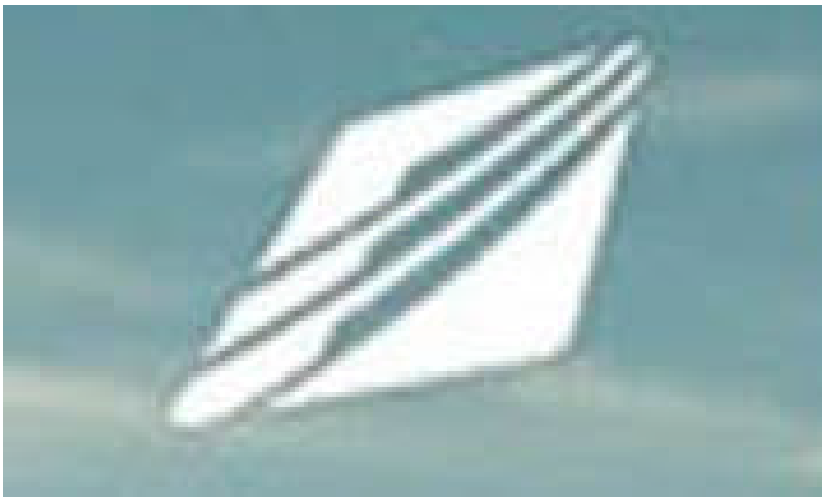
Final Report

For Development and Revision of Small, Minority & Women Business Enterprise Program



Nashville International Airport (BNA)

Submitted to:
Metropolitan Nashville Airport Authority

Submitted September 19, 2007 by:

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I. EXECUTIVE SUMMARY

A. Introduction

This is an executive summary of a report which examines the question of whether disparity exists between the availability of Minority and White Female Business Enterprises (MWFBEs) and the utilization of such firms by the Metropolitan Nashville Airport Authority, hereinafter referred to as "MNAA". Data gathered and analyzed for this study cover four years in MNAA's recent procurement history (July 1, 2003 through December 31, 2006).

Government initiatives which seek to employ "race conscious" remedies to ensure equal opportunity must satisfy the most exacting standards in order to comply with constitutional requirements. These standards and principles of law were applied and closely examined by the Supreme Court in City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), 709 S.Ct. 706, and Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097 (1995). The Croson decision represents the definitive legal precedent which established "strict scrutiny" as the standard of review by which state and local programs that grant or limit government opportunities based on race are evaluated. The Adarand decision subsequently extended the "strict scrutiny" standard of review to race conscious programs enacted by the federal government.

In rendering the Croson decision in January 1989, the U.S. Supreme Court held that the City of Richmond's minority business enterprise ordinance--which mandated that majority-owned prime contractors, to whom the City of Richmond had awarded contracts, subcontract 30% of their construction dollars to minority-owned subcontractors--violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. In a six-to-three majority decision, the Court held that state and local programs which use race conscious measures to allocate, or "set aside," a portion of public contracting exclusively to minority-owned businesses must withstand a "strict scrutiny" standard of judicial review. The strict scrutiny test requires public entities to establish race- or ethnicity-specific programs based upon a compelling governmental interest and further requires that such programs be narrowly tailored to achieve the governmental interest.

The strict scrutiny test requires a "searching judicial inquiry into the justification" for a race-conscious remedy. Currently MNAA operates a race and gender conscious Minority and Women Owned Business Enterprise (MWBE) program. Griffin & Strong, P.C. conducted this study by adhering to the principles outlined in the legal decisions. Inherent in the above discussion is the notion that MWBE programs and remedies must maintain flexibility with regard to local conditions in the public and private sectors. In the full study, Griffin & Strong, P.C. includes a legal analysis, a purchasing policies and practices analysis and anecdotal evidence, in addition to the detailed statistical analysis which is summarized in this executive summary. In the pages which follow we present our findings and our recommendations.

B. Utilization, Disparity Findings, and Recommendations

1. FINDING 1: MWFBEs are underutilized in some areas of MNAA Prime Contracting.

The relevant contracting history for MNAA was recorded during the data collection process of this disparity study, which included physical review of purchasing records by data collectors hired by Griffin & Strong, P.C., as well as incorporation of information from databases supplied by the agency. Cross tabulations of the data, first by procurement categories (Construction, Professional Services, including Architecture/Engineering, and Goods & Services) and then by ethnicity/race and gender group provided the data disaggregation necessary to compute the utilization percentages and disparity indices. A summary of the relevant market analysis is shown below.

Summary of Relevant Market Analysis

Business Categories Source /Final Result	Construction	Professional Services, including Architecture/Engineering	Goods/Services
Vendors	U.S.	U.S.	U.S.
Bidders	U.S.	U.S.	U.S.
Prime Contractors	U.S.	U.S.	U.S.
Final Relevant Market (Summary)	**U.S.**	**U.S.**	**U.S.**

Source: Griffin & Strong, P.C.

The summary of the total dollars awarded or expended by MNAA for each procurement category was broken down by fiscal year, and then by ethnicity/race and gender group. The analysis showed data for universal prime contractors and subcontractors by fiscal year and by procurement category. For each procurement category, utilization data for prime contractors and subcontractors were analyzed separately into tables that provided the total amount paid to minority and white female-owned business enterprises (MWFBEs) by fiscal year and the corresponding percentages for each. The table below shows totals for the entire study period.

MNAA
Utilization of MWFBE by Business Category
July 1, 2003 to December 31, 2006
Prime Contractors

Business Category	All Payments	MWFBE		African American		Asian American		Hispanic American		Native American		White Female	
	Dollars	Dollars	%	Dollars	%	Dollars	%	Dollars	%	Dollars	%	Dollars	%
Construction	21,616,386	29,157	0.13	8,400	0.04	0	0.00	0	0.00	0	0.00	20,757	0.10
Professional Services, including A/E	18,489,945	709,956	3.84	136,277	0.74	18,720	0.10	0	0.00	0	0.00	554,959	3.00
Goods/ Services	12,469,647	966,174	7.75	20,297	0.16	0	0.00	4,318	0.03	5,361	0.04	936,198	7.51
Grand Total for Study Period	52,575,978	1,705,287	3.24	164,974	0.31	18,720	0.04	4,318	0.00	5,361	0.01	1,511,914	2.88

Source: Griffin & Strong, P.C.

Based on the availability and utilization amounts calculated, the following table summarizes the results of the disparity tests which show that most MWFBE firms are underutilized in each business category.

MNAA
Underutilization of MWFBE by Business Category
July 1, 2003 to December 31, 2006
Prime Contractors

Construction (Disparity Indices based on Master Vendor List and Bidders' List)	Professional Services, including Architecture/Engineering (Disparity Indices based on Master Vendor List and Bidders' List)	Goods/Services (Disparity Index based on Master Vendor List)
African American (0.00, 0.01)	African American (0.21, 0.24)	African American (0.04)
Asian American (0.00, 0.00)	Asian American (0.55, 0.11)	Asian American (0.10)
Hispanic American (0.00, 0.00)	Hispanic American (0.00, 0.00)	Hispanic American (0.00)
Native American (0.00, n/a)	White Female (0.52, 0.52)	Native American (0.00)

Source: Griffin & Strong, P.C.

2. FINDING 2: MWFBEs are underutilized in some areas of MNAA Subcontracting.

MWFBE subcontracting can be summarized as follows:

- All MWFBE groups were underutilized in Construction subcontracting with the exception of Hispanic-owned firms, who were neither available nor utilized during the study period.
- All MWFBE groups were overutilized in Professional Services subcontracting with the exception of Hispanic and Native American-owned firms, who were neither available nor utilized during the study period.

3. FINDING 3: Minority and White Female-owned Construction firms are severely underutilized as Primes in the Private Sector in Nashville, TN MSA

Analyses were conducted using both Reed Construction Data and Building Permit data restricted to the MSA.

- Availability based on U.S. Census data show that the large majority of Construction firms are owned by non-minority males, 78.81%.
- White Females are the second largest group, with 7.52%.

- African American firms have 2.6%, Hispanic Americans have 2.01% and Native American firms have 1.91%.
- Asian American firms comprise the smallest group with only 0.44%.

According to Reed Construction Data:

- Only two general contractor awards were won by MWFBE firms out of 116 total projects.
- These two projects totaled $133 million, 6.1%, and were awarded to the same White Female-owned construction firm.

According to Building Permit Data:

- African American firms were issued two permits totaling $1.2 million, 0.004% of the total.
- Hispanic firms were issued one permit totaling $850,000, 0.003% of the total.
- White Female firms pulled 33 permits for $11.7 million, 0.04% of the total.
- According to both Building Permit data and Reed Construction Data, all minority and women owned firms were significantly underutilized, with disparity indices of 0.003 and 0.28, respectively.
- Native American and Asian American construction firms were not utilized according to either data set, despite being available.
- Only White Female-owned firms were awarded contracts according to the Reed Construction Database.

4. FINDING 4: Utilization of MWFBEs by MNAA as compared to Private Sector Commercial Construction Prime Contracting

The utilization percentages for the public sector were derived from MNAA utilization. The utilization percentages for the private construction prime contractors were derived from the building permit data, and the Reed Construction Data (RCD).

Overall, MWFBEs experienced low utilization both in the public sector compared to the private sector. The detailed comparative analysis showed the following:

- African American-owned firms' utilization in the public sector was 0.04 percent compared with 0.004 percent in the private sector for Building Permits and 0.00 percent for RCD.
- Asian American and Hispanic American firms' utilization was 0.00 percent, each, in the public sector compared with no utilization for both in the private sector.
- Native American and White Female-owned firms received 0.00 percent and 0.10 percent of the prime construction dollars in the public sector respectively during the period under review. On the other hand, Native American-owned firms received 0.00 percent of prime dollars in the private sector, and White Female-owned firms received 0.04 percent in private commercial construction from Building Permits primes and 6.08 percent from RCD.
- Non-minority male-owned firms were more successful as construction primes both in the public and the private sector during the period under review.

MNAA
Comparison of Public Sector with Private Sector MWFBE Construction Prime Contractors' Utilization
(Nashville, TN MSA)

Prime Contractors/Public & Private Sector	African American (%)	Asian American (%)	Hispanic American (%)	Native American (%)	White Female (%)	MWFBE (%)	Non-MWFBE (%)
Public Construction Prime Contractors (MNAA Actual Payments)	0.04	0.00	0.00	0.00	0.10	0.13	99.87
Private Construction Prime Contractors (Building Permits)	0.004	0.00	0.003	0.00	0.04	0.05	99.95
Private Construction Prime Contractors (Reed Construction Data)	0.00	0.00	0.00	0.00	6.08	6.08	93.92

Source: Griffin & Strong, P.C.
Note: Percentages are derived from analysis of utilization of dollar amounts both for Public Sector and Private Sector

5. FINDING 5: Summary of Findings on Lending Discrimination from the National Survey of Small Business Finance and GSPC Survey of Business Owners

Based on the 2003 NSSBF:

- 60.5% of African Americans and 14.5% of Females report being always denied loans in the past three years whereas only 7.3% of White Males report the same.
- Once loans are approved, MWFBEs pay higher interest rates than White Males with the exception of Asian Americans.
- Hispanic Americans pay the highest rate on approved loans at 20.9% on average compared to 6.7% for White Males.
- The probability of being denied a loan increased by 19.3% for MWFBEs when compared to Non-minority Males.

Based on 2007 GSPC Survey of Business Owners:

- MWFBEs and non-minority males were equally likely to request bonding, but denial rates were much higher for MWFBEs.
- Majority of respondents had requested commercial bank loans, but MWFBEs were more likely to be denied.
- 40% of African Americans and 50% of Hispanic Americans were denied as compared to 7.8% of non-minority males.

- 12.20% of White Female respondents were denied loans.

C. Conclusions and Recommendations

1. Conclusions

This study produced substantial evidence of both continued discrimination and the continuing effect of past discrimination against minority and white female-owned business enterprises in the Nashville, TN MSA. Specifically, there was evidence of disparity in a number of procurement categories when reviewing the procurements of the Metropolitan Nashville Airport Authority. It is our conclusion that evidence suggests that the procurement process of the MNAA is impacted by the identified marketplace discrimination. Therefore, the MNAA has a governmental interest in ensuring that its own procurement process is not discriminatory and that it is not a passive participant in private schemes of discrimination. The statistical evidence can be summarized as follows:

- Despite using a very conservative method of calculating availability, which probably understates the actual availability of MWFBE firms, minority and White Female-owned firms were significantly underutilized as prime construction contractors in each ethnic/race and gender category.
- MWFBEs were underutilized as prime contractors in Professional Services for the study period, with the exception of Native American firms who were not available and not utilized.
- MWFBEs were significantly underutilized in Goods & Services during the study period in each ethnic/race and gender category examined with the exception of White Females who were actually overutilized.
- MWFBEs were significantly underutilized as subcontractors in Construction for the study period. Each of the ethnic and gender classifications were significantly underutilized in every year of the study period, with the exception of Hispanic American-owned firms who were neither available nor utilized.
- Most MWFBEs were overutilized in Professional Services subcontracting.

The private sector analysis can be summarized as follows:

- Most MWFBE groups were less likely to be self-employed in all business categories than non-minority firms. All minority and women groups made less in self-employment income than their non-minority male counterparts.
- All MWFBEs were significantly underutilized in the private commercial construction prime contracting category according to both Building Permit Data and Reed Construction Data.
- MWFBEs were more likely to be denied loans and pay higher interest rates on approved loans.

The statistical evidence is bolstered by extensive anecdotal evidence.

2. Recommendations

- MNAA should develop a commercial non-discrimination program which should include narrowly tailored race and gender participation levels for each opportunity. The evidence supports narrowly tailored race and gender conscious efforts to ensure that the airport's processes are free from discrimination and from passive participation in private sector discrimination. The Small, Minority and Women Business Enterprise (SMWBE) Program should be revised to take these considerations into account.
- MNAA's Office of Business Diversity should coordinate an ongoing outreach, technical, bonding and financial assistance program.
- MNAA should develop comprehensive policies and procedures for the SMWBE program in order to increase opportunities for small and MWBE firms. The following areas should be addressed:

  1. Incorporation of SMWBEs in all procurements. Procurement planning should include consideration of the impact on SMWBEs of the procurement strategies chosen. Demonstration of efforts to include SMWBEs by issuing or responsible departments should be reviewed by the Office of Business Diversity for procurements over $10,000.

  2. Thorough consideration should be given to unbundling large projects and bidding them based on their components.

3. Written guidelines should be developed for instances in which the CEO or the Department of Planning, Design and Construction will grant a contract up to $100,000 without competition.

4. Automatic extensions and renewals of contracts should be reviewed. A determination should be made by the Office of Business Diversity as to the impact of each contract extension and renewal on SMWBE participation.

5. MNAA should review insurance and bonding requirements on all contracts and consider reducing those when it is determined that MNAA's interests will be protected with lower bonding and insurance limits.

6. MNAA should strengthen the role of compliance by the Office of Business Diversity Development to include monitoring, contract compliance, and facilitation of issues and disputes resolution involving DBE concessionaires and contractors.

- 7. Additional resources should be added to the Office of Business Diversity Development to ensure the successful implementation of the Disparity Study recommendations.

II. STATISTICAL ANALYSIS

A. Introduction

This report examines the question of whether or not disparity exists between the availability of Minority and White Female Business Enterprises (MWFBEs) and the utilization of such firms by Metropolitan Nashville Airport Authority, hereinafter referred to as "MNAA". Data gathered and analyzed for this study cover four and one-half years in MNAA's recent procurement history (July 1, 2003 through December 31, 2006).

The first section of this report addresses the data collection methodology. The second section provides an analysis of the business demographic and a framework for the availability concept, as well as a discussion of the application of that concept to firms that have received awards from MNAA. The third section discusses MNAA's contracting history for the four and one-half year study period, with regard to MWFBEs, and examines utilization for MWFBEs in Construction, Professional Services, including Architecture/Engineering, and Goods/Services (including Non-professional Services and Supplies). The last section provides an analysis of the availability of MWFBEs as vendors to MNAA, as compared to the MNAA's utilization of such firms, and is followed by inference statistics.

B. Data Collection Methodology

The data collection process was initiated with a series of meetings with officials from the Purchasing Department, Business Diversity Development Office, and Finance Department. The objective of those meetings was to assess the availability and location of contract files, vendors' files, and the most current MWFBE certified lists. Other documents relevant to the statistical analysis were also requested (such as contract award tabulations and Purchase Order listings) and an assessment of the accessibility of the contract files or computer files was made in order to establish a general approach for gathering data.

During the data assessment meetings with the MNAA officials, the Griffin & Strong, P.C. (GSPC) team requested several of the available utilization reports and disparity studies already

undertaken by MNAA detailing contracting activities. In addition, the GSPC team provided an explanation regarding the types of information being sought for Construction, Professional Services, including Architecture/Engineering, and Goods/Services (including Non-professional Services and Supplies)[1]. After a thorough explanation of the data needs by the GSPC team, the Director of Purchasing and Inventory Management stated that most of the data would be collected going through actual contract files and purchase order records. All attempts were made to secure electronic data for MWFBE and non-MWFBE utilization for "Capital Improvement Projects" (CIP) and "Operation and Management" (O&M) contracts. After a series of meetings, Finance agreed to extract financial data for CIPs and O&Ms. Spreadsheets with specific fields necessary for the study were developed by GSPC and provided to the Department of Finance, so that the MNAA's available computerized data could be submitted in the format most suitable for analysis.

Subsequent to the data assessment effort, a general framework for the data collection effort was developed, describing the process of developing a history of contracting activity to include the utilization of minority and female business enterprises for MNAA over the last four and one-half years. A data collection sheet was developed for the purpose of recording the specific data and/or information relevant to the statistical analysis of utilization/availability for MNAA. A detailed plan was developed in order to identify, hire, and train temporary workers for the collection of bid and utilization data of majority firms, minority businesses for subcontractors/sub-consultants, and purchase orders for Goods/Services. Additionally, specific plans were developed to record the names of all subcontractors/sub-consultants listed by each bidder during the bidding process and to enter all of the data and/or information collected into project databases.

1. Identification, Hiring and Training of Temporary Data Collectors

During the data assessment phase of this project, the number of MNAA contracts that would require manual data collection was estimated. Then, a preliminary estimate of the number of workers required to complete the data collection was prepared. GSPC determined that the best method for collecting the data was to hire full-time temporary workers who could begin work

[1] This category includes Non-professional Services and Supplies

immediately. In accordance with the MNAA's requirements, GSPC contacted Arvie Personnel Service, (Arvie), a local temporary agency, to assist in identifying individuals who could serve as data collectors. A job description outlining the required skills and abilities was provided to Arvie.

The ideal candidates for the data collector positions possessed a high school diploma or equivalent, excellent handwriting, the ability to read and retrieve information quickly and accurately and record it on a form, and the ability to learn quickly. Individuals who matched these qualifications were offered temporary employment as data collectors and were required to attend training.

A two-hour training session was conducted during which the temporary data collectors were trained using actual contract files in the Office of Purchasing and Inventory Management at 4132 Airfield Boulevard. Therefore, they were able to practice locating the relevant information and completing the data collection forms using the actual files. The data collectors also had ample opportunity to ask questions. The data collection effort was completed on time as planned.

2. Development of Data Collection Sheets

Two types of data collection sheets were developed for the purpose of recording utilization data for prime contractors and subcontractors, bid tabulations, names and other information on subcontractors listed by each bidder, as well as other key information relevant to the statistical analysis portion of the disparity study. The necessary information included the name or description of each project or contract, the contract type, the project or contract number, the full address of the prime contractor, the minority indicator of the prime contractor when available, a list of all bidders with their locations (city, state and zip codes), and names of subcontractors/sub-consultants listed by each bidder along with their work description and minority indicator if available. Copies of the data collection sheets follow.

DATA COLLECTION SHEET FOR CAPITAL IMPROVEMENT PROJECTS (CIP) AND SERVICES CONTRACTS (OPERATION & MAINTENANCE CONTRACTS)

METROPOLITAN NASHVILLE AIRPORT AUTHORITY (MNAA) DISPARITY STUDY

_____

Project/Contract Number

Contract Type

- Construction
- Professional Services
- Supplies (Goods)/Non-professional Services
- Architecture/Engineering

Project/Contract "Description/Name"

_____

_____

_____

Prime Contractor Information

Contractor Name: _____

Address: _____

City _____

State _____

Zip Code: _____

Telephone: _____Fax #:_____ Minority Category: _____

Award/Payment Information

Source of Fund:
Federal Fund _____
Other _____
Effective Date: _____

End Date: _____

Original Budget: _____

(If multiple year contract, please record Amount for:

FY 2004: July 1, 2003 to June 30, 2004 _____
FY 2005: (07/01/04 to 06/30/05) _____
FY 2006: (07/01/05 to 06/30/06) _____
July 1, 2006 to December 31, 2006 _____

Actual Amounts Paid: FY 04 (July/01/03 to June/30/04) _____
FY 05 (07/01/04 to 06/30/05) _____
FY 06 (07/01/05 to 06/30/06) _____
July1, 06 to December 31, 06 _____

Was this contract modified? Yes: ___ No: _____ If Yes, Change Order Amount: _____

BID INFORMATION

PROCEDURE Competitive_____ Competitive Negotiation____

Quotes____ Emergency/Rush____ Sole Source_____
Other___

Was this bid advertised? Yes _____ No _____

List of <u>all</u> Bidders including the successful bidder: (Use additional sheet if needed)

Bidder Name	City, State	Zip Code	Minority Category

SUBCONTRACTOR/SUBCONSULTANT INFORMATION (USE ADDITIONAL SHEET IF NEEDED)

Sub. Name	Amount	Work Description	Minority Category

Completed by:_____

Date: _____

Verified by: _____

DATA COLLECTION SHEET FOR THE PURCHASE ORDERS (POs)

METROPOLITAN NASHVILLE AIRPORT AUTHORITY (MNAA) DISPARITY STUDY

***** FOR BOXES WITH FISCAL YEAR 2003 POs , DO NOT DO JANUARY TO JUNE FOLDERS*****

DO ONLY THE FOLDERS LABELED JULY –DEC 2003"

NOTE: THE DATA COLLECTION COVERS JULY 1, 2003 to DECEMBER 31, 2006

PO No. _____

Order Date _____

Vendor (Name) _____

Address _____

City _____

State _____

Zip Code: _____

Telephone: _____Fax #:_____

Minority Category (SMWBE/DBE): _____ May not be on the form you are looking at (Do not waste time, please move on)

Cost Center: _____

Account Code: _____

Description/Specifications

Payment Information: (Here you are looking for the Money)

Order Total: $ _____

END !!!!!!!!!!

(Please check your work very quickly for accuracy especially the money)

Completed by: _____

Date: _____

Verified by: _____

3. Contract Classification

For the purposes of this report, the contracts have been classified into three major business categories: Construction, Professional Services, including Architecture/Engineering, and Goods/Services (including Non-professional Services and Supplies). The analysis has been conducted for each of the following ethnicity/race and gender groups:

- African American
- Asian American
- White Female
- Hispanic American
- Native American
- Non-Minority male

Analyses have been conducted for both prime contractors and prime contractors' utilization of subcontractors/sub-consultants. It is worth noting that there were no subcontracting activities for Good/Services during the study period.

4. Data Source and Contracting History

During the data collection effort, the Accounting Division of the Department of Finance, with the assistance of the Director of Purchasing and Management, supplied GSPC with various electronic data, including financial data (actual payments) for all Construction services, Professional Services, including Architecture/Engineering, Non-Professional Services, and information relevant to the statistical analysis of the study. The specific databases provided contained the following information:

> All payments to both prime contractors and subcontractors for all Capital Improvement Projects (CIP) and all Operation and Management (O&M) contracts (also referred to as Services Contracts), covering the time from July 1, 2003 to December 31, 2006. The CIPs and O&Ms included Construction, Professional Services, including Architecture/Engineering, and Non-Professional services.

The Department of Purchasing and Inventory Management provided the following data and/or information in electronic or hard copy format:

- Listing of MWFBE Vendors;
- Listing of most current SMBE/DBEs;
- Hard Copy of all prime contract award tabulations of all CIPs
- Hard Copy of all prime contract award tabulations of all O&Ms (Services Contracts)

Purchase Orders for Goods/Supplies, bidder data and listing of subcontractors/sub-consultants listed by each bidder were collected from contract files by GSPC. The data supplied by MNAA and the data collected were entered into GSPC's computer system subsequent to the data collection effort. The databases created were manipulated to develop a database containing contracting history for each business type, for both prime contracting and subcontracting on behalf of MNAA. Cross tabulation of the data, first by business categories and then by ethnicity/race and gender, provided the data disaggregation necessary to compute the utilization percentages and disparity indices, as will be described in the following sections of this report.

C. Relevant Market and Availability Analysis

1. Relevant Market Identification by Business Category

The now commonly held idea that the relevant market area should encompass seventy-five to eighty-five percent of the "qualified" vendors that service a particular sector has its origins in antitrust lawsuits.[2] In line with antitrust precepts, Justice O'Connor specifically criticized Richmond, Virginia, for making Minority Business Enterprises (MBEs) all over the country eligible to participate in its set-aside programs.[3] In Croson, the Supreme Court of the United States reasoned that a mere statistical disparity between the overall minority population in Richmond, Virginia, which was 50% African American, and the award of prime contracts to minority-owned firms, 0.67% of which were African American-owned firms, was an irrelevant statistical comparison and was insufficient to raise an inference of discrimination. Justice O'Connor also wrote that the relevant statistical comparison is one between the percentage of Minority Business Enterprises in the marketplace who were qualified to perform contracting work (including prime and sub-contractors) and the percentage of total City contracting dollars awarded to minority firms.

The Croson decision gave only general guidance as to how the actual availability and utilization of minority firms should be determined. Since Croson, however, a number of court decisions have addressed the question of which type of quantitative evidence is required in order to determine if there is a significant statistical inference of discrimination. One of the most common themes of recent court decisions is that to be considered "available", firms must meet the requisite qualifications to perform work for a local jurisdiction. In addition, the Court emphasized the need to provide evidence of discrimination within a specific geographic area, because, "the scope of the problem would vary from market to market."

In general, there are two methods primarily used to determine the "relevant market." The first method consists of ascertaining the geographic location of the contract awardees and vendors. In the second method, the entity's bidders' or vendors' lists are scrutinized to ascertain their geographic location. The former has gained more acceptance under the United States Justice

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

[3] Croson, 488 U.S. at 506

Department's guidelines for defining relevant markets, particularly in antitrust and merger cases. Some consultants have modified the two main methods and developed an alternative method for determining an entity's relevant market by using the prime contractors (awardees) lists, the vendor (firms registered to do business with the Metropolitan Nashville Airport Authority) lists, and the bidder lists.

The relevant market is established when the geographic area that meets one of the following is defined: 1) the area where 85% or more of the qualified vendors are located; 2) the area where 85% or more of the awardees are located; or, 3) the area where 85% or more of the bidders are located. Ideally, the application of these three criteria results in a unique relevant market designation. However, in cases where this is not true, criterion number three, the area where 85% or more of the bidders are located, is given greater weight because it more accurately reflects the spirit of the Supreme Court's test, which asserts that qualified firms in the area demonstrate that they are ready, willing and able to do business with governmental or other entities. In other words, when the relevant market is the same for the awardees, the vendors and the bidders for a procurement category, the decision to choose is easy. When there is a difference, the bidders are given more weight because many economists and researchers apply a rule of thumb that the relevant market is the geographical area in which a vast majority of the offerors or sellers to the relevant buyer are located.

The relevant market analysis for Metropolitan Nashville Airport Authority (MNAA) from fiscal year 2004 to fiscal year 2007 (FY 2007 includes only data from July 1, 2006 to December 31, 2006), indicated that 39.58 percent of the construction prime contractors (awardees) utilized by MNAA were located within the City of Nashville; 22.92 percent were located in the Nashville, Tennessee Metropolitan Statistical Area (MSA[4]), but outside of the City; 12.50 percent of the primes were located in the State of Tennessee but outside of the City and the Nashville, Tennessee MSA; and finally, 25.00 percent were located outside of the State of Tennessee. Applying the above criteria for Construction, the relevant market is the United States, because the State of Tennessee contains all of the Nashville, TN MSA, with its 62.50 percent, in addition to the 12.50 percent of the contractors that are in the portion of the State that lie outside the

[4] The Nashville Metropolitan Statistical Area (Nashville, TN MSA) is defined by the U.S. Department of Commerce as being within the following county boundaries: Cheatham, Davidson, Dickson, Maury, Montgomery, Robertson, Rutherford, Sumner, Williamson and Wilson.

Nashville, TN MSA, however, 25 percent lie outside the State of Tennessee. The percent of primes elsewhere in the country, outside Tennessee, is large enough to be included in the relevant market. Therefore, the relevant market is the United States.

The analysis of the construction bidders' geographic location data indicated that 77.59 percent of the bidders utilized by MNAA were located in the State of Tennessee, and 22.41 percent outside of the State of Tennessee. Therefore, the relevant market is the United States, when applying the bidder criterion.

The analysis of the vendors' geographic location information indicated that less than 75 percent (72.46 percent) of the vendors were located in the Nashville, TN MSA, 82.04 percent of the vendors were located in the State of Tennessee, and 17.96 percent lie in the U.S outside of Tennessee. Therefore, the relevant market is the United States, when applying the vendor criterion.

Following the decision rule, Griffin & Strong, P.C. determined, by application of all of the standard measures for determining the relevant market, and displayed in Table 4 the relevant markets for the business categories examined in the period under review:

- Construction: the United States;
- Professional Services, including Architecture/Engineering: the United States;
- Goods/Services: the United States.

Table 1
MNAA
Relevant Market Analysis
Bidders

Business Categories / Locations	Construction			Professional Services, including Architecture/Engineering			Goods/Services[5]		
	# Of Firms	%	Cumulative %	# Of Firms	%	Cumulative %	# Of Firms	%	Cumulative %
Nashville, TN	25	43.10	43.10	115	40.21	40.21	72	46.75	46.75
Nashville, TN MSA	5	8.62	51.72	34	11.89	52.10	21	13.64	60.39
State of Tennessee	15	25.86	77.59	20	6.99	59.09	13	8.44	68.83
U.S.	13	22.41	100.00	117	40.91	100.00	48	31.17	100.00
Outside U.S.	0	0.00		0	0.00		0	0.00	
Total	58	100.00		286	100.00		154	100.00	

Source: Griffin & Strong, P.C.
Note: Locations paired are mutually exclusive
The analysis is based on "unique vendor listings."

Table 2
MNAA
Relevant Market Analysis
Prime Contractors

Business Categories / Locations	Construction			Professional Services, including Architecture/Engineering			Goods/Services		
	# Of Firms	%	Cumulative %	# Of Firms	%	Cumulative %	# Of Firms	%	Cumulative %
Nashville, TN	19	39.58	39.58	69	49.29	49.29	320	47.34	47.34
Nashville, TN MSA	11	22.92	62.50	21	15.00	64.29	51	7.54	54.88
State of Tennessee	6	12.50	75.00	6	4.29	68.57	46	6.80	61.69
U.S.	12	25.00	100.00	44	31.43	100.00	258	38.17	99.85
Outside U.S.	0	0.00		0	0.00		1	0.15	100.00
Total	48	100.00		140	100.00		676	100.00	

Source: Griffin & Strong, P.C.
Note: Locations paired are mutually exclusive
The analysis is based on "unique vendor listings."

[5] "Goods/Services" refers to Supplies and Non-professional Services (i.e Landscaping, Janitorial Services…)

Table 3
MNAA
Relevant Market Analysis
Vendors
"Firms registered to do business with MNAA"

Business Categories / Locations	Construction			Professional Services, including Architecture/Engineering			Goods/Services		
	# Of Firms	%	Cumulative %	# Of Firms	%	Cumulative %	# Of Firms	%	Cumulative %
Nashville, TN	74	44.31	44.31	356	28.94	28.94	239	34.24	34.24
Nashville, TN MSA	47	28.14	72.46	139	11.30	40.24	95	13.61	47.85
State of Tennessee	16	9.58	82.04	70	5.69	45.93	50	7.16	55.01
U.S.	30	17.96	100.00	665	54.07	100.00	314	44.99	100.00
Outside U.S.	0	0.00		0	0.00		0	0.00	
Total	167	100.00		1,230	100.00		698	100.00	

Source: Griffin & Strong, P.C.
Note: Locations paired are mutually exclusive
The analysis is based on "unique vendor listings."

Table 4
MNAA
Summary of Relevant Market Analysis

Business Categories / Source /Final Result	Construction	Professional Services, including Architecture/Engineering	Goods/Services
Vendors	U.S.	U.S.	U.S.
Bidders	U.S.	U.S.	U.S.
Prime Contractors	U.S.	U.S.	U.S.
Final Relevant Market (Summary)	U.S.	**U.S.**	**U.S.**

Source: Griffin & Strong, P.C.

2. Total Number of Qualified Firms and Availability Estimates

A) METHODOLOGY FOR AVAILABILITY ANALYSIS

This section of the report discusses Griffin & Strong, P.C.'s (GSPC) approach to estimating availability. The determination of the availability of businesses for public contracting is crucial to a good disparity study. If availability is miscalculated, then all inference statistics, including disparity indices (or disparity ratios), will be in error[6].

Croson and subsequent decisions give only general guidance as to how to measure availability. Instead, decisions are more specific and instructive on what not to use to estimate availability, e.g., measures which emphasize size of firms. One common theme from the court decisions is that being "qualified" to perform work for a local jurisdiction is one of the key indices of an "available" firm.

There are numerous approaches to measuring available, qualified firms. GSPC has developed two different estimations of available, qualified firms for the Metropolitan Nashville Airport Authority Disparity Study, first using a master vendor file and second using bid tabulations. The master vendor file includes vendor lists supplied by each agency included in the 2003 study, certified DBE lists supplied by MNAA, MDHA, Metro Purchasing, and the Tennessee Department of Transportation's Certified DBE list. A unique vendor list was developed from these lists.

The bid tabulations for Construction and Professional Services, including Architecture/Engineering, were compiled by GSPC during the data collection effort. Availability is a benchmark to examine whether there are any disparities between the utilization of minority and female business enterprises and their availability in the marketplace. The measures of availability utilized in this disparity study incorporate all the required criteria of availability:

[6] La Noue, George R., "Standards for the Second Generation of Croson - Inspired Disparity Studies", The Urban Lawyer (The National Quarterly on State and Local Government Law), Summer 1994, Volume 26, No 3, p. 490

- The bidder or the vendor or the certified DBE does business within an industry group from which the Metropolitan Nashville Airport Authority (MNAA) makes certain purchases.
- The firm's owner has demonstrated that he or she believes the firm is qualified and able to perform the work, and is located within a relevant geographical area such that it can do business with MNAA.
- By filling out a vendor application, or by bidding, or going through the certification process, he or she has demonstrated an interest in obtaining work with MNAA.

The following definitions are necessary for the estimation of availability:

Definitions: Let: A = Availability Estimates

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

N (*Asian*) = Number of Asian Business Enterprises in the pool

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

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

Availability (A) is found by dividing the number of minority and/or women- owned business enterprises by the total number of businesses in the pool of bidders. For instance, availability for Asians is A (Asian) = N (Asian)/N (t) and availability for MWFBE is N (MWFBE)/N (t).
Availabilities for this study have been estimated from two sources:

1) Availabilities were estimated from the master vendor list. Availability estimates from this source were used in the prime contracting disparity analysis for Goods and Services.
A master vendor database was developed by combining vendor lists from all entities[7] included in the (2005) study for Metropolitan Government of Nashville and Davidson County. A second master database was developed by combining Certified DBE lists from MNAA with the ones from MDHA and the Tennessee Department of Transportation (TDOT). These two master databases were then combined and used as data sources for the estimations. Availability

[7] These entities included: Metro Purchasing (Metro), Metropolitan Nashville Airport Authority (MNAA), Metropolitan Development and Housing Authority (MDHA), Nashville Electric Service (NES), Metropolitan Nashville Public Schools (MNPS), Metropolitan Transit Authority (MTA).

estimates from this source were used in the subcontracting disparity analysis for the three major procurement categories examined in this study (Construction, Professional Services, and Goods/Services).

Availabilities were estimated from the bid tabulations (except Goods/Services) compiled during the data collection effort.

