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ASSOCIATES, LTD.

April 28, 2006

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Subject: Hillsborough County Aviation Authority and City of Tampa Multi-Jurisdictional
Disparity Study

Dear Mr. Spearman,

Enclosed please find the Final Volume 1, Legal and Anecdotal Analysis and Final Volume 2,
City of Tampa Disparity Study Report.

Feel free to contact me with any questions or concerns.

Sincerely,

Lynn Reddrick

Lynn Reddrick
Senior Project Manager

Enclosure



Multi-Jurisdictional Disparity Study Consultant Services

HILLSBOROUGH COUNTY AVIATION AUTHORITY
AND CITY OF TAMPA

Legal and Anecdotal Analysis

Submitted to:
Hillsborough County
Aviation Authority Office
and City of Tampa, Florida

Submitted by:
Mason Tillman Associates, Ltd.



April 2006

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ACKNOWLEDGMENT

In December 2004, Hillsborough County Aviation Authority (Authority) and the City of Tampa (City) commissioned a Multi-Jurisdictional Disparity Study (Study) to determine the participation of minority and woman-owned business enterprises (M/WBEs) in the Authority and City contracts. Mason Tillman Associates, Ltd., of Oakland, California was selected by the Disparity Study Commission to perform the Disparity Study.

The purpose of this Study was to determine if a significant disparity existed between the availability of ready, willing, and able minority and woman-owned business enterprises (M/WBEs) and the utilization of such businesses in the Authority and City's procurement process. The prime utilization analysis included five industries: construction, construction-related services, professional services, non-professional services, and goods. Contracts awarded between October 1, 2001 and September 30, 2004 were studied. The Authority and the City's contracts were analyzed separately.

The Study could not have been conducted without the cooperation of the local chambers of commerce and business organizations, and the many Hillsborough County business owners who demonstrated their commitment to the Study by participating in interviews. In addition, the City and the Authority staff played a critical role in assisting with the data collection by making available Authority and City personnel, contract records, and documents needed to perform the Study. This Study could not have been completed without their extraordinary effort.

Diane Pryor-Vercelli, Senior Director of Properties and Contracts Administration, Hillsborough County Aviation Authority and Gregory Spearman, Director of Purchasing, City of Tampa provided overall guidance and direction for the Study. Their leadership and guidance helped keep the Study process focused and on target. These Directors facilitated Mason Tillman's access to Authority and City staff and contract documents.



Table of Contents

CHAPTER 1: LEGAL ANALYSIS	1-1
I. INTRODUCTION	1-1
II. STANDARDS OF REVIEW	1-2
A. Race-Conscious Programs	1-2
B. Woman-Owned Business Enterprise	1-3
C. Local Business Enterprise	1-5
D. Disadvantaged Business Enterprise Programs	1-6
III. BURDEN OF PROOF	1-6
A. Strong Basis in Evidence	1-7
B. Ultimate Burden of Proof	1-8
IV. CROSON EVIDENTIARY FRAMEWORK	1-9
A. Active or Passive Participation	1-10
B. Systemic Discriminatory Exclusion	1-13
C. Anecdotal Evidence	1-22
V. CONSIDERATION OF RACE-NEUTRAL OPTIONS	1-28
VI. CONCLUSION	1-29
VII. LIST OF CASES	1-30
Statutes	1-32



Table of Contents Continued

CHAPTER 2:	ANECDOTAL ANALYSIS	2-1
I.	INTRODUCTION	2-1
	A. Anecdotal Evidence of Active or Passive Participation	2-1
	B. Anecdotal Methodology	2-2
	C. Anecdotal Interviewee Profile	2-3
II.	BUSINESS BARRIERS	2-4
	A. Racial Barriers	2-4
III.	BARRIERS CREATED BY THE CITY, AUTHORITY, AND OTHER AGENCIES	2-7
	A. Barriers Created by City and Authority Managers	2-7
	B. Failure to Monitor M/WBE Program Compliance	2-11
IV.	BARRIERS CREATED BY CONTRACTOR COMMUNITY	2-13
	A. Difficulty Breaking into the Contracting and Old Boy Networks	2-13
	B. Abuse of M/WBE Program Requirements	2-14
V.	DIFFICULTIES WITH THE BID PROCESS THROUGH THE LIFE OF A CONTRACT	2-20
	A. Difficulties Obtaining Access to Bid Information	2-20
	B. Inadequate Lead Time	2-24
VI.	PROBLEMS WITH M/WBE CERTIFICATION PROCESS	2-24
	A. Certification Process	2-24
	B. Problem with Front Companies	2-29



Table of Contents Continued

VII.	FINANCIAL BARRIERS	2-32
	A. Difficulty Obtaining Financing or Bonding	2-32
	B. Late Payment by Prime Contractors	2-35
	C. Late Payment by City or Authority	2-38
VIII.	COMMENTS ABOUT THE CITY AND AUTHORITY'S M/WBE PROGRAM	2-40
	A. Positive Comments Regarding M/WBE Program	2-40
	B. Negative Comments About M/WBE Program	2-43
	C. General M/WBE Program Comments	2-44
IX.	POSITIVE STATEMENTS	2-50
X.	RECOMMENDATIONS	2-52
XI.	SUMMARY	2-59



List of Tables

Table 2.01	Anecdotal Interviewee Profile	2-4
Table 2.02	Summary of Findings Concerning Current Barriers against Ethnic/Gender Groups	2-60



1

LEGAL ANALYSIS

I. INTRODUCTION

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

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

A caveat is appropriate here. The review under strict scrutiny is fact-specific. Nevertheless, three post-*Croson* Federal Court of Appeals opinions do provide guidelines for the evidence that should be adduced if race-conscious remedies are put in place. The

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

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



Third, Eleventh, and Tenth Circuits assessed the disparity studies in question on the merits instead of disposing of the cases on procedural issues.³

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

II. STANDARDS OF REVIEW

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

A. Race-Conscious Programs

In *Croson*, the United States Supreme Court affirmed that pursuant to the 14th Amendment, the proper standard of review for state and local race-based programs is strict scrutiny.⁴ Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.⁵ The Court recognized that a state or local entity may take action, in the form of a MBE Program, to rectify the effects of *identified, systemic racial discrimination* within its jurisdiction.⁶ Justice O'Connor, speaking for the majority, articulated various methods of demonstrating discrimination and set forth guidelines for

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

⁴ *Croson*, 488 U.S. at 493-95.

⁵ *Id.* at 493.

⁶ *Croson*, 488 U.S. at 509.



crafting MBE programs so that they are “narrowly tailored” to address systemic racial discrimination.⁷ The specific evidentiary requirements are detailed in Section IV.

B. Woman-Owned Business Enterprise

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

Notwithstanding the Supreme Court’s failure thus far to rule on a WBE program, the consensus among the Circuit Courts of Appeals is that these programs are subject only to intermediate scrutiny, rather than the more exacting strict scrutiny to which race-conscious programs are subject.⁸ Intermediate review requires the governmental entity to demonstrate an “important governmental objective” and a method for achieving this objective which bears a fair and substantial relation to the goal.⁹ The Court has also expressed the test as requiring an “exceedingly persuasive justification” for classifications based on gender.¹⁰

The Supreme Court acknowledged that in limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists the members of that sex which are disproportionately burdened.¹¹

The Third Circuit, in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)*, ruled in 1993 that the standard of review that governs WBE programs is different than the standard imposed upon MBE programs.¹² The Third Circuit

⁷ *Id.* at 501-02. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting: compelling interest and narrowly tailored remedies. The Supreme Court in *Croson* and subsequent cases provides fairly detailed guidance on how those concepts are to be treated in contracting. In education and employment, the concepts are not explicated to nearly the same extent. Therefore, references in those cases to “compelling governmental interest” and “narrow tailoring” for purposes of contracting are essentially generic, and of little value in determining the appropriate methodology for disparity studies.

⁸ See e.g., *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *Philadelphia*, 91 F.3d 586 (3d Cir. 1996); *Engineering Contractors Association of South Florida Inc., et al. v. Metropolitan Dade County et al.*, 122 F.3d 895 (11th Cir. 1997). *Concrete Works II*, 321 F.3d at 959, is in accord.

⁹ *Craig v. Boren*, 429 U.S. at 198-99 (1976).

¹⁰ *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). See also *Michigan Road Builders Ass’n., Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987).

¹¹ *Id.* at 728.

¹² *Philadelphia*, 6 F.3d at 1000-01.



held that whereas MBE programs must be “narrowly tailored” to a “compelling state interest,” WBE programs must be “substantially related” to “important governmental objectives.”¹³ An MBE program would only survive constitutional scrutiny by demonstrating a pattern and practice of systemic racial exclusion or discrimination in which a state or local government was an active or passive participant.¹⁴

The Ninth Circuit in *Associated General Contractors of California v. City and County of San Francisco (AGCC I)* held that classifications based on gender require an “exceedingly persuasive justification.”¹⁵ The justification is valid only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification, and the classification does not reflect or reinforce archaic and stereotyped notions of the roles and abilities of women.¹⁶

The Eleventh Circuit also applies intermediate scrutiny.¹⁷ The district court in *Engineering Contractors Association of South Florida v. Metropolitan Dade County (Dade County)*, which was affirmed by the Eleventh Circuit U.S. Court of Appeals, cited the Third Circuit’s 1993 formulation in *Philadelphia*: “[T]his standard requires the [county] to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.”¹⁸ Although the *Dade County* district court applied the intermediate scrutiny standard, it queried whether the Supreme Court decision in *United States v. Virginia*,¹⁹ finding the all male program at Virginia Military Institute unconstitutional, signaled a heightened level of scrutiny: parties who seek to defend gender-based government action must demonstrate an “exceedingly persuasive justification” for that action.²⁰ The *Dade County* appellate court echoed that speculation but likewise concluded that “[u]nless and until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective.”²¹

¹³ *Id.* at 1009.

¹⁴ *Id.* at 1002.

¹⁵ *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 940 (9th Cir. 1987).

¹⁶ *Id.* at 940.

¹⁷ *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1579-1580 (11th Cir. 1994).

¹⁸ *Dade County*, 122 F.3d at 909, (citing *Philadelphia*, 6 F.3d at 1010 (3d Cir. 1993)).

¹⁹ 116 S.Ct. 2264 (1996).

²⁰ *Dade County*, 943 F.Supp. at 1556.

²¹ *Dade County*, 122 F.3d at 908.



The *Dade County* appellate court noted that, at the time, by articulating the “probative evidence” standard, the Third Circuit in *Philadelphia* was the only federal appellate court that explicitly attempted to clarify the evidentiary requirement applicable to gender-conscious programs.²² It went on to interpret that standard to mean that “evidence offered in support of a gender preference must not only be ‘probative’ [but] must also be ‘sufficient.’”²³ It also reiterated two principal guidelines of intermediate scrutiny evidentiary analysis: (1) under this test, a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself;²⁴ and (2) the intermediate scrutiny evidentiary review is not to be directed toward mandating that gender-conscious affirmative action is used only as a “last resort”²⁵ but instead ensuring that the affirmative action is “a product of analysis rather than a stereotyped reaction based on habit.”²⁶ This determination turns on whether there is evidence of past discrimination in the economic sphere at which the affirmative action program is directed.²⁷ The court also stated that “a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”²⁸

C. Local Business Enterprise

The Ninth Circuit Court of Appeals applied the rational basis standard when evaluating LBE programs, holding that a local entity may give a preference to local businesses to address the economic disadvantages those businesses face in doing business within the city or county.²⁹ In *AGCC I*, a pre-*Croson* case, the City and County of San Francisco conducted a detailed study of the economic disadvantages faced by San Francisco-based businesses versus businesses located outside the City and County boundaries. The study showed a competitive disadvantage in public contracting for businesses located within the City versus businesses from other areas.

San Francisco-based businesses had higher administrative costs of doing business within the City. Such costs included higher taxes, rents, wages, insurance rates, and benefits for

²² *Id.* at 909.

²³ *Id.*

²⁴ *Id.* at 910 (citing *Ensley Branch*, 31 F.3d at 1580).

²⁵ *Id.* (citing *Hayes v. North State Law Enforcement Officers Ass’n.*, 10 F.3d 207, 217 (4th Cir. 1993), racial discrimination case).

²⁶ *Id.* (citing *Philadelphia*, 6 F.3d at 1010 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 582-583 (1990)).

²⁷ *Id.* (citing *Ensley Branch*, 31 F.3d at 1581).

²⁸ *Dade County*, 122 F.3d at 929. However, Judge Posner, in *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001), questioned why there should be a lesser standard where the discrimination was against women rather than minorities.

²⁹ *AGCC I*, 813 F.2d at 943.



labor. In upholding the LBE Ordinance, the Ninth Circuit held that “. . . the city may rationally allocate its own funds to ameliorate disadvantages suffered by local business, particularly where the city itself creates some of the disadvantages.”³⁰

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

D. Disadvantaged Business Enterprise Programs

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

The recent Ninth Circuit decision in *Western States Paving v. Washington State DOT*³¹ criticized WSDOT goals, even though they were derived from the DOT regulations, because the capacity of DBEs to perform contracts was not taken into account. In WSDOT’s program, all ethnic groups were included without determining whether there had been discrimination against each one. Congress’ findings that there was discrimination nationally were sufficient to meet the “compelling interest,” justifying federal legislation. However, the majority held that for the State’s program to be “narrowly tailored,” those local determinations had to be made. The holding that a State had to make such findings is contrary to the district court’s decision in *Sherbrooke Turf, Inc. v. MNDOT* and *Gross Seed v. Nebraska Dept. of Roads*.³² This conflict, however, is not a daunting one because it can be overcome if the disparity study methodology option for determining goals is followed.

III. BURDEN OF PROOF

The procedural protocol established by *Croson* imposes an initial burden of proof upon the government to demonstrate that the challenged MBE program is supported by a strong

³⁰ *Id.* at 943.

³¹ 407 F.3d 983 (9th Cir. 2005).

³² *Sherbrooke Turf*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *Gross Seed*, 2002 U.S. Dist LEXIS 27125 (D.Neb. 2002). In any case, USDOT’s December 21, 2005 guidance recognizes that *Western States Paving* is binding only in the Ninth Circuit, not in Florida.



factual predicate, i.e., documented evidence of past discrimination. Notwithstanding this requirement, the plaintiff bears the ultimate burden of proof to persuade the court that the MBE program is unconstitutional. The plaintiff may challenge a government’s factual predicate on any of the following grounds:³³

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

Thus, a disparity study must be analytically rigorous, at least to the extent that the data permits, if it is to withstand legal challenge.³⁴

A. Strong Basis in Evidence

Croson requires defendant jurisdictions to produce a “strong basis in evidence” that the objective of the challenged MBE program is to rectify the effects of discrimination.³⁵ The issue of whether or not the government has produced a strong basis in evidence is a question of law.³⁶ Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.³⁷

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

³³ These were the issues on which the district court in Philadelphia reviewed the disparity study before it.

³⁴ *Croson*, 488 U.S. 469.

³⁵ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513 at 1522 (10th Cir. 1994), (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 292 (1986); see *Croson* 488 U.S. at 509 (1989)).

³⁶ *Id.* (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 944 (D.Conn 1992)).

³⁷ *Concrete Works I*, 36 F.3d at 1522.

³⁸ *Id.* (citing *Croson* 488 U.S. at 498).



B. Ultimate Burden of Proof

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

Justice O’Connor explained the nature of the plaintiff’s burden of proof in her concurring opinion in *Wygant v. Jackson Board of Education (Wygant)*.⁴⁰ She stated that following the production of the factual predicate supporting the program:

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

In *Philadelphia*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether facts constitute a “strong basis” in evidence.⁴² That court wrote that the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered.⁴³ If the plaintiff’s theory is that an agency has adopted race-based preferences with a purpose other than remedying past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else.⁴⁴

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

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

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

⁴¹ *Id.*

⁴² *Philadelphia*, 91 F.3d at 597.

