual Aspirational**  
**Goals for Prime Contracting for Each Business Category by**  
**Race/Ethnic/Gender Classification**  
**Memphis MSA**

<b>Business Category by MWBE Classification</b>	<b>% of Contract Dollars</b>	<b>% of Available Firms</b>	<b>Availability Index Goal-80.0</b>
<b>Construction Prime Contractors</b>			
African Americans	8.35%	15.17%	12.14%
Asian Americans	0.00%	0.29%	0.23%
Hispanic Americans	0.00%	0.00%	0.00%
Native Americans	0.00%	0.00%	0.00%
White Females	1.24%	3.18%	2.54%
<b>A/E Prime Contractors</b>			
African Americans	10.61%	18.49%	14.49%
Asian Americans	0.00%	0.84%	0.67%
Hispanic Americans	0.00%	2.52%	2.01%
Native Americans	0.00%	0.00%	0.00%
White Females	1.08%	6.72%	5.38%
<b>Goods/Supplies Prime Contractors</b>			
African Americans	4.88%	12.20%	9.76%
Asian Americans	0.00%	0.15%	0.12%
Hispanic Americans	0.00%	0.00%	0.00%
Native Americans	0.01%	0.05%	0.04%
White Females	1.13%	1.45%	1.16%
<b>Other Services Prime Contractors</b>			
African Americans	14.31%	22.90%	18.33%
Asian Americans	0.00%	0.11%	0.09%
Hispanic Americans	0.00%	0.22%	0.18%
Native Americans	0.00%	0.04%	0.03%
White Females	0.31%	2.13%	1.70%
<b>Other Professional Services Prime Contractors</b>			
African Americans	3.09%	12.03%	9.62%
Asian Americans	0.00%	0.47%	0.38%
Hispanic Americans	0.00%	0.12%	0.10%
Native Americans	0.00%	0.00%	0.00%
White Females	0.03%	1.52%	1.22%

Source: Griffin and Strong P.C. (2008) and Master Vendor File

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To establish a benchmark for goal setting, goals should be based on relative MWBE availability. MWBE goals based on vendor availability are reasonable, if not conservative. MWBE vendor-based aspirational goals range from .00 % to 18.33 %.<sup>121</sup>

The primary means for achieving these aspirational goals should be outreach and adjustments in City procurement policy.

### **COMMENDATION and RECOMMENDATION 2: MWBE and SBE Outreach**

The City should be commended for providing MWBE outreach workshops and seminars. There are several vehicles by which City outreach efforts can be strengthened. For example, the data shows zero availability for Hispanic owned Construction firms in the Memphis MSA, however Census Data reports 1,083 Hispanic owned Construction firms in the State of Tennessee. This means that there are likely a number of Hispanic-owned Construction firms that could be doing business with the City of Memphis but they are not getting certified. It is recommended that the City undertake a program to identify those Hispanic-owned firms that are ready, willing, and able to work for the City and assist them in obtaining certification.

- The City should work with Building and Construction Department on providing more forecasts of business opportunities to MWBE vendors.
- The City should partner with federal procurement efforts to market to MWBE firms in the region. If there are firms already certified with the City, the City could assist those firms in growing their capacity by exposing those firms to federal assistance programs and other resources of the federal government, particularly those of the Minority Business Development Agency.

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<sup>121</sup> The MWBE aspirational goal is 80 % of availability. These aspirational goals are set below estimated MWBE availability. The 80 % is derived from the concept that if MWBE utilization is less than 80 % then disparity is substantial. This conservative adjustment reflects a concern that the program errs on the side of narrow tailoring. In principle, goals can be slightly above estimated MWBE availability.

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- City agencies can feature MWBEs and SBEs in employee newsletters to promote firm awareness.
- The effectiveness of MWBE and SBE outreach can be improved by classifying businesses into three categories:
  - Category A: Firms that are new to government contracting. These firms should be directed to the Procurement Technical Assistance Center (PTAC), the Small Business Development Centers (SBDC), and the Minority Business Development Center (MBDC). The Contract Compliance Office should not duplicate PTAC, SBDC, or MBDC services.
  - Category B: Firms that are familiar with government contracting in general but not with the particular agency. These firms should be handled via an enhanced Web site that answers routine questions and quarterly group seminars.
  - Category C: Firms that already have government contracts and are looking for more specific assistance. Some agencies allow for new businesses to have 15-minute presentations of corporate capabilities to program managers. The City can also provide unsuccessful bidders with feedback and brief MWBEs and SBEs on quality assurance standards.