2) Duplications were removed from the databases, and all attempts were made to properly identify the ethnicity/race and gender of the firms. Additionally, major corporations, local, state and federal agencies were also removed from the databases. For instance, corporations and agencies such as the following were removed:

> *Metro Planning Department, Baptist Hospital, American Bar Assoc, 100 Black Men of Middle Tennessee, American Association of Physic Teachers, American Bar Association, Amsouth Bank, Bank of America, BellSouth, First Tennessee Bank, The Bank of Nashville, Tennessee Law Enforcement Academy, Treasurer, State of Tennessee, U.S. Department of Transportation, U.S Department of Education, Nashville Area Chamber of Commerce, Nashville Fire Department…*

B) AVAILABILITY ESTIMATES BASED ON THE MASTER VENDOR FILE

Table 5 shows the availability estimates using the master vendor list. Table 5 shows that firms owned by Asian Americans represented 0.27 percent of the pool of construction firms in the master vendor file. A detailed analysis of the percentage of firms owned by minorities, white females and non-minority males by business category is as follows:

1) Construction
   - African Americans: 7.47 percent;
   - Hispanic Americans: 0.27 percent;
   - Native Americans: 0.27 percent;
   - White Females: 6.67 percent;
   - Non-minority males: 85.7 percent.
2) Professional Services, including Architecture/Engineering
   - Asian Americans: 0.29 percent;

- African Americans: 2.85 percent;
- Hispanic Americans: 0.34 percent;
- Native Americans: 0.00 percent;
- White Females: 4.30 percent;
- Non-minority males: 92.20 percent.

3) Goods/Services

- Asian Americans: 0.17 percent;
- African Americans: 1.00 percent;
- Hispanic Americans: 0.10 percent;
- Native Americans: 0.02 percent;
- White Females: 1.43 percent;
- Non-minority males: 97.23 percent.

Table 5
MNAA
Availability Estimates Based on the Master Vendor List
By Procurement Category
(Percentages)

Business Category	Asian American	African American	Hispanic American	Native American	White Female	Non-Minority Male
Construction	0.27	7.47	0.27	0.27	6.67	85.7
Professional Services, including A/E	0.29	2.85	0.34	0.00	4.30	92.20
Goods/Services	0.17	1.00	0.10	0.02	1.43	97.23

Source: Griffin & Strong, P.C.

C) AVAILABILITY ESTIMATES BASED ON BID TABULATIONS

The number of firms for each ethnicity/race and gender was compared with the total number of firms for Construction, and Professional Services, including Architecture/Engineering. Availabilities for Goods/Services were not estimated using this data source as bid tabulations

were not compiled for this business category. Instead, availability data for this procurement category were provided from the master vendor list and are listed in the following table as such.

The availability estimates based on bid tabulations for each ethnicity/race and gender group in Construction and Professional Services, including Architecture/Engineering are displayed in Table 6. The data drawn from MNAA bidders'[8] lists during the period under review and presented in Table 6 show that 1.61 percent of all construction firms were African American-owned, 0.35 percent of all Professional Services, including A/E firms were owned by Hispanic Americans and 1.43 percent of all Goods/Services firms were owned by White Females.

Table 6
MNAA
Availability Estimates Based on the Bidders' List
(By Procurement Category)
(Percentages)

Business Category	Asian American	African American	Hispanic American	Native American	White Female	Non-Minority Male
Construction	1.61	1.61	3.23	0.00	3.23	90.32
Professional Services, including A/E	1.42	2.48	0.35	0.00	4.26	91.13
Goods/ Services[9]	0.17	1.00	0.10	0.02	1.43	97.23

Source: Griffin & Strong, P.C.

D) AVAILABILITY ESTIMATES BASED ON SUBCONTRACTORS/SUB-CONSULTANTS LISTED BY "RESPONDENT TO BID"

The number of firms for each ethnicity/race and gender group was compared with the total number of firms for Construction and Professional Services, including Architecture/Engineering in order to calculate availabilities. Availabilities for Goods/Services were not estimated using this data source as bid tabulations were not compiled for this business category. Instead, availability data for this procurement category were provided from the master vendor list and are listed in the following table as such. These availabilities are displayed in Table 7.

[8] Bidder tabulations were compiled only for Construction and Professional Services, including Architecture/Engineering during the data collection effort.
[9] The availability estimates for this procurement category are based on the vendor listing only (bid data were not collected).

The data were drawn from a tabulation of subcontractors/sub-consultants listed by each respondent during the bidding process on Metropolitan Nashville Airport Authority contracts during the period under review. This shows that 4.00 percent of all construction firms were African American-owned and 2.38 percent of all Professional Services, including A/E firms, were owned by Asian Americans. A detailed analysis of subcontractors' availability estimates (percentage of firms owned by minority/white female and non-minority male by business category) is as follows:

1) Construction

- African Americans: 4.00 percent;
- Hispanic Americans: 0.00 percent;
- Native Americans: 2.00 percent;
- White Females: 26.00 percent;
- Non-minority males: 66.00 percent.

2) Professional Services, including Architecture/Engineering

- Asian Americans: 2.38 percent;
- African Americans: 8.33 percent;
- Hispanic Americans: 0.00 percent;
- Native Americans: 0.00 percent;
- White Females: 22.62 percent;
- Non-minority males: 66.67 percent.

3) Goods/Services

- Asian Americans: 5.00 percent;
- African Americans: 25.00 percent;
- Hispanic Americans: 0.00 percent;
- Native Americans: 0.00 percent;
- White Females: 10.00 percent;
- Non-minority males: 60.00 percent.

Table 7
MNAA
Availability Estimates Based on Subcontractors/Sub-consultants
Listed by each "Respondent to Bid"
(By Procurement Category)
(Percentages)

Business Category	Asian American	African American	Hispanic American	Native American	White Female	Non-Minority Male
Construction	2.00	4.00	0.00	2.00	26.00	66.00
Professional Services, including A/E	2.38	8.33	0.00	0.00	22.62	66.67
Goods/Services[10]	5.00	25.00	0.00	0.00	10.00	60.00

Source: Griffin & Strong, P.C.

A disparity study measures the difference between the availability and the utilization of minority and White Female-owned firms in a given relevant market area, in this instance MNAA. The purpose of this section is to provide an assessment of utilization of such firms by MNAA. This report includes utilization figures covering fiscal years 2004 through 2007[11] and the procurements categorized by type as Construction, Professional Services, including Architecture/Engineering and Goods/Services.

D. Utilization Analysis

The relevant contracting history for MNAA was recorded during the data collection process of this disparity study, which included physical review of purchasing records by data collectors hired by Griffin & Strong, P.C., as well as incorporation of information from databases supplied by the agency. Cross tabulations of the data, first by procurement categories (Construction, Professional Services, including Architecture/Engineering and Goods & Services) and then by ethnicity/race and gender group provided the data disaggregation necessary to compute the utilization percentages and disparity indices, as will be described in the disparity analysis following this section.

[10] The availability estimates for this procurement category are based on the master vendor listing only (bid data were not collected).

[11] Throughout this report, FY 2007 covers 6 months (July 1, 2006 to December 31, 2006), because during the data collection/gathering early in 2007, the month of December was an appropriate cut-off point.

1. Total Utilization of MWFBEs

The first cross tabulation by procurement category gave the total utilization by fiscal year and ethnicity/race and gender for primes and subcontractors together. All retainage amounts were credited back to the general contractors for each contract. Then, to avoid double counting of project dollars, adjustments were made between prime and subcontractor payments. Tables 8 & 9 below show the summarized results for Construction and Professional Services.

Table 8
MNAA
Total Utilization in Construction by Ethnicity/Race and Gender
(July 1, 2003 to December 31, 2006)
PRIMES AND SUBCONTRACTORS
(DOLLARS AND PERCENTAGES)

	TOTAL	MWFBE		AFRICAN AMERICAN		ASIAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		WHITE FEMALE	
FISCAL YEAR	$	($)	Percent	($)	Percent	($)	Percent	.($)	Percent	($)	Percent	($)	Percent
2004	6,495,952	815,809	12.56	23,995	0.37	0	0.00	0	0.00	0	0.00	791,814	12.19
2005	11,695,103	908,595	7.71	1,773	0.02	0	0.00	0	0.00	46,118	0.39	853,629	7.30
2006	10,036,244	930,811	9.27	8,400	0.08	4,100	0.04	0	0.00	0	0.00	918,311	9.15
2007	7,796,421	737,060	9.45	38,747	0.50	71,107	0.91	0	0.00	0	0.00	627,206	8.04
TOTAL STUDY PERIOD	36,023,719	3,392,276	9.40	72,915	0.20	75,207	0.21	0	0.00	46,118	0.13	3,190,961	8.86

Source: Griffin & Strong, P.C.

Table 9
MNAA
Total Utilization in Professional Services including Architecture and Engineering
By Ethnicity/Race and Gender
(July 1, 2003 to December 31, 2006)
PRIME AND SUBCONTRACTORS
(DOLLARS AND PERCENTAGES)

	TOTAL	MWFBE		AFRICAN AMERICAN		ASIAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		WHITE FEMALE	
FISCAL YEAR	$	($)	Percent	($)	Percent	($)	Percent	.($)	Percent	($)	Percent	($)	Percent
2004	3,531,523	209,494	5.93	56,247	1.59	30,107	0.85	0	0.00	0	0.00	123,139	3.49
2005	5,229,254	362,162	6.93	65,739	1.26	135,733	2.60	0	0.00	0	0.00	160,690	3.07
2006	9,496,971	829,877	8.74	372,401	3.92	118,691	1.25	0	0.00	0	0.00	338,785	3.57
2007	6,104,852	340,195	5.57	46,541	0.76	79,655	1.30	0	0.00	0	0.00	213,999	3.51
TOTAL STUDY PERIOD	24,362,601	1,741,728	7.15	540,929	2.22	364,186	1.49	0	0.00	0	0.00	836,614	3.43

Source: Griffin & Strong, P.C.

Next, for each procurement category, utilization data for prime contractors and subcontractors were analyzed separately into tables that provided the total amount paid to minority and white female-owned business enterprises (MWFBE) by fiscal year and the corresponding percentages for each.

2. MWFBE Utilization in Construction

The data for construction were derived from the database created by GSPC following the data collection/gathering effort. Tables 9 and 10, below, show Construction utilization figures for prime contractors and subcontractors respectively in dollars and percentages.

A) PRIME CONTRACTOR UTILIZATION IN CONSTRUCTION

As depicted in Table 9, MNAA paid $34.6 million for construction services during the period under review.

Table 10 also shows that African Americans and White Females were the only MWFBE groups to be awarded prime contracts in Construction from MNAA during the study period. African American-owned firms received $8,400 or 0.09 percent and White Females received $623,976 or 6.43 percent of the total spending as prime construction contractors.

Table 10
MNAA
Utilization in Construction by Ethnicity/Race and Gender
(July 1, 2003 to December 31, 2006)
PRIME CONTRACTORS
(DOLLARS AND PERCENTAGES)

	TOTAL	MWFBE		AFRICAN AMERICAN		ASIAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		WHITE FEMALE	
FISCAL YEAR	$	($)	Percent	($)	Percent	($)	Percent	.($)	Percent	($)	Percent	($)	Percent
2004	6,336,042	689,096	10.88	0	0.00	0	0.00	0	0.00	0	0.00	689,096	10.88
2005	11,136,658	823,521	7.39	0	0.00	0	0.00	0	0.00	0	0.00	823,521	7.39
2006	9,710,268	632,376	6.51	8,400	0.09	0	0.00	0	0.00	0	0.00	623,976	6.43
2007	7,388,783	329,422	4.46	0	0.00	0	0.00	0	0.00	0	0.00	329,422	4.46
TOTAL STUDY PERIOD	34,571,751	2,474,415	7.16	8,400	0.02	0	0.00	0	0.00	0	0.00	2,466,015	7.13

Source: Griffin & Strong, P.C.

B) SUBCONTRACTOR UTILIZATION IN CONSTRUCTION

According to the United States Bureau of the Census, 57.3[12] percent of all Construction dollars are spent in subcontracting. In order to compute MWFBE subcontracting utilization percentages, the total dollars that apply to both minority and non-minority subcontractors using this distribution key (57.3 percent applied to the total spending in construction for each year) were estimated. The resulting estimated amount paid to subcontractors by prime contractors amounted to $20.64 million during the period under review.

Minority and White Female-Owned Businesses were successful in receiving $917,861 or 4.41 percent of the total estimated payments by prime contractors to subcontractors in Construction during the period under review. African American-owned businesses were utilized as subcontractors during the period under review, receiving $64,515 or 0.31 percent of the primes' total payment during the study period. A detailed analysis of the utilization of subcontractors by prime contractors on MNAA contracts during the period under review in percentages is as follows:

- Asian American-owned firms received 0.36 percent;
- Hispanic American firms received 0.00 percent;
- Native American firms received 0.22 percent;
- White Female-owned firms were awarded 0.03 percent.

[12] http://www.census.gov/prod/ec02/ec0223aga.pdf, p 17

Table 11

MNAA
Utilization in Construction by Ethnicity/Race and Gender
(July 1, 2003 to December 31, 2006)
SUBCONTRACTORS
(DOLLARS AND PERCENTAGES)

	ESTIMATED SUBS	MWFBE		AFRICAN AMERICAN		ASIAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		WHITE FEMALE	
FISCAL YEAR	$	($)	Percent	($)	Percent	($)	Percent	($)	Percent	($)	Percent	($)	Percent
2004	3,722,180	126,713	3.40	23,995	0.64	0	0.00	0	0.00	0	0.00	102,718	2.76
2005	6,701,294	85,074	1.16	1,773	0.03	0	0.00	0	0.00	46,118	0.69	30,108	0.45
2006	5,750,768	298,435	5.19	0	0.00	4,100	0.07	0	0.00	0	0.00	294,335	5.12
2007	4,467,349	407,639	9.12	38,747	0.87	71,107	1.59	0	0.00	0	0.00	297,785	6.67
TOTAL STUDY PERIOD	20,641,591	917,861	4.41	64,515	0.31	75,207	0.36	0	0.00	46,118	0.22	724,946	0.03

Source: Griffin & Strong, P.C.

3. MWFBE Utilization in Professional Services, including Architecture/Engineering

A) PRIME CONTRACTOR UTILIZATION IN PROFESSIONAL SERVICES, INCLUDING ARCHITECTURE/ENGINEERING

As depicted in Table 12, the total spending by MNAA in Professional Services, including Architecture/Engineering, amounted to $23.14 million for the period under review. As prime contractors, Minority and White Female-owned firms received $686,794 or 2.97 percent of the total spending by MNAA in this business category.

A detailed analysis of the Professional Services (including A/E) contracts awarded to MWFBE as prime contractors in percentages of the total spending by MNAA for the period under review is as follows:

- The fraction of prime dollars received by African American-owned firms was 0.59 percent of the total spending in this procurement category during the period under review.
- Asian American-owned firms were awarded 0.16 percent of the total dollars spent by MNAA in this procurement category at the prime level.

- At the prime level, Hispanic American and Native American-owned firms were not successful in receiving prime contracts in Professional Services, including Architecture/Engineering.
- White Female-owned firms were the most successful in receiving awards in this business category compared with other MWFBE group members. In effect, as prime contractors, they received 2.22 percent of the total prime dollars in this procurement category during the period under review.

Table 12
MNAA
Utilization in Professional Services, including Architecture/Engineering
By Ethnicity/Race and Gender
(July 1, 2003 to December 31, 2006)
PRIME CONTRACTORS
(DOLLARS AND PERCENTAGES)

	TOTAL	MWFBE		AFRICAN AMERICAN		ASIAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		WHITE FEMALE	
FISCAL YEAR	$	($)	Percent	($)	Percent	($)	Percent	($)	Percent	($)	Percent	($)	Percent
2004	3,422,484	103,044	3.01	0	0.00	0	0.00	0	0.00	0	0.00	103,044	3.01
2005	4,944,179	124,112	2.51	37,576	0.76	14,000	0.28	0	0.00	0	0.00	72,536	1.47
2006	8,889,568	323,467	3.64	78,910	0.89	18,720	0.21	0	0.00	0	0.00	225,836	2.54
2007	5,887,373	136,171	2.31	19,790	0.34	3,500	0.06	0	0.00	0	0.00	112,881	1.92
TOTAL STUDY PERIOD	23,143,604	686,794	2.97	136,277	0.59	36,220	0.16	0	0.00	0	0.00	514,298	2.22

Source: Griffin & Strong, P.C.

B) SUBCONTRACTING UTILIZATION IN PROFESSIONAL SERVICES, INCLUDING ARCHITECTURE/ENGINEERING

Minority and White Female-Owned Businesses were awarded subcontracting work totaling $1.05 million, or 86.54 percent, of the total spending of $1.24 million in this procurement category. At the subcontracting level, MWFBE success in being utilized on Professional Services (including A/E) contracts during the period under review is summarized below:

- African American-owned firms received $404,652 or 33.20 percent, of the total awarded to primes by MNAA in this procurement category;

- Asian American-owned firms: $327,966 or 26.90 percent;
- Hispanic American and Native American businesses were not awarded subcontracting work during the period under review;
- White Female businesses received awards totaling $322,316 or 26.44 percent of the total spending by prime contractors to subcontractors in this procurement category during the period under review.

Table 13
MNAA
Utilization in Professional Services, including Architecture/Engineering
By Ethnicity/Race and Gender
(July 1, 2003 to December 31, 2006)
SUBCONTRACTORS
(DOLLARS AND PERCENTAGES)

	TOTAL	MWFBE		AFRICAN AMERICAN		ASIAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		WHITE FEMALE	
FISCAL YEAR	$	($)	Percent	($)	Percent	($)	Percent	($)	Percent	($)	Percent	($)	Percent
2004	109,039	106,449	97.62	56,247	51.58	30,107	27.61	0	0.00	0	0.00	20,095	18.43
2005	285,075	238,050	83.50	28,163	9.88	121,733	42.70	0	0.00	0	0.000	88,154	30.92
2006	607,404	506,410	83.37	293,490	48.32	99,971	16.46	0	0.00	0	0.00	112,949	18.60
2007	217,479	204,024	93.81	26,751	12.30	76,155	35.02	0	0.00	0	0.00	101,118	46.50
TOTAL STUDY PERIOD	1,218,997	1,054,934	86.54	404,652	33.20	327,966	26.90	0	0.00	0	0.00	322,316	26.44

Source: Griffin & Strong, P.C.

C) MWFBE UTILIZATION IN GOODS/SERVICES

As displayed in Table 14, the total spending by MNAA in Goods/Services amounted to $12.47 million for the period under review. As prime contractors, MWFBE-owned firms received $966,174 or 7.75 percent of the total spending by MNAA for purchases of Goods/Services.

A detailed analysis of the spending in Goods/Services for the period under review is as follows:

- The award of Goods/Services to African American-owned firms was 0.16 percent of the total spending in this procurement category during the period under review.

- Asian American-owned firms did not receive any awards in Goods/Services at the prime level.
- At the prime level, Hispanic American and Native American-owned firms were successful in receiving prime awards in Goods/Services with 0.03 percent and 0.04 percent, respectively.
- White Female-owned firms were the most successful in receiving awards of Goods/Services compared with other MWFBE group members. In effect, as prime contractors, they received 7.51 percent of the total prime dollars in this procurement category during the period under review. White Female-owned firms received $936,198, compared to $966,174 awarded to all MWFBE, during the period under review. In other words, White Female-owned firms alone received 96.90 percent of all MWFBE awards in this procurement category.

Table 14
MNAA
Utilization in Goods/Services by Ethnicity/Race and Gender
(July 1, 2003 to December 31, 2006)
PRIME CONTRACTORS
(DOLLARS AND PERCENTAGES)

	TOTAL	MWFBE		AFRICAN AMERICAN		ASIAN AMERICAN		HISPANIC AMERICAN		NATIVE AMERICAN		WHITE FEMALE	
FISCAL YEAR	$	($)	Percent	($)	Percent	($)	Percent	($)	Percent	($)	Percent	($)	Percent
2004	2,682,459	196,935	7.34	8,892	0.33	0	0.00	53	0.00	0	0.00	187,991	7.01
2005	3,560,176	112,979	3.17	2,739	0.08	0	0.00	2,345	0.07	5,361	0.15	102,533	2.88
2006	3,528,014	161,718	4.58	8,666	0.25	0	0.00	1,920	0.05	0	0.00	151,133	4.28
2007	2,698,998	494,541	18.32	0	0.00	0	0.00	0	0.00	0	0.00	494,541	18.32
TOTAL STUDY PERIOD	12,469,647	966,174	7.75	20,297	0.16	0	0.00	4,318	0.03	5,361	0.04	936,198	7.51

Source: Griffin & Strong, P.C.

E. Disparity Analysis and Confidence Interval for Statistical Significance Test

This section of the report addresses the crucial question of whether, and to what extent, there is disparity between the utilization of Minority and White Female-Owned Business Enterprises (MWFBEs) as measured against their availability in the Metropolitan Nashville Airport Authority marketplace.

This section also discusses the statistical test concept; hence, the determination of the confidence interval accepted by the court in disparity studies and other disparate analyses, such as employment discrimination cases. Disparity analyses were conducted for utilization of prime contractors and total utilization (prime utilization combined with subcontractor utilization).

1. Disparity Index

One approach to answering the question of disparity between the utilization of MWFBEs as measured against their availability in the MNAA marketplace is to assess the existence and extent of disparity by comparing the MWFBE utilization percentages to the percentage of the total pool of firms in the relevant geographic area. The actual disparity derived as a result of employing this approach is measured by use of a Disparity Index (***DI***).

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

Let: ***U*** =Utilization percentage for the MWFBE group
A =Availability percentage for the MWFBE group
DI =Disparity Index for the MWFBE group
***DI = U/A* or Utilization divided by Availability**

When the ***DI*** is one (1), which indicates that the utilization percentage equals the availability percentage, there is parity or an absence of disparity. In situations where there is availability, but no utilization, the corresponding disparity index will be zero (0). In cases where there is utilization, but no availability, the resulting disparity index is designated by the infinity (∞) symbol. Finally, in cases where there is neither utilization nor availability, the corresponding disparity index is undefined and designated by a dash (-) symbol. Disparity analyses are presented separately for each procurement category and for each ethnicity/race and gender group.

The results obtained by a disparity analysis will result in one of three conclusions: overutilization, underutilization or parity. The determination that a particular ethnic or gender group has been overutilized or underutilized is not, standing alone, proof of discrimination. Identified disparities must be analyzed to determine if they are statistically significant. Those disparities which are statistically significant must be further analyzed by the use of a regression analysis. Regression analyses are designed to determine if there are firm characteristics which explain the identified statistically significant disparities, other than race or gender.

2. Confidence Interval for the Statistical Significance Test

The number calculated via the disparity index is tested for its validity (statistical significance) through the application of a standard deviation analysis. Standard deviation analysis measures the probability that a result is a random deviation from the predicted result (the more standard deviations, the lower the probability the result is a random one.) Social scientists consider a finding of two standard deviations significant, meaning that there is about one (1) chance in

twenty (20), (0.05 or 5 percent chance), that the explanation for the deviation could be random and the deviation must be accounted for by some factor.

Additionally, the Eleventh Circuit has directed that "'where the difference between the expected value and the observed number is greater than two or three standard deviations', then the hypothesis that [employees] were hired without regard to race would be suspect."[13] Statistical significance tests were performed for each disparity index derived for each MWFBE group, in each procurement category and for each year of the study. Tests to determine statistical significance are performed to determine if the difference between the availability and the utilization of a particular category of firm is statistically significant. The type of statistical significance test used in this study is based on the binomial probability distribution. This type of statistical analysis is used when there are independent events, with each event having only two possible outcomes: success or failure.

A disparity study is well-suited for the application of a binomial distribution because the contract award process is a situation in which there are only two possible outcomes for each event: the bidder either wins or loses the contract. The parameters of the binomial probability distribution are: (1) p = probability of success or winning the contract; (2) q = 1-p the probability of failure or losing the contract; and (3) n = the number of trials or sample size. Assuming that under normal circumstances the utilization rate for MWFBE and non-MWFBE businesses should equal their expected utilization rate (availability rate or availability proportion[14]), the statistical test is performed to measure the difference between the actual utilization rate and the expected utilization rate. A confidence level is decided. The confidence level measures the degree of certainty about a result or prediction. For this study, the statistical test was developed at the 0.05 confidence level or 95 percent confidence interval. It is worth noting that the five percent level is arbitrary and is a common benchmark used by statisticians. Additionally, this level of confidence for this disparity study is based on Griffin & Strong's legal research and is in line with the court decision as indicated above.

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[13] Peightal II 26 F.3d 1545, 1556 (11th Cir. 1994). quoting Hazelwood, 433US at 308 n 13, 97 S.Ct 2742 n.13 quoting Castaneda v. Partida, 430 U.S.482, 497, n. 17, 97 S.Ct 1272, 1281 n.17, 51LEd 2d 498 (1977).

[14] Availability estimate, availability percent, availability proportion, expected utilization rate/proportion are used interchangeably in this report.

The decision rule is that when the actual awards fall outside the confidence interval, then the difference between the utilization and the availability of the MWFBE group is statistically significant—that is, the difference between the expected utilization (availability) and the actual utilization of the MWFBE group is greater than two standard deviations. In other words, the corresponding disparity index is statistically significant. The inference statistics is that the MWFBE group is significantly overutilized (disparity index greater than 1.00) or underutilized (disparity index less than 1.00) relative to availability.

Statistical significance tests were performed for each disparity ratio derived in each procurement category for each year. Tests to determine statistical significance were performed to determine if the difference between the availability and the utilization of a particular category of firms owned by an MWFBE group was statistically significant. The type of statistical significance test used in this study is based on the binomial probability distribution. This type of statistical analysis is used when there are independent events, with each event having only two possible outcomes: success or failure.

It is important to note that it is not unusual to find disparities that are not statistically significant. A large disparity index or a small disparity index may not be necessarily statistically significant. It all depends on the combination of (1) actual utilization ratio, (2) the expected utilization ratio or availability ratio, (3) the total number of procurements or awards for the procurement category, and finally, (4) the actual number of awards to the MWFBE group.

A) PRIME CONTRACTING DISPARITY ANALYSIS

(1) MWFBE Prime Contractors' Disparities in Construction

The disparity indices for Construction displayed in Table 15 are based on availability estimates derived from the master vendor list and the bidders' lists. Utilization of MWFBEs has been compared to the availability estimates from these two data sources and presented in the same table for comparing and contrasting purposes. The detailed findings are as follows:

- Overall for the study period, at the prime level, African American-owned firms were significantly underutilized with a disparity index of less than 0.01 relative to

their availability estimate using the master vendor list and significantly underutilized using the bidders' list with a disparity index of 0.01. They have been significantly underutilized for all the years of the study as prime contractors in construction.

- Overall for the period under review, Asian American and Hispanic American-owned firms were significantly underutilized when we compared their utilization to their availabilities from both the master file and the bidders' list. In effect, they were not utilized as prime contractors in Construction during the period under review.
- Overall for the study period, Native American-owned construction firms were not utilized and did not bid on construction contracts during the period under review, resulting in their disparity index being represented by a dash (no utilization compared with no availability, and zero divided by zero is "undefined").
- Overall for the study period, White Female-owned construction firms were overutilized relative to their availability estimated from the master vendor list and the bidders' list both.
- Non-minority male-owned construction firms were slightly overutilized with disparity indices from 1.08 and 1.03 respectively when their utilization was compared with their availability estimated from the master vendor and the bid tabulations. Non-minority male-owned firms' overutilization was marginally significant as their disparity indices are close to 1.00 which is parity.

Table 15

MNAA
MWFBE Disparity Index in Construction
Based on actual Utilization and Availability
Estimated from the Master Vendor list and the Bidders' list
Prime contractors
(July 1, 2003 to December 31, 2006)

Ethnicity/Race and Gender Group	Utilization % (U) (1)	Availability % (AMV)[1] (2)	Availability % (AB)[2] (3)	Disparity Index (U/AMV) (1/2)	Disparate Impact of Utilization for U/AMV	Disparity Index (U/AB) (1/3)	Disparate Impact of Utilization for U/AB
FY 2004							
African American	0.00	7.47	1.61	**0.00**	Underutilization	**0.00**	Underutilization
Asian American	0.00	0.27	1.61	**0.00**	Underutilization	**0.00**	Underutilization
Hispanic American	0.00	0.27	3.23	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.27	0.00	**0.00**	Underutilization	-	N/A
White Female	10.88	6.67	3.23	**1.63**	Overutilization	**3.37**	Overutilization
Non-minority male	89.12	85.7	90.32	1.04[3]	Overutilization	0.99[3]	Parity
FY 2005							
African American	0.00	7.47	1.61	**0.00**	Underutilization	**0.00**	Underutilization
Asian American	0.00	0.27	1.61	**0.00**	Underutilization	**0.00**	Underutilization
Hispanic American	0.00	0.27	3.23	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.27	0.00	**0.00**	Underutilization	-	N/A
White Female	7.39	6.67	3.23	1.11	Overutilization	**2.29**	Overutilization
Non-minority male	92.61	85.7	90.32	1.08[3]	Overutilization	1.02[3]	Overutilization
FY 2006							
African American	0.09	7.47	1.61	0.01	Underutilization	0.06	Underutilization
Asian American	0.00	0.27	1.61	**0.00**	Underutilization	**0.00**	Underutilization
Hispanic American	0.00	0.27	3.23	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.27	0.00	**0.00**	Underutilization	-	N/A
White Female	6.43	6.67	3.23	0.96	Underutilization	**1.99**	Overutilization
Non-minority male	93.49	85.7	90.32	1.09[3]	Overutilization	1.04[3]	Overutilization
FY 2007							
African American	0.00	7.47	1.61	**0.00**	Underutilization	**0.00**	Underutilization
Asian American	0.00	0.27	1.61	**0.00**	Underutilization	**0.00**	Underutilization
Hispanic American	0.00	0.27	3.23	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.27	0.00	**0.00**	Underutilization	-	N/A
White Female	4.46	6.67	3.23	0.67	Underutilization	**1.38**	Overutilization
Non-minority male	95.54	85.7	90.32	1.11[3]	Overutilization	1.06[3]	Overutilization
STUDY PERIOD							
African American	0.02	7.47	1.61	0.00	Underutilization	0.01	Underutilization
Asian American	0.00	0.27	1.61	**0.00**	Underutilization	**0.00**	Underutilization
Hispanic American	0.00	0.27	3.23	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.27	0.00	**0.00**	Underutilization	-	N/A
White Female	7.13	6.67	3.23	1.07	Overutilization	**2.21**	Overutilization
Non-minority male	92.84	85.7	90.32	1.08[3]	Overutilization	1.03[3]	Overutilization

Source: Griffin and Strong, P.C.
1 "AMV" is for availability based on the Master Vendor List,
2 "AB" is for availability based on the Bidders' List,
3 The statistical significance of Non-minority overutilization is ***marginal*** for all the years and the overall study period, the disparity indices were not far away from 1.00 or parity, and additionally the p values associated with Non-minority disparity indices were between 0.05 and 0.10 which means marginal significant.
Bold is for statistically significant at $p \leq 0.05$ (-) means no utilization and no availability (division of zero by zero is "*undefined"*)

(2) MWFBE Prime Contractors' Disparities in Professional Services, including Architecture/Engineering

Table 16 depicts disparity indices for Professional Services, including Architecture/Engineering based on availability estimated from the master vendor list and the bidders' list. The detailed findings are as follows:

- Overall for the study period, all MWFBE-owned firms were significantly underutilized as prime contractors, relative to their availabilities estimated from both data sources (the master vendor list and the bid tabulations).
- Overall for the period under review, Native American-owned firms were not utilized as prime contractors. They did not bid and/or register to do business with MNAA for this business category, resulting in their disparity indices being represented by a dash for both availabilities.
- White Female-owned professional services firms were significantly underutilized relative to their availability estimated from the master vendor list and the bidders' list with a disparity index of 0.52 for both.
- Non-minority male-owned professional services firms were at parity for all the years of the study resulting in parity when their utilization was compared to their availability estimated from the master vender list and the bid tabulations. Their disparity indices were 1.05 and 1.06 when their utilization was compared to both availabilities.

Table 16

MNAA
MWFBE Disparity Index in Professional Services, including A/E
Based on actual utilization and availability
Estimated from the Master Vendor list and the Bidders' list
Prime contractors
(July 1, 2003 to December 31, 2006)

Ethnicity/Race and Gender	Utilization % (U) (1)	Availability % (AMV)[1] (2)	Availability % (AB)[2] (3)	Disparity Index (U/AMV) (1/2)	Disparate Impact of Utilization for U/AMV	Disparity Index (U/AB) (1/3)	Disparate Impact of Utilization for U/AB
FY 2004							
African American	0.00	2.85	2.48	**0.00**	Underutilization	**0.00**	Underutilization
Asian American	0.00	0.29	1.42	**0.00**	Underutilization	**0.00**	Underutilization
Hispanic American	0.00	0.34	0.35	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.00	0.00	-	N/A	-	N/A
White Female	3.01	4.30	4.26	0.70	Underutilization	0.71	Underutilization
Non-minority male	96.99	92.20	91.13	1.05	Overutilization	1.06	Overutilization
FY 2005							
African American	0.76	2.85	2.48	**0.27**	Underutilization	**0.31**	Underutilization
Asian American	0.28	0.29	1.42	0.97	Underutilization	**0.20**	Underutilization
Hispanic American	0.00	0.34	0.35	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.00	0.00	-	N/A	-	N/A
White Female	1.47	4.30	4.26	**0.34**	Underutilization	**0.35**	Underutilization
Non-minority male	97.49	92.20	91.13	1.06	Overutilization	1.07	Overutilization
FY 2006							
African American	0.89	2.85	2.48	**0.31**	Underutilization	**0.36**	Underutilization
Asian American	0.21	0.29	1.42	0.72	Underutilization	**0.15**	Underutilization
Hispanic American	0.00	0.34	0.35	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.00	0.00	-	N/A	-	N/A
White Female	2.54	4.30	4.26	**0.59**	Underutilization	**0.60**	Underutilization
Non-minority male	96.36	92.20	91.13	1.05	Overutilization	1.06	Overutilization
FY 2007							
African American	0.34	2.85	2.48	**0.12**	Underutilization	**0.14**	Underutilization
Asian American	0.06	0.29	1.42	**0.21**	Underutilization	**0.04**	Underutilization
Hispanic American	0.00	0.34	0.35	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.00	0.00	-	N/A	-	N/A
White Female	1.92	4.30	4.26	**0.45**	Underutilization	**0.45**	Underutilization
Non-minority male	97.69	92.20	91.13	1.06	Overutilization	1.07	Overutilization
STUDY PERIOD							
African American	0.59	2.85	2.48	**0.21**	Underutilization	**0.24**	Underutilization
Asian American	0.16	0.29	1.42	**0.55**	Underutilization	**0.11**	Underutilization
Hispanic American	0.00	0.34	0.35	**0.00**	Underutilization	**0.00**	Underutilization
Native American	0.00	0.00	0.00	-	N/A	-	N/A
White Female	2.22	4.30	4.26	**0.52**	Underutilization	**0.52**	Underutilization
Non-minority male	97.03	92.20	91.13	1.05	Overutilization	1.06	Overutilization

Source: Griffin and Strong, P.C.
1 "AMV" is for availability based on the Master Vendor List,
2 "AB" is for availability based on the Bidders' List,
3 The statistical significance of Non-minority overutilization is *marginal* as for all the years and the overall study period, the disparity indices were not far away from 1.00 or parity, and additionally the p values associated with Non-minority disparity indices were between 0.05 and 0.10 which means marginal significant.
Bold is for statistically significant at $p \leq 0.05$
(-) means no utilization and no availability (division of zero by zero is "*undefined"*)

(3) MWFBE Prime Contractors' Disparities in Goods/Services

The disparity indices for Goods/Services reported in Table 17 are based on availability estimates derived from the master vendor list. MWFBE-owned firms except White Female firms have been significantly underutilized every year of the period under review. The detailed findings are as follows:

- Overall for the study period, at the prime level, African American and Asian American-owned firms were significantly underutilized relative to their availability with disparity index of 0.04 and 0.10, respectively.
- Overall for the period under review, Hispanic American and Native American-owned firms were significantly underutilized relative to their availability with a disparity index of 0.00 for each minority group.
- Overall for the study period, White Female-owned firms in this business category were significantly overutilized every year of the study relative to their availability, resulting in an overall statistically significant disparity index of 6.10.
- Non-minority male-owned firms in the Goods/Services industries were slightly underutilized with a disparity index of 0.94 for the overall period under review. Non-minority male-owned firms' underutilization was marginally significant. In effect, the disparity index of 0.94 is close to 1.00, which is parity.