⁴³ *Id.*

⁴⁴ *Id.*



is an issue of law, and the burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue.⁴⁵

Concrete Works II made clear that plaintiff's burden is an evidentiary one; it cannot be discharged simply by argument. The court cited its opinion in *Adarand Constructors Inc. v. Slater*, 228 F.3d 1147 (2000): "[g]eneral criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity study is of little persuasive value."⁴⁶

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

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

IV. CROSON EVIDENTIARY FRAMEWORK

Government entities must construct a strong evidentiary framework to stave off legal challenges and ensure that the adopted MBE programs comport with the requirements of

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

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

⁴⁷ *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado*, 321 F.3d 950 (10th Cir. 2003), *petition for cert. denied*, 540 U.S. 1027 (2003) ("*Concrete Works II*").



the Equal Protection clause of the U.S. Constitution. The framework must comply with the stringent requirements of the strict scrutiny standard. Accordingly, there must be a strong basis in evidence and the race-conscious remedy must be “narrowly tailored,” as set forth in *Croson*. A summary of the appropriate types of evidence to satisfy the first element of the *Croson* standard follows.

A. Active or Passive Participation

Croson requires that the local entity seeking to adopt a MBE program must have perpetuated the discrimination to be remedied by the program. However, the local entity need not be an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court’s strict scrutiny review.⁴⁸

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

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

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. In *Concrete Works I*, the Tenth Circuit considered a purely private sector definition of passive discrimination. Since no government funds were involved in the contracts analyzed in the case, the court questioned whether purely private sector discrimination is likely to be a fruitful line of inquiry.⁵² On

⁴⁸ *Croson*, 488 U.S. at 509.

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

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

⁵¹ *Croson*, 488 U.S. at 492.

⁵² *Concrete Works I*, 36 F.3d at 1529. “What the Denver MSA data does not indicate, however, is whether there is any linkage between Denver’s award of public contracts and the Denver MSA evidence of industry-wide discrimination. That is, we cannot tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis



remand, the district court rejected the three disparity studies offered to support the continuation of Denver's M/WBE program because each focused on purely private sector discrimination. Indeed, Denver's focus on purely private sector discrimination may account for what seemed to be a shift by the court away from the standard *Croson* queries of (1) whether there was a firm basis in the entity's contracting process to conclude that discrimination existed; (2) whether race-neutral remedies would resolve what was found; and (3) whether any race-conscious remedies had to be narrowly tailored. The court noted that in the City of Denver's disparity studies the chosen methodologies failed to address the following six questions:

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

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

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

The *Shaw* Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The Court, however, did set out two conditions which must be met for the

in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that 'it had essentially become a "a passive participant" in a system of racial exclusion practiced by elements of the local construction industry' [citing *Croson*]. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. The record before us does not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and this may well be a fruitful issue to explore at trial."

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

⁵⁴ *Id.* at 61.

⁵⁵ 517 U.S. at 519.



governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 910. The City can satisfy this condition by identifying the discrimination “public or private, with some specificity.” *Id.* (quoting *Croson*, 488 U.S. at 504 (*emphasis added*)). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.*⁵⁶

The Tenth Circuit therefore held that the City was correct in its attempt to show that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against M/WBE subcontractors in other private portions of their business.”⁵⁷ The court emphasized that its reading of *Croson*⁵⁸ and its own precedents supported that conclusion. Also, the court pointed out that the plaintiff, which had the burden of proof, failed to introduce controverting evidence and merely *argued* that the private sector was out of bounds and that Denver’s data was flawed.⁵⁹

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

Ten months later, in *Builders Association of Greater Chicago v. City of Chicago*,⁶¹ the question of whether a public sector remedy is “narrowly tailored” when it is based on purely private sector discrimination was at issue. The district court reviewed the remedies derived from private sector practices with a more stringent scrutiny. It found that there was discrimination against minorities in the Chicago construction industry. However, it did not find the City of Chicago’s subcontracting goal an appropriate remedy because it was not “narrowly tailored” to address the documented private discrimination due to lack of access

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

⁵⁷ Slip opinion, pg. 20.

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

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

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

⁶¹ 298 F.Supp2d 725 (N.D.Ill. 2003).



to credit for MBEs. The court also criticized the remedy because it was a “rigid numerical quota,” and there was no individualized review of MBE beneficiaries, citing Justice O’Connor opinion in *Gratz v. Bollinger*.⁶²

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

B. Systemic Discriminatory Exclusion

Croson clearly established that an entity enacting a business affirmative action program must demonstrate identified, systemic discriminatory exclusion on the basis of race or any other illegitimate criteria (arguably gender).⁶⁵ Thus, it is essential to demonstrate a pattern

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

⁶³ 256 F.3d 642 (7th Cir. 2001).

⁶⁴ 214 F.3d 730 (6th Cir. 2000).

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

In 1996, Houston Metro had adopted a study done for the City of Houston whose statistics were limited to aggregate figures that showed *income* disparity between groups, without making any connection between those statistics and City’s contracting policies. The disadvantages cited that M/WBEs faced in contracting with the City also applied to small businesses. Under *Croson*, that would have pointed to race-neutral remedies. The additional data on which Houston Metro relied was even less



and practice of such discriminatory exclusion in the relevant market area.⁶⁶ Using appropriate evidence of the entity's active or passive participation in the discrimination, as discussed above, the showing of discriminatory exclusion must cover each racial group to whom a remedy would apply.⁶⁷ Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

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

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

Second, "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."⁷¹ Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting

availing. Its own expert contended that the ratio of lawsuits involving private discrimination to total lawsuits and ratio of unskilled black wages to unskilled white wages established that the correlation between low rates of black self-employment was due to discrimination. Even assuming that nexus, there is nothing in *Croson* that accepts a low number of MBE business formation as a basis for a race conscious remedy.

⁶⁶ *Id.* at 509.

⁶⁷ *Id.* at 506. As the Court said in *Croson*, "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination." See *North Shore Concrete and Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998), which rejected the inclusion of Native Americans and Alaskan Natives in the City's program, citing *Croson*.

⁶⁸ *Id.* at 509.

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

⁷⁰ *Croson*, 488 U.S. at 502-03.

⁷¹ *Id.* at 509.



opportunities, it may act to end the discriminatory exclusion.⁷² Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

In *Coral Construction*, the Ninth Circuit Court of Appeals further elaborated upon the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.⁷³ The court explained that statistical evidence, standing alone, often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.⁷⁴

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

1. Geographic Market

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

Read together, these cases support a definition of market area that is reasonable rather than dictate a specific formula. Since *Croson* and its progeny did not provide a bright line rule for local market area, that determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.⁷⁹ Extra-

⁷² *Id.*

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

⁷⁴ *Id.*

⁷⁵ *Id.*

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

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

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

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



jurisdictional evidence may be permitted where doing so is reasonably related to where the jurisdiction contracts.⁸⁰

2. Current Versus Historical Evidence

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

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

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

Pre-program data regarding an entity's utilization of M/WBEs prior to enacting the M/WBE program may be relevant to assessing the need for the agency to keep such a program intact. A 1992 opinion by Judge Henderson of the U.S. District Court for the Northern District of California, *RGW Construction v. San Francisco Bay Area Rapid Transit District (BART)*,⁸⁴ set forth the possible significance of statistical data during an entity's "pre-program" years.

⁸⁰ There is a related question of which firms can participate in a remedial program. In *Coral Construction*, the Court held that the definition of "minority business" used in King County's MBE program was over-inclusive. The Court reasoned that the definition was overbroad because it included businesses other than those who were discriminated against in the King County business community. The program would have allowed, for instance, participation by MBEs who had no prior contact with the County. Hence, location within the geographic area is not enough. An MBE had to have shown that it previously sought business, or is currently doing business, in the market area.

⁸¹ See *Croson*, 488 U.S. at 509-10.

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

⁸³ See *AGCC II*, 950 F.2d 1401 at 1414 (consultant study looked at City's MBE utilization over a one year period). Ultimately dismissing plaintiff's case in *Behavioral Interventions v. Missouri Office of Administration*, Case No. 04-0872-CV-W-GAF (W. D. Mo. 2005), the district court criticized the age of the data on which the program was based (it was nine years old) (May 17, 2005). It is important in such situations that the jurisdiction has an updated study.

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



Judge Henderson opined that statistics that provide data on a period when no M/WBE goals were operative are often the most relevant data in evaluating the need for remedial action by an entity. Indeed, “to the extent that the most recent data reflect the impact of operative DBE goals, then such data are not necessarily a reliable basis for concluding that remedial action is no longer warranted.”⁸⁵ Judge Henderson noted that this is particularly so given the fact that M/WBEs report that they are seldom or never used by a majority prime contractor without M/WBE goals. That this may be the case suggests a possibly fruitful line of inquiry: an examination of whether different programmatic approaches in the same market area led to different outcomes in M/WBE participation. The Tenth Circuit came to the same conclusion in *Concrete Works II*. It is permissible for a study to examine programs where there were no goals.

Similarly, the Eleventh Circuit in *Dade County* cautions that using post-enactment evidence (post-program data) may mask discrimination that might otherwise be occurring in the relevant market. Still, the court agreed with the district court that it was not enough to speculate on what MBE utilization would have been in the absence of the program.⁸⁶

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

3. Statistical Evidence

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

The Third Circuit Court of Appeals, in *Philadelphia*, ruled that the “relevant statistical pool” includes those businesses that not only exist in the marketplace, but that are qualified

⁸⁵ *Id.*

⁸⁶ *Dade County*, 122 F.3d at 912.

⁸⁷ Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been taken into account. In addition to looking at Dade County’s contracting and subcontracting statistics, the district court also considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County’s Wainwright study (which compared construction business ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County’s Brimmer Study (which focused only on Black-owned construction firms and looked at whether disparities existed when the sales and receipts of Black-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms).



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

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

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

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

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

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

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

⁹¹ *Concrete Works*, 36 F.3d at 1522.



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

[Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the market place overstates “the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority owned firms.” In other words, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs.⁹³

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

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

Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to perform the work in question, would also fail to satisfy the Court’s criteria. If MBEs comprise 10% of the total number of contracting firms in the State, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative

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

⁹³ *Concrete Works*, 36 F.3d at 1528.

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

⁹⁵ *Id.*



size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.⁹⁶

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

The appellate opinions in *Philadelphia*⁹⁷ and *Dade County*,⁹⁸ regarding disparity studies involving public sector contracting, are particularly instructive in defining availability.

First, in *Philadelphia*, the earlier of the two decisions, contractors' associations challenged a city ordinance created set-asides for minority subcontractors on city public works contracts, and summary judgment was granted for the contractors.⁹⁹ The Third Circuit upheld the third appeal, affirming that there was no firm basis in evidence for finding that race-based discrimination existed to justify a race-based program, and that the program was not narrowly tailored to address past discrimination by the City.¹⁰⁰

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

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

⁹⁶ *Id.* at 736.

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

⁹⁸ *Dade County*, 943 F.Supp. 1546.

⁹⁹ *Philadelphia*, 91 F.3d 586.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 605.

¹⁰² Another problem with the program was that the 15 percent goal was not based on data indicating that minority businesses in the market area were available to perform 15 percent of the City's contracts. The court noted, however, that "we do not suggest that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides." The court also found the program flawed because it did not provide sufficient waivers and exemptions, as well as



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

Furthermore, the court discussed whether bidding was required in prime construction contracts as the measure of “willingness,” and stated, “[p]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work.”¹⁰⁴

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

In *Dade County*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs was taken into account.¹⁰⁸ The *Dade County* district court accepted the Disparity Study’s

consideration of race neutral alternatives.

¹⁰³ *Philadelphia*, 91 F.3d at 603.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

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



limiting of “available” prime construction contractors to those that had bid at least once in the study period. However, it must be noted that relying solely on bidders to identify available firms may have limitations. If the solicitation of bidders is biased, then the results of the bidding process will be biased.¹⁰⁹ In addition, a comprehensive count of bidders is dependent on the adequacy of the agencies’ record keeping.¹¹⁰

The appellate court in *Dade County* did not determine whether the County presented sufficient evidence to justify the M/WBE program. It merely ascertained that the lower court was not clearly erroneous in concluding that the County lacked a strong basis in evidence to justify race-conscious affirmative action. The appellate court did *not* prescribe the district court’s analysis or any other specific analysis for future cases.

C. Anecdotal Evidence

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

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

- M/WBEs denied contract despite being the low bidder – *Philadelphia*¹¹²
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority to underbid the MBEs – *Cone Corporation v. Hillsborough County*¹¹³

¹⁰⁹ Cf. *League of United Latin American Citizens v. Santa Ana*, 410 F.Supp. 873, 897 (C.D. Cal. 1976); *Reynolds v. Sheet Metal Workers, Local 102*, 498 F.Supp 952, 964 n. 12 (D. D.C. 1980), aff’d, 702 F.2d 221 (D.C. Cir. 1981). (Involving the analysis of available applicants in the employment context).

¹¹⁰ Cf. *EEOC v. American Nat’l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir.), cert. denied, 459 U.S. 923 (1981). (In the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).

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

¹¹² *Philadelphia*, 6 F.3d at 1002.

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



- M/WBEs' inability to obtain contracts for private sector work – *Coral Construction*¹¹⁴
- M/WBEs told they were not qualified although they were later found to be qualified when evaluated by outside parties – *AGCC*¹¹⁵
- Attempts to circumvent M/WBE project goals – *Concrete Works I*¹¹⁶
- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on entity's contracts – *AGCC*¹¹⁷

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

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

¹¹⁴ For instance, where a small percentage of an MBE or WBE's business comes from private contracts and most of its business comes from race or gender-based set-asides, this would demonstrate exclusion in the private industry. *Coral Construction*, 941 F.2d 910 at 933 (WBE's affidavit indicated that less than 7 percent of the firm's business came from private contracts and that most of its business resulted from gender-based set-asides).

¹¹⁵ *AGCC II*, 950 F.2d at 1415.

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

¹¹⁷ *AGCC II*, 950 F.2d at 1415.

¹¹⁸ Cf. *AGCC II*, 950 F.2D at 1417-18 (in finding that an ordinance providing for bid preferences was narrowly tailored, the Ninth Circuit stated that the program encompassed the required flexibility and stated that “the burdens of the bid preferences on those not entitled to them appear relatively light and well distributed. . . . In addition, in contrast to remedial measures struck down in other cases, those bidding have no settled expectation of receiving a contract. [Citations omitted.]”).

¹¹⁹ *Wygant*, 476 U.S. at 283.



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

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

This was not the situation confronting the Ninth Circuit in *Coral Construction*. There, the 700-plus page appellate record contained the affidavits of “at least 57 minority or women contractors, each of whom complains in varying degree of specificity about discrimination within the local construction industry. These affidavits certainly suggest that ongoing discrimination may be occurring in much of the King County business community.”¹²²

Nonetheless, this anecdotal evidence standing alone was insufficient to justify King County’s MBE program since “[n]otably absent from the record, however, is *any* statistical data in support of the County’s MBE program.”¹²³ After noting the Supreme Court’s reliance on statistical data in Title VII employment discrimination cases, and cautioning that statistical data must be carefully used, the Court elaborated on its mistrust of pure anecdotal evidence:

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

The Court concluded its discourse on the potency of anecdotal evidence in the absence of a statistical showing of disparity by observing that “rarely, if ever, can such evidence show

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

¹²¹ *Id.* at 480.

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

¹²³ *Id.* at 918 (emphasis added) (additional statistical evidence gathered after the program had been implemented was also considered by the court and the case was remanded to the lower court for an examination of the factual predicate).