### **COMMENDATION AND RECOMMENDATION 3: Contract Sizing**

The City should be commended for its efforts on issuing contracts in small dollar amounts, thus expanding the opportunities that small MWBE firms have to do business with the City of Memphis. However additional criteria that can be utilized and reviewed in determining whether projects can be divided include multiple locations within one project, size and complexity of the procurement, similarity of goods and services

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procured, and safety. This list is not exhaustive. As recommended in the Office of Management and Budget (OMB) *Contract Bundling Report*, the City should consider limiting the use of contract bundling to those instances where there are considerable and measurable benefits such as decreased time in acquisition, at least 10 % in cost savings, or improved contract terms and conditions.<sup>122</sup>

### **RECOMMENDATION 4: Promoting MWBE Collaboration**

If contract size cannot be reduced to match MWBE capacity, the City should look for instances in which MWBE capacity can be increased to match contract size. MWBE capacity can be increased by encouraging joint ventures among MWBEs. For example, in Oregon the Northeast Urban Trucking Consortium, an organization composed of seven MWBE independent trucking firms with 15 trucks, joined together to win a \$2 million trucking contract. MWBE collaboration can be encouraged by citing consortium examples in CCO newsletters and increasing outreach for projects where such collaboration may be effective.

The City may also cautiously encourage joint ventures between MWBEs and non-minority firms on large-scale projects. For example, the City of Atlanta encourages establishment of joint ventures on large projects over \$10 million,<sup>123</sup> where economically feasible, to ensure prime contracting opportunities for all businesses, including certified MWBEs. This type of joint venture poses potential illicit “front” risks, and the City must examine these joint ventures carefully.

### **RECOMMENDATION 5: Bidder Rotation**

The City should consider a system of bidder rotation, which would include majority and MWBE firms. Some political jurisdictions use bidder rotation schemes to limit habit purchases from majority firms and to ensure that MWBEs have an opportunity to bid along

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<sup>122</sup> Office of Management and Budget, "Contract Bundling—A Strategy for Increasing Federal Contracting Opportunities for Small Business" (October 2002).

<sup>123</sup> City of Atlanta Ordinance Sec. 2-1450 and Sec. 2-1451.

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with majority firms. The City already does some rotation of firms in A&E, but it is here being suggested that firms that new firms be invited to bid with each new RFP and that race-neutral preference be given to firms that have not previously done business with the City, in procurement categories where appropriate.

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

Other bidder rotation best practices: Dekalb County, Georgia “Bidder Box”; Port Authority of New York & New Jersey.

### **RECOMMENDATION 6: Uniform Procedures for Department Solicitation of MWBE and SBE Bids**

The City should establish uniform procedures for department solicitation of MWBE bids or quotes. If the City does establish uniform departmental purchasing policies, such procedures should be included.

### **RECOMMENDATION 7: Debriefings**

The City should increase the frequency of debriefing sessions after contract awards are made, particularly for those projects where there is sufficient MWBE availability to compete for and win contracts but they did not win the bid. Assistance is given to firm to help them determine why they did not win the bid.<sup>7</sup>

### **RECOMMENDATION 8: Performance Reviews**

The City should require employees with procurement authority to be evaluated on their MWBE and SBE, utilization as part of their performance review. The City should also ensure that all personnel with purchasing power are fully trained concerning the City’s



MWBE and SBE program and conform with the program requirements when they solicit bids and make purchases.

## F. Recommendations for Subcontracting

### **RECOMMENDATION 9: Narrow Tailoring of MWBE Program**

Recent developments in court cases involving federal DBE programs provide important insight regarding the design of local MWBE programs. In January 1999, the United States Department of Transportation (USDOT) published its final DBE rule in Title 49, Code of Federal Regulations, Part 26 (49 CFR 26). In the course of several cases involving the DBE program, the courts found the new DBE regulations to be narrowly tailored.<sup>124</sup> The federal DBE program features listed in Table 64 are important to this characterization of a narrowly tailored remedial procurement preference program. In particular, the DOT DBE regulations provide a variety of measures that put race- and gender-neutral techniques first and then use race- and gender-conscious project goals as a supplemental device when race- and gender-neutral techniques are found inadequate to reduce disparity in DBE (or MWBE) utilization.