Table 17
MNAA
MWFBE Disparity Analysis in Goods/Services
Prime Contractors
(July 1, 2003 to December 31, 2006)

Ethnicity/Race and Gender	Utilization % (U) (1)	Availability % (AMV)[1] (2)	Disparity Index (U/AMV) (1/2)	Disparate Impact of Utilization
FY 2004				
African American	0.00	1.00	**0.00**	Underutilization
Asian American	0.00	0.10	**0.00**	Underutilization
Hispanic American	0.00	0.17	**0.00**	Underutilization
Native American	0.00	0.02	**0.00**	Underutilization
White Female	7.84	1.43	**5.48**	Overutilization
Non-minority male	92.16	97.23	0.95	Underutilization
FY 2005				
African American	0.00	1.00	**0.00**	Underutilization
Asian American	0.03	0.10	**0.30**	Underutilization
Hispanic American	0.00	0.17	**0.00**	Underutilization
Native American	0.01	0.02	**0.50**	Underutilization
White Female	9.07	1.43	**6.34**	Overutilization
Non-minority male	90.90	97.23	0.93	Underutilization
FY 2006				
African American	0.12	1.00	**0.12**	Underutilization
Asian American	0.02	0.10	**0.20**	Underutilization
Hispanic American	0.00	0.17	**0.00**	Underutilization
Native American	0.00	0.02	**0.00**	Underutilization
White Female	8.71	1.43	**6.09**	Overutilization
Non-minority male	91.29	97.23	0.94	Underutilization
FY 2007				
African American	0.02	1.00	**0.02**	Underutilization
Asian American	0.00	0.10	**0.00**	Underutilization
Hispanic American	0.00	0.17	**0.00**	Underutilization
Native American	0.00	0.02	**0.00**	Underutilization
White Female	9.88	1.43	**6.91**	Overutilization
Non-minority male	90.10	97.23	0.93	Underutilization
STUDY PERIOD				
African American	0.04	1.00	**0.04**	Underutilization
Asian American	0.01	0.10	**0.10**	Underutilization
Hispanic American	0.00	0.17	**0.00**	Underutilization
Native American	0.00	0.02	**0.00**	Underutilization
White Female	8.72	1.43	**6.10**	Overutilization
Non-minority male	91.23	97.23	0.94	Parity

Source: Griffin and Strong, P.C.
1 "AMV" is for availability based on the Master Vendor List,
Bold is for statistically significant at $p \leq 0.05$

B) SUBCONTRACTING DISPARITY ANALYSIS

The analysis below includes only subcontracting disparity analyses for Construction and Professional Services, including Architecture/Engineering. There were no subcontracting activities for Goods/Services and this business category was not examined in this subcontracting disparity analysis.

(1) MWFBE Subcontractors' Disparities in Construction

The disparity indices for subcontracting in Construction displayed in Table 18 are based on availability estimates derived from the pool of subcontractors listed by each respondent to bid. At the subcontracting level in Construction, all MWFBE-owned firms have been significantly underutilized every year of the study period. Hispanic American-owned firms were not in the market, thus were not utilized. The detailed findings are as follows:

- Overall for the study period, at the Construction subcontracting level, African American and Asian American-owned firms were significantly underutilized relative to their availability with disparity indices of 0.08 and 0.18, respectively.
- Overall for the period under review, Native American and White Female-owned firms were significantly underutilized when we compared their utilization to their availabilities with disparity indices of 0.11 and 0.00, respectively.
- Overall for the study period, Non-minority male-owned firms' participation in construction subcontracting activities resulted in a significant overutilization with a disparity index of 1.45.

Table 18
MNAA
MWFBE Disparity Analysis in Construction Subcontractors
(July 1, 2003 to December 31, 2006)

Ethnicity/Race and Gender	Utilization % (U) (1)	Availability % (ASL)[1] (2)	Disparity Index (U/ASL) (1/2)	Disparate Impact of Utilization
FY 2004				
African American	0.64	4.00	**0.16**	Underutilization
Asian American	0.00	2.00	**0.00**	Underutilization
Hispanic American	0.00	0.00	**-**	N/A
Native American	0.00	2.00	**0.00**	Underutilization
White Female	2.76	26.00	**0.11**	Underutilization
Non-minority male	96.6	66.00	1.46	Overutilization
FY 2005				
African American	0.03	4.00	**0.01**	Underutilization
Asian American	0.00	2.00	**0.00**	Underutilization
Hispanic American	0.00	0.00	**-**	N/A
Native American	0.69	2.00	**0.35**	Underutilization
White Female	0.45	26.00	**0.02**	Underutilization
Non-minority male	98.84	66.00	**1.50**	Overutilization
FY 2006				
African American	0.00	4.00	**0.00**	Underutilization
Asian American	0.07	2.00	**0.04**	Underutilization
Hispanic American	0.00	0.00	**-**	N/A
Native American	0.00	2.00	**0.00**	Underutilization
White Female	5.12	26.00	**0.20**	Underutilization
Non-minority male	94.81	66.00	**1.44**	Overutilization
FY 2007				
African American	0.87	4.00	**0.22**	Underutilization
Asian American	1.59	2.00	0.80	Underutilization
Hispanic American	0.00	0.00	**-**	N/A
Native American	0.00	2.00	**0.00**	Underutilization
White Female	6.67	26.00	**0.26**	Underutilization
Non-minority male	90.88	66.00	**1.38**	Overutilization
STUDY PERIOD				
African American	0.31	4.00	**0.08**	Underutilization
Asian American	0.36	2.00	**0.18**	Underutilization
Hispanic American	0.00	0.00	**-**	N/A
Native American	0.22	2.00	**0.11**	Underutilization
White Female	0.03	26.00	**0.00**	Underutilization
Non-minority male	95.59	66.00	**1.45**	Overutilization

Source: Griffin and Strong, P.C.
1 "ASL" is for Availability estimates based on the Subcontractors Listed by each respondent to bid
Bold is for statistically significant at $p \leq 0.05$
(-) means no utilization and no availability (division of zero by zero is "*undefined"*)

(2) MWFBE Sub-consultants' Disparities in Professional Services, including Architecture/Engineering

The sub-consulting disparities in Professional Services, including A/E displayed in Table 19 are based on availability estimates derived from the pool of sub-consultants listed by each respondent to bid. In general, most MWFBE-owned firms have been overutilized for all the years of the study review.

- Overall, this high level of participation over the years in Professional Services sub-consulting resulted in significant overutilization for African American and Asian American-owned firms, with disparity indices of 3.99 and 11.30, respectively.
- Overall for the study period, at the professional services sub-consulting level, White Female-owned firms were significantly overutilized with a disparity index of 1.17.
- Overall for the study period, Non-minority male-owned firms' participation in professional sub-consulting activities resulted in a significant underutilization with a disparity index of 0.20.

Table 19
MNAA
MWFBE Sub-consulting Disparity Index in Professional Services
Including Architecture/Engineering
MNAA Sub-consultants
(July 1, 2003 to December 31, 2006)

Ethnicity/Race and Gender	Utilization % (U) (1)	Availability % (ASL (2)	Disparity Index (U/ASL) (1/2)	Disparate Impact of Utilization for U/ASL
FY 2004				
African American	51.58	8.33	**6.19**	Overutilization
Asian American	27.61	2.38	**11.6**	Overutilization
Hispanic American	0.00	0.00	-	N/A
Native American	0.00	0.00	-	N/A
White Female	18.43	22.62	0.81	Underutilization
Non-minority male	2.38	66.67	**0.04**	Underutilization
FY 2005				
African American	9.88	8.33	1.19	
Asian American	42.70	2.38	**17.94**	Overutilization
Hispanic American	0.00	0.00	-	N/A
Native American	0.00	0.00	-	N/A
White Female	30.92	22.62	**1.37**	Overutilization
Non-minority male	16.50	66.67	**0.25**	Underutilization
FY 2006				
African American	48.32	8.33	**5.80**	Overutilization
Asian American	16.46	2.38	**6.92**	Overutilization
Hispanic American	0.00	0.00	-	N/A
Native American	0.00	0.00	-	N/A
White Female	18.60	22.62	**0.82**	
Non-minority male	16.63	66.67	**0.25**	Underutilization
FY 2007				
African American	12.30	8.33	**1.48**	Overutilization
Asian American	35.02	2.38	**14.71**	Overutilization
Hispanic American	0.00	0.00	-	N/A
Native American	0.00	0.00	-	N/A
White Female	46.50	22.62	**2.06**	Overutilization
Non-minority male	6.19	66.67	**0.09**	Underutilization
STUDY PERIOD				
African American	33.20	8.33	**3.99**	Overutilization
Asian American	26.90	2.38	**11.30**	Overutilization
Hispanic American	0.00	0.00	-	N/A
Native American	0.00	0.00	-	N/A
White Female	26.44	22.62	1.17	Overutilization
Non-minority male	13.46	66.67	0.20	Underutilization

Source: Griffin and Strong, P.C.
1 "ASL" is for Availability estimates based on the Subcontractors Listed by each respondent to bid
Bold is for statistically significant at $p \leq 0.05$
(-) means no utilization and no availability (division of zero by zero is "*undefined*")

F. "But For" Discrimination Analysis, Private Sector and Other Public and Non-Public Sector Discrimination Analysis

1. Self-employment Rates and Earnings Analyses as an Analog of Business Formation and Maintenance

The decision of the United States Court of Appeals for the Tenth Circuit in Concrete Works Construction Inc. v. City and County of Denver, 321 F 3d 950 (10th Circuit, 2003), suggests that a disparity study should examine the existence of private sector discrimination. This should be done to determine if there is a pervasive pattern of private sector discrimination in a jurisdiction from which it can be inferred that the government assists in perpetuating the discriminatory conduct of private actors by serving as a passive participant in their discriminatory schemes. Griffin & Strong, P.C. reviewed a number of public documents, periodicals and published court opinions in conducting the research for this report.

This section of this report provides regression analyses to assess the effect of ethnicity/race and gender along with other economic and demographic characteristics on the individuals' income (capital formation) from self-employment and the likelihood of business formation through analysis of self-employment statistics of individuals in the private sector in the Nashville, TN MSA (Metropolitan Statistical Area) marketplace, by applying two multivariate regression techniques.

The linear regression is used in the analysis of individuals' income from self-employment and the binary logistic regression is used in the analysis of the likelihood an individual will be self-employed. The data used in both analyses are derived from the 2000 Census of Population and Housing and extracted from the "Census 2000 Public Use Microdata Sample (PUMS) 5 percent (5%)" and are restricted to self-employment data in the private sector of Nashville, TN MSA[15].

[15] Nashville-Davidson-Murphreesboro, TN MSA, as defined by the U. S. Census Bureau, is referred to as Nashville TN MSA throughout this report. "It was originally formed by the United States Census Bureau in 1950 and consisted of Davidson County, Tennessee. As surrounding counties saw an increase in their population densities and the number of their residents employed within Davidson County, they met Census criteria to be added to the MSA. Davidson County is now joined with twelve other counties to form this MSA. Please refer to www.Census.gov for more details."

A) MULTIVARIATE LINEAR REGRESSION FOR AN ANALYSIS OF ETHNICITY/RACE AND GENDER EFFECTS ON INDIVIDUALS' SELF-EMPLOYMENT INCOME IN THE PRIVATE SECTOR IN NASHVILLE, TN MSA

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

(1) Definition and Application of Multivariate Linear and Binary Logistic Regressions

Multivariate linear and binary logistic regression analyses are a set of statistical techniques that permit one to assess the relationship between a variable to be explained, known as the dependent variable (DV or Y[16]) and several explanatory variables, known as independent variables (IV or Xs).

A multivariate linear regression is suitable in assessing the effects of IV (such as age, level of education, ethnicity/race/gender, etc.) on a DV that can take on a wide range of values (such as the 1999 income from self-employment in the private sector). A variable that can take on a wide range of values is referred to as a "*continuous variable*."

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

[16] Y is the dependent variable **being** predicted or explained, and y is the predicted or explained dependent variable. In other words (Y) relates to "actual" values, and (y or "y hat") relates to "predicted or explained" values (when the regression equation is calculated from the actual data).

(2) Multivariate Linear regression

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

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

$$Y= C + B_1 X_1 + B_2 X_2 + B_3 X_3 + \text{----} + B_n X_n + E$$

Where:

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

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

B = the various coefficients of the various IVs, in other words, the Bs represent the weight of the Xs' effect on the DV. They are referred to as slopes, also known as beta coefficients for the independent variables X_i., B1 is the slope or beta coefficient for the independent variable X_1, and generally stated, B_n is the slope or beta coefficient for the independent variable X_n.

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

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

(3) The Use of "Gross Revenue/Income[17]" as Dependent Variable

An extensive review of the literature on economic discrimination reveals that the vast majority of discrimination analyses try to explain the variances in income and earnings (gross receipts for businesses) by selected business and demographic characteristics, when controlling for race and gender. Gary S. Becker, who is one of the pioneers in the field of economic discrimination

[17] Gross revenue, gross receipts, income, earnings are used interchangeably.

research, used revenue differences to investigate discrimination against Non-Whites[18]. In effect, as Emily P. Hoffman (1991) indicates:

> "Almost all modern economic investigation of discrimination follows from the germinal work of Gary S. Becker. In particular, Glen G. Cain examines the current evidence of discrimination in the United States according to Becker's ideas. Cain tries to answer the question of how much discrimination exists. Both Becker and Cain acknowledge that economists cannot accurately answer the question; not only are there problems in precisely defining discrimination, but there are limitations in the data available from which to try to measure discrimination."[19]

In "The Use and Limits of Statistical Analysis in Measuring Economic Discrimination," Cain believes that researchers tend to focus on income and earnings because these variables are relatively easy to quantify.[20] Economists such as William A. Darity, Marianne A. Ferber and Carole A. Green have used earnings or revenue as the dependent variable in both race and gender discrimination investigations, and economic inequality studies.[21]

(4) Statistics, Hypotheses and Variables of Multivariate Linear Regression Analysis

(a) Statistics of a Multiple Regression Model

The two types of statistics in a regression[22] analysis will be presented in the charts of the findings. The statistics for the IVs provide information about how important each individual independent variable is in the model, while the statistics for the regression model summarize the strength of the relationship between the DV and the IVs.[23]

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[18] Becker, Gary. Second Edition. "The Economics of Discrimination." The University of Chicago Press, Chicago, p.110.

[19] Hoffman, Emily. 1991, "Essays on the Economics of Discrimination." W.E. UPJOHN INSTITUTE for Employment Research, Kalamazoo, Michigan, p. 7.

[20] Ibid.

[21] Ibid. pp. 5-7.

[22] For a complete discussion, please see: "Linear Regression and Method of Least Square", M.G. Bulmer, 1967, 1979 "Principles of Statistics, Dover Publication Inc, pp. 209-226

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

(b) Hypotheses of Multiple Regression Model

The hypothesis to be tested using the multivariate linear regression model is that there is no difference in the 1999 private sector self-employment income of MWFBEs compared to that of non-minority male firms in Nashville, TN MSA. The null hypothesis is H_0 and the hypothesis of difference is known as the alternate or H_1.

The following definitions are necessary for the formulation of the null and alternate hypotheses. When we represent the 1999 Income from Self-employment (ISE) for MWFBEs by 1999 ISEMWFBE and the 1999 Income from Self-employment (ISE) of Non-minority male firms by 1999 ISENON-MWFBE, the null and the alternate hypotheses are generally written as follows:

H_0: 1999 ISEMWFBE = 1999 ISENON-MWFBE
H_1: 1999 ISEMWFBE ≠ 1999 ISENON-MWFBE

GSPC also conducted multivariate regression analysis of income using survey data. This survey of business owners included firms who actually worked for MNAA during the study period. The same hypothesis test described above was undertaken using 2006 income reported by firms. The results of this multivariate regression using survey data is reported in this section. It is worth noting that all industries were collapsed as the sample size from the returned surveys was too small per business type to warrant meaningful analyses by individual category.

For both multivariate regressions using income from self-employment (census data) and income reported by firms who worked on MNAA projects (survey data), when the analyses show that ethnicity/race and gender are found to affect the income, we will reject the null hypothesis and accept the alternate hypothesis, H_1. In other words, when the result of the statistical test is significant at a 0.05 confidence level or 95 percent confidence interval, we will reject H_0 and conclude that the probability of the 1999 ISE of MWFBEs being different from the 1999 ISE of Non-MWFBEs is due to chance is less than 5 in 100.

(c) Dependent Variable (DV) and Independent Variables (IV)

The DV used in the examination of whether or not ethnicity/race/gender status has an impact on individuals' income is the 1999 income from private sector self-employment in the Nashville, TN MSA as reported in the PUMS 2000 Five Percent Sample. The variables selected by GSPC as explanatory variables or independent variables believed or hypothesized to predict income included the following business and demographic characteristics:

- Number of years in operation;
- Number of full time employees;
- Ethnicity/race and gender of the owner: African American, Asian American, Hispanic American, Native American, White Female, and Non-minority Male;
- The level of education of the owner: no schooling completed, nursery school to 4th grade, 5th grade to 12th grade, high school graduate, some college, Associates degree, Bachelors degree, Masters degree, professional degree, and doctorate degree;
- Availability of Capital: Interest Income, residual income, home value, mortgage rate;
- Age;
- Ability to speak English well;
- Disability status;
- Marital status.

(5) Findings of the Multivariate Linear Regression Analysis

(a) Results of Regression on 1999 Self-employment Income

The results of the multivariate linear regression estimating the effects of each MWFBE group when the statistical effects of the other business and demographic characteristics were "*controlled for*" or "*neutralized*" are displayed in Table 20[24]. As discussed in the presentation of

[24] The results of the full regression are presented in Appendix A.

the multivariate regression model, the number (or coefficient) corresponding to each MWFBE group is referred to as the "weight" in the variation in the 1999 self-employment income in the private sector. The weight in the variation of the 1999 self-employment income can also be interpreted as percent change in the 1999 self-employment income. The coefficient or percent change for an Asian American when all business categories are combined is -0.086, meaning that an Asian American made 8.6 percent less than a non-minority male (in the private sector in Nashville, TN MSA) after controlling for the effects of all other independent variables in the regression model.

1) All Industries

As shown in Table 20, self-employment income for each MWFBE group was significantly lower than for white males when the three business categories were combined. Income for Asian Americans and African Americans in the private sector was 8.6 percent and 29 percent lower than income for self-employed non-minority males in the Nashville, TN MSA. Native Americans and Hispanic Americans made 10.4 percent and 30 percent less than non-minority males. Non-minority females made 18.2 percent less than non-minority males.

2) Construction

In the Construction industry, the variation in income for African Americans and Native Americans compared to non-minority males was roughly the same. In effect, African Americans made 29.8 percent less and Native Americans made 30.0 percent less than non-minority males. Income for Asian Americans and Hispanic Americans was 11.2 percent and 36.9 percent lower than that of non-minority males, respectively. Non-minority females made about 20 percent (19.9 percent) less than non-minority males.

3) Professional Services

African Americans and Hispanic Americans made about one-third less than self-employed non-minority males in this business category. Income for Native Americans was about 11 percent (10.9 percent) less and non-minority females made 19.3 percent less than non-minority males.

4) Goods and Non-Professional Services

Income for African Americans and Hispanic Americans was 22.1 percent and 30.4 percent less than income of self-employed non-minority males in Goods and Non-Professional Services,

respectively. Non-minority females made 11.1 percent less than self-employed non-minority males in this business category.

Table 20
MNAA
Percent Changes Of MWFBE 1999 Self-Employment Income Relative To Non-minority Males After Controlling For Other Business And Demographic Characteristics By Business Categories (Nashville, TN MSA)

Industries / Ethnicity/Race/Gender	All Industries	Construction	Professional Services[25]	Goods/Services[26]
Asian American	**-0.086**	**-0.112**	0.091	0.151
African American	**-0.290**	**-0.298**	**-0.302**	**-0.221**
Native American	**-0.104**	**-0.300**	**-0.109**	-0.183
Hispanic American	**-0.300**	**-0.369**	**-0.309**	**-0.304**
Non-minority Female	**-0.182**	**-0.199**	**-0.193**	**-0.111**

Source: Griffin & Strong, P.C. and Census of Population and Housing (Census 2000 PUMS Five Percent Sample), Calculations using SPSS.
Bold coefficients (percent changes) are statistically significant (prob- value <= .05)

(b) Results of Regression on 2006 Income Reported by Business Owners during the Survey (July 2007)

All industries were collapsed as the number of respondents per industry was too small to warrant a meaningful analysis. After adjusting the data set for respondents who did not report income, the resulting overall sample size was n = 118. Another limitation of the survey data led to the exclusion of two minority groups during the determination of coefficient when running the multivariate regression. In effect, coefficients were not generated for Asian Americans and Native Americans as the number of respondents for these two minority groups was too small (2 respondents for the former and 1 respondent for the latter), and coefficients associated with small samples are not appropriate for inference statistics. The results of the multivariate regression are as follows for all industries combined:

- African Americans made 42.4 percent less income than their non-minority male counterparts.

[25] Professional Services include Architecture/Engineering
[26] Services include "Non-professional Services such as (Janitorial Services, Landscaping…)

- Hispanic Americans made 37.2 percent less income than their non-minority male counterparts.
- White Females made 10.0 percent less income than White males as reported by business owners.

Table 21
MNAA
Business Owners Survey Data
Percent Changes Of MWBE 2006 Gross Income Relative To Non-minority Males After Controlling For Other Business And Demographic Characteristics By Business Categories

Industries Ethnicity/Race/Gender	All Industries
African American	**-0.424**
Hispanic American	**-0.372**
White Females	-0.10

Source: Griffin & Strong, P.C. and Census of Population and Housing (Census 2000 PUMS Five Percent Sample), Calculations using SPSS.
Bold coefficients (percent changes) are statistically significant (prob- value <= .05)

B) BINARY LOGISTIC REGRESSION FOR AN ANALYSIS OF ETHNICITY/RACE/GENDER ON THE LIKELIHOOD OF BEING SELF-EMPLOYED IN THE PRIVATE SECTOR IN THE NASHVILLE, TN MSA

The self-employment status of an individual is categorical and binomially distributed (non-continuous with only two outcomes: yes or "1" for self-employed and no or "0" for not self-employed). The examination of the effects of ethnicity/race/gender on the likelihood of being self-employed after controlling for the effects of other business and demographic characteristics involves a categorical and binomially distributed dependent variable. Binary logistic regression is suitable for analyses involving categorical and binomially distributed DVs.

(1) Binary Logistic Regression Model as a Variation of the Ordinary Regression Model

Ordinary regression such as multivariate linear regression is suitable to regression analyses where the dependent variable can take on a wide range of values (continuous dependent

variable). As described in the linear regression section, the multivariate regression model is of the form:

$$Y = B_0 + B_1 * X_1 + B_2 * X_2 +...+B_n * X_n + E$$

In the above model, the dependent variable (Y) is a continuous variable. Binary logistic regression is a variation of ordinary regression such as the one above, useful to examine the relationship between a categorical dependent variable (yes/no or 1/0 dependent variable) and two or more independent variables hypothesized to have explanatory power on the yes/no value of the categorical dependent variable. Binary regression is suitable in assessing the odds that an MWFBE is either self-employed (yes or 1) or not self-employed (no or 0). An example of an application of binary regression is assessing the odds that a customer in a store will "buy" or "not buy" an item, hypothesizing some variables influencing the behavior of the customer. Another example of its use is determining the odds that a borrower will default on a loan based on his or her income, debt and age.

Our objective is to determine how the MWFBE status of an individual affects the odds of being self-employed relative to non-minority males while controlling for the effects of other socio-economic and demographic characteristics. Ultimately, we seek to examine how much the ethnicity/race/gender status of an individual will increase or decrease the odds of being self-employed, thus affecting the rate of business formation in Nashville, TN MSA.

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

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

$$\ln(p/1-p) = B_0 + B_1 * X_1 + B_2 * X_2 +,,,,+ B_n * X_n + E$$

Where "**ln**" stands for natural logarithm (natural log) and the ratio (p/1-p) represents the probability of being self-employed

As in a linear model:

B_0 = is a constant value

$B_1, B_2, B_3,\ldots, B_n$ = coefficients corresponding to the independent variables $X_1, X_2, X_3,\ldots, X_n$

$X_1, X_2, X_3,\ldots, X_n$ = selected independent variables or selected economic and demographic characteristics, such as level of education, ethnicity/race and gender, and marital status.

E = an error value or residual term to account for the variation in the dependent variable not explained by the independent variables in the model.

(2) Binary Logistic Regression Results and Findings

Binary logistic regression was used to determine whether minorities and white females were less likely than non-minority males to be self-employed in the private sector. Binary logistic regression was used to assess estimates of the relationship between the likelihood of being self-employed or not, hypothesizing some selected independent variables described below. Each MWFBE member was treated as an independent variable and the maximum likelihood of an individual being self-employed or not was estimated after transforming the dependent variable into a logit variable (the natural logarithm or natural log of the odds of the dependent variable self-employed (yes/1) or not self-employed (no/0)). Logistic regression estimated the probability (odds) of self-employment using PUMS data restricted to:

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

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

- Ethnicity/race/gender: African American, Asian American, Hispanic American, Native American, Non-minority (White) Females, Non-minority males;
- Marital Status;

- Availability of Capital: Interest income, unearned income, home ownership, residual income;
- Number of individuals living in the household over the age of 65;
- Number of children living in the household under the age of 18;
- Ability to speak English well;
- Level of education.

The estimated odds ratios and inverse odds ratios of MWFBEs relative to non-minority males are presented in Table 22. The inverse odds ratio is one (1) divided by the odds ratio. An examination of the results in Table 22 for "All Industries" finds that, holding all other independent variables constant (i.e. controlling for), a non-minority male in the private sector in the Nashville, TN MSA is five times more likely to be self-employed than an Asian American, and more than two times more likely to be self-employed than an African American (odds ratio inverse of 1/0.199 or 5.025 and 1/0.441 or 2.268 respectively). Additionally, a non-minority male is a little more than one time as likely to be self-employed as a Hispanic American or a non-minority female. A detailed analysis by business category revealed the following:

1) Construction

A non-minority male was nearly equally likely to be self-employed as an African American, a Hispanic American and a non-minority female (odd ratios inverses of 1.21, 1.03 and 1.23). Non-minority males were more than three times as likely to be self-employed as Asian Americans and more than one and one-half times as likely to be self-employed as Native Americans.

2) Professional Services

An Asian American was 1.352 times more likely to be self-employed than a non-minority male. A non-minority male was more than two and one-half times more likely to be self-employed than an African American and more than three and a half times more likely to be self-employed than a white female in this business category.

3) Goods and Services

A non-minority male was nearly two times more likely to be self-employed than an African American or a white female. In addition, a non-minority male was almost five times more likely to be self-employed than a Native American in this business category. Asian Americans and Hispanic Americans were 2.186 and 1.132 times more likely to be self-employed than non-minority males in the Goods and Non-Professional Services category, respectively.

Table 22
MNAA
MWFBE Self-employment Odds Ratios Relative to Non-minority males in the Nashville, TN MSA
By Business Category
NASHVILLE, TN MSA

Industries / Ethnicity/Race/Gender	All Industries	Construction	Professional Services[27]	Goods/ Services
Asian American	0.199	0.289	1.352	2.186
African American	0.441	0.826	0.385	0.518
Native American	0.194	0.607	0.992	0.213
Hispanic American	0.815	0.969	0.753	1.132
Non-minority Females	0.753	0.812	0.286	0.547

Source: Griffin & Strong, P.C. and Census of Population and Housing (Census 2000 PUMS Five Percent Sample), Calculations using SPSS.

[27] Professional Services includes Architecture/Engineering

G. Commercial Construction Utilization and Disparity Analysis in the Private Sector

Two types of analyses were conducted in this section. The first type of analysis assessed MWFBE utilization in the marketplace for the private sector commercial construction industry to determine whether or not there are disparities between MWFBE utilization and their availability. The second analysis conducted was a comparison of MWFBE utilization in the private sector commercial construction industry with their utilization by MNAA for public sector construction for the period under review.

Data from two sources were used to conduct the private sector commercial construction analyses described above. The first dataset was derived from the Building Permits Data, restricted to the relevant market area in construction (Nashville, TN MSA) and the second dataset was derived from Reed Construction Data (RCD) also restricted to the relevant market area (Nashville, TN MSA). It is worth noting that there were no subcontracting awards from the Building Permits Data and the data items for subcontracting from RCD were too few to warrant a meaningful utilization analysis.

1. Reed Construction Data: MWFBE Private Sector Commercial Construction Utilization Analysis of Prime Contractors

This section examines the utilization of MWFBE and Non-MWFBE firms in the private sector commercial construction industry in the Nashville, TN MSA using Reed Construction Data (RCD). These utilization analysis results are displayed in Table 23. The total value of construction projects awarded to prime contractors amounted to $2.19 billion during the period under review. White Female-owned construction firms were the only MWFBE group to receive private commercial construction projects according to the RCD data, receiving $133.00 million or 6.10 percent of the total awards.

Table 23
MNAA
Reed Construction Data (RCD)
Private Sector Utilization of Prime Contractors in the Nashville, TN MSA
By Ethnicity/Race and Gender Classification
(July 1, 2003 to December 31, 2006)
(Dollars Awarded and Percentages)

Ethnicity/ Race and Gender	African American		Hispanic American		Asian American		Native American		White Female		MWFBE Subtotal		Non-Minority Male		Total Dollars Awarded
Fiscal Years	$	Percent[1]	$	Percent[1]	$	Percent[1]	$	Percent[1]	$	Percent[1]	$	Percent[1]	**$**	**Percent[1]**	$
2004	0	0.00	0	0.0	0	0.0	0	0.00	133,000,000	42.40	133,000,000	42.40	180,694,000	57.60	313,694,000
2005	0	0.00	0	0.0	0	0.0	0	0.00	0	0.00	0	0.00	889,623,000	100.0	889,623,000
2006	0	0.00	0	0.0	0	0.0	0	0.00	0	0.00	0	0.00	854,662,500	100.0	854,662,500
2007[28]	0	0.00	0	0.0	0	0.0	0	0.00	0	0.00	0	0.00	129,230,000	100.0	129,230,000
TOTAL STUDY PERIOD	0	0.00	0	0.0	0	0.0	0	0.00	133,000,000	6.10	133,000,000	6.10	2,054,209,500	93.92	2,187,209,500

Source: Griffin & Strong, P.C., derived from Reed Construction Data
[1]Percentage of total project dollars awarded to prime contractors during the year
Note: Private commercial not-for-profit construction projects excluded from the analysis.

Table 24 depicts the private sector commercial MWFBE prime contractor utilization, according to RCD, by number of projects. A total of 116 projects were awarded to prime contractors, of which only two projects (1.70 percent of total projects awarded) were awarded to MWFBEs, specifically, White Females. The remaining private sector commercial construction projects in the Reed database were awarded to Non-MWFBE-owned firms at the prime contractor level.

[28] FY 2007 includes only six months.

Table 24
MNAA
Reed Construction Data (RCD)
Private Sector Utilization of Prime Contractors in Nashville TN MSA
By Ethnicity/Race and Gender Classification
(July 1st, 2003 to December 31st, 2006)
(Number of Projects Awarded and Percentages)

Ethnicity/ Race and Gender	African American		Hispanic American		Asian American		Native American		White Female		MWFBE Subtotal		Non-Minority Male		Total # of Projects Awarded
Fiscal Years	#	Percent[1]	#	Percent[1]	#	Percent[1]	#	Percent[1]	#	Percent[1]	#	Percent[1]	#	Percent[1]	#
2004	0	0.00	0	0.00	0	0.00	0	0.00	2	14.30	2	14.30	12	85.71	14
2005	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	35	100.0	35
2006	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	50	100.0	50
2007	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	17	100.0	17
TOTAL STUDY PERIOD	0	0.00	0	0.00	0	0.00	0	0.00	2	1.70	2	1.70	114	98.30	116

Source: Griffin & Strong, P.C., derived from Reed Construction Data
[1]Percentage of total number of projects awarded to prime contractors during the fiscal year
Note: Private commercial not-for-profit construction projects excluded from the analysis.

Table 25 depicts the number of unique vendors for each fiscal year. Again, these data exclude the private sector commercial construction not-for-profit projects. When we conducted a simultaneous analysis of Table 24 and Table 25, only one unique MWFBE firm (Table 25) participated in private commercial construction at the prime contractor level, and this MWFBE firm was the beneficiary of both (Table 24) projects awarded during the period under review. On the other hand, 75 non-minority male-owned firms were utilized as prime contractors and they received the 114 projects (Table 24) awarded to non-MWFBEs during the period under review. A summary analysis of unique prime contractors from Table 24 and Table 25 is as follows:

- Nine unique vendors received 14 private commercial construction projects in FY 2004 as prime contractors.
- Twenty-two unique vendors received 35 private commercial construction projects in FY 2005 as prime contractors.
- Thirty-three unique vendors received 50 private commercial construction projects in FY 2006 as prime contractors.
- Twelve unique vendors received 17 private commercial construction projects in FY 2007 as prime contractors.

Table 25
MNAA
Reed Construction Data (RCD)
Private Sector Utilization of Prime Contractors in Nashville, TN MSA
By Ethnicity/Race and Gender Classification
(July 1st, 2003 to December 31st, 2006)
(Unique Vendor Count)

Ethnicity/ Race and Gender	African American		Hispanic American		Asian American		Native American		White Female		MWFBE Subtotal		Non-Minority Male		Total # of Projects Awarded
Fiscal Years	#	Percent[1]	#	Percent[1]	#	Percent[1]	#	Percent[1]	#	Percent[1]	#	Percent[1]	#	Percent[1]	#
2004	0	0.00	0	0.00	0	0.00	0	0.00	1	1.11	1	1.11	8	88.89	9
2005	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	22	100.00	22
2006	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	33	100.00	33
2007	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	12	100.00	12
TOTAL STUDY PERIOD	0	0.00	0	0.00	0	0.00	0	0.00	1	1.32	1	1.32	75	98.68	76

Source: Griffin & Strong, P.C., derived from Reed Construction Data
[1]Percentage of total number of projects awarded to prime contractors during the fiscal year
Note: Private commercial not-for-profit construction projects excluded from the analysis.
(*) The vendor is counted only once for each year. A vendor could be used in multiple years, therefore the Total Unique Vendors for the entire study period may add up to the sum of all years. (unique vendors for FY paired are not mutually exclusive).

2. Building Permits Data: MWFBE Private Sector Commercial Construction Utilization Analysis of Prime Contractors

This section examines the utilization of MWFBE and Non-MWFBE firms in the private sector commercial construction industry in the Nashville, TN MSA using Building Permits Data. The prime contractor permit amounts for the five year period (FY 1999 to FY 2003) by ethnicity/race and gender are displayed in Table 26. As shown, the value of the private sector commercial construction permits issued amounted to $27.73 billion. Of this amount, projects executed by MWFBEs amounted to $13.2 million or 0.05 percent of total projects. By contrast, non-minority male-owned construction firms executed projects valued at $27.72 billion or 99.95 percent of total projects. A detailed analysis of the private sector prime commercial construction showed the following:

- African Americans were awarded $1.20 million or 0.004 percent of the total projects' value.
- Asian Americans and Native Americans did not receive any private sector prime commercial building construction projects during the period examined in Nashville, TN MSA.
- White Female-owned construction firms received $11.87 million (0.04 percent of total projects) during the five years examined.
- As indicated above, non-minority-owned construction firms received $27.72 billion or 99.95 percent of total projects during the five years examined in Nashville, TN MSA.