¹²⁴ *Id.* at 919.



a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”¹²⁵

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

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

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

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

¹²⁵ *Id.*

¹²⁶ *Philadelphia*, 6 F.3d at 1002.

¹²⁷ *Id.* at 1003.

¹²⁸ *Id.*

¹²⁹ 963 F.2d at 427 (D.C. Cir.1992).



as a supplement to strong statistical evidence—which the Council did not produce in this case.¹³⁰

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

In *Concrete Works I*, the Tenth Circuit Court of Appeals described the type of anecdotal evidence that is most compelling: evidence within a statistical context. In approving of the anecdotal evidence marshaled by the City of Denver in the proceedings below, the court recognized that “[w]hile a factfinder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality’s institutional practices carries more weight due to the systemic impact that such institutional practices have on market conditions.”¹³³ The court noted that the City had provided such systemic evidence.

The Ninth Circuit Court of Appeals has articulated what it deems to be permissible anecdotal evidence in *AGCC II*.¹³⁴ There, the court approved a “vast number of individual accounts of discrimination” which included numerous reports of MBEs denied contracts despite being the low bidder; MBEs told they were not qualified although they were later found qualified when evaluated by outside parties; MBEs refused work even after they were awarded the contracts as low bidder; and MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal, the City points to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the city’s procurement processes; an “old boy’s network” still exists; and racial discrimination is still prevalent within the San Francisco construction industry.¹³⁵ Based on *AGCC II*, it would appear that the Ninth Circuit’s standard for acceptable anecdotal evidence is more lenient than other Circuits that have considered the issue.

¹³⁰ *Id.*

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

¹³² *Id.* at 926.

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

¹³⁴ *AGCC II*, 950 F.2d 1401.

¹³⁵ *Id.* at 1415.



Taken together, these statements constitute a taxonomy of appropriate anecdotal evidence. The cases suggest that, to be optimally persuasive, anecdotal evidence must satisfy six particular requirements.¹³⁶ These requirements are that the accounts:

- C are gathered from minority contractors, preferably those that are “qualified”¹³⁷
- C concern specific, verifiable instances of discrimination¹³⁸
- C involve the actions of governmental officials¹³⁹
- C involve events within the relevant jurisdiction’s market area¹⁴⁰
- C discuss the harm that the improper conduct has inflicted on the businesses in question¹⁴¹ and
- C collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic¹⁴²

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

Philadelphia makes clear that 14 accounts will not suffice.¹⁴³ While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type called for above, were insufficient to justify the program in *Coral Construction*. The number of anecdotal accounts relied upon by the district court in approving Denver’s M/WBE program in *Concrete Works I* is unclear, but by one count the number might have

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

¹³⁷ *Philadelphia*, 91 F.3d at 603.

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

¹³⁹ *Croson*, 488 U.S. at 509.

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

¹⁴¹ *O’Donnell*, 963 F.2d at 427.

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

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



exceeded 139.¹⁴⁴ It is, of course, a matter of speculation as to how many of these accounts were indispensable to the court's approval of the Denver M/WBE program.

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

V. CONSIDERATION OF RACE-NEUTRAL OPTIONS

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

On the other hand, a M/WBE program cannot stand if the sole barrier to minority or woman business participation is a barrier which is faced by all new businesses, regardless of ownership.¹⁴⁶ If the evidence demonstrates that the sole barrier to M/WBE participation is that M/WBE's disproportionately lack capital, or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.¹⁴⁷ In other words, if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

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

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

¹⁴⁵ *AGCC II*, 950 F.2d at 1404.

¹⁴⁶ *Croson*, 488 U.S. at 508.

¹⁴⁷ *Id.* at 507.



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

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

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.¹⁵⁰ Instead, an entity must make a serious, good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing low MBE utilization, it is imperative to examine barriers to MBE participation that go beyond “small business problems.” The impact on the distribution of contracts of programs that have been implemented to improve MBE utilization should also be measured.¹⁵¹

VI. CONCLUSION

The decision of the U.S. Supreme Court in the *Croson* case changed the legal landscape for business affirmative action programs and altered the authority of local governments to institute remedial race-conscious public contracting programs. This chapter has examined what *Croson* and its progeny require of a disparity study if it is to serve as legal justification for a race (and gender)-conscious affirmative action program for the Hillsborough County

¹⁴⁸ *Hershell Gill*, 333 F.Supp. 2d 1305, 1330 (S.D.Fla. 2004). The Eleventh Circuit remanded to the District Court *Paramijit v. DeKalb County School District*, 135 Fed App.262; 2005 U.S. App. LEXIS 11203 finding several flaws. Not only was there no actual disparity study and the program was of unlimited duration, but the Court criticized the program because it could have achieved its purpose by race neutral means alone.

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

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

¹⁵¹ *Dade County*, 122 F.3d at 927. At the same time, the Eleventh Circuit’s caveat in *Dade County* should be kept in mind: “Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications that a government may use to treat race-based problems. Instead, it is the strongest of medicines, with many potentially harmful side-effects, and must be reserved to those severe cases that are highly resistant to conventional treatment.” For additional guidance, see *supra* the discussion of narrow tailoring in *Concrete Works, Adarand,, County of Cook, City of Chicago*.



Aviation Authority or the City of Tampa. Great care must be exercised in determining whether discrimination has been “identified.” If it has, race- neutral remedies have to be considered, and any race-conscious remedy must be “narrowly tailored.”

VII. LIST OF CASES

Cases

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

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Paramijit v. DeKalb County School District, 135 Fed App.262; 2005 U.S. App. LEXIS 11203.

Reynolds v. Sheet Metal Workers, Local 102, 498 F.Supp 952 (D. D.C. 1980), *aff'd*, 702 F.2d 221 (D.C. Cir. 1981).

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

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

Western States Paving v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005).

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

Statutes

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



Appendix A

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

1. Goal Setting

Section 26.45 lays out a two-step process for setting goals. Step 1 is establishing a base figure for DBE availability. It specifies three examples: DBE Directories and Census Bureau Data; Bidders List; and Disparity Study Data. Step 2 is an adjustment of that base figure if there is evidence available in the jurisdiction that supports one.

2. Meeting Overall Goals

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

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

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

3. Good Faith Efforts

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

4. DBE Diversification

Section 26.33 is an effort to diversify the types of work in which DBEs participate, as well as to reduce perceived unfair competitive pressure on non-DBE firms attempting to work in certain fields. This provision requires that if agencies determine there is an over-concentration of DBEs in a certain type of work, they must take appropriate measures to



address the issue. Remedies may include incentives, technical assistance, business development programs, and other appropriate measures.

5. Alternative Programs

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



2

ANECDOTAL ANALYSIS

I. INTRODUCTION

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

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

A. Anecdotal Evidence of Active or Passive Participation

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

¹ *Croson*, 488 U.S. at 509



The second line of inquiry examines not the direct actions of civil servants, but the government’s “passive” support of a private system of prime contractors and other entities that use their power and influence to bar M/WBEs from benefitting from opportunities originating with the government, or “passive” support of exclusionary conditions that occur in the market area into which the government infuses its funds. Under *Croson*, “passive” governmental exclusion results when government officials knowingly either use public monies to contract with private-sector companies that discriminate against M/WBEs, or fail to take positive steps to prevent discrimination by contractors who receive public funds.²

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

This chapter presents anecdotal accounts excerpted from 2005 interviews with City of Tampa (City) and the Hillsborough County Aviation Authority (Authority) business owners. The anecdotes provide evidence of both active and passive forms of discrimination by government officials or barriers encountered by the business community.

B. Anecdotal Methodology

In this study, the method of gathering anecdotal testimony is the oral history interview. Oral history is defined by the *American Heritage Dictionary* as “historical information obtained in tape-recorded interviews with individuals having firsthand knowledge.” This

² *Croson*, 488 U.S. at 491-93, 509.

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

⁴ *Croson*, 488 U.S. at 509.



type of in-depth interview has been determined by Mason Tillman Associates to be superior to other forms of gathering anecdotal evidence—the mail or telephone survey, or public hearing testimony—because it affords the researcher a greater opportunity to assess not only the effects of discriminatory practices on M/WBEs but also the means by which those practices occur. It also affords M/WBEs a protected setting in which their anonymity can be preserved.

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

The interviewees were solicited using contract and certification records. Once identified, interviewees were pre-screened to determine if they operated within the defined market area and were willing to commit to the interview process.

The interviews lasted on average one hour. A set of probes were designed to cover all aspects of business development, from start-up to growth issues and both public and private sector experiences.

Once completed, the interviews were transcribed and analyzed for barriers M/WBE businesses encounter. From this analysis of the transcripts, the anecdotal report was completed. The anecdotal report describes general market conditions, prime contractor barriers, and the range of experiences encountered by interviewees attempting to do business in the City and Authority's market area generally, and with the City and Authority, specifically.

C. Anecdotal Interviewee Profile

Table 2.01 presents a profile of the business owners interviewed for this Disparity Study.



Table 2.01 Anecdotal Interviewee Profile

Ethnicity	Number
African American	18
Asian American	1
Hispanic American	18
Caucasian	14
Total	51
Gender	Number
Male	37
Female	14
Total	51
Industry	Number
Construction	16
Construction-Related	22
Professional Services	13
Total	51

II. BUSINESS BARRIERS

A. Racial Barriers

Historically, many minority and women business owners were confronted with racial barriers when they attempted to participate in the public contracting industry. Today, these business owners are still faced with racial barriers despite the advancements that have been made to increase the number of M/WBEs performing public contracts.

This minority male owner of a mature distribution business believes that strides have been made to increase the participation of minority contractors on government construction contracts but there is still lots of work to do in the product distribution industry:



Many of the business relationships that are in place started before I was even born, and they derived out of years of discrimination. So [it is difficult] to successfully catch up with the same people that have been doing [business] for 100 years. The only way we have been able to [survive] is because of occasional new products where new relationships can be built. To me the government has not been a catalyst in helping to create a change in [the old] traditions. They are doing a tremendous job on the construction side. [But], what about all the building materials that go into building a building? Nobody has ever asked [whose supplying] those [materials]. [If] those purchases are tracked they [would discover that] they are from only official, authorized distributors of the product. And, I'd bet you would [find] a statistical disparity between the number of people of color who are authorized distributors. There are very few and the ones that were around have long gone out of business. So [this] is [forcing] us to [do business in] more of a service society than the product sales, which is an area that is very lucrative.

This same business owner described the difficulties he encountered trying to distribute his product in an industry that had been dominated by established businesses:

A White competitor that we started beating out lobbied to the commissioners and said, 'Y'all just let that Black [company product type withheld] take our contract.' This company had been doing the business with the [Authority] for over 20 years. Also, I had created a potential joint venture to supply [company product type withheld] and they allowed the apparent low bidder to wiggle out of their commitment to do business with me as a minority subcontractor. And then they helped that White European company get out of doing business with me after one of their staff members had already committed that they would do business. The president said he refused to do business with me. What's amazing to me is we had a contractual commitment that was confirmed by [company name withheld] when they accepted the bid, but the staff of the [government agency] allowed them to wiggle out of the commitment. And this [relates] to when this same company that we started beating when the [Authority] had the minority ordinance. And I went to meet with them and the guy told me straight to my face, 'Well, I remember my



father said to never do business with you guys.’ He inherited his company just like I did. I can handle that man to man, but it’s difficult to handle when the government agency helps facilitates [this type of discrimination].

A minority male owner of a mature engineering firm described why he believes minority contractors are confronted with racial barriers when they try to obtain work from the City:

Discrimination today [is not] blatant, it’s subtle. They will [force] you to file bankruptcy and harm you economically. Subtle discrimination [is practiced] at the City of Tampa. [Their] staffers need sensitivity training. [They] need to understand that I might be loud but I [am not] mad. I am going to ask questions and expect answers. I [will] go to the newspaper if [the City’s employees are] not doing what they are supposed to do. If a [contractor] speaks out and criticizes them, [he or she] will be blackballed. I should not be limited from being able to get work with the City at any time, as long as I have the capacity to do it. Our prices [are not] as high as [the majority-owned businesses] because we have home offices. We [do not] have the [same] overhead [expenses]. I don’t want a sinking firm while I wait on the [City’s employees] to stop discriminating against me, when I know there is work going on. I know there are facilities, like the fire houses [that are being] upgraded.

The bottom line is that they need to set aside [work for minorities] because White women are getting most of the work. Just look at the numbers. The Hispanics are getting more than the Black [contractors]. Now, Black [contractors] are getting some [work] in construction, but that’s recent history. But in professional services, it’s still where it was, or less. It’s very rare [that we get a] chance on a big project, because the architect picks whom he wants. Most likely, he will pick a woman and they will have met their minority requirement of five percent, so too bad [for me]. Additionally, we [met] with [name withheld] at the [Authority], and we identified several projects that we knew we could work on. And [we were told that certain] departments [would contact] us. [Not] a damned thing happened.



III. BARRIERS CREATED BY THE CITY, AUTHORITY, AND OTHER AGENCIES

A. Barriers Created by City and Authority Managers

A minority male owner of mature engineering firm reported on a comment made to him by a City official who explained why he thought his company should not receive work from the City:

Every two years I have submitted [a bid to the City] for at least seven years. I have not [received] any work orders, except for one I got in 1996. [City official name withheld] said, 'I had too much work already from [private company name withheld]. He said, 'You are making \$300,000 . . . a year, so you already [receive] enough work.' I said, 'Wait a minute, you don't determine my capacity.'

This same business owner reported that the City does not have pre-proposal meetings for projects governed by their Consultants' Competitive Negotiation Act (CCNA). He believes that a pre-proposal meeting would provide his firm the opportunity to meet and partner with other firms for these projects:

[There] is one [issue] that keeps me from getting work right now with the [City]. They put out RFPs or RFQs for professional services under their Consultants' Competitive Negotiation Act projects, with five points for minority business [participation], but they don't have pre-proposal meetings. This is a problem. They want you to pick up the phone book, open it up to 'architects,' throw a dart to get the right architect to team up with. I don't know who [are the prime contractors] . . . asking the City for [bid] information [so we can] go after the work. I do not know who . . . to call. So, the biggest problem with the City is there are no opportunities to mingle up front, and get the sign-up list, or pass out my business card [to possibly partner with someone else]. [Pre-proposal] meetings would allow us to meet and talk about the project and the scope of work. [Now], they are not having any pre-proposal meetings [regarding] CCNA work. The City needs a little better [process] for their CCNA projects.



A minority male owner of a mature construction-related company reported that his firm is encouraged by the City to bid on their projects, but the same contractors seem to be getting the work:

The [City] always have a positive reaction, as far as encouraging us to continue to [bid with] them. But, there is nothing really available or it seems that the consultants they are already getting the work are the ones that are being called back for additional work. The high-profile City projects are advertised outside of the [City] and those projects usually go to larger companies. Most of them are national firms but, they have local offices.

This same business owner had a similar experience seeking work from the Authority:

We don't have direct experience with the Aviation Authority. But it's pretty obvious by in their [qualification] requirements, that if you don't have experience [working with them] you may as well not even apply because they will not consider you.

A minority male owner of a mature engineering firm reported that he has submitted proposals to the City for the past 19 years but has never been a successful bidder:

My experience with the City of Tampa has been as a subconsultant. We enrolled in their program for consultants and were accepted and put on their list of qualified consultants. I marketed to the managers of the public works department, and I have been unsuccessful in being asked to propose on any [of their] projects in the 19 years that I have been in business. I have stopped marketing to them [because] it seems quite fruitless and a waste of my time. They just say, 'Fine, we will keep you in mind.' But I never hear from them.

This minority male owner of a mature construction-related company reported that he exhausted many avenues trying to obtain work from the City and various other local government agencies:

I am certified with the City of Tampa, the Hillsborough County Aviation Authority and the State of Florida. [But it] does not help [me] get business. I have gone to the [City's] Purchasing Department, Hillsborough County School Board,



Pasco County Government's purchasing information, Polk County, Pinellas County, and iflorida.com. But, I [have not found any work], I don't know what the deal is.