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<sup>124</sup> *Adarand v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir 2000), *Sherbrooke Sodding v. MDOT* (2001 US Dist Lexis 19565) (November 14, 2001), *Gross Seed v. Nebraska Department of Roads*, Case No. 4:00CV3073 (NB 2002), *Western States Paving v. Washington DOT*, Case No. C00-5204-RBL (WA 2003).

**TABLE 64**

**NARROWLY TAILORED MWBE AND DBE PROGRAM FEATURES**

	<i><b>NARROWLY TAILORED GOAL-SETTING FEATURES</b></i>	<b>DBE Regulations</b>
1.	The City should not use MWBE quotas.	49 CFR 26(43)(a)
2.	The City should use race- or gender-conscious set-asides only in extreme cases.	49 CFR 26(43)(b)
3.	The City should meet the maximum amount of MWBE goals through race-neutral means.	49 CFR 26(51)(a)
4.	The City should use MWBE project goals only where race-neutral means are not sufficient.	49 CFR 26(51)(d)
5.	The City should use MWBE project goals only where there are subcontracting possibilities.	49 CFR 26(51)(e)(1)
6.	If the City estimates that it can meet the all MWBE aspirational goals with race-neutral means, then the City should not use MWBE project goals.	49 CFR 26(51)(f)(1)
7.	If it is determined that the City is exceeding its MWBE aspirational goals, then the City should reduce the use of MWBE project goals.	49 CFR 26(51)(f)(2)
8.	If the City exceeds MWBE aspirational goals with race-neutral means for two years, then the City should not set MWBE project goals the next year.	49 CFR 26(51)(f)(3)
9.	Net worth requirements to determine social and economic disadvantage.	49 CFR 26(67)
10.	If the City exceeds MWBE aspirational goals with project goals for two years then the City should reduce use of MWBE project goals the next year.	49 CFR 26(51)(f)(4)
11.	If the City uses MWBE project goals, then the City should award only to firms that made good faith efforts.	49 CFR 26(53)(a)
12.	The City should give bidders an opportunity to cure defects in good faith efforts.	49 CFR 26(53)(d)

The City’s MWBE program is already narrowly tailored in a number of aspects, including the rejection of quotas, the absence of race-conscious set-asides, use of good faith efforts, project goals based on individual project review and linked to MWBE availability, and

bidder rights to cure good faith efforts. The City should take more steps to further refine its MWBE program along the lines suggested in the DOT DBE regulations—in particular items 3 through 10 in Table 64 above.

**RECOMMENDATION 10: Annual Aspirational MWBE Goals for Construction Subcontracting**

The City should also establish annual aspirational goals of MWBE subcontracting (separate from prime contractor aspirational goals) (Table 65). Goals should be adjusted each year according to the utilization of MWBEs by business category, gradually reducing race- and/or gender-conscious goals and increasing race- and gender-neutral goals. The ultimate objective is to eliminate the need for a race- and/or gender-based program and to replace it completely with race- and gender-neutral options. Goals were set at 80% of the availability determined by this study for each race/gender/ethnicity category.

**TABLE 65  
ASPIRATIONAL GOALS FOR CONSTRUCTION SUBCONTRACTING BY  
RACE/ETHNIC./GENDER CLASSIFICATION**

<b>Recommended Race And Gender- Specific Annual Aspirational Goals for Subcontracting by Race/Ethnic/Gender Classification Memphis MSA</b>			
<b>Business Category by MWBE Classification</b>	<b>% of Contract Dollars</b>	<b>% of Available Firms</b>	<b>Availability Index Goal-80.0</b>
<b>Construction Subcontractors</b>			
<b>African Americans</b>	<b>15.62%</b>	<b>15.56%</b>	<b>12.45%</b>
<b>Asian Americans</b>	<b>0.00%</b>	<b>0.28%</b>	<b>0.22%</b>
<b>Hispanic Americans</b>	<b>0.00%</b>	<b>0.00%</b>	<b>0.00%</b>
<b>Native Americans</b>	<b>0.00%</b>	<b>0.14%</b>	<b>0.11%</b>
<b>White Females</b>	<b>1.42%</b>	<b>3.06%</b>	<b>2.45%</b>

Source: Griffin & Strong, P.C., 2008

<sup>1</sup> The percentage of dollars is taken from the sub utilization Table previously shown.