Table 26
MNAA
Building Permits Data
Private Sector Utilization of Prime Contractors in Nashville, TN MSA
By Ethnicity/Race and Gender Classification
(Fiscal Year 1999 to Fiscal Year 2003)
(Dollars)

Fiscal Year	Overall $	MWFBE	African American	Asian American	Hispanic American	Native American	White Female	Non-minority male
1999	6,617,651,430	5,960,774	2,000	0	850,000	0	5,108,774	6,611,690,656
2000	5,811,483,933	2,777,093	0	0	0	0	2,777,093	5,808,706,841
2001	4,656,925,152	1,829,160	0	0	0	0	1,829,160	4,655,095,992
2002	5,552,764,461	1,049,154	0	0	0	0	1,049,154	5,551,715,306
2003	5,090,457,960	2,108,751	1,202,306	0	0	0	906,445	5,088,349,209
TOTAL REPORTING PERIOD	27,729,282,936	13,724,932	1,204,306	0	850,000	0	11,670,627	27,715,558,004

Source: Griffin & Strong, P.C.

Table 26 (Cont'd)
MNAA
Building Permits Data
Private Sector Utilization of Prime Contractors in Nashville, TN MSA
By Ethnicity/Race and Gender Classification
(Fiscal Year 1999 to Fiscal Year 2003)
(Percentages)

Fiscal Year	Overall $	MWFBE	African American	Asian American	Hispanic American	Native American	White Female	Non-minority male
1999	6,617,651,430	0.09	0.00	0.00	0.01	0.00	0.08	99.91
2000	5,811,483,933	0.05	0.00	0.00	0.00	0.00	0.05	99.95
2001	4,656,925,152	0.04	0.00	0.00	0.00	0.00	0.04	99.96
2002	5,552,764,461	0.02	0.00	0.00	0.00	0.00	0.02	99.98
2003	5,090,457,960	0.04	0.02	0.00	0.00	0.00	0.02	99.96
TOTAL REPORTING PERIOD	27,729,282,936	0.05	0.004	0.00	0.003	0.00	0.04	99.95

Source: Griffin & Strong, P.C.

3. Private Commercial Construction Prime Contractor Utilization by Number of Projects

Table 27 depicts the number of private commercial construction projects awarded to prime contractors in the Nashville, TN MSA from fiscal year 1999 to fiscal year 2003 by ethnicity/race and gender. As shown, out of a total of 47,925 private commercial building construction permits issued to prime contractors, 36 permits were issued to minority and White Female-owned construction firms, representing only 0.08 percent of total permits.

A detailed analysis of the distribution of private sector commercial building construction permits indicated the following:

- African American-owned firms were issued two permits or 0.004 percent of total permits.
- Hispanic American-owned construction firms were issued one permit or 0.002 percent of total permits.
- Asian American and Native American-owned construction firms were not successful in receiving private commercial building construction permits in the Nashville, TN MSA from fiscal year 1999 to fiscal year 2003.
- Non-minority-owned construction firms were issued 47,889 permits or 99.92 percent of total permits for the time period examined.

Table 27
MNAA
Building Permits Data
Private Sector Utilization of Prime Contractors in Nashville, TN MSA
By Ethnicity/Race and Gender Classification
(Fiscal Year 1999 to Fiscal Year 2003)
(Number of Permits)

Fiscal Year	Overall # Of Building Permits	MWFBE	African American	Asian American	Hispanic American	Native American	White Female	Non-minority male
1999	10,952	13	1	0	1	0	11	10,939
2000	11,470	7	0	0	0	0	7	11,463
2001	8,670	6	0	0	0	0	6	8,664
2002	8,670	5	0	0	0	0	5	8,665
2003	8,163	5	1	0	0	0	4	8,158
TOTAL REPORTING PERIOD	47,925	36	2	0	1	0	33	47,889

Source: Griffin & Strong, P.C.

Table 27 (Cont'd)
MNAA
Building Permits Data
Private Sector Utilization of Prime Contractors in Nashville, TN MSA
By Ethnicity/Race and Gender Classification
(Fiscal Year 1999 to Fiscal Year 2003)
(Percentages)

Fiscal Year	Overall # Of Building Permits	MWFBE	African American	Asian American	Hispanic American	Native American	White Female	Non-minority male
1999	10,952	0.12	0.01	0.00	0.01	0.00	0.10	99.88
2000	11,470	0.06	0.00	0.00	0.00	0.00	0.06	99.94
2001	8,670	0.07	0.00	0.00	0.00	0.00	0.07	99.93
2002	8,670	0.06	0.00	0.00	0.00	0.00	0.06	99.94
2003	8,163	0.06	0.01	0.00	0.00	0.00	0.05	99.94
TOTAL REPORTING PERIOD	47,925	0.08	0.00	0.00	0.00	0.00	0.07	99.92

Source: Griffin & Strong, P.C.

4. Private Commercial Construction Prime Contractor Utilization by Number of Unique Vendors

Griffin & Strong, P.C. produced a unique vendor file by removing duplications from the building permit file, ensuring each vendor was listed once for each fiscal year. The results of the unique vendor analysis are displayed in Table 28 below. As depicted, ten unique MWFBEs, 0.19 percent of all unique firms, were issued private commercial construction permits as prime contractors. A detailed analysis of the unique vendor file by ethnicity/race and gender showed the following:

- Two unique African American-owned firms were utilized during the period under review, amounting to 0.04 percent of all unique businesses.
- One unique Hispanic American-owned firm was utilized as prime contractor during the study period, accounting for 0.02 percent of all unique firms.
- Seven unique White Female-owned firms were utilized as prime contractors during the period under review, amounting to 0.13 percent of all unique firms.

Table 28
MNAA
Number of Unique Vendors by Ethnicity/Race/Gender
(Fiscal Year 1999 to Fiscal Year 2003)
(Numbers)

Fiscal Year	Overall # Of Vendors	MWFBE	African American	Asian American	Hispanic American	Native American	White Female	Non-minority male
1999	1,800	4	1	0	1	0	2	1,796
2000	1,079	2	0	0	0	0	2	1,077
2001	798	1	0	0	0	0	1	797
2002	816	1	0	0	0	0	1	815
2003	864	2	1	0	0	0	1	862
TOTAL REPORTING PERIOD	5,357	10	2	0	1	0	7	5,347

Source: Griffin & Strong, P.C.

Table 28 (Cont'd)
MNAA
Number of Unique Vendors by Ethnicity/Race/Gender
(Fiscal Year 1999 to Fiscal Year 2003)
(Percentages)

Fiscal Year	Overall # Of Vendors	MWFBE	African American	Asian American	Hispanic American	Native American	White Female	Non-minority male
1999	1,800	0.22	0.06	0.00	0.06	0.00	0.11	99.78
2000	1,079	0.19	0.00	0.00	0.00	0.00	0.19	99.81
2001	798	0.13	0.00	0.00	0.00	0.00	0.13	99.87
2002	816	0.12	0.00	0.00	0.00	0.00	0.12	99.88
2003	864	0.23	0.12	0.00	0.00	0.00	0.12	99.77
TOTAL REPORTING PERIOD	5,357	0.19	0.04	0.00	0.02	0.00	0.13	99.81

Source: Griffin & Strong, P.C.

5. Availability Analyses

The availability estimates presented in Table 29 below are based on U.S Census data in the Nashville, TN MSA by ethnicity/race and gender. Availabilities were estimated for prime contractors only in Construction and related services, as data for subcontractors in private sector commercial building construction permits could not be secured from the agency. These estimates show that the vast majority of construction firms, 78.81 percent, were owned by non-minority males. A detailed analysis of MWFBE construction availability in the Nashville, TN MSA by ethnicity/race and gender indicated the following:

- African Americans and Native Americans represented 2.6 percent and 1.91 percent of the pool of construction firms in the Nashville, TN MSA, respectively.
- Asian American firms made up 0.44 percent.
- Hispanic American firms represented 2.01 percent.
- Construction firms owned by Females of any race represented 8.20 percent.
- White Female firms were 7.52 percent.

Table 29
MNAA
Census Availability of Prime Contractors by Ethnicity/Race/Gender
Construction at two digit NAICS level (code 23)
Nashville, TN MSA

Ethnicity/Race and Gender	Number Of Firms	Percent
African American	467	2.60
Asian American	79	0.44
Females (of any race)	1,474	8.20
White Females	1,351	7.52
Hispanic American	361	2.01
Native American	343	1.91
Non-Minority Males[1]	14,124	78.61
Total Firms in Construction (Nashville, TN MSA)	17,967	100.00

Source: Griffin & Strong, P.C.

6. Disparity Analysis and Statistical Tests

A) DISPARITY ANALYSIS

As in the section analyzing public contracting by Metropolitan Nashville Airport Authority (MNAA), the disparity analysis in this section addresses the crucial question of whether and to what extent there is disparity between the utilization of Minority and White Female-owned Business Enterprises (MWFBEs) as measured against their availability in the private sector in the Nashville, TN MSA using the building permit data from fiscal year 1999 to fiscal year 2003.

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

[29] The number of firms for Non-minority males and White Females derived from special tabulations by the Economic Census Branch of the U.S. Census Bureau. A straight subtraction of minority and female figures from the total to get non-minority male figure will not be accurate due largely to double counting and survey methodology. Likewise, please do not add MWFBE firms and Non-MWFBE firms to get the "Total Number of Firms" in Nashville TN MSA (they will not add up).

The Disparity Index is defined as the ratio of the percentage of Minority and White Female-Owned[30] firms utilized (***U***) divided by the percentage of such firms available in the marketplace, (***A***):

Let: ***U*** =Utilization percentage for the MWFBE group
A =Availability percentage for the MWFBE group
DI =Disparity Index for the MWFBE group

***DI = U/A* or Utilization Percent divided by Availability Percent**

When the ***DI*** is one, which indicates that the utilization percentage equals the availability percentage, there is parity or an absence of disparity. In situations where there is availability but no utilization, the corresponding disparity index will be zero, indicating disparity. In cases where there is utilization but no availability, the resulting disparity index is designated by the infinity (∞) symbol. Finally, in cases where there is neither utilization nor availability, the corresponding disparity index is undefined and designated by a dash (-) symbol.

Disparity index analyses are presented in this section to reflect the history of prime contracting in private sector commercial construction in the Nashville, TN MSA, by MWFBE group and fiscal year.

B) STATISTICAL T-TEST

These disparity indices were tested for their statistical significance. A statistical test suitable for small samples known as a "t-test" was used to determine whether or not the disparity indices associated with each MWFBE group for the fiscal year was statistically significant. The t-test is used because the number of permits issued to MWFBE groups is too small to warrant the use of a z-test, which is derived from a Normal probability distribution and applied to large samples (at least thirty data items in the sample is considered large). The statistical decision rule for the t-test is that, after mathematical derivations and calculations, a t-test value less than -2 or greater

[30] Throughout this report, Women firms refer to White Female firms. All other women are included in their ethnic group (for instance, Asian American women are included in the group Asian American).

than +2 indicates statistical significant of the disparity index being tested. The t-test results for the building permit data analyzed in this report are presented in Table 30 below. The disparity analysis and statistical test results indicated the following:

- Overall, MWFBEs were significantly underutilized across the board during the period under review with a disparity index of 0.003.
- African American firms were significantly underutilized during the study period with a disparity index of 0.002.
- Asian American and Hispanic American firms were significantly underutilized as prime contractors during the period under review.
- White Female firms were significantly underutilized during the period under review with a disparity index of 0.005.
- Native American firms experienced an absolute underutilization, as these firms were not utilized when they were available, yielding a disparity index of zero.
- Non-minority males were overutilized, but not at a statistically significant level, during the period under review.

Table 30
MNAA
Disparity Analysis and Statistical Tests of Private Sector Prime Contractors in Commercial Building Construction in Nashville TN MSA
Based on Building Permit Data and Census Data
(Fiscal Year 1999 to Fiscal Year 2003)

MWFBE Group	Utilization Percent (U)	Availability Percent (A)	Disparity Index (U/A)	Disparate Impact of Utilization	Statistical Significance
African American	0.004	2.6	0.002	Underutilization	Significant
Asian American	0.00	0.44	0.00	Underutilization	Significant
Hispanic American	0.003	2.01	0.001	Underutilization	Significant
Native American	0.00	1.91	0.00	Underutilization	Significant
White Female	0.04	7.52	0.005	Underutilization	Significant
MWFBE	0.05	14.48	0.003	Underutilization	Significant
Non-MWFBE	99.95	78.61	1.27	Overutilization	Not Significant

Source: Griffin & Strong, P.C.

Table 31
MNAA
Disparity Analysis and Statistical Tests of Private Sector Prime Contractors
In Commercial Construction in the Nashville, TN MSA
Based on Reed Construction Data (RCD) and Census Data
(July 1 2003 to December 31, 2006)

MWFBE Group	Utilization Percent (U)	Availability Percent (A)	Disparity Index (U/A)	Disparate Impact of Utilization	Statistical Significance
African American	0.00	2.60	0.00	Underutilization	Significant
Asian American	0.00	0.44	0.00	Underutilization	Significant
Hispanic American	0.00	2.01	0.00	Underutilization	Significant
Native American	0.00	1.91	0.00	Underutilization	Significant
White Female	6.08	7.52	0.81	Underutilization	Significant
MWFBE	6.08	21.39(*)	0.28	Underutilization	Significant
Non-MWFBE	93.92	78.61(*)	1.19	Overutilization	Marginal significant(**) (p-value is between 0.05 and 0.10)

Source: Griffin & Strong, P.C.
(*)The number of firms for Non-minority males and White Females derived from special tabulations by the Economic Census Branch of the U.S. Census Bureau. A straight subtraction of minority and female figures from the total to get non-minority male figures will not be accurate due largely to double counting and survey methodology. Likewise, please do not add MWFBE firms and Non-MWFBE firms to get the "Total Number of Firms" in Nashville TN MSA (they will not add up), and therefore the MWFBE and Non-MWFBE availability percentages ***will not add up to 100 percent***.
(**) The statistical significance of Non-MWFBE overutilization is marginal because the p-value is between 0.05 and 0.10 (In effect the disparity index of 1.19 is not too far away from 1.00 or parity)

7. Comparison of MNAA Utilization of MWFBE Contractors with MWFBE Utilization in the Private Sector

The utilization percentages for the public sector were derived from MNAA utilization, while the utilization percentages for private construction prime contractors were derived from the Building Permit Data and Reed Construction Data (RCD). A comparison of these utilizations is presented in Table 32. MWFBE utilization as prime contractors in the public sector construction was 7.16 percent. On the other hand, their utilization was 0.05 percent in the private sector for commercial building permits and 6.08 percent for Reed Construction Data (RCD). Overall, MWFBEs experienced low utilization both in the public sector compared to the private sector. The detailed comparative analysis showed the following:

- African American-owned firms' utilization in the public sector was 0.02 percent compared with 0.004 percent in the private sector according to building permits and 0.00 percent according to RCD.
- Asian American firms had zero utilization in both public and private sector.
- Hispanic American firms showed utilization in the Building Permits Data with 0.003 percent. However, in the public sector and according to RCD, they had zero utilization.
- Native American firms showed no utilization in public or private construction.
- White Female-owned firms had utilization of 7.13 percent in public contracting, 0.04 percent according to Building Permits, and 6.08 percent according to RCD.
- Non-minority male-owned firms were more successful as construction primes, both in the public and private sector.

Table 32
MNAA
Comparison of Public and Private Sector
MWFBE Construction Prime Contractor Utilization
(Nashville, TN MSA)
(July 1, 2003 to December 31, 2006)

	African American (%)	Asian American (%)	Hispanic American (%)	Native American (%)	White Female (%)	MWFBE (%)	Non-MWFBE (%)
Public Construction Prime Contractors (MNAA Actual Payments)	0.02	0.00	0.00	0.00	7.13	7.16	92.84
Private Construction Prime Contractors (Building Permits)	0.004	0.00	0.003	0.00	0.04	0.05	99.95
Private Construction Prime Contractors (Reed Construction Data)	0.00	0.00	0.00	0.00	6.08	6.08	93.92

Source: Griffin & Strong, P.C.
Note: Percentages are derived from analysis of utilization of dollar amounts both for Public Sector and Private Sector

H. Lending Discrimination Analysis

There is a direct causal connection between access to capital and the ability to obtain and perform government contracts. During this research process, an extensive amount of research was reviewed, which indicates that commercial lending disparities continue to be a problem in Tennessee.

Dr. Timothy Bates, as early as 1993, reported that commercial banks have pronounced racial disparities in business lending. According to Dr. Bates' analysis of the commercial lending data from 28 metropolitan areas, discriminatory treatment by commercial banks of black and white business borrowers resulted in the average white loan recipient being awarded $1.79 debt capital for every dollar of equity, while black borrowers receive, on average, $0.89, all other things being equal.[31] Dr. Bates found that the problem is compounded for minority-owned businesses that are located in minority neighborhoods. After controlling for demographic traits, education, skills, experience, and owner equity investment, black businesses located in minority neighborhoods received $39,564 less than black businesses located in non-minority areas.[32]

A recent study conducted for the Maryland Department of Transportation[33] by Dr. David Blanchflower, former chair of the Department of Economics at Dartmouth College, on behalf of National Economic Research Associates, suggests that Maryland follows the pattern Dr. Bates outlines.[34] Dr. Blanchflower's work used data from the 1993 National Survey of Small Business Finances (NSSBF). This survey is conducted by the Federal Reserve Board and the U. S. Small Business Administration every five years and is now called Survey of Small Business Finances (SSBF). Dr. Blanchflower, after isolating the South Atlantic region where Maryland is located, analyzed the data. Dr. Blanchflower concluded that loan denial rates for minority-owned firms and, particularly for African American-owned firms, are much higher, even when firm size and credit history are taken into consideration.

[31] Bates, T., (1993), "Banking on Black Enterprise".
[32] Ibid.
[33] Dr. Blanchflower's inference statistics were based on data covering the South Atlantic Region of the 1993 National Survey of Small Business Finances (NSSBF).
[34] National Economic Research Associates, (2001), "Utilization of Minority Business Enterprises by the State of Maryland".

Similar to Dr. Blanchflower's analysis based on the 1993 survey data, Griffin and Strong, P.C. (GSPC) analyzed the 2003 Survey of Small Business Finances data (2003 SSBF)[35], after isolating the East South Central Region where Tennessee is located. GSPC's analysis led to the same conclusions that Dr. Blanchflower's did with the 1993 NSSBF data: loan denial rates for minority-owned firms, particularly African American-owned firms, are much higher, even when firm size and credit history are taken into account. Our review of the relevant literature leads to the conclusion that commercial lending discrimination remains a problem in Tennessee, in general, and in the Nashville, TN MSA, in particular.

Table 33 displays some of the statistics GSPC has calculated for firms/owners (loan applicants) in the East South Central Region, including credit history characteristics, firm and owner characteristics and loan application histories.

1. General Characteristics

Table 33 shows that firms owned by African Americans had the highest credit denial rate at 60.5 percent and firms owned by Females had a denial rate of 14.5 percent. These rates were well above the average denial rate of 7.3 percent for non-minority males in the region.

The data also show that, when a loan was approved, the interest rates charged to minorities and females were all higher than that of non-minority males, with the exception of Asian Americans. In effect, Asian Americans were able to get the same interest rate as whites, 6.7 percent, on loans approved. A detailed analysis of interest rates of loans approved by ethnicity/race and gender is as follows:

- Interest rate charged to African Americans: 8.0 percent;
- Interest rate charged to Native Americans: 8.0 percent;
- Interest rate charged to Females: 7.8 percent;
- Interest rate charged to Asian Americans: 6.7 percent;
- Interest rate charged to Hispanic Americans: 20.9 percent.

[35] These Survey of Small Business Finances (SSBF) data are collected by Census Region only (not by individual States or MSAs, or counties/cities) and the East South Central Region includes Kentucky, Tennessee, Mississippi, and Alabama.

2. Credit History of Firms/Owners

Firms owned by Native Americans and Females have more delinquent business obligations as compared to their non-minority male counterparts. The percent of firms with delinquent business obligations for MWBE was as follows, compared to 13.1 percent for non-minority males:

- Firms owned by African Americans: 7.5 percent;
- Firms owned by Asian Americans: 0.0 percent;
- Firms owned by Hispanic Americans: 0.0 percent;
- Firms owned by Native Americans: 23.6 percent;
- Female-owned firms: 14.6 percent.

3. Other Firms Characteristics

On average, when the number of workers was used to measure the size of firms, MWBE firms were smaller, except firms owned by Asian Americans and Hispanic Americans, as compared to their non-minority counterparts at 9.1 employees. In effect, the distribution of average firm size by ethnicity/race and gender was as follows:

- Firms owned by African Americans: 3.8 employees;
- Firms owned by Asian Americans: 9.7 employees;
- Firms owned by Hispanic Americans: 15.9 employees;
- Firms owned by Native Americans: 4.7 employees;
- Firms owned by Females had 4.8 workers, on average.

A closer look at Table 33 also shows that firms owned by MWBEs made less in sales, except firms owned by Hispanic Americans, compared to their non-minority counterparts. Also, MWBEs, with the exception of Asian American firms, made less in profit dollars than non-minority males.

Additionally, MWBEs had less experience compared to their non-minority counterparts who had 21.2 years of experience, on average. In effect, African Americans and Native Americans had

12.0 years and 18.8 years of experience, respectively. Hispanic Americans and Females had 20.1 years and 17.7 years, respectively.

Table 33
MNAA
SELECTED MEANS OF LOAN APPLICATIONS FROM 2003 SSBF
(Census Division 6)

	All	White	African American	Asian American	Hispanic American	Native American	Female
% of firms always Denied in the last 3 years	9.6	7.3	60.5	0.0	0.0	0.0	14.5
Sample Size	106	92	3	3	1	3	16
Interest rate on Approved Loans (%)	6.9	6.7	8.0	6.7	20.9	8.0	7.8
Sample Size	100	88	1	3	1	3	14
1. ***Credit History of Firms/Owners***							
% Owners with Judgments against them	0.6	0.7	0.0	0.0	0.0	0.0	1.5
% Firms with Delinquent Business Obligations	12.5	13.1	7.5	0.0	0.0	23.6	14.6
% Owners with Delinquent Personal Obligations	11.7	10.1	32.3	0.0	26.4	16.2	16.4
% Owners declared Bankruptcy in last 7 years	6.8	4.5	45.4	0.0	0.0	0.0	9.6
Sample Size	231	195	11	6	5	9	48
2. ***Other Firm Characteristics***							
% Female-owned	31.3	31.9	40.3	0.0	24.9	32.0	100.0
Sales (in 1,000's of 2003 $)	$1,148.7	$1,209.4	$75.2	$1,052.2	$1,682.6	$468.6	$374.9
Profits (in 1,000's of 2003 $)	$201.6	$205.5	-$7.1	$411.6	$105.5	$30.9	$36.6
Assets (in 1,000's of 2003 $)	$432.2	$455.4	$38.6	$606.2	$319.9	$149.5	$253.4
Liabilities (in 1,000's of 2003 $)	$225.3	$238.0	$2.5	$295.2	$233.8	$150.2	$79.1
Owners years of Experience	20.6	21.2	12.0	24.8	20.1	18.8	17.7
% Owners share of Business	82.5	82.1	86.1	89.6	62.8	85.5	79.8
% Less than High School	2.0	3.7	0.0	0.0	0.0	7.4	5.0
% High School Diploma	16.5	26.4	26.5	0.0	60.6	31.0	29.1
% Some College but no degree	17.0	17.4	51.6	0.0	0.0	15.3	20.9
% Associates Degree Occupational/Academic	5.9	5.4	6.6	0.0	5.7	10.3	9.2
% Trade School Vocational Program	2.1	2.4	0.0	0.0	0.0	0.0	4.4
% College Degree	33.1	29.7	14.8	0.0	26.4	11.9	18.7
% Post Graduate Degree	23.5	14.9	0.4	100.0	7.3	24.2	12.7
% Sole Proprietorship	53.3	55.2	57.4	10.6	24.9	54.5	68.1
% Partnership	12.3	11.3	26.4	12.8	0.0	11.4	11.1
% S Corporation	20.1	21.6	0.4	0.6	26.4	34.1	11.5
% C Corporation	14.3	11.9	15.8	76.0	48.8	0.0	9.3
Total Number of Workers	8.9	9.1	3.8	9.7	15.9	4.7	4.8
Firm age (in years)	14.1	14.4	8.9	20.2	14.0	11.3	14.8
% New Firms (less than 5 years in operation)	21.3	21.7	12.7	12.8	35.8	31.0	19.1
% Firms Located in MSA	58.7	55.0	82.7	57.5	94.3	83.8	45.3
Sample Size	231	195	11	6	5	9	48

Table 33 (continued)
MNAA
SELECTED MEANS OF LOAN APPLICATIONS FROM 2003 SSBF
(Census Division 6)

2. *Characteristics of Loan Application*							
MRL Amount Approved (in 1,000's of 2003 $)	$268.6	$273.6	$27.0	$650.8	$6.0	$63.1	$63.9
Sample Size	100	88	1	3	1	3	14
MRL Amount Denied (in 1,000's of 2003 $)	$185.6	$211.5	$3.7	$0.0	$10.0	$500.0	$36.2
Sample Size	16	12	2	0	1	1	2
% New Line of Credit	40.0	41.1	100.0	0.0	0.0	0.0	63.8
% Capital Lease	0.0	0.0	0.0	0.0	0.0	0.0	0.0
% Mortgage for Business Purposes	17.2	21.7	0.0	0.0	0.0	0.0	0.0
% Vehicle Loan for Business Purposes	8.6	10.9	0.0	0.0	0.0	0.0	36.2
% Equipment Loan	5.9	0.0	0.0	0.0	100.0	0.0	0.0
% Other Loan	28.2	26.3	0.0	0.0	0.0	100.0	0.0
Sample Size	15	12	1	0	1	1	2

Source: Griffin & Strong, P.C. (Generated from SSBF 2003),
Note: Division 6: East South Central includes Alabama, Kentucky, Mississippi and Tennessee.

4. Estimated Probit Model of Loan Denial Probability

In this section, five probit models[36] were developed for the estimation of loan denial rates in the East South Central Census Division which includes the state of Tennessee and, therefore, the Nashville, TN MSA. As pioneered by Blanchflower et al., loan denial probabilities were estimated using the statistical package SPSS. These estimates are interpreted as the effect of a marginal change in each particular independent variable on the probability of having a loan denied.

It is worth noting that some of the independent variables were collapsed to be in line with some of the key properties of multivariate regression. One of these properties states that the sample size should be *at least* 10 to 20 times the number of independent variables. The sample size was n = 118, after isolating only those who identified their ethnicity/race and gender. By adhering to the aforementioned property, this allowed the use of approximately ten independent variables. Additionally, due to response rates, loan denial probabilities were not estimated for Hispanic

[36] Probit regression is an alternative approach to dealing with categorical and binary dependent variable. In practice, probit models come to the same conclusions as logistic regression presented in this private sector analysis in the self-employment analysis section. Probit regression is suitable in response variable and is widely used in medical studies "biostatistics" to analyze dose-response data. In this particular case, the categorical dependent variable to be explained is whether or not the application of the firm-owner for a loan was denied.

Americans and Asian Americans in the models presented in Table 31[37]. Twenty iterations were done for each model. In model (1), only the ethnicity/race/gender variable is taken into account. In models (2) through (5), additional independent variables were added to assess, in detail, the effects of these variables on loan denial probability. From the first model to model (5), eighteen (18) independent variables were introduced. The results of the regressions are presented in Table 34 below.

The estimates in Tables 34 and 35 are marginal effects of a change in the variable on the probability of loan denial. In model (1) the estimated likelihood of applying for a loan and being denied increased by 26.6 percent for African American-owned-firms, 24.1 percent for Native American-owned firms, and 2.5 percent for Female-owned firms in the East South Central Census Division. The increase of the probability of loan denial was statistically significant for African Americans even when credit worthiness and educational attainment variables were taken into account. In model (3), (4), and (5), the increase of the probability of loan denial for African Americans was also statistically significant. The estimate in the increase of the probability of loan denial for Native American-owned firms might have been different if the sample size was a bit larger. Being a female business owner seemed to have little effect on the probability of loan denial.

Table 34
MNAA
Estimated Probit Model of Loan Denial Probability

Models: New Variables Included When running Each New Model	African American	Native American	Female	Sample Size
(1) Ethnicity/race/gender variable	0.266 (1.12)	0.241 (1.65)	0.025 (0.107)	118
(2) Model (1) plus creditworthiness measures and education attainment variables	**0.335** (1.98)	0.104 (0.29)	0.0002 (0.001)	118
(3) Model (2) plus Dunn and Bradstreet credit rating variables	**0.483** (2.30)	0.392 (2.90)	0.011 (0.07)	118
(4) Model (3) plus other firm characteristic and loan characteristic variables	**0.372** (2.09)	0.148 (0.63)	0.002 (0.02)	118
(5) Model (4) plus housing and non-housing wealth variables	**0.394** (2.35)	0.126 (0.75)	0.034 (0.41)	118

Source: Griffin & Strong, P.C.
Sample size: White (92), African American (3), Hispanic American (1), Native American (3), Asian American (3), Females (16).
Note: In model (2), the t-statistic is almost equal to 2.00 and the estimate for African American is assumed statistically significant (we are approximating 1.98 to 2.00).

[37] Only one Hispanic American responded to the survey question, and this firm owner was sometimes approved and sometimes denied over the last three years. Also, all three Asian Americans who submitted loan applications over the last three years were approved.

In Table 35, all ethnic groups and Females are collapsed to address the concern of the small sample sizes. In effect, we are mindful of the fact that a larger sample would have been ideal. However, in response variable analysis, researchers have little impact on the survey response rates and often times deal with small size samples. These data fall into that case.

Table 35
MNAA
Estimated Probit Model of Loan Denial Probability
(All ethnicity/race/gender are collapsed in one IV referred to as MWFBE)

Models: New Variables Included When running Each New Model	MWFBE	Sample Size
(1) Ethnicity/race/gender variable	0.193 (1.190)	118
(2) Model (1) plus creditworthiness measures and education attainment variables	0.0018 (0.010)	118
(3) Model (2) plus Dunn and Bradstreet credit rating variables	**0.322** (3.402)	118
(4) Model (3) plus other firm characteristic and loan characteristics variables	0.173 (1.563)	118
(5) Model (4) plus housing and non-housing wealth variables	0.174 (1.330)	118

Source: Griffin & Strong, P.C.

5. Survey Results on Commercial Loan and Bond Denials

A) SURVEY RESULTS ON BOND DENIALS

GSPC conducted a mail survey of business owners which included questions regarding their experiences with discrimination in lending and bonding in the financial marketplace. Table 36 shows that MWFBE firm owners and Non-minority Male firm owners were equally likely to request bonding, but the denial rates were much higher for MWFBEs compared to Non-minority Males. In effect, of the respondents to the bonding questions, 55.0 percent of African Americans tried to secure bonding, 100 percent of Native Americans said they requested bonding, and 45.1 percent of Non-minority Males requested bonding. The request rates for bonding for MWFBE and Non-minority Males are, theoretically, in the same magnitude.

A detailed analysis of the bonding denial rates showed that, in general, MWFBEs were more likely to be denied bonding compared to Non-minority Males as shown below:

- African American: 30.00 percent;
- Asian American: 0.00 percent;
- Hispanic American: 0.00 percent;
- Native American: 100.00 percent;
- White Female: 6.10 percent;
- Non-minority Male: 3.90 percent.

Table 36
MNAA
Mail Survey
Requested Bonding

	Total	African American	Asian American	Hispanic American	Native American	White Female	Non-minority Male	Disabled
Responses Row %	129	20 15.5	2 1.6	4 3.1	1 0.8	49 38.0	51 39.5	2 1.6
Yes Column % Row %	48 37.2	11 55.0 22.9	0 0.0 0.0	0 0.0 0.0	1 100.0 2.1	12 24.5 25.0	23 45.1 47.9	1 50.0 2.1
No Column % Row %	76 58.9	8 40.0 10.5	2 100.0 2.6	4 100.0 5.3	0 0.0 0.0	36 73.5 47.3	25 49.0 32.9	1 50.0 1.3
Don't Know Column % Row %	5 3.9	1 5.0 20.0	0 0.0 0.0	0 0.0 0.0	0 0.0 0.0	1 2.0 20.0	3 5.9 60.0	0 0.0 0.0

Source: Griffin & Strong, P.C. Mail Survey of Business Owners in July 2007

Table 37
MNAA
Mail Survey
Denied Bonding

	Total	African American	Asian American	Hispanic American	Native American	White Female	Non-minority Male	Disabled
Responses	129	20	2	4	1	49	51	2
Row %		15.5	1.6	3.1	0.8	38.0	39.5	1.6
Yes	12	6	0	0	1	3	2	0
Column %	9.3	30.0	0.0	0.0	100.0	6.1	3.9	0.0
Row %		50.0	0.0	0.0	8.3	25.0	16.7	0.0
No	101	13	1	3	0	39	44	1
Column %	78.3	65.0	50.0	75.0	0.0	79.6	86.3	50.0
Row %		12.9	1.0	3.0	0.0	38.6	43.6	1.0
Don't Know/No Response	16	1	1	1	0	7	5	1
Column %	12.4	5.0	50.0	25.0	0.0	14.3	9.8	50.0
Row %		6.3	6.3	6.3	0.0	43.7	31.2	6.3

Source: Griffin & Strong, P.C. Mail Survey of Business Owners in July 2007

B) SURVEY RESULTS ON LOAN DENIALS

The vast majority of MWFBEs and Non-minority Male firms who responded said they had requested commercial bank loans, except Asian Americans. In effect, 80.00 percent of African Americans who responded said they had requested a loan, 100 percent of both Native Americans and Hispanic Americans said they had requested a commercial loan, and 88.2 percent of Non-minority Males had requested loans. When all business owners were equally likely to request commercial loans, the denial rates were higher for MWFBEs compared to Non-minority Males. The commercial loan denial rates supported the fact that MWFBEs were more likely to be denied commercial loans compared to their Non-minority Male counterparts as shown below:

- African Americans: 40.00 percent;
- Asian Americans: 0.00 percent;
- Native Americans: 0.00 percent;
- Hispanic Americans: 50.00 percent;
- White Females: 12.20 percent;
- Non-minority Males: 7.8 percent.

Table 38
MNAA
Mail Survey
Requested Commercial Bank Loan

	Total	African American	Asian American	Hispanic American	Native American	White Female	Non-minority Male	Disabled
Responses	129	20	2	4	1	49	51	2
Row %		15.5	1.6	3.1	0.8	38.0	39.5	1.6
Yes	105	16	0	4	1	37	45	2
Column %	81.4	80.0	0.0	100.0	100.0	75.5	88.2	100.0
Row %		15.2	0.0	3.8	1.0	35.2	42.9	1.9
No	22	3	2	0	0	12	5	0
Column %	17.1	15.0	100.0	0.0	0.0	24.5	9.8	0.0
Row %		13.6	9.1	0.0	0.0	54.6	22.7	0.0
Don't Know/No Response	2	1	0	0	0	0	1	0
Column %	1.6	5.0	0.0	0.0	0.0	0.0	2.0	0.0
Row %		50.0	0.0	0.0	0.0	0.0	50.0	0.0

Source: Griffin & Strong, P.C. Mail Survey of Business Owners in July 2007

Table 39
MNAA
Mail Survey
Denied Commercial Bank Loan

	Total	African American	Asian American	Hispanic American	Native American	White Female	Non-minority Male	Disabled
Responses	129	20	2	4	1	49	51	2
Row %		15.5	1.6	3.1	0.8	38.0	39.5	1.6
Yes	21	8	0	2	0	6	4	1
Column %	16.3	40.0	0.0	50.0	0.0	12.2	7.8	50.0
Row %		38.1	0.0	9.5	0.0	28.6	19.0	4.8
No	101	11	1	2	1	40	45	1
Column %	78.3	55.0	50.0	50.0	100.0	81.6	88.2	50.0
Row %		10.9	1.0	2.0	1.0	39.6	44.6	1.0
Don't Know/No Response	7	1	1	0	0	3	2	0
Column %	5.4	5.0	50.0	0.0	0.0	6.1	3.9	0.0
Row %		14.3	14.3	0.0	0.0	42.9	28.6	0.0

Source: Griffin & Strong, P.C. Mail Survey of Business Owners in July 2007

The findings of the survey data were consistent with the findings of the loan application analyses and the econometric loan denial probability model analysis presented earlier in this report. MWFBEs were more likely to be denied bonding as compared to Non-minority Males.