This same business owner said he has been more successful as a subconsultant with the Authority:

The Aviation Authority, like all the other authorities and agencies, are reluctant to offer prime contracts to the smaller companies. So we don't work as a prime [contractor for them]. We are always the subconsultant with the Airport Authority. But we do a lot of work there and they seem to make a better effort to make sure that minority consultants get at least 10 [percent] of the work from the prime [contractors].

A minority male owner of a mature construction related company has also had difficulty obtaining work from the City. He also reported that he believes his bid was shopped:

I sent proposals two times to the City and one to the [Authority]. Then I called three or four times and I was never called back. I don't feel good [about seeking work from the City], but I would like to do [work] for the City. But for some reason, they won't give me a job. I have eight [employees], a big shop, and plenty of tools. I do a lot of work for different [private] companies. I think they are just playing games with me, by trying to get . . . numbers from me, [to get a] better price [from another contractor], like [bid] shopping.

A minority male owner of a mature professional services firm also believes that large corporations are utilized more frequently than small local companies:

Instead of just hiring outside large corporations, the [City] should do business with the companies that exist here. . . . More emphasis [should be placed] on small businesses [located] in the [City].

A minority female service provider for a mature company believes that the City of Tampa has preferred contractors:

I think they use certain [contractors] on their contracts. For instance, we bid on [a project with] the Water Department



about three months ago. They sent out [RFPs] for all vendors to [bid]. My company and another company were the only ones [at the pre-bid conference], and the other company was not certified. But, I was certified and all my paperwork was in order. [Only] my company submitted a bid and they took it from us. [Name withheld] said that more bidders [needed] to participate. [Our bid] was not overly priced. Then they told us we had the bid then [they] took it and gave it to someone else. I came to the conclusion that I don't want be bothered with the City of Tampa anymore because it has not been any benefit to me at all. I'm still struggling trying to keep my business above ground but not with the help from the City of Tampa. So, I don't have a good taste in my mouth for the City of Tampa.

A minority male owner of a mature engineering firm explained why he stopped submitting bids to the City:

I see the City's [bid notices] online and through the mail. I actually stopped proposing as a prime [contractor] because I've never been short-listed and I can't compete with the larger firms that they routinely do business with. I [already] know what the results will be. They need to put some teeth in their [M/WBE] requirements. A commitment [to increasing minority businesses] on their contractors would be nice too.

An minority male owner of a mature supply company reported that his company has not been successful at obtaining business with the City of Tampa. However, he has worked with the Authority:

[I have had] interaction with the City of Tampa, but no business. We go through the process of [getting] certified and they indicate that they have certain programs for minorities, but so far, I have not been the beneficiary of anything from the City. [But], we have been doing business with the Aviation Authority for about 12 years.

This Caucasian male owner of a mature professional services firm believes that the City needs to change their attitude towards new businesses:

[The one issue] that [needs] to change with the City is their [perception towards small businesses]. Since they have done



business with a company for ten years, [they do not believe] that a new company could not do the same thing, possibly at a lower cost. [This] is where the doors need to be broken down. You just never know when the new kid on the block might be able to [provide the service] at a better price.

A minority male owner of a new construction-related company has been certified with the City for three years, but he has been unable to secure a contract:

[We have been certified with the City] for approximately three [years]. But, nothing has ever come out of it. We have never done any work with the City of Tampa under a minority contract.

This minority male owner of a new engineering firm believes that most government agencies prefer to work with large corporations:

I am certified as a minority business with the City of Tampa, the State of Florida, Hillsborough County and Polk County. I have noticed that there is not a lot of compassion for small businesses, [most governmental entities] prefer to work with large conglomerates.

B. Failure to Monitor M/WBE Program Compliance

This minority male owner of a mature construction-related company believes that some agency managers are not competent to adequately supervise projects that require a specific expertise:

For instance, a plumbing inspector does not have a say on public works [contracts]. The inspector does not have any [knowledge] of plumbing is all of a sudden telling the contractor that he is not doing it correctly. They are field inspectors and they really don't have a clue what's happening half the time. Yet, they are passing judgment on my work, the electrical and air conditioning work. We have asked for a plumbing inspection to have our work released. Because, if a year down the road there's a problem, we want a record indicating that we passed inspection. In my industry the plumbing inspector has always been a respected figure of authority that no one should tamper with because we work on health-structured contracts. In other words, if we don't put



it in writing, you can get [the disease] SARS for example, a result of poor plumbing. I can't tell you what other contractors are facing, but some of the plans [that I see] are not correct and is suspect to having problems down the road. [Sometimes], the plumbing inspector would come in, and say, 'That's not right.' And I'd say, 'I know, but look at the plans.' They say, 'Don't deviate from the plans, they are cast in stone.' Well, that's baloney. And like myself, I know a couple of electrical contractors that have pulled away.

A Caucasian male owner of a mature construction-related business reported that he has never had one of his projects monitored to determine whether he met the City's M/WBE goals:

From my [perspective] I have never physically seen anyone come and [monitor the City projects I have worked on]. [At the time the bid is due] we turn in a list of subcontractors that are going to be used towards our M/WBE goals. I guess they just do their checks to make sure that our paperwork is correct.

A Caucasian male owner of a mature construction-related company also described his efforts to meet the City's M/WBE goals:

The goals are realistic for the vast majority of the instances that the City [encourages on their contracts]. We see many bids that have requirements so we prepare our bids and make phone calls [to minority contractors]. We [are aware of] the minority businesses in the City of Tampa, so we begin calling those folks to see if there is an opportunity for us to utilize them to help meet the goal. On [some] occasions we have hit it or done better [than the M/WBE participation goal]. And, then sometimes we perform so much of the work ourselves that do not meet the goal. It's a kind of scattered occurrence whether we meet the goal or not. [If we cannot meet the goal] we will inform the City of our inability to meet the goal and they just require us to [submit] some paperwork explaining the reason. It has not been very difficult because we have been doing work for the City for a number of years and they understand why we were not able to [met the goal]. It has never held up any jobs or caused any problems to my knowledge.



However, this same business owner also reported that his company has difficulty finding minority contractors willing to perform subcontract work:

But sometimes we have problems when we try to solicit these [minority] companies [because] we do not get [any] responses. A lot of times we just don't get responses or if we do call and get in touch with them they are just not interested in the work. Or they are busy looking at something else.

IV. BARRIERS CREATED BY CONTRACTOR COMMUNITY

A. Difficulty Breaking into the Contracting and Old Boy Networks

Several interviewees expressed that they have been unable to break into the contracting network in the City of Tampa and Hillsborough County Aviation Authority.

A minority male owner of a mature distribution company reported that manufacturers routinely give preferential treatment to majority-owned companies which allow them to be more competitive:

There is a lot of special treatment given to authorized distributors as it relates to pricing, availability of products and prices. So, when I go out and do a deal, I'm the last man on the totem pole to get the lowest price to be able to resell [product type withheld] to some of my customers. Other [businesses] who own [company product type withheld] has been doing business with major [product type withheld] for 50 to 60 years. And they get special price preferences that I can't get. Plus, when I come to the marketplace to try to resell the [product type withheld], I'm always the last one on the totem pole, it's very difficult for me to provide a fair price to the marketplace because I'm always the low man on the totem pole.

This same business owner believes that government agencies are not trying to prevent this type of activity from occurring:

The activities of the end-users, especially the ones that receive federal dollars or state dollars, tend to help facilitate that type of relationship by not giving any preferential



treatment or any special pricing or sheltered market projects to help me be more active in the marketplace as it relates to my vendors. Most disparity programs don't address the goods and the services side of business, [especially] in construction. But it's a huge market in product sales—anywhere from office supplies to petroleum. It is just a huge market out there that a lot of people just aren't targeting. But they are allowing industries to squash competition. And I believe the government has a fiduciary responsibility to create competition. They cannot be that naive and not understand that this is going on. Especially, if year after year after year they are dealing with the same vendor.

This Caucasian female owner of a mature engineering firm attends pre-bid conferences to team up with other businesses in an attempt to win a bid. However, this approach has not been successful:

We go to pre-bid meetings to solicit teaming arrangements. But, outside of an invitation to bid, I have not had the opportunity to meet with the Authority in probably three or four years.

A minority male owner of a mature construction-related company reported a conversation he had with a general contractor who indicated that he preferred working with a group of pre-determined subcontractors:

They have a certain group of companies they [prefer] to work [with]. I was very surprised by a comment [made to me by a general contractor]. He said, 'We use our own people. I said, 'What do you mean you use your own people?' He said, 'We [have dealt with the same] mechanical contractors and plumbers for years and I really hate to go to somebody else.' I said, 'Why did you call me, just [to] compare [bids]?'

B. Abuse of M/WBE Program Requirements

Several M/WBEs described instances where prime contractors used various tactics to circumvent M/WBE participation requirements. A minority male owner of a new professional services firm provided two examples where the same prime contractor tried to avoid MBE requirements:



We had two very different experiences with the same contractor but with different agencies. The contractor was [company name withheld]. Hillsborough County has a MBE requirement, but they did not specify a minimum dollar amount or percentage of the contract. There was a RFP for a \$5 million budget. And we all worked very hard on that bid. We participated in the presentations and we gave the [other team members] materials to prepare the proposal. They used our track record because we had done about three or four projects for Hillsborough County Water Department, which were very successful. And the client for this RFP was the Hillsborough County Water Department. So they used those projects and our track record, [which] gave them an advantage. So, we finally won this bid and when the time came to divide the work, we find out that they assigned us a number that [amounted] to \$15,000. So we didn't participate and we stepped out of the contract.

This same business owner provided another example of this same prime contractor attempting to avoid M/WBE requirements:

We bid on a contract with the same company for the City of Tampa. They [required] a 25 percent MBE [participation]. [During] the evaluation we found out unexpectedly, that [company name withheld] made commitments in dollars to award work to our company, [if] they were awarded the contract. Again, it was about a \$5 million RFP, and the amount awarded to us was [supposed to be for] \$300,000. So that was much more proportional, because there were a couple MBEs. The City of Tampa asked each of the MBEs included in the proposal to acknowledge that they had received a letter [explaining the award amounts]. So they showed us the letter that was presumably sent to us two months earlier, but we had never seen it. So, the first thing I did was call [company name withheld] and I asked them, 'How come I never received this letter, which is addressed to us?' They didn't know what to do. They said, 'Well, you better send that letter [or] we are all going to lose.' So [they wanted us to] agree to do \$200,000 worth of work [without] a scope [of work]. We had no idea what we were agreeing to. So we told the guy, 'We need to have more information about this. They said, 'I'll send it to you by tomorrow, but you need to send that letter today because if you don't do it



by 5:00 p.m., we are going to lose the contract.’ So I said, ‘Fine, okay, we’ll do that.’ And we did, and at about 4:30 p.m. we sent the fax to the City of Tampa acknowledging that everything was fine. But the next day, [when] we asked [company name withheld] for the scope of work as they promised, and they didn’t want to send it. So we said, ‘Well, you leave us no choice, we [will] have to talk with the City of Tampa.’ And then they sent it.

A minority male owner of a mature engineering firm also described how some prime contractors avoid M/WBE requirements:

When they call me at the last minute and ask me to dedicate a crew for two months without any notice, I can’t do it. It’s going to hurt my business more if I told them I could do it and then I didn’t perform. Then they will tell the City or the [Authority] that they can’t find a consultant with the right skills or the schedules. And then they will allow that contractor or consultant to use a non-minority [subcontractor]. I have heard contractors say, ‘Well we made a good faith effort.’

Sometimes I find out that we have been short listed or we are [suppose] to start work only days before the project is to begin. The [prime contractors] just don’t contact us, we are just not their first priority. And then as an afterthought we get a call to see if we want to do some work. We may not have the personnel because we [were not afforded an opportunity] to do our project planning. So, we can’t gear up and be prepared to finish the job and be ready to start another one. In fact, we may have to say, ‘No we don’t have the personnel to meet that schedule.’

This same business owner further explained that he believes some prime contractors purposely give him short notice to respond to their bid:

I think [they are trying to] pull a fast one when a contractor has a large project and he calls me the day before the bid day and ask me if I want to bid on the project. I can’t possibly put a bid together in that short amount of time. So, I have no choice but to sign his form and send it in that I have no bid for this project. And now that helps him justify his good



faith effort because he sent me a request for proposal and I couldn't respond.

This Caucasian female owner of a mature engineering firm reported that she also does not receive many calls from prime contractors seeking bids:

We do not get a lot of calls from firms asking us to bid, but I make a lot of calls to engineering firms soliciting for teaming arrangements.

And this minority female owner of a mature professional services firm reported that she receives bid requests from prime contractors with only one week to respond:

Traditionally, we are faxed requests from certain contractors who might be able to use our services, particularly surveying services. And [yesterday] I looked at some request and three of them were due within a week. This has happened over the years with several contractors in particular.

A Caucasian male owner of a new professional services company reported that he was encouraged to work with minority contractors on a City project. He also stated that he worked with the City's purchasing office to fulfill their goals:

I don't remember the exact verbiage on the RFP, but [MBE participation] was strongly recommended. We were not required, but we were encouraged. We received incentives for doing so in the form of a point [system]. The scores of the RFP responses were ranged from 0 to 100 and for every \$10,000 worth of minority participation we were awarded one point. The purchasing manager spent a fair amount of time talking about the value in doing so and was very forthcoming with information about how to develop our relationship with a minority or woman-owned business. It was fairly easy to learn how to [met the goals] and how to participate with [minority contractors]. We had two participants in this contract, one was a [Caucasian] woman-owned enterprise and the other was a minority woman business enterprise.



A minority male owner of a mature construction-related company reported on an incident where a prime contractor misrepresented to a government agency that he had worked as a subcontractor on a construction project:

About three years ago a juvenile center sent me a strong letter [requesting] that I go back and replace all the units that we put in there [center]. I called them and said, ‘What are you talking about?’ [They said], ‘Well, you did it under this general contractor.’ I said, ‘I’ve never [worked] with that general contractor before!’ He used my name.’ He used me as a minority [for bonus points] and used someone else to do the job. I don’t know how many others have done the same thing, it’s horrible. Nobody [monitors the projects] to see whether [the prime contractor] really used [a minority subcontractor] or if he used someone else. This happened at a project in Pinellas.

This same business owner reported that his company is contacted by prime contractors, but typically his firm is not the successful bidder. He also explained why he is now reluctant to spend money for drawings requested by prime contractors:

I used to go to the pre-bid meetings with the general contractors at the City of Tampa. Sometimes, I called the [general contractors] and ask [about the project] and they would say, ‘Oh, we didn’t get it.’ And that [would be] it, so now I don’t even call them. But if they call or send me a fax [inquiring whether] I want to participate on a project, I [respond with] a fax saying, ‘You provide me with drawings and I [will submit a] bid to you.’ Some of them don’t [provide] drawings, they want me to buy them. I don’t need a \$100 set of drawings. For what? Some of them [may] send it to me with no problem, but some [general contractors] just ignore me. I don’t need the whole set of drawings. All I need are the mechanical drawings, which are two or three pages. But, I am certainly not going to spend money on drawings and copies when I do not know how much of a chance I [have to work on the] project. They [usually] say I’m not the lowest bidder. But I don’t know who was the lowest bidder or how much I was off.



This minority male owner of a mature construction-related company described how prime contractors avoid M/WBE requirements:

[The prime contractors are supposed] to make a good faith effort [to subcontract with minority contractors]. But, if they don't solicit you and you solicit them, they [can] decide, 'OK, we're going to bid this job and we are not going to use you.' But, when [they report] back to the County or the City they say they can't find anyone to work with.