<sup>2</sup> The percentage of available contractors is taken from the availability Table previously shown.

<sup>3</sup> Disparity ratios for construction subcontracting are calculated based on estimates of nonminority subcontracting utilization. For further details see statistical chapter.

**COMMENDATION AND RECOMMENDATION 11: Consistency in Goal Setting Methods**

Setting project goals separate from the overall aspirational goals serves to further narrowly tailor an agency's MWBE program. Project goals should be set based on the characteristics of the project, the percentage of that type of work that is typically performed by MWBEs, the areas in which MWBEs are known to provide services, and the goals set by the County.

Setting project goals distinct from overall aspirational goals would raise MWBE program costs. Setting project goals would require an additional part-time staff person. Such project goals should also be subject to periodic review by a goal-setting committee.

**RECOMMENDATION 12: Mandatory Subcontracting**

As a part of some SBE subcontracting programs some agencies impose mandatory subcontracting clauses which would promote SBE utilization and be consistent with industry practices.

City of Columbia, SC. The City of Columbia Subcontracting Program established in 2003 applies to City contract of \$200,000 or more. A prime must subcontract a minimum percentage of its bid. The minimums are shown below:

**TABLE 66**

**CITY OF COLUMBIA, S.C MANDATORY SUBCONTRACTING MINIMUMS**

<b>Projects</b>	<b>Minimum subcontracting</b>
<b>Parks</b>	<b>20 %</b>
<b>Pipelines (water &amp; sewer)</b>	<b>20%</b>
<b>Pump Stations</b>	<b>20%</b>
<b>Street Improvements</b>	<b>20%</b>
<b>Traffic Signals/Street Lighting</b>	<b>20%</b>
<b>Building Project by Project</b>	<b>Not to exceed 49%</b>
<b>Miscellaneous projects</b>	<b>20%</b>

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

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

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

Contra Costa. The Contra Costa County (California) Outreach Program sets mandatory subcontracting minimums on a contract by contract basis. The Contra Costa Outreach Program requires that MBEs and WBEs be considered by contractors as possible sources of supply and subcontracting opportunities.

**RECOMMENDATION 13: Review City of Jacksonville’s Program**

The City of Jacksonville, FL implemented a hybrid program by establishing a declining schedule of race conscious targets.<sup>125</sup> In the first program year, Jacksonville proposed to meet 70 % of its MWBE goal with race-conscious means, the second year, 50 %, and the third year, 25 %. At the end of the three year period the program is to be evaluated.

The City of Memphis should consider creating and funding many components of the initiatives of the City of Jacksonville, Florida program to include the following:

- Creation of SBE program with MWBE component
- Creation of Bond Enhancement Program
- Creation of Access to Capital Program
- Creation of Accounting Grants
- Creation of Educational Summits
- Semi-monthly payments to MWBEs
- A cap on the number and total dollar value of contracts that may be set-aside per year
- Appropriating the funds necessary to implement all programs

**RECOMMENDATION 14: Reciprocal Certification**

Memphis should accept the certification decisions of other governmental entities and not require MWBEs and SBEs to submit to a lengthy process. At a minimum, for firms that are already certified by other governmental entities<sup>126</sup>, Memphis should only request the necessary documentation to verify compliance with City of Memphis’ policies and procedures and conduct site visits for further verification, if warranted.

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<sup>125</sup> City of Jacksonville, Executive Order No. 04-02

<sup>126</sup> The State of Florida has an MBE Certification program. It has a larger size standard than the Orange County, FL program. (<http://osd.dms.state.fl.us/eligibil.htm>) Chapter 288, The 2005 Florida Statutes and Chapter 38A-20, Florida Administrative Code.

**RECOMMENDATION 15: Steering Committee**

The true success of a SBE and MWBE Program cannot fall on the shoulders of one office in the organization. The Contract Compliance Office alone cannot make this effort successful. The participation of all procurement professionals is needed to reach out to firms to get certified, to encourage inclusion of new firms and not just the firms that they are used to doing business with, and to assist firms in growing their capacity.