Additionally, in general, MWFBE commercial loan denial rates were likely to be higher, compared to their Non-minority Male counterparts.

I. Size Standard Analysis

1. Demographic and Economic Characteristics of Firms in the Nashville, TN MSA

This section of the report examines the size of firms in the Nashville, TN MSA as reported by the 2002 Census Bureau Economic Survey. This information allowed GSPC to conduct a comparative analysis between the size of firms in the Nashville, TN MSA and the Small Business Administration Size Standards. A detailed analysis of Table 40 indicates that there were 3,269 Architectural, Design, Engineering & Other Professional firms with paid employees in the Nashville, TN MSA in 2002, who generated $3.7 billion in revenues (receipts). Overall, these firms employed a combined total of 33,347 employees. Table 40 also indicates that 3,074 construction firms were in activity in the Nashville, TN MSA, generating $7.3 billion in gross receipts and employing a total of 39,440 employees. Please refer to Table 40 for a detailed analysis of other industries in the Nashville, TN MSA.

Table 40
MNAA
Number of employees and Gross Receipts of Firms in the Nashville, TN MSA
(2002 Census Bureau Economic Survey)

Industry Categorization by Ethnicity/Race/Gender	**Nashville-Davidson--Murfreesboro, TN MSA**		
2002	# of Firms w/pd employees	Receipts($1,000's)	# of Employees
Agriculture, Forestry & Fishing (NAICS 11)			
African American	0	0	0
Hispanic American	0	0	0
Asian American	0	0	0
Native American or Alaskan	S	D	S
Female (all races)	S	D	0 - 19
Total	23	D	100 - 249
Architectural, Design, Engineering & Other Professional Services (NAICS 54)			
African American	55	26,446	192
Hispanic American	S	D	0 - 19
Asian American	S	S	S
Native American or Alaskan	S	S	S
Female (all races)	605	285,131	2,550
Total	3,269	3,715,497	33,347
Construction (NAICS 23)			
African American	S	S	S
Hispanic American	37	12,119	189
Asian American	S	D	20 - 99
Native American or Alaskan	S	D	100 - 249
Female (all races)	S	S	S
Total	3,074	7,297,821	39,440
Educational (NAICS 61)			
African American	S	D	0 - 19
Hispanic American	S	S	S
Asian American	S	S	S
Native American or Alaskan	0	0	0
Female (all races)	S	D	500 - 999
Total	322	D	10,000 - 24,999
Finance, Insurance & Real Estate (NAICS 52-53)			
African American	S	S	S
Hispanic American	S	D	0 - 19
Asian American	S	S	S
Native American or Alaskan	S	S	S
Female (all races)	363	153,941	47,774
Total	2,857	15,426,965	1,125
Manufacturing (NAICS 31-33)			
African American	S	S	S
Hispanic American	S	D	500 - 999
Asian American	37	D	250 - 499
Native American or Alaskan	0	0	0
Female (all races)	122	339,725	2,054
Total	1,515	28,818,433	80,846

Table 40(continued)
MNAA
Number of employees and Gross Receipts of Firms in the Nashville, TN MSA
(2002 Census Bureau Economic Survey)

Medical/Healthcare (NAICS 62)			
African American	S	D	1,000 - 2,499
Hispanic American	34	11,123	94
Asian American	S	D	250 - 499
Native American or Alaskan	S	S	S
Female (all races)	579	D	2,500 - 4,999
Total	2,721	6,591,254	77,501
Mining (NAICS 21)			
African American	0	0	0
Hispanic American	0	0	0
Asian American	0	0	0
Native American or Alaskan	0	0	0
Female (all races)	S	S	S
Total	17	D	500 - 999
Retail Trade (NAICS 44-45)			
African American	53	23,678	107
Hispanic American	S	D	100 - 249
Asian American	145	D	500 - 999
Native American or Alaskan	S	D	0 - 19
Female (all races)	625	536,574	3,538
Total	3,748	16,070,886	80,508
Wholesale Trade (NAICS 42)			
African American	S	S	S
Hispanic American	4	D	100 - 249
Asian American	8	82,719	59
Native American or Alaskan	S	D	0 - 19
Female (all races)	154	4,156,143	2,166
Total	1,998	31,046,068	37,814
Service Industry (NAICS 71-72)			
African American	S	D	1,000 - 2,499
Hispanic American	86	47,780	898 + b
Asian American	336	158,481	3,221
Native American or Alaskan	S	D	100 - 249
Female (all races)	151	97,146	1,004
Total	2,658	3,656,454	68,513
Transportation, Commerce & Utilities (NAICS 22, 48-49)			
African American	31	D	20 - 99
Hispanic American	S	D	20 - 99
Asian American	4	D	0 - 19
Native American or Alaskan	S	D	20 - 99
Female (all races)	96	204,362	1,834 + a
Total	914	2,980,006	30,950 + g

Source: Griffin & Strong, P.C. and 2002 Economic Census (U.S. Census Bureau)
Note: The following symbols are used with the 2002 Economic Census Data:
S = Estimates are suppressed when publication standards are not met, such as, the firm count is less than 3, or the relative standard error of the sales and receipts is 50 percent or more,
b = 20 to 99 employees, a = 0 to 19 employees, g = 1,000 to 2,499 employees
D = Withheld to avoid disclosing data for individual companies; data are included in higher level totals

2. Comparative Analysis of firms in Selected Industries in the Nashville, TN MSA with the Small Business Administration (SBA) Size Standards

The findings of the comparative analysis of firm size in selected industries in the Nashville, TN MSA with the Small Business Administration Size Standards criteria, in dollars and number of employees, are reported in Tables 41 and 42. Table 41 shows that the Nashville, TN MSA firms in Architecture/Engineering, Construction, Goods/Supplies, and Professional Services are small, in general, when the SBA size criteria were used. On average, a construction firm made $2.4 million, which was below the threshold of the SBA classification and therefore, could be considered a small firm. Table 42 shows that Goods/Supplies firms in the Nashville, TN MSA had, on average, 19 employees each which was below the SBA threshold, and, therefore, could also be considered small. Overall, firms in all the selected industries could be classified as small businesses and would therefore qualify for Federal Government programs as defined by the SBA.

Table 41
MNAA
Size of Firms in Selected Industries Compared to the SBA Size Standards in $
Nashville TN MSA

Industry	# of Firms	Sales in $	Average Sales in millions of $ (A)	SBA Size Standards in millions of $ (B)	Is A more than B?
Architectural, Design, Engineering & Other Professional Services (NAICS[38] 54)	3,269	3,715,497,000	1.1	6.5	False
Construction (NAICS 23)	3,074	7,297,821,000	2.4	31	False
Wholesale trade (NAICS 42)	1,998	31,046,068,000	15.5	ND	N/A (see table with # employees)
Retail trade (NAICS 44-45)	3,748	16,070,886,000	4.3	10	False
Health care & social assistance (NAICS 62)	2,721	6,591,254,000	2.4	13	False
Services (NAICS 71-72)	2,658	2,656,876,000	1.0	7	False

Source: Griffin & Strong, P.C. and U.S. Census Bureau
Note: ND = SBA Size Standard Not Defined by $ amount and
N/A = Not Applicable

[38] NAICS is for North American Industry Classification System

Table 42
MNAA
Size of Firms in Selected Industries Compared to the SBA Size Standards in # of Employees
Nashville TN MSA

Industry	# of Firms	# of Employees	Average # of Employees (A)	SBA Size Standards # of Employees (B)	Is A more than B?
Architectural, Design, Engineering & Other Professional Services (NAICS54)	3,269	33,347	10	ND	N/A
Construction (NAICS 23)	3,074	39,440	13	ND	N/A
Wholesale trade (NAICS 42)	1,998	37,814	19	100	False
Retail trade (NAICS 44-45)	3,748	80,508	21	ND	N/A
Health care & social assistance (NAICS 62)	2,721	77,501	28	ND	N/A
Services (NAICS 71-72)	2,658	68,513	26	ND	N/A

Source: Griffin & Strong, P.C. and U.S. Census Bureau
Note: ND = SBA Size Standard Not Defined by # of employees
N/A = Not Applicable

III. LEGAL ANALYSIS

A. Background and Introduction

The purpose of this disparity study is to evaluate the need and basis for the enactment of a Minority/Women Business Enterprise program by the MNAA. In order to ensure that public contracting opportunities are equally available to minorities and women, MNAA has dedicated itself to creating a program that will not only address the needs of willing and capable minority and women business owners, but also render a more diverse and equitable business environment that will benefit all citizens.

MNAA initiatives which seek to employ "race conscious" remedies to ensure equal opportunity must satisfy the most exacting standards in order to comply with constitutional requirements. These standards and principles of law were applied and closely examined by the Supreme Court in City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), 709 S.Ct. 706, and Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097 (1995). The Croson decision represents the definitive legal precedent which established "strict scrutiny" as the standard of review by which courts evaluate state and local programs that grant or limit government opportunities based on race. The Adarand decision subsequently extended the "strict scrutiny" standard of review to race conscious programs enacted by the federal government.

In rendering the Croson decision in January 1989, the U.S. Supreme Court held that the City of Richmond's minority business enterprise ordinance--which mandated that majority-owned prime contractors, to whom the City of Richmond had awarded contracts, subcontract 30% of their construction dollars to minority-owned subcontractors--violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. In a six-to-three majority decision, the Court held that state and local programs which use race conscious measures to allocate, or "set aside," a portion of public contracting exclusively to minority-owned businesses must withstand a "strict scrutiny" standard of judicial review.

The strict scrutiny test requires public entities to establish race- or ethnicity-specific programs based upon a compelling governmental interest and that such programs be narrowly tailored to achieve the governmental interest. See also Tennessee Asphalt v. Farris, 942 F.2d 969 (6th Circuit 1991); Eason v. City of Memphis, 9 F.3d 477 (6th Circuit 1993); Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Circuit 1997); Associated General Contractors v. Drabik, 214 F.3d 730 (6th Circuit 2000). The strict scrutiny test further requires a "searching judicial inquiry into the justification" for the race-conscious remedy to determine whether the classifications are remedial or "in fact, motivated by the illegitimate notions of social inferiority or simple social politics".[39] See also Stefanovic v. University of Tennessee, 1998 U. S. App. LEXIS 1905 (6th Circuit 1998); Doe v. Sundquist, 943 F. Supp. 886 (M.D. Tenn. 1996).

It is important to note that the "strict scrutiny" standard of review represents the highest level of judicial scrutiny and is used to test the legality of all state programs which consider race as a determining factor for the award of benefits or services. Concurrently, some lower courts have applied an "intermediate" level of scrutiny to state programs that use gender as a determining factor and assist women-owned businesses.

Various governmental entities throughout the state of Tennessee have confronted the issue of "affirmative action" in the Sixth Circuit Court of Appeals and the federal District Courts on several occasions. Generally, the decisions have been consistent with the analysis and principles of law set forth in Croson. However, there are anomalies among some of the more recent opinions, which present judicial modification and expansion of the principles of law in Croson, with regard to data collection and other evidentiary matters. These cases are of particular importance to MNAA. This legal analysis includes, inter alia, an extended discussion of public contracting, the Equal Protection Clause, and Equal Employment Opportunity Commission (hereinafter "EEOC") cases from the aforementioned courts which have had a direct impact on the methodology employed by Griffin & Strong in conducting our disparity study for MNAA. We will discuss the legal principles outlined by the United States Supreme Court and lower courts in setting forth the specific requirements that governments must follow in forming affirmative action plans. Moreover, this legal analysis will assess the potential impact on

39 488 U.S. at 493

MNAA's M/WBE program of recent Supreme Court decisions regarding race conscious measures.

B. The Croson Decision

In its Croson decision, the Supreme Court ruled that the City of Richmond's Minority Business Enterprise (hereinafter "MBE") program failed to satisfy both prongs of the strict scrutiny standard.[40] The City failed to show that its minority set-aside program was "necessary" to remedy the effects of discrimination in the marketplace. The City of Richmond had not demonstrated the necessary discrimination. The Court reasoned that a mere statistical disparity between the overall minority population in Richmond (50 percent African-American) and awards of prime contracts to minority-owned firms (0.67 percent to African-American firms) was an irrelevant statistical comparison and insufficient to raise an inference of discrimination. Regarding the evidence that Richmond provided to support its goal program, the Court emphasized the distinction between "societal discrimination", which it found to be an inappropriate and inadequate basis for social classification, and the type of identified discrimination that can support and define the scope of race-based relief. The Court noted that a generalized assertion that there has been past discrimination in an entire industry provided no guidance to determine the present scope of the injury a race-conscious program seeks to remedy. The Court emphasized "there 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." Id at 480.

In short, the Court concluded there was no prima facie case of a constitutional or statutory violation by anyone in the construction industry. Justice O'Connor did opine, however, what evidence might indicate a proper statistical comparison: "where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise".[41] In other words, the statistical comparison would be one between the percentage of MBEs in the market

[40] Id at 469,507
[41] Id at 509

qualified to do contracting work (including prime contractors and subcontractors) and the percentage of total City contracting dollars awarded to minority firms. The relevant question among lower federal courts has been how to determine this particular comparison. See discussion of statistical comparison, infra.

Additionally, the Court stated that identified anecdotal accounts of past discrimination also could provide the basis to establish a compelling interest for local governments to enact race-conscious remedies. However, conclusory claims of discrimination by City officials, alone, would not suffice. In addition, the Court held that Richmond's MBE program was not remedial in nature because it provided preferential treatment to minorities such as Eskimos and Aleuts, groups for which there was no evidence of discrimination in Richmond. In order to uphold a race- or ethnicity-based program, there must be a determination that a strong basis in evidence exists to support the conclusion that the remedial use of race is necessary. A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or congressional findings of discrimination in the national economy.

Regarding the second prong of the strict scrutiny test, the Court ruled that Richmond's MBE program was not narrowly tailored to redress the effects of discrimination. First, the program extended to a long list of ethnic minorities (e.g. Aleuts) for which the City had established no evidence of discrimination. Thus, the scope of the City's program was too broad. Second, the Court ruled that the thirty percent (30%) goal for MBE participation in the Richmond program was a rigid quota not related to identified discrimination. Specifically, the Court criticized the City for its lack of inquiry into whether a particular minority business, seeking racial preferences, had suffered from the effects of past discrimination. Third, the Court expressed disappointment that the City failed to consider race-neutral alternatives to remedy the under-representation of minorities in contract awards. Finally, the Court highlighted the fact that the City's MBE program contained no sunset provisions for a periodic review process intended to assess the continued need for the program.[42]

[42] Id at 500

Thus, in order for states, municipalities, and other local governments to satisfy the narrow tailoring prong of the strict scrutiny test, the Croson Court suggested analyzing the following factors:

- Whether the MBE program covers minorities or women for which there is evidence of discrimination (i.e. statistical disparity, anecdotal evidence, etc.);
- Whether the size of the MBE participation goal is flexible and contains waiver provisions for prime contractors who make a "good faith" effort to satisfy MBE utilization goals, but are unsuccessful in finding any qualified, willing and able MBEs;
- Whether there was a reasonable relationship between the numerical goals set and the relevant labor pool of MBEs capable of performing the work in the marketplace;
- Whether race-neutral alternatives were considered before race-conscious remedies were enacted; and
- Whether the MBE program contains sunset provisions or mechanisms for periodic review to assess the program's continued need.

C. Procedural Posture, Permissible Evidence and Burdens of Proof

This section is a four-part review of the methodology upon which courts rely in reviewing legal challenges to M/WBE programs. First, we will discuss the standing requirements for a plaintiff to maintain a suit against a M/WBE program. Second, we will analyze the standard of review of equal protection that governs judicial inquiry. Third, we will review the evidentiary requirements courts utilize to determine proof of discrimination. Fourth, we will address the burden of production and proof the courts require of the parties in these cases.

1. Standing

As a result of the Croson decision, courts have entertained numerous legal challenges to M/WBE set-aside programs. Standing is important because it usually is pivotal in determining a party's relevance in a lawsuit. Thus, if a M/WBE program is properly constructed and administered, there should be no legitimate claims of reverse discrimination by majority contractors resulting

in a lawsuit. Under the traditional standing analysis, in order to satisfy the "injury in fact" requirement, plaintiffs must establish a causal connection between the injury, the ordinance, and the likelihood that the injury will be redressed by a favorable decision. Moreover, the Courts may not tolerate a lawsuit unless the plaintiff shows some "concrete and particularized" injury that is in fact imminent and which amounts to something more than "conjectural or hypothetical" injury.[43] See also Osborne v. AmSouth Bank Corp., 2003 U.S. Dist. LEXIS 24507, p. 8 (M.D. TN. 2003).

For example, in Safeco v. City of White House, TN., 191 F.3d 675 (6th Circuit 1999), the court addressed the standing of an insurer and bidder to challenge the constitutionality of a minority business plan. The case, which began in the Federal District Court for the Middle District of Tennessee, pertained to obligations under bid bonds and breach of contract, among other things. The court ruled that the insurance company and its insured – Eatherly Construction Company – had standing to challenge the MBE plan required for work performed in White House with funds from the United States Environmental Protection Agency. "The alleged failure to comply with the regulations did not result in the loss of a bid to an advantaged competitor, but did result in the loss of a contract and the institution of a suit. Further, even if the assumed-unconstitutional regulations do not place one contractor at a competitive disadvantage with other contractors, the regulations place white *subcontractors* at a disadvantage." Ibid. at 689 (emphasis in original).

Noteworthy is the fact that Justice Thomas' opinion in Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida, et al., 508 U.S. 656, 113 S.Ct. 2297, (1993), modified the traditional standing requirement for contractors challenging local and state government minority preference schemes. The Court relaxed the injury in fact requirements by holding that so long as the non-minority contractor can show that they were "able and qualified to bid" on a contract subject to the City's ordinance, the "injury in fact" arises from an inability to compete with M/WBEs on an equal footing due to the ordinance's "discriminatory policy."[44] Specifically, the Court stated:

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[5] See Cone Corp. v. Hillsborough County, 1994 WL 371368; Cone Corp., 1994 WL 526019 (M.D. Fla. 1994) (Court imposed Rule 11 sanctions based on plaintiffs' complaint which failed to establish injury in fact). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[44] See Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990, 995 (3rd Cir. 1993); Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513, 1518 (10th Cir. 1994);(concrete works submitted and the ordinance prevented it from competing on an equal basis.); Webster Greenthumb v. Fulton County, 51 FSupp. 2d 1354(Plaintiff Greenthumb demonstrated that it was able to bid on contracts and a discriminatory policy prevented it.)

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside program…need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal footing. 508 U.S. at 666.

See also Parents Involved in Comm. Schools v. Seattle School District No. 1, et al., 127 S.Ct. 2738, 168 L.Ed. 2d 508, 2007 U.S. LEXIS 8670, P. 35 (2007).

More recently, in Associated General Contractors of America v. City of Columbus, 172 F.3d 411 (6th Cir. 1999), the United States Court of Appeals for the Sixth Circuit issued a decision which addressed the injury-in-fact element of the standing requirement. In Associated General Contractors, a contractors' association brought an action challenging the constitutionality of the City of Columbus' minority business set-aside ordinance. The Federal District Court for the Southern District of Ohio struck down the ordinance and the City moved for relief from judgment, *inter alia*, after enacting a new set-aside ordinance. The Court of Appeals held, in pertinent part, that the contractors' association could not demonstrate the injury-in-fact required to establish standing to challenge the constitutionality of the second minority business set-aside ordinance that was enacted by the City, but had not yet been put into effect. The Court further stated that any injury foreseen as a result of the ordinance could not be other than hypothetical or conjectural until the ordinance was put into effect.

The Sixth Circuit explained:

> Once the set-aside program was gone, the constitutional violation was gone, and no condition requiring repair remained. The remedy was complete. The agreed order, however…enjoined the City from enacting any new set-aside legislation without first obtaining District Court approval--thus, the decree aimed at eliminating a condition that did not yet exist, a condition that, at most, might violate the Constitution, if that condition should in fact materialize. 172 F.3d at 418.

Lastly, in Adarand, the Supreme Court continued to find standing in cases in which the challenging party made "an adequate showing that sometime in the relatively near future it will bid on another government contract."[45] That is, if the challenging party is very likely to bid on future contracts, and must compete for such contracts against MBEs, then that contractor has standing to bring a lawsuit. See generally, Patterson v. Heartland Indus. Partners LLP, 428 F. Supp.2d 714, 719-720 (N.D. Ohio 2006).

2. Outreach Race-Neutral Programs

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

> *Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding. . . procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests, and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.*[46]

In Safeco, the 6th Circuit stated that "[o]utreach efforts may or may not require strict scrutiny" and cited as authority Allen v. Alabama State Bd. Of Education, 164 F.3d 1347 (11th Cir.1999). In Allen, the United States Court of Appeals for the 11th Circuit opined extensively on the issue of outreach. In that case, the Alabama State Board of Education appealed a decision of the United States District Court for the Middle District of Alabama, which rejected a motion of the Board to vacate a 1987 consent decree. The consent decree was entered in order to terminate a civil rights class action lawsuit which challenged, under Title VI and Title VII of the Civil Rights Act of 1964 and 42 USC §1981, the Board's state teacher certification requirements. The Board argued that recent changes in Supreme Court Equal Protection jurisprudence rendered the consent decree unconstitutional. The 11th Circuit agreed that a change in equal protection law could result in a requirement that the District Court modify the consent decree. The court

[45] Adarand, 515 U.S. 200, 211, 115 S.Ct. 2097, 2105.
[46] CROSON, 488 US at 510.

analyzed whether the changes in the law subjected the provisions of the consent decree to "strict scrutiny".

> *In Adarand…, the Supreme Court held that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." Id.at 224. Adarand's strict scrutiny standard is plainly applicable where the government distributes burdens or benefits along racial lines, granting a preference or imposing a penalty to individuals because of their race. Adrand teaches us that strict scrutiny applies in such instances because the government has subjected individuals to unequal treatment based on race. Id. At 229-30 ('[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."). (fn2) By contrast, where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable. See Peightal v. Metropolitan Dade County, 26 F.3d 154, 1557-58 (11th Cir. 1994) (treating such recruiting and outreach efforts as "race-neutral"); Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1551-52 (M.D. Ala. 1995) (distinguishing between inclusive and exclusive race-conscious measures and holding inclusive techniques, which "seek to ensure that as many qualified candidates as possible make it to the selection process," are not subject to the "traditional…equal protection analysis that courts have used for techniques of exclusion").*
>
> *In this case, under the consent decree, the Board may develop a new test to be used in making teacher certification decisions for African-American and white candidates alike. The decree does not require the Board to impose a different passing grade for African-American candidates or otherwise classify teachers based on race in grading the examinations. In this respect, the decree does not require the Board to act according to racial classifications, which takes this case out of Adarand. Instead, the Board must be conscious of race in developing the examination, choosing test items to minimize any racially disparate impact within the framework of designing a valid and comprehensive teaching examination. Nothing in Adarand requires the application of strict scrutiny to this sort of race-consciousness.*
>
> *Further, to do so would imperil Title VII, which requires covered employers to ensure that their selection processes do not result in an unjustifiable discriminatory impact on African-American candidates.*[47]

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

In contrast, a jurisprudential difference of opinion exists in cases outside the 6th Circuit. In MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13 (DC Circuit 2001), the broadcasters petitioned for review of an Equal Employment Opportunity Rule promulgated by the Federal Communications Commission. The rule required that the broadcasters "establish, maintain, and

[47] ALLEN, 164 F.3d at 1352.

carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice". The rule was primarily an outreach program with some ancillary features which will be discussed infra. The D.C. Circuit explicitly disagreed with the prevailing view in the 6th and 11th Circuits, stating in pertinent part:

> *With respect to minorities, the Broadcasters argue that the court should give strict constitutional scrutiny to the recruiting requirement. The Commission's position is that, unlike affirmative action in hiring, "affirmative outreach" in recruitment does not implicate equal protection concerns because it merely expands the applicant pool, and an individual applicant has no right to compete against fewer rivals for a job.*
>
> *In Adarand Constructors, Inc. v. Pena, the Supreme Court held that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." 515 U.S. 200, 224 (1995). The question before the court today, therefore, is whether a government mandate for recruitment targeted at minorities constitutes a "racial classification" that subjects persons of different races to "unequal treatment." We expressly reserved this question in Lutheran Church- Missouri Synod v. FCC, 154 F.3d 487, 492 (1998), denying reh'g in Lutheran Church, 141 F.3d 344 ("Whether the government can encourage - or even require - an outreach program specifically targeted on minorities is, of course, a question we need not decide").*
>
> *Among our sister circuits only one has heretofore considered the level of constitutional scrutiny applicable to affirmative outreach, and even that decision has since been vacated. See Allen v. Alabama State Board of Education, 164 F.3d 1347 (11th Cir. 1999), vacated by 216 F.3d 1263 (11th Cir. 2000); cf. Safeco Ins. Co. of America v. City of White House, 191 F.3d 675, 692 (6th Cir. 1999) ("Outreach efforts may or may not require strict scrutiny"). In Allen the Eleventh Circuit held that "where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable." Id. at 1352; see also Sussman v.Tanoue, 39 F. Supp. 2d 13, 27 (D.D.C. 1999) (noting that program "does not create preferences in hiring based on race or gender, and therefore need not be examined under strict scrutiny"). In a footnote, the Eleventh Circuit observed that there is some suggestion in Adarand "that all race-based actions, whether or not they lead to unequal treatment, are subject to strict scrutiny. See Adarand, 515 U.S. at 227. Courts, however, have not accepted this broad reading of Adarand." 164 F.3d 1352 n.2 (citing Lutheran Church; Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998); Monteray Mechanical Co. v. Wilson, 125 F.3d 702, 711 (9th Cir. 1997)).*
>
> *We may assume, with the Eleventh Circuit, that Adarand requires strict scrutiny only of governmental actions that lead to people being treated unequally on the basis of their race. We nonetheless disagree with that court's (short-lived) conclusion that preferential recruiting "disadvantag[es] no one." 164 F.3d at 1352.*

It must be noted that the 11th Circuit opinion in Allen that was vacated only related to the question of payment of attorneys' fees. 216 F.3d at 1263. Nevertheless, this split between the circuits was further exacerbated by a very recent decision of the 11th Circuit. In Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 U.S. App. LEXIS 11203 (11th Cir. 2005) the Plaintiff, an architect of Asian Indian descent, brought a claim against the DeKalb County (GA) School District alleging that they discriminated against him in the award of architectural

contracts on the basis of race. Since 1991, the DeKalb County School District has operated a "Minority Vendor Involvement program" (MVP), which was primarily an outreach program with several other non-compulsory features. The United States District Court for the Northern District of Georgia had granted summary judgment and that opinion was summarized as follows by the 11th Circuit:

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

The 11th Circuit proceeded to assert, contrary to its opinion in Allen, that:

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

135 Fed. Appx. at 267. We see, therefore, that the ground upon which the "outreach" component of the Tennessee MWSB Act rests appears to be shifting. See also Virdi v. DeKalb County School District, 216 Fed. Appx. 867, 871-874, 2007 U.S. App. LEXIS 2564 (11th Circuit 2007).

3. Equal Protection Clause Standards

The second preliminary matter that courts address is the standard of equal protection review that governs their analysis. The Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[48]

A) JUDICIAL STANDARDS OF REVIEW

Courts determine the appropriate standard of equal protection review by examining the protected classes embodied in the statute. The courts apply *strict scrutiny* to review an ordinance's race-based preference scheme and inquire whether the law is narrowly tailored to achieve a compelling governmental interest. See, e.g., U.S. v. Taylor, 956 F.2d 572 (6th Circuit 1992).

[48] U.S. Const. amend. XIV, § 1.

Conversely, gender-based classifications are evaluated under the *intermediate scrutiny* rubric, which provides that the statute must be substantially related to an important governmental objective.[49] Therefore, race-conscious affirmative action is subject to a much higher standard of judicial review than gender-conscious affirmative action.

(1) Strict Scrutiny

In order for a local governmental entity to enact a constitutionally valid M/WBE ordinance which awards contracts, it must show a *compelling governmental interest*. This compelling interest must be proven by particularized findings of past discrimination. Rutherford v. City of Cleveland, 179 Fed. Appx. 366, 373-375, 2006 U.S. App. LEXIS 13736 (6TH Circuit 2006). The strict scrutiny test ensures that the means used to address the compelling goal of remedying past discrimination "fit" so closely that there is little likelihood that the motive for the racial classification is illegitimate racial prejudice or stereotype.[50] The court in Ashton v. City of Memphis 49 F. Supp.2d 1051 (W. D. Tenn. 1999), noted that courts must "ensure that the government's intent in using affirmative action is benign or remedial rather than illegitimate." Ibid, at 1057 (cited favorably in Rutherford, 2006 U.S. App. LEXIS 13736, p. 32); see also Parents Involved, 127 S.Ct. 2738, 2007 U.S. LEXIS 8670, pp. 10-11. After legislative or administrative findings of constitutional or statutory violations, local governments have a compelling interest in remedying past discrimination.

The Courts have ruled that general societal discrimination is insufficient proof to justify the use of race-based measures to satisfy a compelling governmental interest.[51] Rather, there must be some showing of prior discrimination by the governmental actor involved, either as an "active" or "passive" participant.[52] As the court noted in Tennessee Asphalt, "governmental entities are not restricted to eradicating the effects only of their own discriminatory acts." 942 F.2d at 974.

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

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

[51] Id. at 496-97, 723. See Miller v. Johnson, 515 U.S. 900, 922, 115 S.Ct. 2475, 2491 (1995).

[52] Id. at 498, 724.

The governmental entity must point to specific instances or patterns of identifiable discrimination in the area and in the industry to which the plan applies. A *prima facie* case of intentional discrimination is deemed sufficient to support a local government's affirmative action plan. However, generalized assertions that there has been past discrimination in an entire industry provide no guidance for a legislative body to determine the precise scope of the injury it seeks to redress.[53]

Since all racial classifications are viewed as legally suspect, the governing body must show a "sound basis in the evidence" of discrimination in order to justify any enactment of race-conscious legislation. Merely stating a "benign" or "remedial" purpose does not constitute a "strong basis in evidence" that the remedial plan is necessary, nor does it establish a *prima facie* case of discrimination. See Parents Involved, 127 S.Ct. 2738, 2007 U.S. LEXIS 8670, p. 11 and Johnson v. California, 543 U.S. 499, 505-506, 125 S.Ct. 1141, 160 L.Ed. 2d 949 (2005). Thus, the local government must identify the discrimination it seeks to redress.[54] Particularized findings of discrimination are required under Croson. See also Aiken v. City of Memphis, 190 F.3d 753 (6th Circuit 1999) (re: particularized findings in the context of fair employment plans). Although Croson places the burden on the government to demonstrate a "strong basis in evidence," the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before the government may take affirmative steps to eradicate discrimination.

In City and County of Denver, Colorado v. Concrete Works of Colorado, Inc., 36 F.3d 1513 (10th Cir. 1994), the Tenth Circuit Court of Appeals reversed the District Court's granting of summary judgment for the City of Denver, which had determined that Denver's factual showing of past race and gender discrimination justified its compelling government interest in remedying the discrimination. In reversing, the Tenth Circuit held that factual issues of dispute existed about the accuracy of Denver's public and private discrimination data, but noted that Denver had shown evidence of discrimination in both the award of public contracts and within the Denver Metropolitan Statistical Area ("MSA") that was particularized and geographically based. On

[53] Id. at 498-99, 724. See Miller, 515 U.S. 900, 921, 115 S.Ct. 2475, 2491.
[54] Id. at 500-501, 725.

remand, Denver needed only to come forward with evidence that its ordinance was narrowly based, whereupon it became Concrete Works' burden to show that there was no such strong basis.

The types of evidence routinely presented to show the existence of a compelling interest include statistical and anecdotal evidence.[55] See also Aiken, 37 F.3d at 1162-1163. Where gross statistical disparities exist, they alone may constitute *prima facie* proof of a pattern or practice of discrimination. Anecdotal evidence, such as testimony from minority contractors, is most useful as a supplement to strong statistical evidence.[56] Nevertheless, anecdotal evidence is rarely so dominant that it can, by itself, establish discrimination under Croson. The "combination of anecdotal and statistical evidence," however, is viewed by the courts as "potent."[57]

If there is a strong basis in evidence to justify a race- or ethnicity-based program, the next step of the strict scrutiny test is to determine whether the M/WBE program is narrowly tailored to redress the effects of discrimination. Racial and ethnic specific programs must be a remedy of last resort. See Engineers at 926. In Croson, the Court considered four factors:

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

Other considerations include the flexibility and duration of the program; that is, whether the program contains a sunset provision or other mechanisms for periodic review of its effectiveness. These mechanisms ensure that the program does not last longer than necessary to serve its intended remedial purpose. Furthermore, such mechanisms keep pure the relationship of numerical goals to the relevant labor market, as well as the impact of the relief on the rights of

[55] Id. at 501, 725-26. See, United Black Firefighters Assn. v. City of Akron, 976 F.2d 999, 1009 (6th Cir. 1992). See also, Engineering Contractors, 122 F.3d 895 (11th Cir. 1997).

[56] Concrete Works, 36 F.3d 1513, 1520. (10th Cir. 1994). See Engineering Contractors, 122 F.3d 895, 125-26 (11th Cir. 1997); Ensley Branch v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994).

[57] Coral Construction Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991).

third parties.[58] In Ensley Branch NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994), the Eleventh Circuit U.S. Court of Appeals also held that four factors should be taken into account when evaluating whether a race- or ethnicity-conscious affirmative action program is narrowly tailored:

1) the necessity for the relief and the efficacy of alternative remedies;
2) the flexibility and duration of the relief, including the availability of waiver provisions;
3) the relationship of the numerical goals to the relevant labor market; and
4) the impact of the relief on the rights of innocent third parties.[59]

(2) Intermediate Scrutiny

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

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

[58] Adarand, 515 U.S. 200, 238, 115 S. Ct. 2097, 2118.
[59] Ensley Branch, 31 F.3d 1548, 1569 (11th Cir. 1994); Webster v. Fulton County, GA at 1362.

The Eleventh Circuit Court of Appeals in Ensley Branch NAACP v. Seibels, addressed the issue in a Title VII action.[60] In this decision, the Eleventh Circuit rejected the argument that, based on Croson, the Supreme Court intended strict scrutiny to apply to gender-conscious programs challenged under the Equal Protection Clause. Since Ensley, the Supreme Court decided United States v. Virginia, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), thereby invalidating Virginia's maintenance of the single sex Virginia Military Institution (VMI). Rather than deciding the constitutionality of the VMI program under intermediate scrutiny, the Court held that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[61] The Court then applied this "exceedingly persuasive justification" standard in invalidating the VMI program. Justice Rehnquist concurred only in the judgment, noting that "the Court . . . introduces an element of uncertainty respecting the appropriate test."[62] Justice Scalia dissented, suggesting that the majority had effectively adopted a strict scrutiny standard to judge the constitutionality of classifications that deny individuals opportunity on the basis of sex.[63] The majority however, neither denied nor affirmed Justice Scalia's analysis.

It is not certain whether the Supreme Court intended the VMI decision to signal a heightening in scrutiny of gender-based classifications. However, it may be that the VMI case stands as unique because – like key, recent Supreme Court rulings - it involves an institution of higher learning. Nevertheless, recent Federal District Court cases, as in Engineering Contractors Assn. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997), continue to confine their analysis of WBE programs to traditional intermediate scrutiny.[64] Here the court noted, however, that the measure of evidence required for a gender classification is ambiguous. The court agreed with the Third Circuit's holding that intermediate scrutiny requires that evidence be probative, but added that "probative" must be "sufficient as well." 122 F.3d 895. See also Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 249 (6th Cir. 2006).

[60] 31 F.3d 1548, 1579 (11th Cir. 1994).
[61] U.S. v. Virginia at 529, 2274.
[62] Id. at 559, 2288.
[63] Id. at 571, 2294.
[64] 122 F.3d 895, 907-08 (11th Cir. 1997).