This same business owner reported that he does not receive calls from prime contractors seeking subcontract bids. He also believes that prime contractors can be discriminatory in choosing subcontractors by selectively waiving bonding requirements:

[We do not] get a lot of calls from contractors asking for bids. We basically market [directly] with the City of Tampa and the surrounding areas. We call them or go on Demand Star to see what's available. And then we put together a quotation and mail it to all the contractors that are bidding that particular job.

[Also], prime contractors have the wherewithal on whether or not they will waive the bond, so they can be selective. If they have their favorite subcontractors that are non-minority or are personal friends, they can waive the bonds for them. [But], when the small or minority contractors come along, we have to have a bond.

A minority male owner of a mature construction-related company reported that his company has never received calls from prime contractors for bids:

I am [aware] that the State and the Aviation Authority [requires] general or primary contractors [to subcontract] a percentage of [their work to] minorities. But, I have not [had a prime contractor] question me or anyone in my company [for a bid].

A minority male owner of a mature general construction company reported that he believes prime contractors contact him to assist with their negotiations with other subcontractors:

I [receive] calls from [prime contractors] asking me to bid on a job as a minority [contractor]. They [are usually



considering] another low bidder and they have seen my numbers.

A minority American male owner of a new engineering firm believes the City should be more aggressive in its commitment to establishing and enforcing M/WBE participation requirements:

I think the [City] has to take a more aggressive stand in [enforcing] more minority participation, instead of claiming it in some sort of town hall meeting. [It should be] documented. And they have to get the [word out] to [minority businesses] and let them know that minority participation will be at a minimal level and it's not capped at that level.

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

A. Difficulties Obtaining Access to Bid Information

Some interviewees reported difficulties obtaining access to bid information from the City and the Authority. This minority male owner of a mature professional services company reported that his company registered with the Demand Star system to obtain upcoming bidding opportunities with the City and the Authority. However, he explained that the Demand Star system was not beneficial for his company because the bid notices are drafted in such a manner that only large electrical firms can bid as prime contractors:

Trying to find work with the Authority and the City was very difficult. We signed up for Demand Star, but it did not work for us. The [Demand Star] system is supposed to identify [work] that is going out to bid for City and Authority agencies. There is a lot work being contracted by other contractors in the City and the Authority. However, we are not seeing those bids on Demand Star. I contacted the City and the Authority, and they told me that the bids should be posted but they are not. I'm finding that the [prime] electrical contractors are getting the [bids] and then they sub[contract] it down to [my] level. And, this is a problem [for me] as a business owner because I continually have to get work through a prime contractor, who are electricians [like myself]. [Currently], I [have to] bid as a subcontractor



because there is no information on prime contracts for low voltage [electrical work].

This same business owner also reported on the difficulties he encountered trying to determine the correct City codes when seeking bidding opportunities:

I started with the process of trying to get registered with the City and the Aviation Authority. I found it very difficult to get anyone to help with [information on the codes] we need to find about upcoming bidding opportunities. It's basically been impossible to get my hands on any blueprint or service work that comes out of the City or the Authority.

A minority male owner of a mature construction-related company reported that he reads the paper and searches the Internet for bid opportunities with the City. He also mentioned why he is not listed with the Demand Star system:

I [receive bid information] a couple of ways. I read the newspaper and I go on the Internet. I'm not currently a [part of their Demand Star system] because I think there is a fee for that [service]. But, I also [learn about] City jobs through the [mailers] they send me. Chances are that before it comes in the mail, I have already looked at the internet or [newspaper] to [learn about their bids].

A minority male owner of a mature construction-related company reported that he does not receive bid information from the City of Tampa:

[I do not receive bid information] directly from the City of Tampa. No, I get nothing like that.

A minority male owner of a mature construction-related company reported that he has experienced difficulties trying to obtain bid notification regarding City projects:

I have tried looking on the computer to look for jobs with the City. Something happens all the time and they do not give me any information. These people never call me back or they never answer the phone.



A minority male owner of mature supply company reported that he receives bid notices from the City approximately once every three months:

I get a few [bid] notices in the mail [from the City], but they are few and far between. It seems like I receive one [bid notice] every three months. I would assume that the City purchases the type of products that I sell a lot more often than that.

A minority male owner of a mature professional services firm mentioned a service that he uses to learn about state-wide bid opportunities:

I subscribe to a document called the Florida Bid Service Report and it [informs me] about different public bidding opportunities across the state.

This minority male owner of a mature general construction company receives bid notifications from the City through the mail:

The City actually mails out [bids because] I am on the City's bid list. So, they actually mail notices to my [company]. They also have [bid information on their] website.

A minority male owner of a mature supply company believes that the bid process is not competitive for small suppliers that have to buy from the same manufacturers that also service the large suppliers:

It is very difficult for us to bid directly to the City or the Authority. [We are buying] materials from the same [manufacturers who supply the large corporations]. There are three to four manufacturers that [sell] iron piping [and they] sell to [company name withheld] who buys six hundred million dollars a year worth of this stuff! I buy two or three million dollars [worth of piping a year], so they are always going to get a better number. I [believe] it is against the law to sell [materials] to me at a different [price] than anyone else, but I don't think it's against the law to give quantity discounts. So, [we] are almost in a no-win situation, unless there is a requirement to have minority participation. [Even] then, they are reluctant to give [us] the better price, but they figure, [since] we have a couple of minority [contractors] bidding against each other, we will try to at least [make the process] competitive.



And this Caucasian female owner of a mature engineering firm reported that her company receives bid notices from the City:

We get notifications from the City regarding bid notifications. We also [utilize] other lead services [to learn about bid opportunities].

However, this same business owner suggested that the City provide more advance notice of its upcoming projects to allow smaller businesses to form teams to help with preparing bids:

Another thing that would be help increase opportunities [for minority contractors] would be more advanced notice of the projects for the year so we can start [preparing our bids]. We could position ourselves to [work] as a team and strategize ahead of time, because the larger projects naturally go to the larger firms.

A Caucasian female owner of a new professional services firm described the various methods she uses to learn about upcoming business opportunities with the City:

I'm registered with the City, so I get [bid] notifications several ways. I'm listed under the City's NAICS code. But, I also go on line and check their website.

A minority male owner of a mature general construction company also reported on the various methods he utilizes to learn about the City's contracting opportunities:

I am on a bidders list with the City and also I go to their website [to learn about upcoming contracting opportunities]. They have a purchasing department, but they don't have all their eggs in one basket. [By that] I mean each department advertises differently. So, I'm on the bidders list and also subscribe to some magazines where jobs are advertised.

Finally, this minority male owner of mature a construction-related firm reported that he also receives bid information regularly and on a timely basis from the City:

They mail [notices of] what is coming down the road. The [bid notices are] very timely I do not have a problem with that. They [also] fax us [bid information] pretty quickly as well.



B. Inadequate Lead Time

When government agencies do not provide adequate lead time to respond to their RFPs, most minority and women business owners do not have the staff to sufficiently respond. A minority male owner of a mature supply company reported that he usually receives approximately 14 days to respond to a RFP form the City:

[With the City], when [we receive] notice [there is] about seven to 14 days before it's due. Now, that may be adequate [for some contractors]. I am a sole proprietor, basically doing everything myself. I have more than one pot in the fire, and 14 days, 10 days, or 7 days [is not enough time for me to adequately respond].

This Caucasian female owner of a mature engineering firm reported that she typically has only two weeks to respond to the City's RFPs:

I would like to have months [notice to prepare a response to a RFP]. On a typical competitive bid we probably get a two week [notice].

However, this minority male owner of a mature general construction company reported that he receives adequate notice to respond to the City's RFP notices:

The City is good about putting out [RFP notices] four weeks from when the bid is [due]. There also may be one or two bid extensions if clarification [is needed]. I have never run into a situation where I received a notice where the bid was due the next week.

VI. PROBLEMS WITH M/WBE CERTIFICATION PROCESS

A. Certification Process

Programs for small, minority, and women businesses establish certification eligibility standards. The City and Authority's M/WBE certification process determines the status of minority and women business enterprises. A minority male owner of a new engineering firm does not believe an M/WBE certificate is beneficial for minority business owners:

I wouldn't say that being [certified as an M/WBE] has been an advantage. It's just a nicety to say that you are certified.



Basically, it takes time out of your schedule to recertify and go through the hoops that are required on an annual basis. I think if the re certification process were at least every two years, it would be less taxing on small businesses.

A minority female owner of a mature service company explained why she decided not to re-certify with the City of Tampa:

I re-certified every year with the City of Tampa and I [decided] last year I am [not] going to [re]certify because I'm not getting any [work] from them. I don't [want to] waste my time being certified. I have been in business for 18 years and my WBE [status] has not benefitted me.

A Caucasian female owner of a mature service company reported that the City's certification process is very time consuming, but she described the recertification process as simple:

When I was first [certified] with the City the paperwork that I had to get together was almost like a telephone book. It was very time consuming and I think that it could be shortened. I recertify every year and that [process] is simple. The renewal is simple as long as nothing has changed in your business and we haven't had any changes.

This minority male owner of a mature professional services firm believes there are pros and cons to being a certified MBE:

I think that the certification process is good for small and minority owned businesses to get involved in the process. However, if I become certified, I am 'labeled' a minority, a small business or a disadvantaged business and I am perceived as just that. So it's a double-edged sword.

A minority male owner of a mature supply company reported that he believes the certification process is much easier now than it was in the past:

[I am certified with] the City of Tampa, Hillsborough, and the City of Orlando. It's a little simpler for us now than it was in the past. Previously, it was held up by a lot of things. But, now the process is a whole lot [easier] than it used to be. [Being certified] at least [provides me with] an opportunity to see what's going on. Because some [prime contractors]



will consider [us since] we are a [certified] minority firm and there is a goal that [they] have to [meet].

This Caucasian female owner of a new professional services firm reported that since the City now accepts Women Business Enterprise National Council certifications the process has become a lot easier:

The City of Tampa is great because they now recognize the Women Business Enterprise National Council (WBENC) certifications. We still have a lot of forms to fill out but it is much easier, from a registration perspective. I think they are doing a much better job. [Previously], I had to send all my financial information to them every other year before they [accepted the WBENC] certifications. So, the fact that the City of Tampa recognizes this is huge because in other county organizations or county entities, you have to go through a certification process that is ridiculous. I do believe the [M/WBE] certification process is necessary, I just don't believe that it needs to be a cumbersome event. As small business owner, I was doing everything myself, and even now that I have a couple people working for me, I've got to work smart. So, [my employees have] to spend [a lot of] time on a certification [application] it can cost me a lot of money.

This Caucasian female owner of a mature engineering firm reported feeling overwhelmed with the certification process and suggests that the agencies institute reciprocity agreements:

What happened with us is that we tend to get overwhelmed by the paperwork [required to be certified]. Just keeping up with all of the [requirements] for the cities, municipalities and counties [is cumbersome]. We were hopeful that through this study we could see more reciprocity between the agencies so that the hoops that we have to jump through to get certified are not so daunting. Also, I am not sure that we are seeing any fruit from being a [certified] minority owned business with the City. As a minority, I wouldn't say that we are getting any advantage for being a minority business. We are currently in the process of getting recertified and for the past two weeks we have not been able to get hold of anyone at the City. [When we] call [we get] voicemail after voicemail and you can't speak to anyone. So we are having



a little trouble finding the right person with the right information.

A minority male owner of a mature construction-related company also believes that reciprocity between the agencies regarding M/WBE certification would be beneficial for small business owners:

I think some of the paperwork should be cut down in terms of the certification [process] and institute one central location and one standard form. [One form] that would [be accepted by the] Aviation Authority, the County, and the City. When they first started MBE [participation], it was beneficial to my company because it has allowed us to do other type of work that I am qualified to do.

A Caucasian female owner of a mature engineering firm described the City's certification process as easy, because they have reciprocity with the Florida Department Transportation:

[The certification process] was pretty easy especially through the City of Tampa because they have reciprocity with a number of different entities. The first entity that we were certified with was the FDOT, which is pretty strenuous. [They required] tax returns and a lot of documentation. Once you're certified, it's a lot easier to get the re-certification, because we are attesting to what has changed or not changed.

However, this same business owner does not believe her certification status has benefitted her company:

Honestly, I don't see [that being a M/WBE-certified business] has benefitted my company. We pursue Aviation Authority work through engineering firms, and we have been successful on a couple of [projects], but many times after the contract [is awarded] the work is cut down to a lot less than was anticipated.

This minority male owner of a new professional services company reported that his company is certified with several government entities. He described the process as straightforward:

We are certified with the City of Tampa, Hillsborough County, and the State of Florida. So far, we haven't had any contracts with the City of Tampa. And, we are participating



in two RFPs as subcontractors, thanks [to our] certifications. The certification process was fairly straightforward and they were very helpful.

This minority male owner of a mature supply company also found the City's certification process easy to navigate:

[The City's certification process] was not too difficult. [We answered] the basic questions, and the process itself was not difficult.

A minority male owner of a mature general construction company found the City's certification process relatively simple and beneficial as well:

I don't think I spent more than a week on getting the documents together to become [certified with the City]. And, certainly the people at the M/WBE Office were helpful. [Being certified] has gotten me some jobs. So, I'd say yes, it's been beneficial.

A minority male owner of a mature general construction company is certified with several agencies and he believes that they have helped sustain his business:

I am certified with the City of Tampa, FDOT, State of Florida, and Hillsborough County and it has been a tremendous help. Without it I would not be in business today. The City of Tampa really looks after minority [contractors].

A Caucasian male representative of mature a woman-owned company reported that the company was encouraged to become certified by local governments:

[We] currently have about 70 personnel in [our] Tampa office, and we are certified as a woman-owned business. [We] were encouraged by the state and by the local governments—City of Tampa and Hillsborough County to become certified. [They] said there wasn't much they could do for us unless we got certified to break into their markets. [It] took almost a year to approve [our application], it seemed to be a lengthy process.



This minority male owner of a new a professional services firm found the City's certification process relatively easy:

I'm certified with the County, and the City accepts their [M/WBE] certificate so the process was real easy.

A minority male owner of a mature professional services firm reported that the Authority's certification process was clear, and its staff was very helpful:

For a business owner, it was gratifying to [discover] that the Hillsborough County Aviation Authority process was smooth and in place. [Name withheld] at the Aviation Authority was very helpful through the process as was her assistant, [name withheld]. They explained everything thoroughly when I met with them on two separate occasions. They even made an effort to come to our place of business here in Tampa to verify that we were an established company. They went through our documents and they wanted to see our financials; everything was reported to them and copied to them. So I was really impressed with the process with the Hillsborough County Aviation Authority.

This same business owner also reported that he received a lot of help certifying with the City and the Authority as well:

I did receive a lot of help through the minority program at the City and the Authority. Primarily, I worked with [name withheld], at the MBE office, and he helped us [with] the application [process]. The [State's certification] process was very simple. The documentation was very clear and concise. We went put our [package] together and provided then with all the supporting documentation. I received a response within eight working days after they received my packet, which was very impressive.

B. Problem with Front Companies

Some business owners fraudulently seek M/WBE certifications so that they can take advantage of programs designed for small, woman, and minority businesses. A minority male owner of a mature engineering firm reported to the City instances where he believes certain businesses were fraudulently certified as M/WBEs:



I have actually called the [City] and complained about some people cheating in the [M/WBE] program. And the minority management people seem to be reluctant to act on that. [I reported on business name withheld] who misrepresented themselves on their application. There is a company that's owned by a woman who's not a surveyor or an engineer. [She] does not manage the business. In fact she inherited the business through a divorce. [But], she knows nothing about the business and the employees [operate] it. She is a figurehead which qualifies the [business] as a woman-owned business. The people who [operate] it are non-minorities and they are getting work from the City. [When] I reported this, I was told, 'Well, they can't prove it. And, if someone says, 'Yeah, I run the business,' they have to accept that. [She also said], 'If I inform them of an onsite interview, the female owner [will be] present. So, it [would] appear that she might be running the business.' But, in my opinion, if you're not a licensed surveyor, you should not be certified as a minority consultant.