This means that there must be accountability and regular reporting on performance, as well as continuing development of program strategies. A key component is to assemble, senior staff members in the organization, who should serve as a steering committee to drive home the importance of full participation, including the City Administrator, Deputy City Administrators, and User Department Heads. A communications strategy should be established to get the message out that the total integration of MWBEs and LSBEs into the procurement process is important enough to implement, track, and report, by department and division heads. The steering committee should be responsible for a quarterly review and the ultimate outcomes.

*Recommendations for Race-Neutral Alternatives*

**COMMENDATION AND RECOMMENDATION 16: SBE Program**

Memphis should be commended for its establishment of a local business program. The City should move forward with setting SBE goals. A strong SBE program is at the center of maintaining a narrowly tailored program to promote MWBE utilization. It is certainly conceivable that a larger portion of City MWBE utilization can be achieved through the City SBE program.

Larger MWBE utilization through the SBE program can be achieved by increasing the scope of contracts placed in the SBE program, applying SBE goals to more contracts,

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applying a bid incentive to SBE contracts and changing the SBE size standard (discussed below). Further guidance on SBE programs can come from features of the other SBE programs around the United States, including:

- setting SBE goals for contracts (City of Charlotte)<sup>127</sup>, (Miami-Dade County, FL)<sup>128</sup>;
- setting department goals for SBE utilization (City of Charlotte SBE program);
- making SBE utilization part of department performance review (City of Charlotte SBE program);
- rejecting bids for bidder noncompliance with the SBE program (City of Charlotte SBE program); and
- imposing mandatory subcontracting clauses where such clauses would promote SBE and MWBE utilization, and be consistent with industry practice (City of San Diego Subcontractor Outreach Program).<sup>129</sup>

### **RECOMMENDATION 17: Mentor-Protégé Program**

Memphis' MWBE program has assisted in developing successful MWBE subcontractors, some of which have graduated to undertaking prime projects. It is recommended that the City consider an MWBE mentor-protégé program where MWBEs serve as mentors for other MWBE subcontractors. Such an approach has been tried with some success in Orlando, FL. The City should consider partnering with organizations such as the Associated General

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<sup>127</sup> A description of the Charlotte SBE program can be found at [www.charmeck.org/Departments/Economic+Development/Small+Business/Home.htm](http://www.charmeck.org/Departments/Economic+Development/Small+Business/Home.htm).

<sup>128</sup> 10-33.02 Code of Miami (CSBE); [www.co.miami-dade.fl.us/dbd](http://www.co.miami-dade.fl.us/dbd) Ordinance 01-103, Administrative Order 3-32 CBE Program)

<sup>129</sup> San Diego as part of its Subcontractor Outreach Program (SCOPE) has mandatory outreach, mandatory use of subcontractors, and mandatory submission of an outreach document. Whether a contract has subcontracting is determined by the engineer on the project.



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Contractors, local builders association, the Association of Women Contractors, the National Association of Minority Contractors and similar organization in such a program.

### **RECOMMENDATION 18: HUBZones**

Another variant of an SBE program provides incentives for SBEs located in distressed areas. For example, under the 1997 Small Business Reauthorization Act, the federal government started the federal HUBZone program. A HUBZone firm is a small business that is: (1) owned and controlled by U.S. citizens; (2) has at least 35 % of its employees who reside in a HUBZone; and (3) has its principal place of business located in a HUBZone.<sup>130</sup>

The same preferences that can be given to SBEs can be given to HUBZone firms. For example, the City of New York has a HUBZone type program providing subcontracting preferences to small construction firms (with less than \$2 million in average revenue) that either perform 25 % of their work in economically distressed areas or for which 25 % of their employees are economically disadvantaged individuals.<sup>131</sup>

All HUBZone programs are race neutral, HUBZone programs can serve as a vehicle for encouraging MWBE contract utilization. Nationally, there are 5,357 female and minority HUBZone firms, representing 56.2 % of total HUBZone firms.<sup>132</sup> In the Phoenix MSA there are 46 women and minority HUBZone firms (107 in the State of Arizona), representing 64.8 % of total HUBZone firms in the city.