B) PASSIVE PARTICIPATION

Strict scrutiny requires a strong basis in evidence of either active participation by the government in prior discrimination or passive participation by the government in discrimination by the local industry.[65] In Dade County, the court noted again that the measure of evidence required for a gender classification is less clear. The court agreed with the Third Circuit's holding that intermediate scrutiny requires that evidence be probative but here the court added that probative must be "sufficient as well." 122 F3d at 895. The Supreme Court in Croson opined that municipalities have a compelling interest in ensuring that public funds do not serve to finance private discrimination. Local governments may be able to take remedial action when they possess evidence that their own spending practices exacerbate a pattern of private discrimination. Croson at 502.

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

The court in Concrete Works remarked that "neither Croson nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program…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 racial gender conscious program." 36 F.3d 1529. Other courts continue to struggle with this issue.

[65] Croson, 488 U.S. at 491-92, 109 S.Ct. at 537-38.

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

> Unlike Concrete Works, the evidence presented by the government in the present case demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.[66] Concrete Works at 1529.

The federal government's evidence consisted of numerous congressional investigations, hearings, local disparity studies and anecdotal evidence demonstrating discrimination by prime contractors, unions and financial lenders in the private marketplace. The Court of Appeals concluded that the government's evidence had demonstrated as a matter of law that there was a strong basis in evidence for taking remedial action to remedy the effects of prior and present discrimination. The Court found that Adarand had not met its burden of proof to refute the government's evidence.[67]

[66] 228 F.3d 1147 (Emphasis Added)
[67] Id at 1147, 1176

Since the strict scrutiny standards and evidentiary benchmarks apply to all public entities and agencies, it follows that the questions regarding passive participation in discrimination are relevant to all governmental units. Moving a step further, since the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of public funds, cities share the same interest. The Court in Croson stated that "it is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice".[68]

C) PERMISSIBLE EVIDENCE

In Croson, the Court concluded that state and local governments have a compelling interest to remedy identified past and present discrimination within their jurisdiction. Thus, courts have to assess whether a public entity has the requisite factual support for its M/WBE program in order to satisfy the particularized showing of discrimination required by Croson. This factual support can be developed from statistical and anecdotal evidence.

D) ANECDOTAL EVIDENCE

The majority decision in Croson impliedly endorsed the inclusion of personal accounts of discrimination.[69] However, according to the Croson standard, selective anecdotal evidence about MBE experiences alone would not provide an ample basis in evidence to demonstrate public or private discrimination in a municipality's construction industry.[70] Nonetheless, personal accounts of actual discrimination or the effects of discriminatory practices may complement empirical evidence. In addition, anecdotal evidence of a governmental entity's institutional practices that provoke discriminatory market conditions are particularly probative. Thus, courts have required the inclusion of anecdotal evidence of past or present discrimination.[71]

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[68] See Croson 488 U.S. at 492 (citing Norwood v. Harrison 413 U.S. 455)

[69] Croson, 488 U.S. at 480, 109 S.Ct. at 714-15 (noting as a weakness in the City's case that the Richmond City Council heard "no direct evidence of race conscious 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").

[70] See Concrete Works, 36 F. 3rd 1513 (10th Cir. 1994).

[71] See Contractors Assn., 6 F.3d 990, 1002-03 (3rd Cir. 1993) (weighing Philadelphia's anecdotal evidence); Coral Construction Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991) ("[The combination of convincing anecdotal and statistical evidence is potent"); Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 (11th Cir. 1990) (supplementing Hillsborough County's statistical evidence with testimony from

In Coral Construction Company v. King County, the Ninth Circuit U.S. Court of Appeals concluded that "the combination of convincing anecdotal and statistical evidence" was potent.[72] Additionally, the Third Circuit suggested that a combination of empirical and anecdotal evidence was necessary for establishing a prima facie case of discrimination.[73] In addition, the Ninth Circuit approved the combination of statistical and anecdotal evidence used by the City of San Francisco in enacting its M/WBE ordinances.[74]

On the other hand, neither empirical evidence alone nor selected anecdotal evidence alone provides a strong enough basis in evidence to demonstrate public or private discrimination in a municipality's construction industry to meet the Croson standard.[75] For example, in O'Donnell Construction v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992), the court reversed the denial of a preliminary injunction for the plaintiff because the District of Columbia failed to prove a "strong basis in evidence" for its MBE program. The Court held in favor of the plaintiff because much of the evidence the District offered in support of its program was anecdotal. The Court opined that "anecdotal evidence is most useful as a supplement to strong statistical evidence--which the Council did not produce in this case".[76]

In Associated General Contractors of America v. City of Columbus, 936 F. Supp 1363 (S.D. Ohio 1996), vacated on other grounds 172 F.3d 411 (6th Circ. 1999), the District Court stated that the City's investigation was poorly executed for several reasons. According to the Court, no efforts were made to verify reports of discrimination, there was no attempt to determine whether similarly situated majority-owned firms were treated more favorably than M/WBE firms, and political pressures may have clouded the fact-finding process. The Court concluded that the anecdotal evidence in that case fell short of proof of pervasive discrimination.

Plaintiffs are entitled to have a government's anecdotal evidence subjected to the test of trial before the court determines whether it actually supports a sound basis in the evidence of

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MBEs who filed complaints to the County about prime contractors' discriminatory practices), cert. denied, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990); Engineering Contractors, 122 F.3d at 925-26.

[72] 941 F.2d at 919.

[73] Eastern Contractors, 6 F. 3rd 990, 1003 (3rd Cir. 1993).

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

[75] Concrete Works, 36 F. 3rd 1513.

[76] O'Donnell, 963 F.2d 420, 427 (D.C. Cir. 1992).

discrimination. Associated General Contractors v. the City of Columbus at 1428. Additionally, in Engineering Contractors, the Federal District Court held that, "we have found that kind of evidence [anecdotal] to be helpful in the past, but only when it was combined with and reinforced by sufficiently probative statistical evidence."[77]

Accordingly, a combination of statistical disparities in the utilization of M/WBEs and particularized anecdotal accounts of discrimination are required to satisfy the factual predicate. Thus, this study has included anecdotal evidence of past and present discrimination in order to establish the factual predicate by these guidelines.

E) STATISTICAL DATA

Croson additionally held that an inference of discrimination may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors . . . and the number of such contractors actually engaged by the locality or the locality's prime contractors."[78] See also Aiken, at 1163. A predicate to governmental action is a demonstration that gross statistical disparities exist between the proportion of MBEs awarded government contracts and the proportion of MBEs in the local industry "willing and able to do the work," in order to justify its use of race conscious contract measures.[79] See Rutherford, 179 Fed. Appx. at 375-376. In order to adequately assess statistical evidence, there must be evidence identifying the basic qualifications of minority contractors "willing and able to do the job" and the Court must determine, based upon these qualifications, the relevant statistical pool with which to make the appropriate statistical comparisons.[80] Subsequent lower court decisions have provided considerable guidelines for statistical analyses sufficient for satisfying the Croson factual predicate. "Qualified," "willing," and "able" are the three pillars of the Croson case. "The relevant question is how to determine who are qualified, willing and able."

Webster v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), presents a different method in terms of the statistical pool from which quantitative data is collected. In this case, a white male

[77] 122 F. 3rd at 925 (11th Cir. 1997).
[78] Croson, 488 U.S. 469, 509, 109 S.Ct. 706, 730.
[79] Ensley Branch, NAACP 31 F3d 1548, 1565 (11th Cir. 1994).
[80] 122 F. 3rd at 925 (11th Cir. 1997).

and female plaintiff, owners of a landscaping and tree removal service, the Webster Greenthumb Company, brought suit against Fulton County's 1994 MFBE Program. The Court analyzed the statistical factual predicate which was developed by Fulton County relying heavily on Croson, and a more recent Eleventh Circuit opinion, Engineering Contractors Association v. Metropolitan Dade County, 122 F.3d. 895 (11th Cir. 1997). In Webster, the Court indicated that it favored census availability data; however, other courts have made it clear that they believe that the most relevant data is bidder data, that is, data which determines availability based on the number of minority bidders in contrast to the number of majority bidders. The judge also suggests that bid data be analyzed, that is, the total number of bids submitted by all parties divided by the total number of bids submitted by minority firms. See also, George LaNoue, Who Counts? Determining the Availability of Minority Businesses for Public Contracting, 21 Harv. L. & Pub. Pol. 793. LaNoue writes that although this problem has consumed an enormous volume of resources, no consensus has evolved among scholars or practitioners. "Measuring availability is the key issue in performing a disparity analysis. Despite substantial efforts made by consultants thus far, they have achieved no consensus *above this* measurement."[39]

(1) Availability

The method of calculating M/WBE availability has varied from case to case. In Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990 (3rd Cir. 1993), the Court stated that available and qualified minority-owned businesses comprise the "relevant statistical pool" for purposes of determining availability. The Court permitted availability to be based on the metropolitan statistical area ("MSA") and local list of the Office of Minority Opportunity; for non-MWBE's, census data. In Associated General Contractors of America v. City of Columbus, 936 F. Supp 1363 (S.D. Ohio 1996), the City's consultants collected data on the number of M/WBE firms in the Columbus MSA, in order to calculate the percentage of available M/WBE firms. This is referred to as the rate of availability. Three sources were considered to determine the number of M/WBEs "ready willing and able" to perform construction work for the city. None of the measures of availability purported to measure the number of M/WBEs who were qualified and willing to bid as a prime on city construction projects.

[39] Id at 833

The issue of availability also was examined by the Court in Contractors Association of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (11th Cir. 1997). Here, the Court opined that when reliance is made upon statistical disparity, and special qualifications are necessary to undertake a particular task, the relevant statistical pool must include only those minority-owned firms qualified to provide the requested services. Moreover, these minority firms must be qualified, willing and able to provide the requested services. If the statistical analysis includes the proper pool of eligible minorities, any resulting disparity, in a proper case, may constitute prima facie proof of a pattern or practice of discrimination.

In a recent opinion by the Sixth Circuit in Associated General Contractors v. Drabik, 214 F.3d 730 (6th Circuit 2000), the Court of Appeals ruled that the state of Ohio failed to satisfy the strict scrutiny standard to justify the state's minority business enterprise act, by relying on statistical evidence that did not account for which firms were qualified, willing and able to perform on construction contracts. The court stated that "although Ohio's most compelling statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority-owned businesses…the problem is that the percentage of minority-owned businesses in Ohio (7% of 1978) did not take into account which were construction firms and those who were qualified, willing and able to perform on state construction contracts." Id. at 736. Although this was more data than was submitted in Croson, it was still insufficient under strict scrutiny, according to the court. Id.

(2) Utilization

Utilization is a natural corollary of availability, in terms of statistical calculation. In City of Columbus, the City's consultants calculated the percentage of City contracting dollars that were paid to M/WBE construction firms. This is referred to as the rate of utilization. From this point, one can determine if a disparity exists and, if so, to what extent.

(3) Disparity Index and Croson

To demonstrate the underutilization of M/WBEs in a particular area, parties can employ a statistical device known as the "disparity index".[40] The disparity index is calculated by dividing the percentage of M/WBE participation in government contracts by the percentage of M/WBEs in the relevant population of local firms. A disparity index of one (1) demonstrates full M/WBE participation, whereas the closer the index is to zero, the greater the M/WBE underutilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100, with 100 representing full M/WBE utilization.

Courts have used these M/WBE disparity indices to apply the "strong basis in evidence" standard in Croson. For instance, the Eleventh Circuit held that a 0.11 disparity "clearly constitutes a prima facie case of discrimination indicating that the racial classifications in the County plan were necessary" under Croson.[81] Based on a disparity index of 0.22, the Ninth Circuit upheld the denial of a preliminary injunction to a challenger of the City of San Francisco's MBE plan based upon an equal protection claim.[82] Accordingly, the Third Circuit held that a disparity of 0.04 was "probative of discrimination in City contracting in the Philadelphia construction industry."[83]

(4) Standard Deviation

The number calculated via the disparity index is then tested for its validity through the application of a standard deviation analysis. Standard deviation analysis measures the probability that a result is a random deviation from the predicted result (the more standard deviations, the lower the probability the result is a random one.) Social scientists consider a finding of two standard deviations significant, meaning that there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor. The Eleventh Circuit has directed that " 'where the difference between the expected value and the observed number is greater than two or three standard deviations', then the hypothesis that [employees] were hired without regard to race would be suspect."[84]

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

[42] Cone Corp., 908 F.2d 908, 916 (11th Cir. 1990).

[82] AGC v. Coalition for Economic Equity, 950 F.2d 1401, 1414 (9th Cir. 1991).

[83] Contractors Assn. 6 F.3d 990, 1005 (3rd Cir. 1993).

[84] Peightal II 26 F.3d 1545, 1556 (11th Cir. 1994). quoting Hazelwood, 433 US at 308 n 13, 97 S.Ct 2742 n.13 quoting Castaneda v. Partida, 430 U.S.482, 497,n.17, 97 S.Ct 1272, 1281 n.17, 51LEd 2d 498 (1977).

(5) Statistical Regression Analysis

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

The Webster court noted that the Court of Appeals in Engineering Contractors affirmed the District Court's conclusion that the disparities offered by Dade County's experts in that case were better explained by firm size than discrimination. Dade County had conducted a regression analysis to control for firm size after calculating disparity indices with regard to the utilization of BBEs, HBEs and WBEs in the Dade County market, by comparing the amount of contracts awarded to the amount each group would be expected to receive based on the group's bidding activity and the awardee success rate. Although there were a few unexplained disparities that remained after controlling for firm size, the District Court concluded (and the Court of Appeals affirmed) that there was no strong basis in evidence for discrimination for BBEs and HBEs and that the quantitative analysis did not sufficiently demonstrate the existence of discrimination against WBEs in the relevant economic sector. 122 F3d 917. Specifically, the court noted that finding a single explained negative disparity against BBEs for the years 1989-1991 for a single SIC code was not enough to show discrimination.

(6) Geographic Scope of the Data

The Croson Court observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the disputed industry to draw conclusions about prevailing market conditions in their respective regions.[85] However, to confine the permissible data to a governmental entity's strict geographical borders would ignore the economic reality that contracts are often awarded to firms located in adjacent areas. Thus,

[85] Croson, 488 U.S. 469, 504, 109 S.Ct. 706, 727.

courts closely scrutinize pertinent data related to the jurisdictional area of the state or municipality.

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

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

Accordingly, it can be inferred that the most appropriate and legally defensible scope of empirical data for the MNAA is the standard metropolitan area of Nashville, including the relevant, adjacent counties in Tennessee and, perhaps, in the Commonwealth of Kentucky.

4. Post-Enactment Evidence

In Croson, the Court stated that a state or local government "must identify that discrimination . . . with some specificity before they may use race-conscious relief."[86] However, the Court declined to require that all relevant evidence of such discrimination be gathered prior to the enactment of the program. Pre-enactment evidence refers to evidence developed prior to the enactment of a M/WBE program by a governmental entity. Such evidence is critical to any affirmative action program because, absent any pre-enactment evidence of discrimination, a state or local government would be unable to satisfy the standards established in Croson. On the other hand, post-enactment evidence is that which has been developed since the affirmative action program was enacted and therefore was not specifically relied upon as a rationale for the government's

[86] Croson, 488 U.S. 469, 504, 109 S.Ct. 706, 727.

race and gender conscious efforts. As such, post-enactment evidence has been another source of controversy in contemporary litigation, though most subsequent rulings have interpreted Croson's evidentiary requirement to include post-enactment evidence. Significantly, crucial exceptions exist in rulings from the local federal courts.

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

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

Associated General Contractors of Ohio v. Sandra Drabik, 50 F.Supp.2d. 741 (1999), is another relatively recent opinion wherein the District Court for the Eastern Division of Ohio stated that in order to support a compelling state interest for race-based preferences, challenged on equal protection grounds, evidence of past discrimination must be reasonably current. "Under *Croson*, the state must have had sufficient evidentiary justification for a racially conscious statute in advance of its passage; the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding." Ibid., at 738.

Moreover, the Court ruled that evidence of purported racial discrimination that was more than twenty (20) years old was too remote to form the basis for a compelling governmental interest justifying the enactment of a race-based affirmative action program. This line of reasoning, in terms of the currency of statistical and anecdotal evidence, was fully considered by Griffin & Strong, P.C. while formulating the methodology employed in conducting Nashville's disparity study.

Early post-Croson decisions permitted the use of post-enactment evidence to determine whether an M/WBE program complies with Croson.[87] In Ensley, the Eleventh Circuit explicitly held that post-enactment evidence is properly introduced in the record and relied upon by district courts in determining the constitutionality of government race and gender-conscious programs:

> Although Croson requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the Supreme Court has never required that, before implementing affirmative action, the employer not have proved that it has discriminated. On the contrary, further finding of discrimination need neither precede nor accompany the adoption of affirmative action.[88]

Again, a federal case from Tennessee clouds the issue.

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

In 1996, the City of Memphis adopted a Minority and Women Business Enterprise Procurement Program ("MWBE"), based upon findings from a disparity study covering the period from 1988 to 1992. The West Tennessee Chapter of Associated Builders and Contractors, Inc. and Zellner Construction Company, Inc. filed suit against the City of Memphis in January 1999, claiming

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

[88] Ensley Branch, NAACP, 31 F.3d 1548, 1565 (11th Cir. 1994).

that the City's MBWE program violated the Equal Protection Clause of the Fourteenth Amendment. In response to the lawsuit, Memphis proposed to commission a new disparity study, covering the period from 1993 to 1998. The City asserted that the post-enactment study could be used as evidence to demonstrate a compelling governmental interest. Six months after the initiation of the lawsuit, the District Court ruled that Memphis could not introduce the post-enactment study as evidence of a compelling governmental interest and initially denied the City's motion to certify an interlocutory appeal. In response to the City's motion to reconsider, the District Court certified an interlocutory appeal, though notice of this decision was not rendered to the parties in a timely fashion. Ibid.

After deciding that it had jurisdiction to rule on the matter, the Sixth Circuit examined the issue of post-enactment evidence through its analysis of the three requirements for interlocutory appeal: 1) whether the order involves a controlling issue of law; 2) whether a substantial ground for difference of opinion exists regarding the correctness of the decision; and, 3) whether an immediate appeal may materially advance the ultimate termination of the litigation. Of the three requirements, the Sixth Circuit focused on the second. The appeals court observed that the District Court had relied upon the City's assertion that substantial ground for difference of opinion existed regarding the value of post-enactment evidence. The Sixth Circuit rejected the City's argument, stating that "[t]his issue…appears to have been resolved in this circuit." Ibid. The Sixth Circuit turned to the ruling in Drabik to imply that post-enactment evidence was inadmissible. "The City argues that the court in *Drabik* did not find that postenactment evidence was inadmissible…Although *Drabik* did not directly address the admissibility of postenactment evidence, it held that a governmental entity must have preenactment evidence sufficient to justify a racially conscious statute. It also indicates that this circuit would not favor using postenactment evidence to make that showing." Ultimately, the appeals court denied the City's application for permission to appeal because "[e]ven if we concluded that there is a substantial difference of opinion, the issue presented in this case is not a controlling legal issue." Ibid. at 351.

It is important to reiterate that the court in In re: City of Memphis did not reject the validity of post-enactment evidence. The court rejected the City of Memphis' attempt to pursue an appeal of the trial court's evidentiary ruling. Only at first blush does it appear that the 6th Circuit

suggested that post-enactment evidence has little value. A clear reading of the case reveals that the court's primary concern was the appropriateness of the City's appeal. The court's tangential concern was whether a governmental entity could rely upon post-enactment evidence alone to justify a pre-existing statute and MWBE program. Indeed, the court merely encouraged the City to continue its defense of the MWBE program with pre-enactment evidence gleaned from the initial disparity study. Furthermore, because this discussion of the admissibility of post-enactment evidence occurred in the dicta of the opinion, the case does not suggest a sea change in the Sixth Circuit over the last four years.

Therefore, a race and gender-conscious program implemented by the MNAA may be supported by post-enactment evidence of discrimination. Although post-enactment evidence may not suffice to support the original intent of a governmental entity, it can prove helpful in other ways. See, i.e., Mark L. Johnson, "Legislate First, Ask Questions Later: Post-Enactment Evidence in Minority Set-Aside Litigation," 2002 U. Chi. Legal F. 303 (2002). Specifically, post-enactment evidence seems necessary to determine the program's success for narrow tailoring and continued need after the program's initial term has expired. See Associated General Utility Contractors of MD v. Mayor of Baltimore, 218 F Supp. 2d 749, 620 (D. MD. 2002) (post-enactment evidence admissible on the issue of narrow tailoring and the use of race neutral alternatives).[89]

5. Remedies-- Narrowly Tailored

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

[89] 91 F. 3d at 606

1) consideration of race neutral alternatives,
2) flexibility of plan,
3) relationship of plan's numerical goals to relevant market, and
4) effect of plan on third parties.[90]

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

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

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

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

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

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

had considered race-neutral alternatives before adopting the plan to increase minority participation. 214 F.3d 739.

Croson requires that there not only be a strong basis in evidence for a conclusion that there has been discrimination, but also for a conclusion that the particular remedy is made necessary by the discrimination. In other words, there must be a "fit" between past/present harm and the remedy. The Third Circuit, in Contractors Association of Eastern Pennsylvania, approved the District Court's finding that the subcontracting goal program was not narrowly tailored. Much of the evidence found on the discrimination by the City of Philadelphia was against black "prime contractors" who were capable of bidding on City prime contracts. Moreover, there was no firm evidentiary basis for believing that non-minority contractors would not hire black subcontractors.[91]

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

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

[91] Contractor's Association of Eastern PA, Inc. v. City of Philadelphia, 91F.3d 586, (3d Cir. 1996)

6. Burdens of Production and Proof

The Croson Court struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past and present discrimination.[92] Since the Fourteenth Amendment only allows race-conscious programs that narrowly seek to remedy particularized discrimination, the Court held that state and local governments "must identify that discrimination . . . with some specificity before they may use race-conscious relief." The Court's rationale for judging the sufficiency of the City's factual predicate for affirmative action legislation was whether there existed a "strong basis in evidence for its [government's] conclusion that remedial action was necessary."[93]

Croson places the initial burden of production on the state or local governmental actor to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program is aimed at remedying identified past or present discrimination. A state or local affirmative action program that responds to discrimination is sustainable against an equal protection challenge so long as it is based upon strong evidence of discrimination. A municipality may establish an inference of discrimination by using empirical evidence that proves a significant statistical disparity between the number of qualified M/WBEs, the number of M/WBE contractors actually contracted by the government, or by the entity's prime contractors. Furthermore, the quantum of evidence required for the governmental entity must be determined on a case-by-case basis and in the context and breadth of the M/WBE program it advanced.[94] If the local government is able to do this, then the burden shifts to the challenging party to rebut the municipality's showing.[95]

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.[96]

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[92] Croson, 488 U.S. at 498-506, 109 S.Ct. at 723-28.

[93] Id. at 500, 725 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277, 106 S.Ct. 1842, 1849, 90 L.Ed.2d 260 (1986).

[94] See Concrete Works, 36 F.3rd 1513 (10th Cir. 1994).

[95] See Contractors v. Philadelphia, 6 F.3d 990, 1007.

[96] Mazeske v. City of Chicago 218 F.3d 820 (7th Cir. 2000)

7. The Potential Impact of Recent Supreme Court Decisions

As one court noted, "it appears that litigation involving affirmative action programs of governmental units and public bodies has been among the most troublesome considered by the Supreme Court over the past decade." Tennessee Asphalt at 972. No litigation is more symbolic of this trend than the twin cases involving the University of Michigan. Although these cases are unique to public education, they provide some insight into the future of public contracting.

Gratz v. Bollinger, 123 S. Ct. 2411 (2003)

In Gratz v. Bollinger, 123 S. Ct. 2411 (2003), plaintiffs Jennifer Gratz and Patrick Hamacher applied for, and were denied, admission to the College of Literature, Science, and the Arts (LSA) at the University of Michigan. Consequently, the two – both White and residents of the state of Michigan - filed suit against the University of Michigan, claiming that the school's use of a race-conscious program in its undergraduate admission policy violated the Equal Protection Clause of the Fourteenth Amendment.

Pursuant to the LSA's admission guidelines, applicants were awarded a number of points for meeting certain criteria. The LSA guaranteed admission to an applicant who received at least 100 points. Under the race-conscious plan employed by the University, applicants from a group designated as an under-represented minority – African Americans, Hispanics, and Native Americans – automatically received 20 points. Although the University's Office of Undergraduate Admissions deemed Gratz and Hamacher to be "well qualified" and "qualified," respectively, for admission, it denied them admission. In contrast, the parties agreed that the University admitted virtually every "qualified" applicant from an under-represented minority group.

The University argued that its admissions plan aimed to increase the diversity of the entering class of students. Although the LSA asserted that it "had a compelling interest in remedying the University's past and current discrimination against minorities," the Court did not agree. Ibid. at 2420. Writing for the majority, Chief Justice Rehnquist wrote that "because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve Michigan's interest in diversity, the policy violates the Equal Protection Clause." Ibid. at 2416.

The focus of the Court's ire was the automatic award of points to applicants from an under-represented minority group. "We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program." Ibid. at 2427-2428. In referring to early Supreme Court rulings, most notably Justice Powell's opinion in the famous *Bakke* case, the Court determined that the LSA's plan ran afoul of the ideal assessment of each applicant. "The current LSA policy does not provide such individualized consideration…Moreover, Justice Powell's example, where the race of a 'particular black applicant' could be considered without being decisive…the LSA's automatic distribution of 20 points has the effect of making 'the factor of race…decisive' for virtually every minimally qualified underrepresented minority applicant." Ibid. at 2428.

Grutter v. Bollinger, 123 S. Ct. 2325 (2003)

In Grutter v. Bollinger, 123 S. Ct. 2325 (2003), Barbara Grutter – a White resident of the state of Michigan – applied for, and was denied, admission to the University of Michigan Law School. Grutter believed that she had been denied admission to the law school because – despite her high undergraduate grade point average and LSAT score – the law school "use[d] race as a 'predominant' factor, giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups." She asserted that the law school had no compelling interest to justify the use of race in admissions and that the law school's admissions policy violated the Equal protection Clause of the Fourteenth Amendment. Ibid. at 2326-2327. The Court rejected plaintiff's assertions and held that the law school's admission policy passed constitutional muster.

Writing for the majority, Justice O'Connor noted that the law school's "efforts to achieve student body diversity complied with [*Bakke*]…The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicant's talents, experiences, and potential 'to contribute to the learning of those around them.'" Ibid. at 2331. The Court held that the law school had a compelling interest in creating a diverse student body and that its admissions program was narrowly tailored to satisfy that interest.

Following a thoroughgoing discussion of Justice Powell's decision in *Bakke*, Justice O'Connor stated that "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." Ibid. at 2337. Furthermore, the Court opined that the law school's admissions approach was sound, constitutionally. "We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan…Unlike the program at issue in *Gratz v. Bollinger*…the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." Ibid. at 2343.

Critique of Gratz/ Grutter

At first blush, it is important to note that these cases likely will have limited, direct impact on public contracting. Because the cases involved a public university, the Court acknowledged the special place of institutions of higher learning in constitutional litigation. "The Law School's educational judgment that [a diverse student body] is essential to its educational mission is one to which we defer…Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." Ibid. at 2339. Thus, it is highly unlikely that any court would offer the same amount of deference to municipalities.

At another level, the rulings undermine the idea of fairness that the Justices hold so dear. Implicit in nearly all of the opinions – with the possible exception of Justice Thomas's ill-informed dissent in Grutter – is the notion that "race" continues to matter in America. Many observers acknowledged this reality, even if they quibbled with the Court's split decision. See, i.e., Paul Schmidt, "Affirmative Action Survives, and So Does the Debate," *The Chronicle of Higher Education*, July 4, 2003; Nat Hentoff, "What the Supreme Court Left Out: The Smoking Gun in Grutter v. Bollinger," *The Village Voice*, July 11, 2003; Joan Walsh, "Right Ruling, Wrong Reason," *Salon.com*, July 24, 2003; but, cf. Alton Maddox, Jr. "Is Racial Diversity in America the Cure or the Problem," *Amsterdam News*, July 3, 2003; Matthew Rothschild editorial, *The Progressive*, August 2003. However, the Court failed to observe how this continuing phenomenon manifested itself in the LSA's admissions plan.

For instance, the LSA plan provided Whites with a hidden advantage of nearly 60 points. Because applicants who were from low-income backgrounds received 20 points – and applicants who hailed from under-represented minority groups could not claim their "minority status" points along with the "poverty" points – these points went to White students, almost exclusively. Similarly, applicants who were the children of Michigan alums received 4 points. Given the pattern of past and current discrimination against students of color, the alumni base for the University of Michigan is overwhelmingly White, as was the proportion of applicants who could have claimed those points. The LSA awarded 10 points to those applicants who attended a top-notch high school and 8 points for applicants who took AP and honors courses. Again, these points were awarded primarily to White applicants through no effort of their own other than the fact that they lived in well-funded, suburban school districts which excluded students of color. In addition, the LSA awarded 16 points to applicants who lived in the part of the state known as the Upper Peninsula, a rural, isolated, overwhelmingly White area far removed from the state's urban centers. Although these 58 points appeared to comprise a race-neutral method of creating economic and geographic diversity, they clearly acted as racial preferences for White students from one of the most racially segregated state school systems in the nation. Thus, the 20 points awarded to Black, Native American, and Latino applicants pale in comparison to the points awarded for being White. See Tim Wise, "Whites Swim in Racial Preference," AlterNet.org, February 20, 2003.

Finally, in our view, the Court's mechanistic analysis of racial classifications over the last few decades has led to the assumption of a moral equivalency between racial classifications used to subordinate a group and those used to remedy the effects of such subordination. The exclusion of Blacks from various opportunities and resources had, and continues to have, a detrimental impact on an entire race of people. The underlying assertion of the claims of plaintiffs Gratz, Grutter, and Hamaker is that, had they been Black, they would have been admitted to the University of Michigan. Yet, had they been Black, everything about their lives would have differed so much from their reality as Whites that it is difficult to say if they would have tried to enter college or law school. Moreover, the Jim Crow and de facto racial segregation practiced against Blacks bears no resemblance to the effects of race-specific remedies on Whites. Contemporary race-conscious plans neither stigmatize Whites nor elevate Blacks as a group to a privileged status above Whites. The impact on Blacks from de jure educational segregation in

the 19th and early 20th centuries, and of de facto segregation which continues until the present day, creates an infirmity which, in our opinion, requires continuing remediation.

Lessons for Public Contracting

Despite the uniqueness of the cases, the litigation in both Gratz and Grutter provides significant lessons for governmental entities interested in remedying past and current discriminatory practices. Taking the cases together, they emphasize the need for municipalities to craft narrowly-tailored remedies to address any disparities in their awarding of public contracts. Accordingly, any race-conscious programs must be inherently flexible and based on sound quantitative and qualitative evidence of a compelling governmental interest. See Steven K. DiLiberto, "Setting Aside Set Asides: The New Standard for Affirmative Action Programs in the Construction Industry," 42 Vill. L. Rev. 2039 (1997)

It is quite likely that potential litigants who might claim harm as a result of a race-conscious program will scrutinize the contract awards process to determine if a municipality has employed a rigid, quota-like system or an individualized approach which considers many factors without making race a "decisive" factor. See, i.e., David J. Antczak, "Bras v. California Public Utilities Commission: Using 'Economic Realities' to Establish Standing and Challenge 'Goal'-Based Affirmative Action," 41 Vill. L. Rev. 1445 (1996). Furthermore, these hypothetical antagonists likely will assert that any type of evaluative regime which accounts for the race of a prime- or sub-contractor actually is an informal quota system. Particularly vulnerable, for example, may be M/WBE plans that add or subtract points on a bidder's application based on the race or gender of the bidder or its subcontractors. However, challenges to M/WBE programs could take many forms, including an attack on the statistical support buttressing such a program. See Christine C. Goodman, "Disregarding Intent: Using Statistical Evidence to Provide Greater Protection of the Laws," 66 Alb. L. Rev. 633 (2003); Docia Rudley and Donna Hubbard, "What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set-Asides Ten Years After *City of Richmond v. J. A. Croson*," 25 S. Ill. U. L. J. 39 (2000); see also Jeffrey M. Hanson, "Hanging By Yarns?: Deficiencies in Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting," 88 Cornell L. Rev. 1433 (2003). In short, it is highly probable that many constituencies might push federal courts to more clearly articulate the

contours of an MWBE program which provides – in the words of Justice O'Connor in Grutter – "a meaningful, individualized review of applicants."

A) RECENT CIRCUIT COURT DECISION

Northern Contracting, Inc. v. State of Illinois, et al., 473 F.3d 715 (7th Cir. 2007)

On February 7, 2007, the United States Court of Appeals for the Seventh Circuit published its opinion in Northern Contracting, Inc. v. State of Illinois, et al., 473 F.3d 715 (7th Cir. 2007). At issue was whether the Illinois Department of Transportation ("IDOT") violated the constitutional rights of a White male-owned firm through the administration of a business program designed to increase the participation of socially and economically disadvantaged individuals in Illinois highway construction subcontracting. The plaintiff, Northern Contracting, Inc. ("NCI"), appealed a trial court decision upholding the program. The Seventh Circuit agreed that NCI failed to prove a constitutional violation and affirmed the judgment of the district court.[97] Northern Contracting, Inc. is a company based in Sycamore, Illinois, a small town west of Chicago. NCI, a business with 11 employees and estimated annual revenues of $2.3 million, specializes in the building of guardrails, fences, and traffic barriers for highway construction projects throughout the state. As recently as FY 2006, NCI received a contract worth nearly $750,000 from IDOT.[98]

The owner of NCI was convinced that he was discriminated against in the award of highway construction contracts because he was a White male. Because IDOT'S disadvantaged business enterprise ("DBE") program is an outgrowth of federal public policy, NCI filed its lawsuit in July 2000 against the state of Illinois, IDOT, and the U.S. Department of Transportation, not to mention various agency officials. NCI's lawsuit received media attention as well as support from an influential state business group. At the January 2002 board meeting of the Illinois chapter of

[97] 473 F.3d at 717.

[98] For general information, see "Manta: Essential Business Information on Demand: Company Profiles and Information," www.manta.com and the Illinois Valley Construction Industry Labor/Management Program's Contractor Directory at www.ivlabgmt.org/Fence.html. See also the website maintained by the Illinois State Comptroller, www.wh1.ioc.state.il.us/QuickTake/Contracts/Construction.cfm?StartRow=224; for smaller contracts issued by local entities to NCI, see August 25, 2003 Minutes of the Meeting of the Board of Trustees for the Village of Roselle, Illinois, p. 3 and March 13, 2007 Tabulation of Bids, Ogle County, Illinois, at www.roselle.il.us/news and www.oglecounty.org, respectively.

the Associated General Contractors, a noted anti-Affirmative Action business group, a board member stated, in reference to NCI, that "they need the backing of the industry."[99]

During the trial phase of the case, IDOT provided the court with the details of its DBE program, a program required because IDOT receives federal funding. As previously noted in the sections regarding "Availability" and "Statistical Regression Analysis," the consultant for IDOT performed a sophisticated "custom census" that was reinforced by a regression analysis to determine the actual percentage of DBE's that were "ready, willing, and able" to participate on IDOT contracts. In arriving at its final goal for the DBE program, IDOT relied on additional sources of information, including but not limited to anecdotal evidence, statistical evidence pertaining to public contracting in Chicago, and IDOT's own data regarding prior use of DBE's. Indeed, the latter piece of evidence proved quite persuasive to the court.

In Fiscal Years 2002 and 2003, IDOT conducted its own "zero goal" experiment in which IDOT set aside its DBE goals on 5% of its contracts. The "zero goal" experiment itself provided irrefutable evidence of the underutilization of DBE's; of the total value of contracts let under the experiment, DBE's received only 1.5%. In an effort to validate the findings of the experiment, IDOT reviewed the race-neutral small business program implemented by the Illinois State Toll Authority ("Tollway"), a state entity that receives no federal funding. Although the Tollway sets a voluntary DBE goal of 15%, its average utilization rate for DBE's in 2002 and 2003 was a mere 1.6%. Despite the rigor of the analysis of its consultant, IDOT eschewed the higher DBE availability figure of 27.5% and set its goal at the more conservative figure of 22.77%. 473 F.3d at 418-419.