This same business owner described another instance of a M/WBE firm he believes is a front:

There is another company that's [M/WBE]-certified. The [City] has criteria limiting the number of employees [to qualify for M/WBE certification]. Last time I checked this company had six offices throughout the state of Florida. And I know this far exceeds the number of employees [for certification], yet they are certified as a minority [businesses]. They probably sent in their application stating the number of employees at their local office only and not their statewide offices. I'm telling you these things because I'm hoping that you can pursue [them] and I can remain anonymous and not suffer consequences for raising these issues.

A Caucasian male representative of a mature general construction company reported an instance where he believes a minority business was fraudulently certified as an M/WBE:

There is a female African American underground utility contractor who is a lawyer. She does not even hold a contractor's license and her qualifiers are White Anglo-Saxon males. She has zero minority employees, period. They don't



even have a female secretary or a clerk. If [you are] not blonde and blue eyed, [you can't] work for them. And she is certified as a minority contractor with Orange County, the City of Orlando, and FDOT.

This minority male owner of a mature professional services firm reported his personal knowledge of WBE firms that are actually fronts:

I have personally known [of certified WBEs where the] woman was just a wife of the contractor. They are really fronts.

This same business owner believes that companies that are determined to be fronts should be legally penalized:

Just like ordinances are set up to establish the minority business programs' policies and procedures, they also need to [set] penalties for firms that are perpetuating fronts. There needs to be incentives, but there also needs to be disincentives as well. If a . . . company [claims] that it is a legitimate company and takes advantage of [M/WBE] contract requirements and is found to be lying, then there needs to be some legal repercussions.

Another minority male owner of a mature general construction company reported that he is aware of companies that are male-owned and operated but are certified as WBE firms:

I know of companies where the husband has transferred [the ownership to] his wife so he can become a WBE. I feel that a lot of companies can [easily] meet the [City's certification] requirements.

And this minority male owner of a new professional services firm reported on a company he believes is a front:

[I was] just talking with a guy in the field, and his wife owns [the company]. They are certified as a woman-owned business, but she is never around.



And this minority male owner of a mature general construction company believes that the City's certification requirements are too broad and allows for firms to be erroneously certified as an WBE firm:

I think the criteria [to become certified] has become so broad that probably half of the firms could meet them. It's so inclusive that most firms probably could meet the certification requirement. This truly hurts and puts the small guys trying to start out at disadvantage. They need to tighten the requirements because a lot of companies are [wrongly] qualified as an WBE.

VII. FINANCIAL BARRIERS

A. Difficulty Obtaining Financing or Bonding

According to many interviewees, their limited access to capital inhibits their growth potential. A minority male owner of a mature general construction company believes that he was denied a loan at a banking institution because of the color of his skin:

I have tried in the past to get a line of credit and I was told that I was qualified but they gave me the run around. Even though I have over one-half million in that bank. When I called them, they said, 'Yeah we will call you back.' My record is impeccable and my company's credit is impeccable and they had all that information. Even the branch manager told me we don't need anymore information from you. But she also made it clear to me that the bank was not going to give me the loan because of my color. So I didn't pursue it any [further]. So I closed my account at that bank and I moved it somewhere else. It is tough being a minority. It is a different ball game if you are a black person, but not if you are a White female.

This minority male owner of a mature construction-related company believes banks are reluctant to loan money to small business owners for several reasons:

The banks will deal with you if you have [some money] in the bank. Banks are very reluctant to [loan money to] those that don't have [any] money, are trying to get started, or trying to finance a project. They don't want to loan money



unless you've got money. If you don't have any money, they are very difficult. . . .

A minority male owner of a mature supply company explained why he no longer seeks financial assistance from banking institutions:

I have been self-funding [my company]. When I first started [my] business I had a business plan and I went to all of the [local] banks, but they wouldn't loan me money. I even went to two organizations in Tampa called [company names withheld] and I got a worse response or reception [from them] than I did from the banks. So, I was fortunate that I had saved some money. I then talked with my broker and we worked out a plan to fund [my] company. I don't want to deal with the [banks] now, I took on the attitude that if you didn't want to help me when I really needed it, I don't want your help.

And this minority female owner of a mature services company reported that she has not been successful in obtaining financing for her business:

I am in the process of trying to get a loan. They charge [fees to process the loan application] and then they say you didn't qualify so you are out your money and you have to start all over again. Every time we apply there is usually a \$50 fee.

An minority male owner of a mature construction-related company reported on the difficulties he encountered seeking financing for his company:

I put on a suit and went to talk to [managers at various banks], which was the worst thing I have ever done. I [could not establish] a direct relationship [with the financing institutions]. I never got the help [that I needed].

This minority male owner of a mature professional services firm described the negative impact on small businesses when they borrow money to finance their business:

It kills you, to start borrowing money. And, obviously when you borrow [money] you have a cost to borrow that is never [anticipated]. Now, this can [cause my company] to move into a negative loss situation. Based on the fact that we are paying a tremendous amount of interest to borrow money to cover our receivables. So, this can put a [small company]



out of business. And also it makes us non-competitive for future jobs.

A Caucasian female owner of a new professional services firm reported that she has had to rely on her personal finances and relationships to help sustain her business financially:

I have been very fortunate in that I have been able to self-fund my business. But, it's been a challenge. Because when you are a small business, you have to prove yourself and unless you have someone to believe in you and give you that opportunity. Fortunately, I was able to develop a relationship with a billion dollar company and they gave me a break.

This minority male owner of a new construction-related company described the difficulties he encountered in trying to seek bonding:

We have the same problems with the bidding process. The bonding [requirements are] too high, and we can't get in. I would assume [that there are] minority companies [that are] women, Black, or Hispanic but are unable to bid on large [projects]. And if they are qualified to do the job they should be able to work out a bonding situation with [the client]. [But] this leaves 95 [percent] of firms out of the ballpark. So, there are not very many minority companies doing million-dollar projects for the City of Tampa. They are working under general contractors, like we were. It's not that we can't handle the work: we can't get the bonding power that we need. And, it's a slow process [trying to increase our bonding limits]. We have to show a lot of capital and money in the banks and we just don't have that. We have never had a year that [was not profitable], but that's not enough for bonding companies to bond a million [dollar] or a two million dollar project.

A minority male owner of a mature construction-related company reported that he was able to secure bonding in the past, but currently has not been able to obtain bonding:

I used to get big jobs from the Pinellas County School Board and the Hillsborough County School Board. [These were] projects [with contracts that amounted to] \$90,000 to \$400,000. [At this point] I was able to be bonded. Now, these [bond] companies [have gone] belly up. I don't even



know if I am going to be able to bid now [because I cannot secure a bond].

This minority male owner of a mature general construction company also reported that he is not able to bid on many City jobs because he is unable to obtain adequate bonding:

On most M/WBE jobs, I bid as a sub[contractor] because they require bonding limits that are above my capabilities. The Small Business Enterprise (SBE) program removed its bonding requirements, so I am able to bid as a prime [contractor]. But, if I go out and get a \$200,000 or a \$300,000 bonding limit, that would still leave me out of a lot of jobs because the City [mainly has] million dollar [projects].

However, this minority male owner of a new professional services firm reported that his firm has not encountered any difficulties trying to obtain bonding for his company:

Bonding is not an issue for [my company]. I have not been asked once to bond a job. I have been in business three years now and the first year we did \$1 million [in revenues], the second year we did \$1.8 [million], and this year we're in line for about \$3.2 million in revenues.

Finally, this minority male owner of a mature construction-related company reported on a government agency that provides financial assistance for small business owners:

Usually, there is a lot of help [with financing projects] in the school system. The Florida school system has incorporated into their bids that [they will pay some of the up-front cost for contractors] and at the end of the job they [receive] a refund if [it not used]. So, they have opened the door for [small business owners].

B. Late Payment by Prime Contractors

Many minority, women, and small business enterprises reported a lag between when prime contractors receive payment from a public agency and when the prime contractor pays its subcontractors.



A minority male owner of a mature construction-related company reported that his company is currently waiting on the final payment for services on a project that was completed six months ago:

Normally, if you [submit] your bill by the 25th of the month, you probably [are] paid by the 10th of the month. That was the standard rule, but that has changed considerably. Now some of the contractors, even minorities, are saying, 'We will pay you when we get paid. If we don't get paid, you don't get paid.' That turns us off. We quit bidding with those contractors. I can understand their position because they are not getting paid in a timely manner, so their cash flow is being affected. [For] example, we just finished a [project] at [school name withheld] six months ago. I am still owed about 5 percent of my retainage, which is about \$6,000. I finished another job and they owe us \$30,000, and that's been finished for two months.

This same business owner explained how subcontractors are affected by late payments:

Unfortunately, the larger minority contractors have to carry these general contractors when the general contractors aren't paid [on time]. We are acting as financing institution [allowing the prime contractor] to draw on [our] line of credit. But, the banks charge interest as soon as we [borrow] money from them. If we try to tack on interest to the money [owed to us by prime contractors] they would refuse to pay it.

And this minority male owner of a mature engineering company reported that he has waited six months to receive payment from one of the City's prime contractors:

[Prime contractors] are very slow to pay. They never want to pay before they are paid. I don't know what [happens] on their end, but frequently it [takes] six months [before we are paid]. It just takes forever for us to get paid. I don't think they submit our invoices until they have an invoice to submit. The City of Tampa does not ask me to fill out any forms verifying what I've been paid. And they certainly don't tell me what the consultant's been paid.



This same business owner reported that sometimes he is asked to do work outside of the scope, without an increase in the contract amount:

We don't get too many changes in the scope, but there have been times where they stretch the scope and ask us to do things that we could not have anticipated. And, of course they put the pressure on us by telling us that they are not getting paid any extra money for it either. [I was told] they have to keep the client—the City or [Authority]- happy. So, I have got to bicycle along with them. We have to do this to keep on their good side to get more work. If I'm not a team player, I'm probably not going to hear from them again.

A minority male owner of a mature construction-related company reported that he usually waits 90 to 120 days before he receives payment from prime contractors:

The one thing that hurts us when we deal [with] prime contractors, are the late payments. And sometimes we [wait] 90 to 120 [days] before receiving payment. When we work with [government] agencies typically our payments are rendered in 40 to 50 days, which is acceptable. But as soon as you go through a prime contractor, you need your paperwork submitted prior to the dates identified on the original contract.

A minority male owner of a new professional services firm typically waits up to 60 days before receiving payment from prime contractors:

The longest that I have waited to get paid is 40 to 60 days from the day I submit my bill. Sometimes even longer. This impacts [my company] because I have to scramble around [and try to figure out] how I can pay [my] people. It's tough.

This minority male owner of a mature professional services company reported that the prime contractor with which he often works regularly pays him in a timely manner:

[Company name withheld] are a great company to work for. They are really on top of the job and they take care of their subcontractors. We are [working with them on] construction projects [that] require us to get our monthly bill in by a certain date, so we get paid in a timely manner. Obviously, if [we are late] by a day or two, then we have to wait a whole extra month to get paid.



C. Late Payment by City or Authority

Even though the most government agencies' procurement regulations specify the methods and timing of payments to its contractors, this minority male owner of a mature construction-related company reported that the City did not pay one of their prime contractors until 11 months after the project was completed:

[Contractors] have made little kingdoms in this [industry], and they are the guys with the swing stick. The little guy [does not] stand a chance. There is a [contractor] that we [worked with] a couple of recreation buildings for the City. They held his money . . . [they took] three months to make up their mind on a color to paint [for] the inside of the building. This guy did not get paid until eleven months after the job [was completed]. Now, that's not right, it almost broke him. I had to tell him, 'Hold off paying me [until] you get caught up.' [This is] prevalent in the City, but it is also happening [with] the Authority. I just quit bidding, I said, 'The heck with it. I am not going to go through that turmoil.' In fact, I can't afford it because if I don't get my money in a timely fashion, I have to go borrow money.

A minority male owner of a mature general construction company said that he waited 90 days for payment on a project with the City and that it also took approximately four months before he received his final payment on the same project:

One time I was on a project for City of Tampa's Stormwater Management [Department], and I was on a job for about 90 days and I was not paid. I submitted invoice number one and number two and then nothing. Then I kept calling them and they said, 'Oh, we have processed it,' when in fact they had not. I found out that the guy that was supposed to present the invoice was on vacation. I don't see how he could be on vacation for 90 days. And again it's not the City as an entity, but it's the individuals handling the projects. I have also been on other projects, but the road and Stormwater Management Department are the ones I'm specifically talking about. Even with my last invoice, I [waited] probably four or five months before I saw any money. I did not [complain] because I [did not want to] inflame the situation. I just laid low and [took] a hit on the chin, [so] that I can continue to be in business.



This minority female owner of a mature professional services firm reported that she seldom has problems with late payments:

[We have worked] with the Authority, the City, the School Board, and even the DOT. If we [submit] our invoice the way they want it and we meet their schedule we seldom have trouble getting paid. Now, there are times when it will sit on somebody's desk and they go on vacation, then it can cost [us an extra] month.

And this minority male owner of a mature general construction company reported that the City assists subcontractors with receiving prompt payment from their prime contractors:

One benefit of the M/WBE Program is that they have guidelines for payment that the prime [contractors] have to follow, so our payment typically is in accordance to what was agreed in the contract. The City [encourages prime contractors] to pay their subcontractors in a timely fashion. Sometimes, at the closeout [the payment is late] because if we are doing concrete work and there are other trades behind you, the job [may not] be completed for a year or more.

A minority male owner of a mature professional services firm reported that it is sometimes difficult to receive payment from government agencies:

I do tend to focus on government [contracts]. Even though they try to stretch you to the max. Sometimes I feel like we are getting picked on because of our size or minority status. I make phone calls and tell them, 'Hey, I'm not a big [company] and I need my check. I have to make payroll this week. Please send me my check.'

Caucasian male representative of a mature general construction company explained why he believes late payments can influence M/WBEs decisions to bid to prime contractors:

The Aviation Authority has a much more restrictive minority list, but their payment schedules are much better. We get a little bit more minority participation as an end result. These people will dedicate themselves to doing Aviation Authority work.



This minority male owner of a mature construction-related company explained why he prefers to utilize the joint check option for his payments:

Basically, most of our payments are in the form of a joint check. At first I thought that was a bad [idea], but I think it's a good [procedure]. Without a joint check, the manufacturers want to be [paid] in 30 days, but if you get a joint check, they [will accept payment] whenever the contractor pays you. Which is normally never in 30 days. So, in actuality it was better off for me in the long run. We] seldom [are] paid in less than 30 days. I don't have a problem with [waiting] 60 or 90 days as long as I'm not being harassed by my vendors. That is why we usually [accept] the joint check option agreement with vendors and general contractors. We also try to deal with [contractors] that have decent pay records. You can tell who the good contractors are by the way they pay. They basically pay you when they get paid. So, if the City or the [Authority] takes a long [time] to pay them, the longer it takes for them to pay us. It is a trickle down effect.

VIII. COMMENTS ABOUT THE CITY AND AUTHORITY'S M/WBE PROGRAM

The City has three business enterprise programs. They are the Women/Minority Business Enterprise Program, the Small Business Enterprise Program, and the Equal Employment Opportunity/Affirmative Action Program. All three programs are administered by the Minority Business Development Office (MBDO).

There are two business development programs operated by the Authority. One is the Disadvantaged Business Enterprise Policy and Program (DBE Program) for projects funded by the United States Department of Transportation (USDOT), and the other is the non-federally funded Disadvantaged Business Enterprise Policy and Program, which was adopted on August 2, 2001. Both programs are administered by the Authority's DBE Liaison Officer (DBELO).