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<sup>130</sup> 13 C.F.R. 126.200 (1999). The State of California provides a 5 % preference for a business work site located in state enterprise zones and an additional 1-4 % preference (not to exceed \$50,000 on goods and services contracts in excess of \$100,000) for hiring from within the enterprise zone. (Cal Code Sec 4530 *et seq.*) Minnesota's bid preferences are limited to small businesses operating in high unemployment areas.

<sup>131</sup> New York Administrative Code § 6-108.1. For a description of the New York local business enterprise program see <http://www.nyc.gov/html/sbs/html/lbe.html>. Miami-Dade has a Community Workforce Program that requires all Capital Construction Projects contractors to hire 10 % of their workforce from Designated Target Areas (which include Empowerment Zones, Community Development block grant Eligible Block Groups, Enterprise Zones and Target Urban Areas) in which the Capital Project is located. (Miami Ordinance 03-237.)

<sup>132</sup> Based on the SBA pro-net database located at <http://pro-net.sba.gov/pro-net/search.html>.

**RECOMMENDATION 19: Two Tier Size Standard**

The federal case law and the DOT DBE regulations point to the use of size standards and net worth requirements as one factor in the narrow tailoring of remedial procurement programs.

Size standards for remedial procurement programs face a dilemma. If the size standard is placed too high, large firms crowd out new firms. If the size standard is placed too low, then too many experienced firms lose the advantages of the remedial program. The City should consider adopting a two-tier standard and a net worth requirement for MWBEs and should update its requirements for SBE firms.

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

**RECOMMENDATION 20: Commercial Antidiscrimination Rules**

Some courts have noted that putting in place antidiscrimination rules is an important component of race-neutral alternatives.<sup>133</sup> Nationally, some agencies have adopted requirements to ensure that their procurement is not discriminatory (e.g., Baltimore, MD; Oakland, CA; Cincinnati, OH; Jackson, MS; Dade County, FL; Seattle, WA; Atlanta Public Schools, GA and Charlotte, NC).

Features of an antidiscrimination policy would include:

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<sup>133</sup> *Engineering Contractors v. Dade County*, 943 F.Supp. 1546 (SD Fla 1996).

- submission of a Business Utilization report on MWBE subcontractor utilization
- review of the Business Utilization report for evidence of discrimination;
- a mechanism whereby complaints may be filed against firms that have discriminated in the marketplace;
- due process, in terms of an investigation by agency staff;
- a hearing process before an independent hearing examiner;
- an appeals process to the agency manager and ultimately to a court; and
- imposition of sanctions, including:
  - disqualification from bidding with the agency for up to five years;
  - termination of all existing contracts; and
  - referral for prosecution for fraud.

**RECOMMENDATION 21: Private Sector Initiatives**

Bexar County, TX added SMWBE participation to their county tax incentive policy in 2004. The county currently considers tax abatements of up to 40 % on qualified real property improvement and new personal property investment. A number of entities such as the City of Tampa, FL, Atlanta, GA, Saint Paul, MN have created private sector initiatives such as including MWBE goals in their economic development contracts and measuring MWBE participation on private sector projects performed by City prime contractors.

**COMMENDATION AND RECOMMENDATION 22: Outsourcing Management and Technical Services**

The City should be commended for its current efforts in providing management and technical assistance through its partnership with the Renaissance Business Center. These efforts could be strengthened by contracting with an outside management and technical assistance provider to provide needed technical services related to business development and performance, particularly in the area of loans and bonding. Such a contract should be structured to include providing incentives to produce results, such as the number of MWBEs being registered as qualified vendors with the City, the number of MWBEs graduating from subcontract work to prime contracting, and rewarding firms that utilize MWBEs in their private sector business activities.

**RECOMMENDATION 23: Surety Assistance and Wrap-Up Insurance**

A small business surety assistance program should provide technical assistance to small firms, track subcontractor utilization by ethnicity, coordinate existing financial as well as management and technical assistance resources, and provide for quality surety companies to participate in the bonding program.