All of the parties filed cross-motions for summary judgment and the District Court granted only the motion by the federal defendants, thereby removing them from the litigation.[100] The state defendants introduced the aforementioned evidence, along with further testimony from various experts, to the court at trial. Although NCI introduced its own statistical and anecdotal evidence, the District Court ruled that IDOT's DBE program "was narrowly tailored to the compelling

[99] 473 F.3d at 717; see, e.g., "IDOT Program Upheld," *Chicago Tribune*, September 14, 2005. With regard to the support of the business community, see the January 7, 2002 minutes of the Meeting of the Board of Directors of the Associated General Contractors of Illinois, p. 3, paragraph 9 "Equal Opportunity Committee."

[100] 2004 U.S. Dist. LEXIS 3226 (N.D. IL. 2004).

interest identified by the federal government" and granted judgment for the state of Illinois and IDOT. 473 F.3d at 719-720.

The 7th Circuit panel stated that the "only question that we must answer in this appeal is whether NCI can prove that IDOT's DBE program does not pass constitutional muster." 473 F.3d at 720. The court acknowledged that the strict scrutiny test was the appropriate standard by which to measure the DBE program since it contained racial classifications. In a footnote, the court stated that it would not rule on whether a more lenient standard should be employed to evaluate the gender classifications in the DBE program, but that it felt compelled to evaluate the entire DBE program under strict scrutiny since IDOT had not argued for a different standard. 473 F.3d at 720, n.3.

Although NCI failed to raise the issue on appeal, the 7th Circuit panel first addressed the matter of whether IDOT's DBE program served a compelling interest. The court noted that the 8th and 9th Circuit courts had ruled that states may rely on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market.[101] The court opined that:

> NCI has not articulated any reason for us to break ranks with our sister circuits. Indeed…we considered the question of whether the federal government's interest in remedying discrimination in highway construction contracting provided sufficient justification for the state to engage in a federally mandated DBE program, and we concluded that it did…NCI has not challenged the constitutionality of the applicable federal statutes and regulations on appeal. And as the more recent decisions of the Eight and Ninth Circuits make clear, our compelling interest analysis in this context should not be altered by *Adarand*. Therefore the question of compelling interest must be decided in favor of IDOT. 473 F.3d at 721 (citing Western States Paving Co, Inc. v. Washington State Dep't. of Transp., 407 F.3d 983, 997 (9th Cir. 2005), Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 970 (8th Cir. 2004), and Milwaukee County Pavers Ass'n. v. Fielder, 922 F.2d 419, 423 (7th Cir. 1991)).

The court then quickly addressed the narrow tailoring issue. "We are convinced that IDOT has satisfied its burden of demonstrating that its program is narrowly tailored. Our holding in *Milwaukee County Pavers* that a state is insulated from this sort of constitutional attack, absent a

[101] 473 F.3d at 720-721.

showing that the state exceeded its federal authority, remains applicable." 473 F.3d at 721 (emphasis in original). Because the U.S. Supreme Court's ruling in Adarand occurred after the 7th Circuit had ruled in Milwaukee County Pavers, and because of NCI's misreading of a subsequent 7th Circuit case, the court felt compelled to expound on its decision. "In *Adarand*, the Supreme Court did not seize the opportunity to conclude that our decision in *Milwaukee County Pavers*…was incorrect. The Court only decided that federal programs involving racial classifications must also be subjected to strict scrutiny…Thus, the remainder of our inquiry is limited to the question of whether IDOT exceeded its grant of authority under federal law." 473 F.3d at 721-722 (citing Adarand, 515 U.S. at 235; emphasis in original).

NCI's claim that IDOT had exceeded its grant of authority rested on three arguments pertaining to the calculation of availability and the supposed failure of IDOT to adequately use race-neutral means to reach the DBE participation goals. The court rejected all of NCI's assertions.

> The gravamen of NCI's first noncompliance argument is that IDOT miscalculated the number of DBEs that were "ready, willing, and able" by utilizing the…custom census instead of a simple count of the number of registered and prequalified DBEs under Illinois law…[The custom survey] reflects an attempt by IDOT to arrive at more accurate numbers than would be possible through use of just the list. Indeed, the method used here…is the very methodology used by the Minnesota Department of Transportation in the unsuccessful challenge to its program in *Sherbrooke*…We agree with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net." 473 F.3d at 723 (citing Sherbrooke, 345 F.3d at 973).

The court was equally dismissive of NCI's other arguments, in large part, because of the flexibility that IDOT built into its DBE program and because of the results of IDOT's "zero goal" experiment.

> NCI accurately points out that, under [federal regulations], IDOT was required to implement its program without setting contract goals if, under IDOT's approved projection, it estimated that it was able to meet its goal strictly through race-neutral means. But IDOT's projection yielded no such conclusion…NCI has failed to demonstrate that IDOT has not maximized the portion of its goal that will be met through race-neutral means. This failure reflects NCI's broader inability to demonstrate that IDOT's DBE program is in violation of the Constitution. 473 F.3d at 723-724.

The court affirmed the district court's decision in favor of IDOT and news of the victory spread quickly across the nation in mainstream and specialty media.[102]

The Implications of the 7th Circuit's Decision

Though decisions in the 7th Circuit are not binding on parties to lawsuits in Tennessee or the 6th Circuit, they are instructive. Northern Contracting provides a great deal of guidance for those interested in M/WBE programs. In fact, the implications of the decision are wide-ranging.

At first blush, Northern Contracting acts to stem the growing momentum of federal court decisions that undermined race- and gender-specific programs. The 7th Circuit also upheld the pro-active efforts of a state agency that genuinely fought for diversity and inclusion with regard to its contracting. In particular, the court's ruling supported the importance of post-enactment evidence as a means of protecting an M/WBE program from a constitutional challenge. Finally, the facts of the case, over which the court of appeals lingered, clearly demonstrate the continuing difficulties facing M/WBEs.

Despite the fact that the 7th Circuit did not seek to depart from the prevailing consensus regarding the application of strict scrutiny to race-specific programs, its holding solidifies an important benchmark. Like the 10th Circuit Court in Concrete Works IV, the 7th Circuit Court in Northern Contracting rejected a very conservative approach to the problems of participation in public contracting for companies owned by women and members of racial minorities. Moreover, the 7th Circuit implied what the 10th Circuit stated directly: to wit, that well-conceived and executed disparity studies are effective tools for public entities to use to establish and/or defend M/WBE programs. The 7th Circuit applauded the sophistication of the "custom census" conducted by IDOT's consultant and the powerful synergy of expert testimony, statistical data, and anecdotal evidence mustered by IDOT at trial.

[102] See, e.g., February 5, 2007, "Seventh Circuit Court Re-Affirms NERA Study as Valid Tool in Illinois DOT's Disadvantaged Business Enterprise Program Case," *FindLaw Legal News and Commentary*, http//news.findlaw.com, February 5, 2007, WPVI-TV, Channel 6 (the ABC affiliate in Philadelphia), and February 5, 2007, KCTV, Channel 5 (the CBS affiliate in Kansas City, Missouri).

As mentioned previously in this document, the court found compelling the calculation of availability of M/WBEs and the statistical regression analysis used to provide conclusiveness to the relative availability rate determined by the IDOT consultant. Equally striking is the court's acknowledgment that racial and gender discrimination continues in the current marketplace. It is no accident that the court took judicial notice of the stark realities for disadvantaged businesses. In remarking about the work of IDOT's consultant, the court pointed out nearly a quarter of the businesses on a list of minority- and women-owned firms were instead owned by White men, while nearly 15% of supposedly non-disadvantaged businesses were in fact owned by minorities and women. Anecdotal evidence collected by Griffin & Strong, as well as other firms, suggests that a portion of M/WBEs refuse to identify as such because the possible benefits of self-identification are often outweighed by the negative stereotypes of peers or public officials. Thus, the 7th Circuit's opinion tells us that disparity studies and complex statistical analysis are necessary to overcome overly conservative estimates of M/WBE availability that fail to account for fear and fraud.

The court took further notice of these stark realities during its discussion of the feasibility of IDOT reaching its DBE participation goals without using race- and gender-specific tools. Near the end of its opinion, the court noted that IDOT was required under federal law to meet its DBE goal through race-neutral means if its projections predicted that such a result was possible. This served as a reference to IDOT's "zero goal" experiment in FY 2002 and 2003. At trial, the parties stipulated that during FY 2003, 15.19% of the total value of IDOT contracts were awarded to DBEs.[103] During that same fiscal year, IDOT found through its "zero goal" experiment that only 1.5% of the total value of its contracts went to DBEs when the agency used no race- or gender-specific tools for participation. White businesses proved again in overwhelming numbers that they preferred not to work with M/WBEs unless forced to do so. Accordingly, the court's decision provided eloquent testimony to the persistence of racial and gender discrimination and the ability of public entities to ameliorate the pernicious effects of these lingering societal ills.

[103] 473 F.3d at 719.

B) CONCRETE WORKS: THE CONTINUING SIGNIFICANCE OF DISPARITY STUDIES

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

In 1992, Concrete Works of Colorado, Inc. ("CWC") filed a lawsuit against the City of Denver which challenged the constitutionality of an affirmative action ordinance enacted by the City and County of Denver, Colorado ("Denver"). The ordinance, in pertinent part, set participation goals for W/MBE's on specific City construction and professional design projects. It is worth noting that although Denver amended the ordinance twice following the initiation of the lawsuit, the program remained unchanged for purposes of constitutional analysis. In response, Denver filed a motion for summary judgment, which the district court granted. Concrete Works of Colorado, Inc. v. City and County of Denver, 823 F. Supp. 821, 845 (D. Colo. 1993) ("*Concrete Works I*"). When CWC appealed the grant of summary judgment, the litigation began weaving its way through the federal judiciary.

CWC prevailed at the appellate level when the U. S. Court of Appeals for the Tenth Circuit determined that genuine, triable issues of fact did exist and reversed the district court's ruling. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513, 1530-31 (10th Cir. 1994) ("*Concrete Works II*"). On remand, the district court held a bench trial and entered a judgment in favor of CWC for its claims of injunctive and declaratory relief. The court reserved judgment on CWC's entitlement to monetary damages. Concrete Works of Colorado, Inc. v. City and County of Denver, 86 F. Supp.2d 1042, 1079 (D. Colo. 2000) ("*Concrete Works III*"). In turn, Denver appealed the verdict to the Tenth Circuit.

Interestingly, Denver received support from municipalities across the United States - including Chicago, Phoenix, Minneapolis, and San Francisco - and various advocacy groups like the Lawyers' Committee for Civil Rights Under Law and the Latin American Management Association, all of whom filed amicus curiae briefs. On appeal, Denver persuasively argued that its numerous disparity studies demonstrated that it had a compelling government interest to ameliorate the effects of past and present race- and gender-based discrimination. Furthermore, Denver demonstrated that - because of the evidence gleaned from its disparity studies - its ordinance was narrowly-tailored to serve that compelling interest. Consequently, the Tenth Circuit reversed the judgment of the trial court and remanded the case with directions to enter a judgment in favor of Denver. In its ruling, the Tenth Circuit not only affirmed the validity of race- and gender-specific programs, but delivered a stinging rebuke to some of the most prominent critics of disparity studies.

In 1990, Denver enacted an affirmative action program under the designation of Ordinance No. 513 (the "1990 Ordinance_). The 1990 Ordinance established the Mayor's Office of Contract Compliance (the "MOCC") and set annual goals for the utilization of W/MBE's: for City construction contracts, MBEs and WBEs were to receive 16% and 12% of total dollars spent, respectively; for professional design and construction services, the goal was 10% for each category. Importantly, the 1990 Ordinance provided flexibility for Denver's administrators. For example, the program empowered the MOCC to set individualized participation goals for discrete City projects. On occasion, this meant that - on some projects - goals could be set at zero. In addition, the 1990 Ordinance narrowly defined the scope of the program so that the goals did not apply to privately-financed projects on publicly-owned land or change orders to "covered contracts," among other things. Furthermore, the 1990 Ordinance contained a "good faith exemption" which allowed the MOCC to exempt prime contractors from the established goals if they made an unsuccessful, good faith effort at securing W/MBEs as subcontractors.

Four years after the litigation began, Denver modified its program, replacing Ordinance 513 with Ordinance No. 304 (the "1996 Ordinance"). The 1996 Ordinance, among many things, expanded the definition of covered contracts, mandated the use of W/MBEs on change orders, and expanded the sanctions against "improper behavior" by any firm - including W/MBEs - which sought to circumvent Denver's affirmative action commitments. By 1998, Denver's race-

and gender-conscious program underwent its final iteration with the passage of Ordinance No. 948 (the "1998 Ordinance"). The 1998 Ordinance lowered the annual goals for the utilization of W/MBEs to 10% for both construction and professional design/construction services projects. Additionally, the 1998 Ordinance prohibited W/MBEs, acting as bidders on prime contracts, from counting self-performed work toward the project goals.

When CWC initiated this action in January 1992, it alleged that it had lost three contracts with Denver because it had failed to comply with the participation goals - or meet the good-faith requirements - of the 1990 Ordinance. CWC sought both injunctive relief and monetary damages. As the litigation moved toward trial following Concrete Works II, Denver began to change its program in an attempt to insure that it would pass constitutional muster. That CWC prevailed at the trial level in *Concrete Works III* had more to do with the influence of CWC's experts on the trial court than with any language within the evolving ordinances.

The Tenth Circuit articulated the standard approach to judicial review and burdens of proof in litigation involving contract compliance programs with race-specific remedies: "[t]o withstand CWC's challenge, the race-based measures in the ordinances must serve a compelling governmental interest and must be narrowly tailored to further that interest." Concrete Works Construction, Inc. v. City and County of Denver, 321 F.3d 950, 957 (10th Cir. 2003). After noting that Denver averred that, indeed, it had a compelling interest in remedying racial discrimination in its jurisdiction, the court stated the manner in which Denver could demonstrate this compelling interest: Denver may rely on "empirical evidence that demonstrates 'a significant statistical disparity between the number of qualified minority contractors...and the number of such contractors actually engaged by the locality or the locality's prime contractors." Furthermore, Denver may rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area ("MSA")...Denver may supplement the statistical evidence with anecdotal evidence of public and private discrimination. 321 F.3d at 958 (quoting and citing both *Croson* and *Concrete Works II*).

In turn, upon Denver's satisfactory showing, CWC "must introduce 'credible, particularized evidence to rebut [Denver's] initial showing of the existence of a compelling interest'...This

court has repeatedly emphasized that the burden of proof at all times remains with CWC to demonstrate the unconstitutionality of the ordinances." 321 F.3d at 959 (quoting *Adarand VII*).

The fundamental problem during the bench trial in *Concrete Works III* was that the district court misconstrued the constitutional standard. Instead of holding Denver to the standard articulated in *Croson* and its progeny, the trial judge posed six questions for Denver with regard to its statistical and anecdotal evidence:

1) Is there pervasive race, ethnic and gender discrimination throughout all aspects of the construction and professional design industry in the six county Denver MSA?;
2) Does the discrimination equally affect all of the racial and ethnic groups designated for preference by Denver and all women?;
3) Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender?;
4) Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentages on each project make Denver guilty of prohibited discrimination?;
5) Is the compelled use of certified MBEs and WBEs in the prescribed percentages in particular projects likely to change the discriminatory policies and programs that taint the industry?;
6) Is the burden of compliance with Denver's preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination? *Concrete Works III*, 86 F. Supp.2d , 1042, 1066-67.

It seems certain that the district court had been influenced by the testimony of CWC experts George LaNoue and John Lunn. In particular, LaNoue - a political scientist at the University of Maryland - is a renowned opponent of race- and gender-specific programs and a critic of disparity studies. Based on these six questions, the district court employed the improper legal framework within which to evaluate the viability of Denver's evidence. "[P]ersuaded by CWC's erroneous and unsupported statement in its written closing argument," the trial court discredited

the several disparity and consulting studies which formed the foundation for the ordinances. 321 F.3d at 970.

The appellate court, in no uncertain terms, characterized the CWC-influenced legal framework as either irrelevant, illogical, or immaterial. 321 F.3d at 970-3. "The six questions posed by the district court as its aggregate litmus test contain misstatements or misapplications of the legal principles that govern equal protection cases like the one before the court. Not only did the district court analyze the ordinances and Denver's evidence supporting them through an incorrect legal framework, it also discounted Denver's studies as biased because they failed to address the six questions." 321 F.3d at 974. The court went further as it addressed the salience of Denver's disparity studies and weaknesses of CWC's rebuttal evidence.

The Tenth Circuit roundly criticized CWC and its experts for their mischaracterization of the rulings in cases like *Croson*, *Adarand*, and Shaw v. Hunt, 517 U.S. 899 (1996). "CWC's argument is based on language used in *Croson* but taken out of context by CWC and by memorandum orders issued by two federal district courts." 321 F.3d at 975 (citing Associated Util. Contractors of Md., Inc. v. Mayor and City Council, 83 F. Supp.2d 613 (D. Md. 2000) and *Webster v. Fulton County*). Moreover, the appellate court remarked upon the fact that CWC's experts had done no disparity studies of their own and had simply offered counter-arguments or tangentially-related hypotheticals to support their assertions. 321 F.3d at 976-978, 981-984. Summing up its impressions of CWC's rebuttal to Denver's disparity studies, the Court stated that "[g]eneral criticism of disparity studies...is of little persuasive value." 321 F.3d at 979 (quoting *Adarand VII*).

The Tenth Circuit described the varied, multi-faceted studies which Denver employed to support its affirmative action program. Denver relied upon a lending discrimination study, business formation studies, studies measuring marketplace discrimination, and stories from W/MBEs regarding their treatment by prime contractors, the racial and gender-based epithets used to humiliate W/MBEs and their employees, and the hostility or obstruction of some Denver employees. Denver also relied on historical events unrelated to the studies which it commissioned. Denver fielded testimony regarding a 1977 Department of Housing and Urban Development ("HUD") investigation into allegations of racial discrimination against minority

contractors. The HUD investigation spawned a separate investigation by the Congressional General Accounting Office, which also found evidence of significant racial bias. These episodes were buttressed by the fact that, in 1979, the U.S. Department of Transportation threatened to withdraw federal funding for contracting projects at Denver's Stapleton International Airport until Denver took strong steps to "facilitate minority participation on Stapleton projects." 321 F.3d at 960-970.

Although the court acknowledged a few minor criticisms of one of Denver's many disparity studies because it used incorrect availability figures, it generally praised the breadth and scope of Denver's statistical and anecdotal evidence. It found the quantitative analyses to be both valid and "extensive" and the qualitative material to be compelling, if not "disturbing." 321 F.3d at 981-987, 989-990. "[W]e conclude that Denver had a strong basis in evidence to conclude that action was necessary to remediate discrimination against [W/MBEs] *before* it adopted both the 1990 Ordinance and the 1998 Ordinance." 321 F.3d at 991 (emphasis in original). The court added that Denver's evidence survived the challenge of CWC's experts because "CWC [could not] meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence." Ibid. The court determined that the trial court erred when it did not give sufficient weight to Denver's disparity studies, reversed the ruling of the trial court and remanded the case so that judgment would be entered on behalf of Denver.

The ramifications of the Tenth Circuit's 2003 decision, what we might deem *Concrete Works IV*, are many and significant. First, the court validated the use of disparity studies as the best tool available for governmental entities to reach the legal threshold for establishing an affirmative action program. In essence, a disparity study is the best means for accumulating viable statistical and anecdotal evidence in order to support the compelling governmental interest in remedying past and present race- and gender-based discrimination. Second, the court opined that its peers in other parts of the federal judiciary misconstrued the legal framework established in *Croson*, thereby imposing an unnecessarily narrow approach to viewing the evidence generated by disparity studies. In effect, the district court in *Concrete Works III* - as well as fellow federal courts in other states - incorrectly shifted the constitutional burden to Denver by forcing it to prove the "innocence" of its program. In reality, the heaviest burden rests with the opponents of the governmental programs - and critics of disparity studies - to demonstrate with extreme

specificity the unconstitutionality of the remedial plan. Given both the stature of the Tenth Circuit and the wide array of legal and professional advocacy groups which participated in the final stage of the litigation, it is likely that *Concrete Works IV* will influence juridical opinion throughout the nation.

Third, and finally, the court's dim view of CWC's expert testimony also will ripple into other jurisdictions. The appellate court not only noted the manner in which CWC's experts insinuated their misapprehensions into the analysis of the trial court in *Concrete Works III*, the court implied that much of the analysis of observers like LaNoue was too superficial to be dispositive.

> [CWC's] legal arguments urging us to disregard Denver's [disparity studies] lack merit. Further, its criticisms of the methodologies used in those studies, albeit legitimate in some very limited circumstances, merely nip at the edges of Denver's evidence and are insufficient to undermine the reliability of the studies. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, it did not conduct its own marketplace disparity study controlling for the disputed variables and has presented no other evidence from which this court could conclude that such variables explain the disparities. 321 F.3d at 991.

In sum, the Tenth Circuit has warned that some of the most widely-used criticisms - and critics - of disparity studies must be regarded with healthy skepticism because they do not match the detail and richness of a competent study prepared by an experienced firm like Griffin & Strong. Ultimately, the Tenth Circuit validated the indispensable role of disparity studies in supporting any remedial program.

D. Conclusion

Despite the nearly eighteen years of litigation following the Croson decision, the law in the area of race-conscious remedies used to ameliorate inequities concerning M/WBE utilization in the area of public contracting, is far from settled. Clearly, the law requires that such programs be reviewed periodically. What remains unclear is the applicable standard used to determine whether a race- and gender-conscious program has achieved its intended goal of eliminating identified discrimination, thereby negating the need for the continued use of race- and gender-conscious remedies. In this study, the Griffin & Strong P.C. team analyzed the statistical data as

extensively as possible given the limitations of the data maintained by the MNAA. The data were analyzed using the more conservative interpretations of availability which have been proffered by the most recent Court opinions. The quantitative data is buttressed with detailed and varied anecdotal evidence.

IV. SYNOPSIS OF 49 CFR PART 26

The Code of Federal Regulations Title 49 Part 26 is the instrument developed by the United States Department of Transportation (DOT) to provide guidelines for the implementation and monitoring of its Disadvantaged Business Enterprise (DBE) Program. The DBE program is administered by the Federal Aviation Administration (FAA), The Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA). It applies only to modalities for the transportation of people. Carriers of goods and merchandise only are not governed by the regulation. It is intended to maximize opportunities for minorities and women to successfully compete for federally assisted development and expansion projects, as well as for projects necessary to maintain air, road, and rail capacity for the efficient and safe transportation of people.

A. Section 26:1

The objectives of the regulation are stated as follows:

- Assure non-discrimination in the award and administration of DOT assisted contracts in the Department's highway, rail and airport financial assistance programs;
- To provide a level playing field on which DBE's can compete fairly for DOT assisted contracts;
- Ensure that the various DBE programs are narrowly tailored in compliance with applicable law;
- To ensure that only firms that meet the eligibility requirements are permitted to participate as DBEs;
- To remove barriers that prevent DBEs from participating in DOT assisted contracts;
- To assist in the development of firms that can compete successfully outside of the DBE program;

- To provide flexibility for recipients receiving financial assistance to establish and provide opportunities for DBE participation.

The Federal Aviation Administration has oversight for program administration of primary service airports, the Federal Highway Administration has oversight of the various state Departments of Transportation and their road building contracts and the Federal Transit Authority oversees the various transit authorities providing mass transportation for consumers, whether through local and/or regional service, or the larger interstate rail systems.

B. Section 26:3

The regulation is specifically drafted to provide guidelines and a mechanism for implementation and monitoring of DBE programs which only apply to federally assisted contracts. It should not be used in any way to set policy and procedures for the non-federally assisted contracting opportunities of the recipient. 26:3 (3) (d)

Although the regulation is developed to assist minorities and women in obtaining contracts in areas where they have traditionally faced insurmountable barriers while attempting to gain access to federal contracting opportunities, any discriminatory practices that would serve to provide an unfair advantage to minority and women contractors is prohibited. The DBE program is not a set-aside program, where specific portions or percentages of work can only be contracted to specific ethnic or gender groups. It is instead a method of providing opportunities for groups that have historically been unable to enter the federal contracting arena, to gain access. This includes access not only to contracts, but to insurance and bonding, where feasible.

49 CFR Part 26 should be used to set minimum standards for purchasing and procurement when federal funds are utilized. Minimum standards would serve as a baseline for securing DBE participation for the purchase of goods and services that may not be directly related to construction. Federal funding is available not only for the design and construction of airfield projects. The following may also be eligible for federal financial assistance: the purchase of equipment necessary to maintain or enhance airport capacity, security, or rescue and fire fighting operations.

The regulation has very specific guidelines developed to assist the agencies in maintaining compliance. This synopsis will discuss the requested sections and provide accompanying recommendations.

C. Section 26:11 Record Keeping

49 CFR part 26:11 discusses the requirement to maintain specific records (bidders list) for all bidders on federally assisted contracts. The bidders list must contain the firm name, complete mailing address, status of the firm as a DBE or non-DBE, length of time firm has been in business, and the firms' annual gross receipts. The purpose of the bidders list is to provide as much data as possible about the contractors, both DBE and non-DBE, who have expressed an interest in bidding on federally assisted contracts. The gross annual receipts provide a mechanism of comparing firms to determine who (large corporations or smaller businesses) is bidding competitively for the same work. Compiling the bidders list is not difficult; however, firms can be hesitant to disclose their gross receipts, particularly in an open bid environment. This data can be collected by having the firm submit the information prior to the bid opening or by providing it in a separate sealed envelope with the bid. The financial information is not opened during the bid process and is not available for public review. Gathering this information during each bid process will result in a comprehensive bidders list. The list also provides an opportunity for purchasing and the DBE staff members to assess how and when DBE firms are bidding. This also allows for the assessment of DBEs for over-concentration or underutilization in specific areas, as well as the ability to identify when there is a sudden increase or decrease in DBE participation.

D. Section 26:13

Section 13 refers to grant assurances. Two assurances are mandatory – one is signed upon receipt of a financial assistance grant from the operating agency and the other is included in all federally assisted contracts for prime and all subcontracts without regard to the tier of subcontracting. The assurance signed upon receipt of financial assistance is as follows:

> The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR part 26. The

> recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

The assurance that is incorporated into contracts between the recipient and successful bidders reads as follows:

> The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

Enforcement of the first grant assurance is the responsibility of the Department of Transportation. The recipient assures that it will not discriminate in the administration of the DBE program and that the recipient will have, in place, an approved DBE program, which will be fully implemented throughout the administration of contracts funded by the Department of Transportation. The second agreement places enforcement responsibility with the recipient. It is the recipient who must monitor contracts to ensure nondiscrimination in the award of subcontracts and have prepared enforcement measures to address noncompliance.

E. Section 25:23 Required Policy Statement

The policy statement referred to in 49 CFR part 26:23 is incorporated into the approved DBE program. Entities with an approved program in place have a policy statement signed by the highest ranking officer in the agency. This policy statement should be disseminated to staff involved in purchasing and contracting and made available to the contracting and vendor community. The policy statement is normally the first page of the approved DBE program.

F. Section 26:25 Requirement for a DBE Liaison Officer

This staff position is responsible for implementing all aspects of the DBE program. The regulation requires that "the DBELO have direct, independent access to the CEO and that they must have adequate staff to administer the program appropriately." The DBELO should not be subject to political influences or to pressure from departments issuing contracts to approve or ignore bids that are not fully compliant with the approved DBE program, that do not meet the established goal, or provide adequate good faith efforts in the event that the prime contractor has not met the stated contract goal.

G. Section 26:27 Requirement to use Minority-owned Financial Institutions Where Available

Section 26:27 of the regulation instructs recipients to review financial establishments (banks, credit unions, etc.) in the market area to determine if any are minority-owned. Should there be minority-owned financial establishments, the recipient should make all reasonable efforts to secure financial services from them, including referring contractors and subcontractors to these establishments for financial services.

H. Section 25:31 Requirement for a Directory of Certified DBE Firms

The DBE directory provides a mechanism for the recipient and prime contractors to identify firms that have expressed an interest and desire to compete for contracting opportunities by fulfilling the requirements of the certification process. This list should be generated and available to the general public upon request. Electronic distribution via email, and access via company websites are excellent means disseminating the list to interested parties. Recipients relying on their state Uniform Certification Program for certified firms need not generate a separate DBE directory.

I. Section 26:33 Over Concentration of DBEs

Over concentration of DBE contractors addresses situations where DBEs are so heavily concentrated in a specific field that the ability of non-minority contractors to secure work in the field is compromised. An example of this situation would be when the number of qualified DBE trucking companies is larger than the pool of non-minority contractors, making it difficult for non-minority contractors to secure contracts or to find non-DBE contractors that are willing to work as subcontractors. When this situation occurs, the recipient is responsible for developing remedies to remove the burden placed on non-minority contractors. The regulation provides options for program development to remedy this situation. Recipients are required to submit information detailing the over concentration to the DOT regional administrative office and must receive a concurrence regarding the over concentration prior to taking any corrective action. The regional administrative office will review the finding of over concentration and must concur. Additionally, the regional administrative office must approve any planned efforts to remedy the over concentration. Several means of remedy are available to the recipient, including mentor-protégé programs, programs to assist contractors in learning other trades, and varying contract goals; however, all measures must receive prior approval.

J. Section 26:35 Mentor-protégé and Business Development Programs

These programs are developed after recipients have either been instructed to develop them or have requested permission to develop programs to address over concentration in the DBE program. These programs are designed to assist DBEs in developing the capacity to successfully compete outside of the DBE program. Mentor-protégé programs involve non-DBE and DBE firms. DBE and non-DBE forms enter arrangements such that a non-DBE may use the same DBE as its primary subcontractor. The DBE benefits from the insurance and bonding of the non-DBE mentor. The mentor assists the protégé in developing sound business practices, obtaining insurance, bonding, and financing if necessary, and treats the protégé as an affiliate of the larger business. The recipient does not consider the mentor-protégé relationship an affiliation for the purposes of this program, and the DBE protégé continues to participate in the DBE program. Recipients may place guidelines on business development and mentor-protégé programs. Such

guidelines may include time limits for participation in the program. All programs of this type must receive prior approval from the regional administrative offices.

K. Section 26:37 Monitoring and Enforcement

This section provides guidance on how recipients monitor DBE programs in order to verify that contracts awarded to DBEs are actually performed by DBEs. Recipients are responsible for developing, implementing, and maintaining a program to monitor and enforce contract compliance. Enforcement should include means to remedy situations where, for example; DBEs are listed on bid documents, but are either not used on the project(s), perform work other than what was identified in the bid documents, are not paid in a prompt manner, etc. Recipients should be prepared to use all legal remedies available as enforcement tools, without regard to potential project delays, or other inconveniences resulting from enforcing contract terms.

L. Section 26:61 Burden of Proof

The regulation provides guidance regarding ethnic groups, women, and the finding of social and economic disadvantage. Firms seeking certification have the responsibility of providing the burden of proof necessary to meet tests for eligibility. Recipients must presume that applicants meeting the basic criteria for gender and/or ethnicity meet the test for social disadvantage; therefore, those groups are not required to present proof of heritage other than in extenuating circumstances. All applicants are required to meet the test of economic disadvantage. The regulation does provide a mechanism for certification of firms owned by individuals who are not presumed to be socially or economically disadvantaged. These applicant firms must prove that there are, or have been, circumstances present in the lives of the owner(s) which qualify the owner(s) as socially and economically disadvantaged. The eligibility test must always determine both social and economic disadvantage.

M. Section 26:81 Uniform Certification Program (UCP)

All states were required to have a UCP in place by March 2002; however, several states did not meet the deadline. The state of Tennessee does have in place a UCP. The UCP acts as a "one-stop shop" for DBE certifications. The Tennessee Department of Transportation (TDOT) is the

lead agency responsible for determining eligibility of all firms applying for DBE certification in the state, including those firms based in other states which are applying for certification in Tennessee. The UCP requires that all DOT recipients sign an agreement to participate in the UCP, which includes abiding by certification decisions issued by the UCP. The guidelines in sections 26:81-91 specifically apply to certification procedures which are the responsibility of the TDOT Uniform Certification Program.

N. Section 26:101 Compliance Procedures for Grant Assurances

The compliance procedures referenced in 26:101 refer to compliance with grant assurances. Section 105 specifically discusses recipients of FAA financial assistance. 49 USC 47106(d) discusses grant assurances, 47111(d) details options for sanctions which may be issued to recipients who are not in compliance with the approved DBE program, and 47112 discusses FAA investigatory processes utilized when compliance complaints are received regarding an FAA recipient.

O. Summary

49 CFR Part 26 is designed as a guide to the development, implementation, and monitoring of the Disadvantaged Business Enterprise (DBE) Program. The DBE program serves as a means to provide maximum opportunities to business entities that have historically been denied entrance into the arena of federal contracting. It is intended only for those projects receiving federal financial assistance. Its application in similar, locally funded programs is not authorized and could lead to corrective action from the FAA. Each section provides specific instruction on the implementation, monitoring and/or enforcement, of the various aspects involved in administering a fully functioning program. The program is a method of assisting groups that have been historically underutilized in federal contracting. However, it is not a set-aside program designed to provide non-competitive opportunities to those groups.

49 CFR Part 26 was released as a revision to the original Part 23 in October 2002, in response to mandates for the narrow tailoring of minority and disadvantaged business programs resulting from the Adarand and Croson supreme court decisions.

V. ANECDOTAL EVIDENCE INTERVIEWS

The objective of these interviews is to provide supplemental information which may be relevant to identifying and addressing systemic barriers to the participation of minority- and women-owned businesses in MNAA purchasing and contracting, which may justify recommending race- and gender-conscious remedies. The legal significance of anecdotal evidence and the applicability of such evidence to the recommendations resulting from this disparity study are discussed more fully in the Legal Analysis section of this study.

In support of the research for this section, 21 confidential interviews were conducted with business owners and operators, as well as other members of the business community and minority and women business advocates. Most participants were chosen through a process of random selection from the database compiled by Griffin & Strong, P.C. for the quantitative analysis; others were chosen because of recommendations from MNAA officials and employees, and follow-ups or referrals by other business owners and advocates after the interview process began. Of the 21 persons interviewed, there were 13 African American males, 2 African American females, 1 Hispanic female, and 5 Caucasian females.

Interviews typically addressed each company's history, the background and experience of its principals, the relative proportions of public sector versus private sector business, the geographic market that the firm attempts to serve, the amount of work resulting from projects with minority- or woman-owned business participation requirements, specific experiences that involved MNAA, and experiences in the Nashville marketplace.

Experiences related by persons interviewed for this Disparity Study have been grouped into broad categories based on the type or nature of the experience or discriminatory act. References to individual interviewees are noted by alphanumeric designations beginning with AI-1 through AI-21 in order to preserve the confidentiality of the interviews. Some of the companies whose owners were interviewed are actively engaged on contracts or subcontracts with MNAA, or are currently pursuing opportunities, and they expressed concern that their participation in these interviews might place them at risk of retaliation by MNAA officials. Despite the perceived risks, these individuals, nevertheless, proceeded to tell their anecdotes, stating variously their

hopes that a higher purpose would be served if they spoke than if they remained silent. The following are the categories into which anecdotes have been grouped:

- Exclusion from the "Good Old Boy" Network in Subcontracting or Other Contracting;
- Denial of Opportunities to Bid *or* Denial of Awards;
- Use of "Pass-Throughs" or "Fronts";
- Discrimination on the Part of Customers or End Users;
- Stereotypical Attitudes on the Part of Customers or End Users;
- Double Standards in Performance;
- Substitution after Award;
- Bonding or Insurance Barriers;
- Non-Payment or Slow Payment;
- Other Barriers and Concerns.

Each alleged act of discrimination, barrier, or concern is discussed separately, by section, with each section beginning with anecdotes that relate entirely or primarily to MNAA. Specific acts or occurrences, which may not involve the airport directly, but may involve other local public entities or commercial activities, are discussed last in each section. Part of the rationale for inclusion of local public entity and commercial marketplace anecdotes is that, in some cases, MNAA projects could have been involved, but the speakers could not definitely recall. In addition, many of the discriminatory or inappropriate activities were alleged against players in the market of vendors and contractors on which MNAA relies to carry out its own good faith efforts at diversity.