A. Positive Comments Regarding M/WBE Program

A minority male owner of a mature supply company believes that the City's and the Authority's M/WBE programs are valuable for minority business and should not be dismantled:



Most of the [contractors] who are bidding Authority or City work they try to meet the goals. If there [were not] goals or mandates . . . minority firms would not fare well at all. At some point they were talking about dismantling the [M/WBE programs]. This would basically hurt a lot of people. I think what those guys are doing at the City and the Authority, trying to keep us informed about what's going on makes all the difference in the world. On a scale of one to ten [I would rate the City's program] as an eight and a half or nine.

This minority male owner of a mature supply company believes that the City's M/WBE program is valuable because the surrounding communities do not have an M/WBE program:

[I think they should] encourage the general contractors to utilize minority [subcontractors]. I don't know if they meet [the City's goals] or if they even enforce them. They used to have [more] minority participation [on City contracts] for Blacks, Hispanics and women. [Now], that is totally gone. I don't even bother going to Pinellas County. They [have] killed [their M/WBE program]. It is worse in Petersburg. So, actually the only [program for minority businesses] is what little bit [is being done] in the City of Tampa. [But right now], I am totally frustrated with the [City's] program. It's not working for us. I bid a bunch of [jobs] and I get nothing. It's just an exercise I'm doing here. I think there are a lot of opportunities for minority businesses [in the public sector] but, the [same is] not [true] in corporate America.

A minority male owner of a mature construction-related firm believes the Authority has a real commitment to increasing the participation of M/WBEs on their contracts:

I think the [Aviation Authority] has a real commitment to making a difference in Tampa. And [their program] has helped me. I feel the MBE department stands up for all people's rights. The Aviation Authority is trying to make their MBE program benefit the smaller guy.

This minority male owner of a mature professional services firm believes the main reason his company was awarded a large contract with the Authority was due to its M/WBE participation requirements:

The [Aviation Authority's] M/WBE program was the main reason we [were awarded a large] project with [company]



name withheld]. I think that a business should be able to stand on the strength of its own capabilities. I think that if you're qualified to do the work, it shouldn't matter if you are minority owned or owned by a Ross Perot. Small and minority owned businesses should be entitled to have opportunities that are given to large businesses. And, I think MBE participation is the way to do it. There [should] be a mandated [M/WBE] participation requirement.

A minority male owner of a professional services firm explained why he believes M/WBE programs are valuable for minority business owners:

I think [M/WBE programs] are extremely valuable, especially for beginning businesses that are relatively small. Once they become part of the program they [gain] exposure for doing the work, and they are defined by how well they do, not by who they are. So I think it's very important, and I will be very disappointed if it went away. I [credit] the success of our company to [M/WBE programs]. If it wasn't for programs like that at the federal, state, and municipal level, I feel that our chances of [getting] the work would probably be reduced by as much as 30 to 40 percent. I find that the Aviation Authority's [M/WBE] program has a little more meat and substance to it. The City of Tampa's and Hillsborough County [also has] very good [programs].

A minority male owner of a mature professional services firm reported that M/WBE programs were instrumental in sustaining his business when he first opened his company:

I think [M/WBE] programs have definitely helped our business get started. They are great programs. I am not very familiar with Hillsborough and the City of Tampa [M/WBE] programs. But, yesterday the City of Orlando and Orlando Aviation Authority had a public meeting regarding setting M/WBE goals. I was really pleased that they have really gone out of their way to help local M/WBE and DBE firms. They also said they are [teaming with] Hillsborough County Aviation Authority, and they will recognize each others' DBEs. So, I would definitely encourage a continuing dialogue between these agencies.



This minority male owner of a new professional services firm believes being part of the Authority's M/WBE program has had a positive effect on his firm:

I received my first certification from Hillsborough County Aviation Authority. A lot of doors have opened up [for us]. We have [only been certified] for three months, but I see a lot happening with the process. They are involved in communicating thoroughly with us when there are workshops for minorities and to connect us with their general contractors to make [sure we are] on the list. It is very important for the generals to know who the minority contractors are [and] what specific entities or codes of work [we provide]. We have also received several calls from other agencies that received our information from the Hillsborough County Aviation Authority. [Employee names withheld] have done a fantastic job in keeping my company very informed.

B. Negative Comments About M/WBE Program

A minority male owner of a mature construction-related company does not believe there is value in the M/WBE programs for the City and the Housing Authority:

Basically, the program itself is good, but it's the management and the operation of the program [that needs to be changed]. The Housing Authority is a different ball game. . . . they are not really responsive to the program. Fortunately, we had a good general contractor that wouldn't put up with anything. However, they [told] the Housing Authority we are going to stop until you get your stuff together. But I think the [City's] program is a failure because there are so many people abandoning it, and it's not working. It's a waste because I see a lot of people just falling by the wayside.

This minority male owner of a new professional services firm explained why he decided not to involve his company in the City's M/WBE program:

The Airport Authority has a very strong [M/WBE] program in place, but I gave up on the City. It was very difficult to establish [my business] as a minority contractor with them. We found that both the [Authority], the City, and any other agencies look at the State's [vendor] list first [for prospective bidders]. And if you are on the State's list for minority



contractors, then you could be called upon [to bid on] work. They don't look at the City and the [Authority] lists. So, I found it a waste of time to [register with] the City's or the [Authority]'s minority [program] because the State's [vendor] list [is the priority] by all the entities in the City and the [Authority].

This minority male owner of a mature engineering firm believes that the City's current M/WBE program is not effectual:

[The City's M/WBE program] does not have any teeth anymore, [because the initial] City ordinance [regulating M/WBE participation] has sunset. Now, the [ordinance needs to be reinstated].

A minority male owner of a new construction-related company believes that the City's M/WBE program is not useful for minority contractors because of their difficulty meeting bonding requirements:

I think the [City] has an ideal [M/WBE] program. [But], in my opinion . . . I don't think it works because of the [difficulties minority contractors experience trying to obtain] bonding. The jobs that the City puts out [require bonding]. [That is why] it doesn't work in favor for minority businesses, and it never will the way it's operating now. Since, there are no set-aside [requirements] for minority [contractors] with the City of Tampa, we have to bid with general contractors. They can meet the three or four million dollar bonding [requirements]. We are a small company, and . . . we don't carry the massive cash flow like big contractors.

C. General M/WBE Program Comments

A Caucasian female owner of a new professional services firm described her frustrations, because she believes the City does not have a real commitment to M/WBEs:

There is really no commitment from the [City to increase M/WBE participation] on their contracts. I'm on a Florida state-term contract which allows me to be a selected vendor. This allows any state, local, or educational facility in the state of Florida to use me without having to go through the prequalification [process], because I have already [been] qualified for that. So, that to me is a rather big deal, but it



has never benefitted me. How much work have I done with any government entity? I have done maybe \$40,000 worth of work. [But], I have done over \$1 million dollars worth of work with major corporations and [other] private entities. The City of Tampa says that they are committed to [increasing M/WBE participation], but what's really [needed] is action. No one should be looking for a hand out, but a hand up. Just give me one opportunity. Here I am in the City of Tampa, and I have done some work with New College University down in Sarasota and with Hillsborough County Schools, but I haven't done anything with my own city.

A minority male owner of a mature professional services firm believes that the City should refocus its objectives for its M/WBE program. A one-stop certification process with the regional agencies was described as a means of improving certification procedures:

I have not renewed my certification with the City because I don't see any benefit. Once you're certified, I believe an agency should be able to share that information like a one-stop certification process. Most of the [M/WBE] programs spend more time certifying businesses than advocating to get them contracts. I'd say 80 percent of their time is spent on certifying and recertifying businesses and then keeping a database of those certified businesses. And that takes up the predominance of time of the staff, and it leaves very little time to give [minority contractors] advanced notice of what are the forecasted new construction projects coming up in the next year. [They need] what I call 'teeth in the tiger' to make [prime] contractors serious about making opportunities available for [minority contractors]. There should be hard [rules] saying that they must do 10 percent of their business with MBE firms.

This same business owner further described what he believes would make an M/WBE program successful:

The success of an [M/WBE program depends] on whether the government agency either has a toothless ordinance or an ordinance with teeth. The 'good old boys' will simply use the good faith method [rather than subcontract with a minority subcontractor]. I used to get a tremendous amount of calls because they were on notice that they could not win



a bid unless they did serious outreach to [minority contractors]. Unfortunately, the result of taking the teeth out of the law has [hurt minority businesses]. They should put the numbers back in the law or create an atmosphere where minorities [have a sense] of inclusion. But it is a definite disadvantage when you are out here in the marketplace being a person of color.

A minority male owner of a mature professional services company believes M/WBE programs are needed to infiltrate good old boy networks:

The jail system in Hillsborough County is like a good old boy's network and [I have not been able] to infiltrate [that network]. Certain contractors have networks in place it is very difficult for others to [be competitive]. The City of Tampa and the Authority [should] take steps to introduce small minority businesses to these [networks]. I am [located] in Tampa, yet 30 percent of my revenues are generated in Miami and South Florida. [Minority contractors] in the Tampa area and the Hillsborough County area are moving to other cities and counties that have supportive programs for minority contractors. And, not just minority contractors, but contractors in general too. The City of Tampa and Hillsborough County are sleepy-good-old-boy-network towns.

A minority female owner of a mature service provider company believes that the City's M/WBE program managers do not have the authority to help minority businesses succeed:

The Blacks that [are] head of these [M/WBE] programs . . . can't do anything unless somebody tells them they can. They say they want to help minority [businesses], then they should help us and not just say words just to see how we are going to react in the community. I need help and a lot of other women out there need help. [We] have to crawl and almost pull each others eyes out to try to get a contract and to me that's really not necessary.

A minority male owner of a mature general construction company believes the lack of minority set-asides is the major reason why many minority businesses have failed:

[There are] no set-asides for minority [businesses], instead they [set aside contracts] for small businesses. [But] I think



they should have [set-asides] for minority [contractors]. This would really help a lot of minorities because about 60 to 70 percent of minority-run businesses [have gone] out of business. Minority set-asides really help minorities compete with the big boys, because they can bid anything regardless of the dollar amount. I turned to the City and [Authority] [for work] my first five years in business, and I did not even work as a subcontractor. I was strictly doing FDOT work [and they had a minority set aside program]. If I had [depended] on the City or the [Authority] I would have been out of business the way they treated me.

This minority male owner of a mature engineering firm reported on how his business declined when the State ended its M/WBE set-aside requirements:

[Being certified] has helped me be able to participate at least in the role as a subconsultant. However, I must point out that when the State of Florida dropped their minority participation [requirements] on FDOT projects, our workload dropped about 50 to 75 percent.

This same business owner believes that the City should increase its minority participation goals:

It seems like the City is making more of an effort than other cities, but they can certainly do a lot better. If nothing else, at least I would like to see them increase their minority goals from 10 percent to maybe 25 percent. I would also prefer that they have some set-asides.

A minority male owner of a mature general construction company believes that the City should give incentives to local businesses to increase their participation on City contracts:

It certainly would be better [if the City] gave incentives to local [businesses] as opposed to having companies from out of town come in and get the projects. If they are trying to produce and nurture small businesses then the dollars should stay in Tampa.



This Caucasian female owner of a mature service company also believes that the absence of set-aside programs have made it difficult for minority and female-owned businesses to survive:

It is becoming very hard [to get work because] the quotas are not there, especially for women or minority [businesses].

A Caucasian male owner of a mature construction-related company explained why he believes minority businesses should not be subjected to graduation provisions in M/WBE programs:

To my knowledge the [minority development office] has been very helpful, I know my company has been very happy with the level of service that all of the City of Tampa departments have provided. And, I don't think any different [about] the business development side of things. I personally see value in [M/WBE programs], the only trick is if a minority business grows and is successful that can take them out of the disadvantaged business [program]. This can penalize the successful minority owned businesses when those types of restrictions are placed on them and I don't agree with that. If it's a successful business, it should still stay in the [program]. Because I've seen some [examples] where these folks get a couple of contracts and they get bumped out of [the program].

A Caucasian male owner of a mature general construction company believes the Authority has a better M/WBE program than the City of Tampa:

The City of Tampa, the [Authority], and the Port Authority [programs] are out of synch. . . . If I have \$200,000 worth of pipe work, they'll set a \$225,000 [minority] goal. And, before you know it there is no work left. I have on many occasions refused to bid [with] the City of Tampa because of a goal; I won't waste my time. The goal setting at the Airport Authority is much smaller, it's a fraction of the City of Tampa's typical program. It has a [smaller] list of available minority contractors, but you will get a higher percentage of [contractors] that will be responsive.



This same business owner explained why he believes the City's M/WBE goals are unrealistic:

We do between 5 and 10 percent annually with the City of Tampa. We also do an additional 5 to 10 percent with Hillsborough County and with the Airport Authority a year. A lot of times, especially with the City of Tampa, the goals are absolutely unrealistic. I have found situations where they have taken a material supplier and an installer and put a dual goal, which is impossible to do. I can't buy the material from a minority [supplier] and turn around and have it brought and installed by a minority contractor. So the goal settings to me have no comprehension whatsoever. Additionally, if a project is [primarily] an underground utility [project], we are not going to subcontract to an underground utility contractor because you have to be an underground utility contractor performing 51 percent of the project. It is impossible to do. So I have seen goals of 35 to 40 percent when realistically if you did a very good job, 10 to 12 [percent] is probably the absolute most you can put in. Many [of the City's rules] are archaic and preclude others from even bothering to file because they don't want to deal with them. I would love to give you some names. It is a topic of conversation on many occasions.

And this Caucasian male owner of a new professional services firm reported that he worked on a City project where he fulfilled its M/WBE requirements. He also believes that M/WBE requirements should be enforced and understands why they are being implemented:

During the RFP process, both the purchasing department and the business enterprise department [at the City] made themselves available if we needed the help. The minority participation turned out extremely well. We completed two assignments with the City of Tampa, and both of them had minority participation [requirements]. Frankly, I think it's unfortunate that [M/WBE requirements] have to be in place. I understand the reason for them, but they are a solution to a bad problem. To be honest they are an unnecessary step in the evolution of bringing normal business practices to [par]. We would not have to do that if we operated in a culture where diversity and differences were not mandated by color, religion, or gender. But it is sad to say, we live in a culture where that's not the case. So, it's unfortunate that we have



to [have] them. I understand why we have them, and it's not an answer to the problem, but I guess you can call it a bandage.

IX. POSITIVE STATEMENTS

Although interviewees were solicited for barriers they experienced with the City and the Authority, many business owners shared their sentiments regarding the positive experiences and relationships they developed with managers and staff at several City and Authority agencies.

A minority owner of a mature supply company described a positive relationship he developed with City employees:

A lady at the City of Tampa named [employee name withheld] would call us [and ask], 'Hey, did you bid this job? What did you bid it for? [And], have you been paid?' So, I would like to give her a [thumbs-up]. And, if we did not [receive] payments we notified the City and the bonding company and that would hold everything up. So, the City lets us know [if the prime contractor] has been paid. Then we can turn around and say, 'We know you've been paid, so pay us now, or we are going to put a lien against your bond.' This wakes them up, because they don't want [the City] to know . . . that they are not paying their subcontractors.

This minority male owner of a new professional services firm had positive comments about the City of Tampa's M/WBE program:

The City of Tampa is probably the most progressive agency that we have [worked with] in Florida. [Employee name withheld] had very progressive ideas. I think they are on the side of minorities. Their process for publishing bid information is well organized. The rest of the state agencies, such as agencies in Tallahassee, their MBE [programs] really do not have much weight. [Our] MBE certification has only helped in dealing with the City of Tampa. But, agencies like the Department of Health only pay lip service to MBEs, they don't strictly enforce [their requirements]. It's really not much of an advantage to have an MBE [certification] when dealing with the rest of the [State] agencies.