The Port Authority of New York and New Jersey uses a Contractor Insurance Program (CIP), a form of wrap-up insurance under which the Port Authority provides various insurance coverages to approved on-site contractors and subcontractors for construction contracts. In particular, the Port Authority buys and pays the premiums on public liability insurance (\$25 million per occurrence), builders' risk insurance, and workers' compensation and employers' liability insurance. In general, the CIP can reduce an owner's project costs by an average of 1 to 2 % compared to traditional contractor procured insurance programs. The Port Authority CIP does help alleviate barriers from insurance costs to MWBE participation in Port Authority construction projects.

The City of Atlanta and Fulton County provide surety assistance programs as a part of their OCIP.

## G. Organizational Recommendations

### RECOMMENDATION 24: MWBE Program Data

It is imperative for the City to closely monitor the utilization of all businesses by race, ethnicity, gender, and business category over time to determine whether an LSBE program has the potential to eliminate race and gender disparities without applying specific race and gender goals. The City is still behind in some aspects of its tracking of MWBE spending.

The City should require that all contractors maintain data for subcontractors they have employed for a City project. This includes all subcontractors utilized (minority, women, and nonminority) and the total amount paid. These data should be submitted to the City before the prime contractor's final payment for services.

Availability analysis requires a good data source, such as the centralized bidder registration systems for prime vendors and contractors that are becoming increasingly common. For future availability analysis, it is equally important to identify not only the number of prime vendors but also the number of subcontractors available and the services provided by all vendors. Because the City does not collect these data, it is limited in the type of availability analysis it can conduct. In order for Memphis to monitor an M/W/SBE program accurately and improve future availability analyses, it should require all contractors to submit a list of all subcontractors contacted in preparation of their bid package. The list of potential subcontractors should include the proposed service and bid amount. The data will allow the City to identify with accuracy the number of actual subcontractors available. These data should be analyzed and reviewed at least annually and the MWBE program adjusted according to review results.

Ideally, the City data management should rest upon Internet-based data tracking. Such a system would assist in the acquisition of subcontracting data, reduce the costs of disparity

analysis, facilitate CCO time management of its staff, and shift focus of CCO staff from certification to contract compliance.

**RECOMMENDATION 25: Listing of Subcontractors**

The City should require all contractors to submit a list of all subcontractors contacted in preparation of their bid package. The list of potential subcontractors should include the proposed service and bid amount. The listing of subcontractors would reduce the possibility of bid shopping. It would also assist the City during the submission review process, goal-setting process, and goal attainment review, and help avoid administrative issues of handling noncompliance after contract award. Some agencies reduce bid shopping with the following requirements:

- prime contractors must report all subcontractors;
- subcontractor bids must remain confidential;
- prime contractors must contract with subcontractors in the same dollar amount upon which the prime bid was based;
- prime contractors must seek written approval of the substitution of subcontractors; and
- each pay request must identify the dollar amount to be paid to subcontractors.

**RECOMMENDATION 26: Historically Under-utilized Subcontractors**

Memphis should find ways to encourage the award of contracts to qualified MWBEs that have participated in bidding but that have not won any bids and therefore, have not previously done business with the City. The City could provide bonus points or other incentives when a prime utilizes an “untried” business.

**COMMENDATION and RECOMMENDATION 27: Access to Capital**

The City should be commended for its collaboration with existing financial assistance providers. Other examples of lending assistance programs include linked deposit programs and collateral enhancement programs. Agencies use linked deposit programs to subsidize lower rates for business and housing loans by accepting a lower rate on their deposits with participating financial institutions. Under a collateral enhancement program the City would not loan funds directly to businesses, but instead would place a collateral reserve account at a bank. The business would then be required to secure financing from a lending institution, which could be conditioned on receipt of additional collateral supplied by the collateral enhancement program.

The cities of Phoenix, AZ, Saint Paul, MN are a couple of examples that offer capital program that have established or partnered with local lending assistance programs and CDC lending programs. Such programs should be evaluated for their impact on SMWBE growth, development and utilization.

**RECOMMENDATION 28: Prompt Payment**

The City should establish a prompt payment policy. One such policy operates at the Orlando Orange County Expressway Authority (OOCEA) in Florida:

- The OOCEA cuts checks every Tuesday.
- The OOCEA has a Quick Pay program that can pay vendors within two weeks.
- The OOCEA also makes mobilization payments for project preparation.
- The OOCEA payment policy allows for joint checks payable to small and MWBE firms and the materials supplier.