This minority male owner of a mature construction-related company reported that a City official was instrumental in helping him get certified:

[The City's certification process] is a little tedious. But, there is a great guy in the City that really helped us [through the process]. He has been doing it for a long time, and he is a good man. In fact, I had gotten to a point where I was frustrated. I told him, 'Look, I don't need to be certified, I'm pulling out of the program.' He said, 'No, no, no.' He actually came to our office and helped one of my [employees] fill [out] the [paperwork].

A minority male owner of a mature construction-related company spoke about his positive relationship with the City's M/WBE office:

I have a great relationship with the [M/WBE department], from the administrative office [workers] to the department heads. My phone conversations with them have been great. I have a good relationship with the M/WBE department, and I think they have a good relationship with me.

This Caucasian male owner of a mature construction-related company reported on his positive relationship with the City of Tampa:

It's been great, we have [had] a very good experience with the City of Tampa. The nice thing is that they have been very easy to work with, we worked a lot with their engineering [department]. And we also do quite a bit of work with them.

A minority male owner of a mature professional services company credits the City's M/WBE program with helping to make his firm a success:

The folks at Tampa's Minority Development Business [office] and [name withheld] at the airport has been [very] helpful. They have pretty much welcomed our business with open arms, and they have done whatever they could to promote small businesses and us personally. If [the M/WBE program] has had a lack of results, it has not been their fault. So I cannot put fault on them. If it wasn't for that program, we probably would not even be half as successful as we are.



A minority male owner of a mature professional services firm spoke highly of the efforts by the Authority to increase minorities on its contracts:

The personnel at the [Aviation Authority] are very aggressive. [Name withheld] physically attends the pre-bid meetings. And she puts potential bidders on notice that the Aviation Authority takes their DBE requirements very seriously. This creates an atmosphere where they do more than what the new word of the day—‘good faith.’ They literally take the M/WBE directory and [contact minority businesses].

X. RECOMMENDATIONS

The interviewees listed a number of ways the City and the Authority could improve its programs, including: strengthening its M/WBE participation requirements and implement a sheltered market program. Additionally, the interviewees also reported on whether they believe M/WBE programs are valuable for minority and women-owned businesses.

A minority male owner of a new professional services firm believes the Authority should institute mandated rules for their M/WBE program in order to ensure that they are enforced:

I spoke with a gentleman [name withheld] at the Authority’s M/WBE office, and I think he has good intentions. But, he doesn’t get much help from the rest of the Authority. For example, the [project] I worked on had no [M/WBE participation requirements]. All they said was, ‘We will give you points if you [subcontract with] a MBE.’ But, they did not [require] a specific [percentage] that should be given to [MBEs]. Most prime [contractor] give us half a percent just to get the MBE points. So that is a big failure. They need to [set specific] rules. Also, when they award a contract to a prime [contractor], they [should] monitor the contract to make sure the [MBEs are] getting the work. They need to monitor the [program], and they need to set some [specific] rules. You [should not be able] to say you are using MBEs, get the [bonus] points, and then give them a half percentage of the [total contract amount].



This minority male owner of a mature supply company also believes the Authority's M/WBE program should be revitalized, and new rules should be established and enforced:

I think the [City] needs to initiate a [M/WBE] program with some teeth. If they put out a bid with a requirement for minority participation and [the responses are not in compliance], then they [should] reject it. That's what the Airport did in the beginning and the word got out to those one or two contractors that were failing [to meet the requirements]. But, this was about 12 years ago and they need to [reinstate this practice]. Instead of accepting the contractor's word saying that they could not find any [qualified minority contractors]. I have heard of instances where [prime] contractors say they will use minority firms and once they get the bid, they do not [utilize their services]. Or, they use them at a percentage less than they [initially promised]. As far as the Authority, there is always room for improvement, but I don't know what else they could do. They have a pretty solid program, and if contractors don't include DBE subcontractors, then they just don't do any business.

And this minority male owner of a mature professional services firm echoed the same sentiments as the previous two interviewees:

The [City] needs to go back a few years and do the same thing they were doing before [the M/WBE requirements were changed]. In other words, [implement] a program where [prime contractors] are required to [meet a specific] minority percentage, because this is not encouraged. Whether I bid high or too [low] they do not [have to] use me. [They] know they got the ball in their hands and we all know who can play ball. Before, [there were] [participation] percentages for Blacks, Hispanics, and women. We don't have that nowadays and [it should be] enforced. The state of minority businesses [have been] buried [with] a cross on it. In fact, I have no hope [for minority businesses], unless we change this around. My only recommendation is to require . . . general contractors to [meet] the minority participation [requirements] for each category.



A minority male owner of a mature engineering firm recommends sanctions for City representatives who fail to enforce M/WBE requirements:

[The City should] have punitive sanctions for employees and directors that are responsible for implementing the objectives of the [M/WBE] program and are [failing] to do their job. That way they will know that they are subject to civil infractions [if they do not enforce the City's M/WBE requirements]. Right now they don't have [any processes in place] to make them [enforce the requirements].

This same business owner also suggested sensitivity training for City officials in the purchasing departments:

[Also], the City should [engage in] sensitivity training for some of their high level [representatives] in the purchasing departments. Because the purchasing director, [name withheld] does not do anything to [help] minority [businesses]. And [this person] is the reason the study was never [completed], because she tied up [company name withheld] by negotiating with them for four years until they finally left the building.

A minority male owner of a mature construction-related company believes that the Authority should do more to provide equal access to minority businesses on their contracts:

I think the Aviation Authority [needs to make] changes that include [providing] equal access to people of color. I have been certified for 20 years and there is a lot more that needs to be done. There needs to be more opportunities. You have the same contractors doing all the work.

This minority male owner of a mature general construction company recommends stricter monitoring to verify that the minority contractors listed in the bid proposals are actually utilized on the projects:

I would like a more hands on approach to make sure the those minorities that are selected [as subcontractors] are actually utilized. And, not just only on paper.



A Caucasian male representative of a mature general construction company believes that the City should model its M/WBE program after the Authority's program:

The City could learn from the Authority to help improve their program. First of all, they would learn how to set M/WBE goals. An engineer typically doesn't have a clue what the actual cost of the work is. He then [uses] a database [that provides] an average cost. Every job [we perform] is unique, they may be similar but they are not the same. Production rates are set by what it's going to take to do the job in a [certain number of] days, plus a crew and the equipment for the material [must be factored into the equation].

A minority male owner of a mature construction-related business recommended that the City waives its bond requirements for minority firms if they have good track records:

I know of some [agencies] that don't require a bond if you are a minority firm and have a [good] track record. I do not [believe] this happens with the City of Tampa.

This minority male owner of a mature professional services company suggests the City institute procedures to inform MBEs about its procurement process:

I would recommend that the City of Tampa provide [a more cohesive] process for [disseminating] information [regarding MBEs] to business owners. It's very cumbersome for prime contractors to [go to] five or six different areas to research [information on MBEs]. Hillsborough County and the City of Tampa do not assist MBEs in [learning about their procurement process]. The most help that I received was from [City employees names withheld]. These two gentlemen were the ones who helped me through the process. But, I can't see 100 minority contractors in Tampa going to see [names withheld] with [inquiries about the City's procurement process]. There's got to be a [better] process that can facilitate [the needs of] everyone that wants to inquire about the process. Hillsborough County Aviation Authority had a minority development department that was strictly focused on helping minority [businesses] become recognized as a minority [prime contractor]. That's why I'm involved with the disparity study, because I want to voice my



opinion as a business owner and hopefully make things better for the future.

This same business owner explained why he believes it would be beneficial for the City and Authority to separate their electrical work into low and high voltage contracts:

For the last three years [I have been] driving my head up against the wall with the City and the Authority. The City and the Authority could save a tremendous amount of money [if they separate high voltage and low voltage work into separate contracts]. [Right now] there is probably a mark-up of anywhere from 15 percent to 30 percent. It would [also] open the doors to small cabling low voltage contractors [by providing them with the opportunity] to bid [as prime contractors].

And this same business owner also spoke about a minority business seminar he attended in Fort Lauderdale, which he believes should be duplicated by the City and the Authority:

We went to a workshop in Fort Lauderdale and we were able to meet with [representatives from] the City of Miami, the City of Broward, Riviera Beach, and the West Palm Beach area. They seem to have a lot of processes in place [to support minority businesses]. I have not been to a workshop like that in Tampa. Hillsborough County did have one workshop scheduled at a local library, but when we got there the time had been changed and we [could not make the new scheduled time]. But, I have not seen any large workshop where all of the [City's] agencies are present. For example, in Fort Lauderdale, the Department of Juvenile Justice, [local] newspapers, the county jails, and the Highway Patrol [were at the workshop]. Purchasing agents [were there] and they were open to listening to [us]. Interviews were scheduled [for those who] wanted to [meet with them], and they had a panel of several minority business owners that were very successful [to our answer questions]. I think the leadership in the City and with the Authority [should] take the first step and initiate [assistance for minority businesses]. It is very tough, based on my personal experience as president of my company [and] diligently trying to get work from the City and the Authority.



A Caucasian female owner of a mature engineering firm explained why she believes more pre-bid conferences are needed:

More pre-bid conferences would be great. I think that would give us an opportunity to [meet] the prime [consultant] and also as a subconsultant it would give us a better idea of how we should market ourselves to them.

This same business owner also suggested that the City and the Authority host a reverse trade show for small and minority vendors:

There have been efforts from other agencies to do what they call a reverse trade show. For example, the City and the Aviation Authority would come and talk about their program and their process of selection. This would give us insight and we could learn what they expect from their consultants.

A minority female owner of a mature service company suggested that the City host meetings for minority businesses to determine what technical assistance it requires:

I would really like to see something that is really exciting for minorities, not only the Blacks but [all] minorities. I would love to see someone [at the City] come and sit down [with minority firms] to determine what we need to enhance our business. [Such as], somewhere we can go to borrow money. [We] went to meetings at the School Board but I do not go to the meetings anymore. They want us to go to the meetings and we call them five or six times and nobody answers.

This minority male owner of a mature professional services firm described a program in Miami where the City is committed to breaking up large contracts into smaller projects to increase minority participation on its contracts:

I believe that the mayor is committed to making a change in terms of its MBE department. I think their general attitude is [geared toward] trying to make a change. I like a city that's on the move. A program in Miami called the MCC program is successful because they purposely break their projects up into small projects so that smaller companies can get a piece of the pie and grow [as a result]. A lot of times public agencies, in their desire to maximize small or minority participation, will put a lofty goal on a particular project, and



the prime contractors will prop somebody up that really doesn't have the capacity financially to pull it off. They don't necessarily want to break it up into smaller pieces because they are not getting paid enough to do all the training [needed]. Well, most programs have leaned towards small businesses as opposed to race and/or disadvantaged [businesses].

A minority male owner of a new professional services firm also recommends that large projects be broken into smaller contracts:

I would recommend breaking down large projects. This will allow small companies to [bid as prime contractors]. For example, we don't have the capability to do a lot of the large [contracts for] duct work. Those [jobs] always go to the big companies.

A minority male owner of a mature professional services firm recommends the City implement a sheltered market program:

Pinellas County has a sheltered market program which basically means if you have one to three certified small businesses in a particular class code, they will set that business aside and only allow competition amongst the small business community. If the small business community can't bid on it, then they will release it to the open marketplace. This is a tremendous and aggressive way to change the business clientele.

This minority male owner of a mature professional services firm suggested a mentoring program for small and minority businesses be instated:

Perhaps more [government agencies] should [implement] a mentor/protégée approach with small, minority-owned businesses to help get them rolling. I believe the mentoring program [we participated in with the federal government] was a big help to us.

A minority male owner of a mature general construction company believes the City should help subcontractors to grow into successful prime contractors:

[The City] should try to develop more [technical assistance] for minority contractors. Their goal should be to get



M/WBEs certified and [help develop them] so that they can grow enough to move onto the next level. For example, after a subcontractor has been on their bidder's list for 10, 12, or 15 years [with a proven track record], they should consider helping these subcontractors move to the next level, [such as a prime contractor]. Basically, moving from subcontractor to the prime [contractor].

And finally, this minority male owner of a mature engineering firm provided these two recommendations:

First, I think the City should monitor whether or not minority consultants are being paid on a timely basis. In fact, it should be part of the [prime] contract and the invoices from minority [contractors] should be processed immediately.

And [my second recommendation] would be for the [City] to follow up and determine whether [minority contractors] were actually used on the project. When minority contractors receive their payments, they [should be required by the government agency] to sign a form certifying the amount that they were paid. Then they could track how much money was spent on minorities on a particular contract.

XI. SUMMARY

The reoccurring theme from most of the anecdotes consisted of a belief that the City and Authority's M/WBE programs are ineffectual. This sentiment was based on the fact that neither program requires M/WBE set-asides on its contracts. Instead, M/WBE goals have been established to encourage majority-owned businesses to subcontract with M/WBEs. One business owner described the City's M/WBE program as having "no teeth," because M/WBE participation requirements were replaced with M/WBE goals. And, most interviewees believe that the M/WBE goals are not monitored adequately to determine whether they are being met. For instance, one Caucasian male construction contractor reported that he has never witnessed a City official conduct an on-site visit at his work sites to determine the fulfillment of M/WBE goals. It should also be noted that some interviewees thought that the Authority's M/WBE programs are more effective than the City's.

Because most of the interviewees believe the City's M/WBE program is ineffectual, they also felt that there is no real commitment to increasing minority or female participation on its contracts. There were various reports of prime contractors using various unscrupulous



methods to avoid M/WBE requirements. In fact, one business owner reported that one prime contractor fraudulently attempted to use his company to fulfill M/WBE goals with two separate Tampa government agencies.

An overwhelming number of interviewees also described their frustration in trying to break into the contracting network in Tampa. One interviewee reported that she has tried to obtain a City contract for 18 years, with no success. And many other interviewees reported that they were unable to break into the contracting industry in Tampa and the surrounding counties.

There also seems to be confusion regarding the City’s certification process concerning reciprocity with other agencies. Some business owners reported that their certification process was easy because of reciprocity. Others reported that the City’s certification process was tedious and cumbersome because of a lack of reciprocity with certain local agencies.

Establishing mandated M/WBE participation on City and Authority contracts along with stricter monitoring standards was also recommended by a majority of the interviewees. Mentoring/protégée and sheltered market programs were also suggested by the business owners. Finally, it should also be noted that numerous positive comments were made praising City and Authority employees for their helpfulness and hard work. Table 2.02 lists a summary of findings concerning current barriers against ethnic/gender groups.

Table 2.02 Summary of Findings Concerning Current Barriers against Ethnic/Gender Groups

Type of Evidence	African Americans	Hispanic Americans	Caucasian Females
BUSINESS BARRIERS			
Barriers Based on Race	U		
BARRIERS CREATED BY THE GOVERNMENT			
Barriers Created by City or Authority Managers and Failure to Monitor M/WBE Program Requirements	U	U	



Table 2.02 Summary of Findings Concerning Current Barriers against Ethnic/Gender Groups

Type of Evidence	African Americans	Hispanic Americans	Caucasian Females
BARRIERS CREATED BY THE CONTRACTOR COMMUNITY			
Difficulty Breaking Into Contracting Network	U	U	U
Old Boys Network			U
Prime Contractors Avoiding Program Requirements	U	U	U
DIFFICULTIES IN BID PROCESS THROUGH THE LIFE OF A CONTRACT			
Difficulties with Bid Process	U	U	U
Inadequate Lead Time	U		U
Problems with the Certification Procedures	U	U	U
Fronts	U	U	
FINANCIAL BARRIERS			
Difficulty Obtaining Financing or Bonding	U	U	U
Late Payment by Prime Contractors	U	U	
Late Payment by Public Agency	U	U	