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- The OOCEA's payment policy provides for no progress payments to the prime contractor until the prime has certified disbursement of a pro rata share of payments to subcontractors.

The State of Minnesota covers subcontractors in their prompt payment statute. Some small vendors still have problems with prompt payment particularly payments by prime contractors to subcontractors. Certain subcontractors that work on an early phase in a project can suffer from retainage withheld on lengthy projects. The prompt payment policy should address this issue. The City should require that retainage be released when the tasks for the subcontractors phase of work is accepted rather than at the end of the project.

<sup>134</sup> This policy has been adopted by a number of state departments of transportation and federal DOT grant recipients.

### **RECOMMENDATION 29: Oversight Committee**

It is important that major stakeholders (including representatives of general contractors and MWBE contractors) take part in discussions about the City's MWBE program. Consequently, the City should provide a vehicle for stakeholder input in the review of any reforms of its MWBE program.

In addition, MWBEs are facing challenges in the general marketplace related to capital, private sector bid opportunities, prompt payment, contract compliance, and business operations. There are a number of entities within the Memphis MSA that operate an MWDBE program or who suspended their program. These governmental entities should enter into an inter-local agreement and work in concert to ensure increased contract access, contract compliance, and a coordinated effort to ensure the growth and viability of Memphis MWBEs.

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<sup>134</sup> 49 CFR Part 26.29(b)



**RECOMMENDATION 30: Additional Features for MWBE Web site**

Other agencies put the following information on their Web site: directory of certified firms in electronic format (City of New York), uniform certification application, MWBE program description, SBE program description, how to do business information, bid tabulations, direct links to on-line purchasing manuals, capacity and experience data on certified firms, bid opportunities, vendor application, information on loan programs, and forecasts of business opportunities for MWBEs.

**RECOMMENDATION 31: Performance Reviews**

A means of increasing understanding of the ordinance would be to identify means of broader distribution of program requirements. A first step would be revision of the Purchasing Policies and Procedures manual section, Minority and Women Business Enterprise (C-050) to include more details regarding the ordinances provisions.

Secondly, additional internal materials providing the program highlights could be developed and distributed during a training session for supervisors, managers and directors. Most City personnel interviewed indicated it had been a number of years since they had gone through training for the program. Following implementation of the new ordinance would be an ideal time to schedule training.

The City should require employees with procurement authority to be evaluated on their MWBE utilization as part of their performance review. The City should also ensure that all personnel with purchasing power are fully trained concerning the City's MWBE program and conform with the program requirements when they solicit bids and make purchases.

**RECOMMENDATION 32: Staffing and Program Monitoring**

Increase staff, training and resources of the Contract Compliance Office to ensure the necessary resources to operate the MWBE program, train the internal customers and to

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track the data necessary to report on accomplishment. Specifically, this staff would be responsible to perform outreach, respond to public inquiries about the program, set project and overall goals, analyze bid requirements, monitor compliance from current contracts, and perform dispute resolution, collect and report on data related to contract awards and expenditures and to respond to the needs of the internal customers regarding interpretation, assistance and compliance.

### **RECOMMENDATION 33: Balanced Scorecard**

The City should develop additional measures to gauge the effectiveness of its efforts. Jacksonville, Florida has had a balanced scorecard approach.

Possible measures include:

- growth in the number of MWBEs winning their first award from the City;
- growth in percentage of MWBE utilization by the City;
- growth in MWBE prime contracting;
- growth in MWBE subcontracting to prime contractors;
- number of firms that receive bonding;
- number of firms that successfully graduate from the MWBE program;
- number of graduated firms that successfully win City projects;
- percentage of MWBE utilization for contracts not subject to competitive bidding requirements;
- growth in the number of MWBEs utilized by the City;
- number of joint ventures involving MWBEs; and

## H. Conclusion

Utilization of minority and White Female firms by the City did improve during the five-year period of this study and since the previous study of 1994, both in relative and absolute terms. Substantial disparities did remain in some areas. Disparities in firm revenue and in entry into and earnings from self-employment were also evident after controlling for firm characteristics. MWBEs faced higher barriers in the private sector than in City of Memphis procurement.

Griffin & Strong, P.C.

March, 2010