A. The Good Old Boy Network

The practice, referred to by many as the "good old boy" system of doing business, typically involves the tendency on the part of contractors and purchasing agents to solicit bids from, and conduct business with, companies or individuals with whom they have previously done business or for whom the user department has expressed a preference. Such emphasis on prior relationships is often at odds with the goal of fostering fair and open competition with equal

access to opportunities for other potential bidders. The weight of influence of prior business dealings on purchasing agents and user departments often results in newer vendors, which often include minority- or woman-owned companies, being forced to face a standard which, initially at least, they simply cannot meet.

AI-3

AI-3 said she sometimes gets the runaround from companies that do not want to do business with her company, usually because they want to do business with someone else.

AI-6

AI-6 said that MNAA has a "good old boy" system, wherein, most of the contracts go to the same companies. On one bid that was due around Thanksgiving, the bidders requested more time, but the request was turned down and the contract was awarded to the same company that MNAA always uses. AI-6 said that she believes MNAA fears that if they give opportunities to new companies, they (MNAA) will have to do more work.

AI-9

AI-9 said that he has found that people do business with people that they know. In this regard, he counsels minority businesses to network and develop relationships, not only in the minority business community, but also in banking and government and with prospective customers. AI-9 went on to note that African Americans can do anything if they go about it the right way, although some people might not do business with an African American anyway (and here he named a non-minority contractor for the airport).

AI-11

AI-11 said his firm has tried to get in on airport work and, in one instance, partnered with a much more experienced firm to get into one particular area of construction only to find that "a couple of firms had a lock on it". According to AI-11, it is hard to get jobs because people tend to use the same companies. AI-11 said he believes that subcontractors tell "their" bidders where to come in with their numbers and they tell them where they can make up the difference on the project and how to pursue change orders. By the end of a project, his competitors have been paid more than his original estimate, which was rejected for being too high.

AI-12

According to AI-12, the airport made a mistake in disbanding SMWBE requirements because there are still a lot of "good old boys" playing golf and the like. Having a diversity manager helps "level the playing field" and provides "checks and balances".

AI-14

AI-14 worked on a contract for MNAA and observed that the MNAA employee in charge of overseeing his work came from the "old boy system" and did not deal fairly with him. According to AI-14, this particular employee, who wielded a lot of influence, tried to get him replaced on the job by telling other airport personnel that he was not working up to standard, but the employee did not bring his dissatisfaction directly to AI-14's attention at times when it would have been appropriate or expected. According to AI-14, some African American employees at the airport told him that they did not expect AI-14 to last as long as he did, working in the area in which he worked and with certain people.

B. Denial of Opportunities to Bid *or* Denial of Awards

The denial of opportunities to bid on contracts can severely restrict the ability of MWBEs to function in both the public and private marketplaces and serves to jeopardize their viability.

AI-1

AI-1 expressed extreme frustration with the apparent lack of movement toward finalizing his concession agreement. According to AI-1, this is a "huge project" for his company and he has already invested a lot of time, money and other resources in it, but is not seeing progress toward closing his deal. AI-1 said he could use the assistance of the Minority Affairs Office, but he has been frustrated by the employee turnover in that office. AI-1 said he started working on his certification somewhere around 2000 and he has dealt with about four different minority affairs representatives. At the time of the interview, AI-1 was not aware that anyone was in the job. AI-1 said he was concerned about the fact that he worked with the concessionaire to get its deal with MNAA, but was told, "What is laid out in the presentation gets tweaked later", so he has been left not knowing what type of agreement he will have and what steps he can take to prepare to meet his obligations under the contract.

AI-4

AI-4 derived at least 20% of her income from airport projects last year. She mentioned two contractors that she has dealt with whose different approaches to bidding make a difference in whether she can successfully bid with them. Contractor A is excellent to do business with, and its representatives routinely volunteer all of the information that would be beneficial in putting together a bid. Contractor B happened to call the day of the interview and wanted pricing provided by the next day. AI-4 said that Contractor B does not want to provide the "specifics" and she has to pull information out of them.

AI-8

AI-8 said he is supposed to be working with a contractor at the airport on construction-related work, but the contractor has not been using his company much. AI-8 said he does not know much about what is going on at the airport and has to figure out its system in order to find out why he is not getting much work.

AI-14

AI-14 said she has done quite a bit of work as an airport subcontractor; however, there were a couple of contractors who attempted to deny her a fair opportunity to compete. In one instance, an out-of-town contractor was awarded a job where its MWBE participation documents were falsified. After the project was awarded, using the falsified documents, the contractor contacted AI-14 and asked her to bid on the job. AI-14 believes MNAA officials found out about the falsified documents and terminated the contract. In the other situation, the contractor approached her and asked her to "just push paperwork" and not work on the project at all.

AI-10

AI-10, a service provider, said that he first approached airport personnel on a "cold call" several years ago and the individual he approached was quite receptive, but the cost to A-10 of performing the work would have been more than he could earn from it. AI-10 then started more aggressively pursuing work, but was eventually told by a highly placed MNAA official that there was "no way" he would get any business.

AI-11

AI-11 said his company pursued subcontracting opportunities on the major airport renovation, but once the general contractor got the job, AI-11 never heard back from them. AI-11 also proposed partnering with other subcontractors on the job and made an offer to the general contractor, but never heard anything back. AI-11 said it became apparent that the general contractor did not intend to do anything since, with the program suspended, it was not required to have participation.

AI-13

AI-13 said he has recently performed two small contracts for the airport after years of working with the Minority Affairs office. He also said that he bid on the airport renovation work and two contractors called him and told him he was too low for the job. He attempted to contact the contractor who won the job and talk to the contractor about his "numbers", but he could not get his calls returned and does not know why he was not selected. AI-13 said it would help if he got his calls returned because he needs more feedback so he will know how to set future prices. As an example, the wage rate prices jobs beyond reach, increasing his cost by 30%, and AI-13 said he does not believe that the people on the airport project are actually paying that rate.

The following anecdotes refer to incidents which either did not specifically involve MNAA or the speakers could not be certain that MNAA was involved, but are related to other local public entities in the Nashville marketplace. These incidents are consistent with the type of discrimination discussed in this section and in some instances involve the behavior of contractors on which MNAA relies to carry out its good faith efforts at diversity.

AI-7

AI-7 said her company stopped bidding public school jobs because of a bad experience in which her firm submitted the lowest bid and was denied award of the contract after the next lowest bidder protested. The protester said AI-7's company's bid should have indicated "not applicable" to the minority and women business participation section, since her *woman-owned* firm was going to perform 100% of the job. AI-7 said her company bid previous jobs the same way and the bids were accepted.

AI-17

AI-17 discussed a Tennessee Department of Transportation (TDOT) project at a nearby airport. AI-17 attended the pre-bid conference for the project and made its availability known to the other companies bidding, including the company that ultimately won the contract. The project had a DBE goal of eight percent, so AI-17 sent an estimate via certified mail, in advance of bid opening, to the same company, also reminding them that his company was DBE certified. As is its practice, AI-17's company also submitted a hard bid for the job as prime and came in as third lowest bidder. After the contract had been awarded and was near completion, AI-17 was contacted for work on the project to help the contractor meet a two percent goal. When AI-17 contacted TDOT about the matter, he was informed that the goal for the project had been reduced from eight percent to two percent because the contractor who won the job said that he could not locate anyone to do more than two percent. When AI-17 explained about his efforts to get on the project by both hard bidding and providing subcontract estimates, he was told that there was nothing that could be done about it since the contract had already been awarded.

AI-17 also said that his company has had several situations where its name has been used, but the company did not receive any work. At one point, AI-17 went out and acquired expensive equipment on the basis of a contractor's promise to put him on its contracts.

At another nearby airport, the compliance officer caught the fact that AI-17's company was not on a job that was already 80% complete, which had AI-17's company listed on the contract. The prime contractor had already completed the scope of work that AI-17 bid on, but AI-17 was unaware that the contractor had moved ahead and used his company's information in its contract.

AI-20

AI-20 said she bid as both a prime and a subcontractor to two contractors on a recent DOT project. One of the other contractors won, but AI-20 did not know how much she would get because the amounts were not required to be put in the bids. The winning contractor sent an email telling AI-20 of its intent to perform the work itself and allow her to sign off on it. AI-20 refused this arrangement and was eventually given a portion of commercially useful work to perform.

AI-20 said she had another situation on a local government job in which the prime with which she was working was asked to price a change order, which the prime told AI-20 that she would perform and asked her to prepare the proposal. AI-20 prepared the proposal, which the prime marked up to more than double her price and then reduced AI-20's portion of the change order work to about two percent of the total amount of the proposal, essentially kicking her out of the deal. AI-20 complained and the customer cancelled the change and took the work back inside. AI-20 said she was outraged that the prime would try to use her in that way and she would not have complained if they had not promised her the work in the first place.

C. Use of "Pass-Throughs" or "Fronts"

The use of "fronts", also referred to as "storefronts" or "pass-throughs", among other names, refers to awards of contracts to companies that are set up to give the appearance of at least 51% ownership by minorities or women, but may be mostly controlled or financed by white males. The terms also encompass bona fide MWBE firms that are awarded contracts for which they will be paid, but will not perform commercially useful functions commensurate with the amounts that they are being paid or will not perform the work at all.

AI-15

AI-15, who has had several subcontracts on MNAA work, said she was approached by a contractor and asked if she could "just push paperwork" and allow her name to be used on the project without actually performing.

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AI-7

AI-7, a trade contractor, said she has been approached "pretty regularly" to bid jobs where minority- and women-owned businesses were required, including a relatively recent stadium job. Two contractors approached her about switching places, wherein she would be put forward as the prime or higher tier contractor, and they would be subcontractors. AI-7 said she refused to participate in the schemes.

AI-7 also said she was approached by a contractor in another trade who wanted her to bid as the prime on State DOT work in his trade, and subcontract the work back to him.

D. Discrimination or Stereotypical Attitudes on the Part of Customers or End Users

AI-6

AI-6 said that one of the previous MNAA compliance officers tried to withhold her initial certification because she did not look like she was "disadvantaged" in the context meant by the DBE program, essentially because she looked prosperous. AI-6 said she finally convinced him that in the context of her industry, she was disadvantaged and obtained her certification.

AI-6 said contractors resent having to use MBEs and DBEs because they are not sophisticated and available for labor-intensive work. AI-6 also said she believes that, because of mandates and goals, when smaller companies receive contracts, they still receive no respect.

AI-14

AI-14 performs work for MNAA along with a non-SMWBE contractor, with whom he feels that he works well. The non-SMWBE contractor received numerous complaints about an area of its work that AI-14 specializes in, but did not do for MNAA because MNAA would not give him the opportunity. AI-14 believes that, with his expertise, if he were white and doing the same work that he does for MNAA now, MNAA would have allowed him a chance to see if he could perform the job more effectively.

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AI-3

AI-3 said that, as a woman, she sometimes encounters discrimination from others in the construction industry, although the situation is better now than it was when she first started over two decades ago. Nevertheless, she still encounters people who assume that she is a front, or that she is not qualified until she dispels the notions by demonstrating her expertise. AI-3 said that when she first started going out on jobs, men would look at her and ask, "What are you doing here?"

AI-5

AI-5 said he worked as a subcontractor on a Board of Education project on which he was making a profit because he owned appropriate equipment to self-perform the job. According to AI-5, the contractor on the job found something he had not done because he did not know that he was supposed to, and terminated his contract without allowing him an opportunity to correct the problem, which he could have easily done. AI-5 said he was cancelled out of the last portion of the job for no reason and the contractor tried to ensure that he was left out of all of the customer communications in order to handicap him. AI-5 also said that the contractor placed requirements on him to keep more records than his contract required and withheld his payments until he provided the additional paperwork. AI-5 said the incident left a "bitter taste" because he is very thorough and tries to be attentive to detail. He said it really bothered him that the contractor found a way to "steal the contract back". AI-5 said he reached an agreement with the contractor to pay him an amount far less than he was owed and the contractor required him to sign a document waiving his right to sue.

AI-7

AI-7 said that being a woman in business has been hard, although it is better now. She has had to prove that she is not a figurehead and knows her trade. AI-7 said she has gone out on jobs where contractors or owners refused to discuss her trade with her and one even told her that she needed to send her husband. This type of thing still occurs, usually with older men. She does not believe that she has ever won a job or been denied one specifically because her company is woman-owned; she simply always has to be low bidder.

AI-8

AI-8 said that his company has contracts with Metro and NES. He said his company does well to break even on its Metro contract, but certain Metro employees act as if they are "doing me a favor" and "stay on my back all the time." By contrast, however, AI-8 says the people at NES work with him more as a consultant because they know he knows his business.

AI-8 also said that, for a time, he was harassed daily at Metro and asked to do things that were clearly not a part of his job. One person in particular made her wishes known to staff, that she

wanted AI-8's company out and he believes she has caused his company to get fewer Metro contracts.

AI-15

AI-15 said she has encountered people who do not want to work with women. One man in his late sixties would call her company and tell her that he only wanted to talk to the project manager, a male employee of hers. According to AI-15, even when the man saw her signature on a document, he wanted to discuss the document with the project manager, not with her. AI-15 said she eventually worked things out with the man in question, but in other situations, with other people, she can sometimes "just feel the resistance", though it is not as overt.

AI-18

AI-18 said that sometimes being African American is a barrier because people sometimes assume that he does not understand the more complicated specifications. According to AI-18, he was bidding a concrete job once and the person kept talking to him very slowly; when AI-18 asked why, the man told him that he wanted to make sure AI-18 understood. According to AI-18, it was not a complicated matter.

E. Double Standards in Performance

AI-14

AI-14 performed work on a contract for MNAA where he worked as part of a team with a non-SMWBE contractor. AI-14 said the situation was "awful" when his company began its contract and he made a substantial push to bring about improvements. AI-14 said he wondered, as he went through the initial stages of work, how the situation was allowed to get as bad as it was without anyone's "feet being held to the fire". Yet, from the moment his company began working, MNAA personnel disparaged his company's work and "bombarded" him with small issues. Even in situations when his fellow contractor and other airport personnel praised his work, the persons overseeing his contract would only make comments like his company would "get there", implying that the work was not good enough, but not specifically saying what was lacking. By contrast, complaints for the non-SMWBE were played down and compliments were more generous in comparable situations.

According to AI-14, MNAA personnel conducted regularly scheduled checks of his and the non-SMWBE contractor's work so that they could discuss problem areas and agree on changes or improvement that needed to be made. AI-14 said that he always addressed problems immediately and shared any feedback with his workers so that they could be mindful of the customer's concerns. The non-SMWBE, which was also involved in the regularly scheduled checks, almost invariably had the same issue pointed out to it from one check to the next, as well as on a daily basis, so that the issue was well documented as a concern to MNAA. The weekly reviews were followed up with emails and checklists specifically developed for documenting any concerns or problems. AI-14 said that there were rarely any major problems noted for his company and certainly nothing that was repeated as frequently as the particular problem that came up regularly with the non-SMWBE contractor. AI-14 also noted that MNAA personnel came by every morning to observe his company's work, which provided additional opportunities for them to give him feedback on any problems they encountered.

In addition to weekly reports, quarterly ratings were also made, and it was based on these that the non-SMWBE firm would be entitled to its bonuses (in which AI-14 did not participate). The non-SMWBE always appeared to receive quarterly ratings sufficiently high to qualify for its bonuses. AI-14 almost always received extremely low quarterly ratings, often receiving zeroes in some categories. Since the weekly reports and the daily observations did not reflect any issues that would justify a zero rating, AI-14 eventually asked why he received a zero for the quarter when the weekly reviews did not support a zero rating for the particular category. AI-14 says he was told by one of the MNAA managers that the zero was because of one particular problem that this person observed one morning. According to AI-14, this incident and the series of related acts that occurred during performance of his contract highlight the subjective nature of the ratings and the amount of control a single individual can have over the livelihoods of SMWBE contractors. In AI-14's opinion, the weekly emails and checklists would have to reflect that he did everything wrong in order to support ratings as low as the ones he sometimes received, but they did not. To emphasize his point, AI-14 brought paperwork to the interview to demonstrate the weekly reviews and the quarterly ratings over a span of months. According to AI-14, the low ratings are a "morale buster" for his workers, who are experienced and have been with his company for a long time. AI-14 observed that the non-SMWBE contractor, who received a regular complaint about the same matter, was rated as "meeting standards", while AI-14 received

a zero for the quarter on the basis of a problem that was observed only once, and not reported to him.

AI-14 also said that his employees are more closely monitored on airport cameras, while other contractors' people walk away from the job when they should be working and get away with it.

AI-14 said that, after observing the way he had been dealt with, the non-SMWBE contractor's representative asked why a particular MNAA employee was so hard on him (AI-14). AI-14 told him he would have to figure it out for himself.

AI-14 also said that certain airport personnel also did things to make it harder for his people to perform their work, but when he complained to the person overseeing his contract, he refused to make correcting the matter a priority. Some of the problems reported, which airport personnel were slow to address, included electrical wiring repairs, power outages, and water problems. AI-14 said he was also left out of meetings that he believed he should have been attending in connection with his work.

AI-19

AI-19's firm was an SMWBE subcontractor serving on an MNAA contract when another firm bought out the first tier contractor. Shortly after the acquisition, one of the contractor's officers faxed AI-19 a letter of termination with a "vaguely worded" explanation that alluded to the acquisition and their new owner's desire to move in a different direction. AI-19 asked the sender to "shoot me straight" on the question of whether the termination had anything to do with performance and inquired as to whether he would be provided a good reference. AI-19 was informed that he was fine and was told that he would have the opportunity to bid on additional work. The contractor also told AI-19 that the new owner had staff that could be flown in from around the country to do the work that AI-19's company had done, which AI-19 thought sounded "utterly ridiculous". AI-19 learned months after the termination that the contractor had given different information to the MNAA's Minority Affairs office, and had "nothing good" to say about his company. When AI-19 questioned the same contractor's representative, as before, about the difference in stories and told him that he was considering filing a complaint with MNAA, AI-19 was informed that the contractor's "people" had documented poor response times

and other problems with AI-19's company and he just wanted to save AI-19's "feelings" when he failed to speak truthfully about the matter.

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AI-16

AI-16 found out that his company was being paid the lowest hourly rate on a local hauling job, as compared to the other companies doing comparable work. AI-16 also learned that the contractor was using his trucks more roughly and preserving the owner's newer trucks by using AI-16's trucks for more damaging types of loading. When AI-16 confronted the owner about the matter, the owner told him he could stay and load trucks. AI-16 told the owner that he was the owner of the trucks, not an operator. AI-16 then paid the owner's operator extra money on the side to have him take better care of his trucks.

AI-17

AI-17, whose company bids as a prime and subcontractor, said that, when "hard bidding" a job, his company always has to anticipate what a customer might have them do because of their color. According to AI-17, the customers always add extra requirements and his company just goes on and does them. In addition, many jobs that his company gets come to them because no one wants to do them because they are either too hard or too rough.

F. Bonding or Insurance Barriers

AI-7

AI-7 said that she is running into insurance specifications that are getting onerous. More customers are asking for $5 million in general liability for both governmental and commercial jobs.

AI-10

AI-10 believes the biggest barrier at the airport is against small construction contractors. Projects for such contractors should be broken down more because the insurance requirements

are simply too high. While AI-10 said he believes that such contractors must be prepared with resources and experience, he said the insurance requirements are simply too high for most small businesses to participate.

AI-18

AI-18 said his company bid and won an airport job a couple of years ago. MNAA required $5 million in insurance, which AI-18 says his company does not need to carry in its line of work; however, with $1 million insurance, he was allowed to start work as long as he was escorted in certain places. According to AI-18, issues were raised about his insurance level, even though he thought the matter had been worked out and he only worked one day before he was terminated. AI-18 says he later learned that there were ways that he could have partnered with another company to get the job done and meet the insurance requirements, but he did not know about them at the time. According to AI-18, after his departure, the job was done by MNAA's "preferred vendor", whom AI-18 under-bid to get the job.

G. Substitution After Award

AI-14

AI-14 was a subcontractor to a non-SMWBE company on an airport contract. AI-14 said that the non-SMWBE originally told the airport that they would have 15% SMWBE participation on the contract when only 8% was required. AI-14 said that he did not receive 15% because the non-SMWBE charged him an administrative fee for equipment and other fees, which ate up the difference. AI-14 said that the work that he was originally supposed to perform was reduced, but since he needed the work he did not turn down what was offered.

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AI-7

AI-7 said it is her practice to give her best numbers when she bids, although the general contractors often come back and try to get her to negotiate them down and she usually declines. She knows, however, that other subcontractors have been made offers to come down to her price

and have gotten business based on her pricing. Likewise, she is aware of other subcontractors contacting general contractors and offering to meet her price, which has caused her to lose jobs. Such incidents, according to AI-7 are a problem in all trades, not just hers.

H. Non-Payment or Slow Payment

AI-14

AI-14 said he submitted a request to the contractor for which he works for additional unforeseen work, which the contractor refused to fully reimburse.

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AI-5

AI-5 said his contract on a school project was terminated unfairly and the contractor withheld the amount that it finally agreed to pay until he signed an agreement not to sue. The final amount was far less than AI-5 believed he was owed.

AI-16

AI-16 said he has had to learn how to negotiate getting paid when contractors and others try to renege on payment.

AI-17

AI-17 said he has learned from his own experiences and the experiences of others how contractors and other parties try to get out of paying. He said he drafts his contracts to address the lessons from those cumulative experiences.

I. Other Barriers or Concerns

AI-6

MNAA and Nashville Metro have no organization or cohesion when it comes to SMWBE matters. According to AI-6, their goal setting is flawed. She also said she gets many calls where contractors want to use her company, but they say they have to put someone "black" in the job. MNAA posts opportunities on the internet, but AI-6 does not believe it is enough to be considered "outreach". According to AI-6, "they give the work to the same companies anyway." The business community is tired of studies that yield no real action. MBEs attend mixers and socialize, but they are tired of hearing about commitment.

The certification processes and lists should be unified across all agencies and lists should be comprehensive. Every contractor has "thrown lots of money at developing their lists." These should be centralized, also. Every company and entity has its own lists, including TDOT, Public Schools, MTA, the Governor's Office, Vanderbilt, and the rest.

It is a burden on smaller companies to work with large ones. The smaller companies cannot "meet to death" the way large companies like to do. AI-6 said her company was a subcontractor to one of the largest construction firms, where they had "tons of meetings" which she had not budgeted in her bid. According to AI-6, when you mix larger companies with smaller ones, the smaller companies get overwhelmed. Accordingly, goals should be set for smaller jobs in $100,000.00 range.

AI-6 said the Davis-Bacon wage jobs cause her to lose employees because when they go out on jobs that require them to be paid more per hour, they do not want to return to the lower wages when the jobs are done.

AI-7

It has been a "joke" to AI-7's company that MNAA has a DBE program and is supposed to have work for minority- and woman-owned businesses. She has received invitations to bid because the firm is woman-owned, but it has not resulted in business. There is so much work involved in certification that AI-7 wonders if it is worth it.

AI-8

AI-8 said he is doing a small amount of work on an airport project, but he does not know much about what is going on at the airport and has to figure out its system. He believes the "8A notifier" from the U. S. Small Business Administration is the best system for notification of opportunities because the information comes in on his PDA. AI-8 said, "The State, Metro, Vanderbilt, and possibly the airport, have info in their website."

AI-9

AI-9 said that, as a minority business advocate and adviser, he has told people not to bid with MNAA. As an example, he spoke of a minority business with large contracts and demonstrated capacity in the private sector, yet the airport only wanted him to bid for a portion of a comparable contract when he had clearly demonstrated that he had the capacity to handle the whole contract. AI-9 also said that the airport should look at what other agencies, such as MDHA and NES are doing as a model.

AI-10

AI-10 said it is important for the Officer of Minority Affairs to be a viable position, one in which the information flows both ways. The Minority Affairs Officer must know of available projects at the airport and get the information out to the community.

MNAA sends a huge negative message with its handling of Minority Affairs personnel. One pushed paper and was ineffective. More recently, the person in the position was more effective and even convinced AI-10 that his company should become registered; that person also worked with him on ways to partner and be more competitive on airport bids.

AI-10 said he found the airport's website "very difficult" to navigate; he had to call and get help on how to get to the minority information on the website.

AI-10 also said the airport needs a forum where vendors get to meet each other and talk to each other. According to AI-10, most entities such as TDOT, NES, and the State of Tennessee hold such gatherings.

AI-10 said it is his understanding that the attorney at the airport said that the airport did not need to set goals because some have been sued for setting goals, but he (AI-10) does not understand that decision.

AI-10 also suggested that all firms should be certified, whether they are minority or majority, so that not just minorities' information is open to the public. In addition, the certification process should be uniform across all entities. AI-10 also noted that certifications can work against minority businesses. As an example, he cited his experience with the State of Tennessee, where he was certified for eight years and did not receive any business. It was only after he stopped certifying that his company won a single source contract.

AI-11

AI-11 said he believes that partnerships should be promoted and the owner (MNAA) has to stay involved in the relationship because, unless the majority partner is being watched, they will not always share profits fairly. AI-11 went on to observe that some primes prefer using a novice to an experienced person because experienced people know how the "numbers are built-up and tracked" and when they are being "ripped-off", and "primes don't want to help them grow or see them grow". If the small and medium firms are allowed to hold the contracts and have the larger companies do work for them, it would give the smaller companies more of a chance to grow.

AI-12

AI-12 expressed concern about the treatment of "new" Americans. She said a lack of education about them leads to stereotyping. In addition, many do not know about insurance, bonding, and other processes of doing business with governments, so the governments should reach out to ensure that they are properly educated on what is required and the process for obtaining it.

AI-13

AI-13 said wage rate requirements price jobs beyond reach, increasing his cost by 30%. He questions whether the contractors at the airport are paying that much.

VI. PUBLIC HEARING REPORT

MNAA sponsored a public hearing on July 18, 2007, at 5:00 P.M. at the Millennium Maxwell House Hotel, 2026 Metrocenter Blvd., Nashville, Tennessee. The hearing opened with a greeting from Ms. Amber Gooding, the Director for Business Diversity Development at MNAA. Ms. Gooding stated the reason for the hearing, explaining that MNAA was gathering data for a disparity study, and introduced Attorney Rodney K. Strong of Griffin & Strong, P.C., the firm conducting the disparity study.

Mr. Strong greeted the gathering and introduced himself and his partner, Attorney Delmarie A. Griffin, who was assisting him at the hearing. Mr. Strong explained that the hearing was being recorded by a court reporter so that a transcript of the testimony could be prepared. Mr. Strong went on to explain the guidelines for the hearing and the nature of the testimony being sought. Attendees were advised that, since the study is for MNAA, any testimony regarding experiences specifically with MNAA would be of great interest. Mr. Strong also advised that speakers' experiences in attempting to engage in public contracting with other agencies would also be useful in providing insight into the types of barriers, based on race, gender, or ethnicity, that the speakers might have faced. Mr. Strong explained that witnesses would be called in the order in which they signed up to speak and that witnesses could expect him to ask questions for purposes of clarification, if necessary.

Five (5) witnesses gave testimony, under oath, at the hearing. A summary of each person's testimony is presented below.

1. Mr. John Willie Roberts, VIP Security and Secure Care, LLC

Mr. Roberts testified that he worked as a subcontractor on an airport contract and did not receive payments in time to meet his twice-monthly employee payroll. Mr. Roberts said that, based on the manner in which the prime contractor paid him, he was, in effect, receiving partial checks for each month, which had him either skipping a month or a pay period. As a result, Mr. Roberts said, "…it was causing a hardship for me to pay my 941 taxes and keep up." Mr. Roberts said the contract called for weekly invoicing, but at a meeting with the

prime contractor's representatives, it was agreed that payments would be made twice monthly, although this was not done.
Mr. Roberts also said that the contract called for him to pay his employees a specific hourly rate and that he was to receive a certain amount for the contract, plus a "12 percent override of the prime contractor, but that never happened."

Mr. Roberts also testified concerning a different MNAA subcontract in which he was to provide security services for the construction of a new runway. Mr. Roberts said the prime contractor "took the contract away from me and continued to do the contract until it was ended." Mr. Roberts said he reported what was happening to Airport personnel in charge of security at that time and he was told that the prime contractor was in charge and "he could do whatever he wanted to do."

Mr. Roberts testified concerning a third matter involving Airport work. In this instance, he learned of several open positions, contacted the prime contractor to let him know that he (Mr. Roberts) was a "licensed trainer", and qualified to "fulfill any placements, because I can train people to do the job." Mr. Roberts said he was flatly refused the job. Mr. Roberts went on to say that the same prime contractor received a contract with the State of Tennessee that required 120 people, some of which Mr. Roberts could have provided since he was already a subcontractor to the same prime contractor on the Airport job. Mr. Roberts said the contractor was "very negative" and "discriminatory" where providing contracting opportunities for minorities was concerned. Mr. Roberts said he was one of the minorities who was qualified in that he had identification, State licensing, and "everything that was necessary to be able to fulfill the contract, and I was refused."

When prompted by Mr. Strong for clarification, Mr. Roberts verified his reasoning in approaching the contractor to allow him to participate in the new work by stating, "Because I am the subcontractor under you, you have all my identification, my qualification, and I have a quarter of a million dollars of insurance just like that they have; every requirement that was necessary in order to fulfill a contract. I won the contract at the original bid as the subcontractor under Title 6." When asked by Ms. Griffin whether the prime contractor gave

a reason for denying his request for work, Mr. Roberts said, "No, he just said no, that's it. And I'm talking to the prime contractor, multi-billionaire. As a result of it, no was no."

2. Ms. Angela Mitchell Hill, Nashville Nails by Na'Sah's

Ms. Hill testified that she pursued, and was awarded, an opportunity to open a nail salon in the Nashville Airport, and that the Airport has been very supportive of her efforts. Ms. Hill said that she has been in the Airport for three years, although she has another nail salon, which has been in operation elsewhere in Nashville for ten years, and she had no previous experience with Airport business at the time she sought the opportunity with the Airport. Ms. Hill testified that she had some "major glitches" at the start of her contract, but that Airport personnel were "extremely supportive" of her, and open to new ideas. In response to a question from Mr. Strong concerning the nature of the "glitches", Ms. Hill replied that her initial financing arrangement did not work out and that Airport personnel were supportive in seeing to it that she did not lose her contract while she worked on new financing.

3. Mr. Demarco Reynolds, Reynolds & Reynolds Janitorial Services, Incorporated

Mr. Reynolds testified that his company has been in business for slightly more than 18 years and has been performing work as a subcontractor at the Airport for almost three years. Mr. Reynolds said that he has a good relationship with SMS, the contractor with whom he works, and that the contractor has treated him well and pays him on time. Mr. Reynolds said that one of his problems with the Airport Authority has to do with "some of the internal situations." Mr. Reynolds explained that he does not believe that his company is getting a "fair shake" on some of the reports prepared by Airport personnel. Some of the reports are scored at the end of the month, and the scores are relied on as a factor in SMS' bonuses, although Mr. Reynolds does not participate in the bonus system. Mr. Reynolds suggested it might be necessary to have a "third party" involved when the walk-throughs are conducted in order to get a more objective evaluation because "I just sometimes feel that I don't get a total square shake when it comes to some of the reports."

Mr. Strong asked Mr. Reynolds whether he was saying that his technical evaluations were "a little skewed", and whether it was fair to say that there is a difference in the way in which

areas that Mr. Reynolds covers are evaluated and the way in which the areas covered by the prime are evaluated. Mr. Reynolds replied that he sometimes thinks that is the case. Mr. Reynolds also said he thinks things have gotten a little better lately, but that there is "some room for improvement", if not for him, then for the next MBE.

Mr. Strong asked Mr. Reynolds if he could provide an example of a situation that might illustrate the perceived difference in the way in which his work is looked at. Mr. Reynolds said that his company services the outside of the parking garage, where they have to deal with rainstorms, heat, and other elements, and "from being in business and seeing what could be done under certain situations, I think my people do an excellent job there. And I don't think sometimes they [MNAA] take that into consideration when they do some evaluations." Mr. Reynolds also said he thinks that there is sometimes room for improvement on both ends, but that he does not always receive fair evaluations.

4. Mr. Richard Lewis, Transfare, Inc.

Mr. Lewis testified that his company has been doing business in the Airport since 1987, and they have current partnering relationships with at least two concessionaires. Mr. Lewis said that he has learned a lot about the food service business over the last 20 years and that his company has had a very "fruitful relationship" with MNAA. He went on to say that his company has also been afforded opportunities to open other franchises in the Nashville area food service industry, and to receive two contract extensions during its 20-year tenure at the Airport.

5. Mr. Carlton Jones, Hannah Jones Group

Mr. Jones testified that his company, which has been in business for over 15 years, has been in Nashville for slightly more than a year and a half. Mr. Jones said that the Airport was the first entity to "embrace" his company and that his company has "entertained six or seven contracts" with the Airport. Mr. Jones testified that the professional service area is "very touchy" because selection is based on evaluation of qualifications, not just price. He said that being a disadvantaged business or a small business could sometimes be a "major issue"

in consideration of qualifications and that people do not often realize how difficult it can be to break through such a barrier. Accordingly, Mr. Jones said his business does not initially identify itself as small or disadvantaged, but tries to demonstrate that it can provide quality services.

Mr. Jones also stated that the "catch there is when you become up-sized, you have to have sizable work to bring in a quality team." He said he believes the Airport is committed to supporting his firm's growth, but it is still difficult to break through and compete for major work.

Mr. Strong asked whether Mr. Jones' firm participated on Airport projects as a subcontractor or contractor. Mr. Jones said that the projects have been smaller ones awarded directly to his firm. He said that his company is open to working with other firms, but the challenge with doing work for a firm that is in the same business is that you "usually don't get quality parts of the service, and it does not entice your staff to want to work on projects when you're getting leftovers."

Mr. Strong also asked whether Mr. Jones' firm provides services other than architectural, such as program management services, and whether the Airport projects have been stand-alone design or program management. Mr. Jones said that his firm is capable of providing program management services in addition to architectural design. He also stated that they usually do "investigation work, which falls up under architectural services…building analysis for projects, doing front end to see exactly whether the project is to be completed or is one that the Airport wants to go forward with." Mr. Jones also said his firm was recently considered for a full service smaller job, for which they are appreciative because it is a full service job, which allows them to do "the full architectural components." Mr. Jones said his firm is primarily architectural and subcontracts the engineering and testing components of its work.

Ms. Griffin asked Mr. Jones whether he has perceived any particular barriers to obtaining larger airport contracts. Mr. Jones said he could not say that they have bid on such contracts yet. He said that the "major thing" to which he was alluding earlier is to build confidence in

the firm's qualifications to perform and he is hopeful that his company will get a "fair shake" when they start pursuing the larger contracts.

After Mr. Strong ascertained that there were no more witnesses, Mr. Jones returned to the microphone to ask questions of Mr. Strong. He asked whether Mr. Strong could provide some guidance on how to identify and address marketplace barriers, explaining that, while he (Mr. Jones) realizes that a company may not get every job it pursues, there can be at the same time an "internal feeling" about the situation. Mr. Strong explained that the hearings are just part of the process and are available to individuals who would like to put testimony on the record. He stated that his firm has also conducted anecdotal evidence interviews where people were not comfortable having a public discussion about their business experiences. Mr. Strong went on to explain that the matters of interest are those barriers to entry to doing business with an entity, which can include the inability to obtain financing, bonding or insurance, or the belief that the levels are higher than necessary to do business. Another type of barrier is the inability to get business, which can occur in more than one way, such as through a contractor's denial of an opportunity to participate on subcontracts, or subcontractors who get work with certain contractors in the public sector, but who cannot get work with the same contractors in other environments.

Mr. Strong also explained that other factors could involve disparate treatment, wherein an individual has reason to believe that his firm is being held to a different standard from other firms. He said that the public hearing testimony is important because it is sworn testimony, on the record, with statements that can be followed up and verified. This is an important part of the process, but only one factor. Mr. Strong went on to explain the disparity study process and the requirement for statistical, purchasing practices, and other analyses.

Mr. Jones said that, in the competitive market, volume "drives the price", particularly in construction, and people coming into the market who do not have the same volume or experience may find it difficult to compete. He said that coming into a market with "established companies already rolling" is a barrier to competition. He said he knows the Airport does not want to pay more, but it should understand that "in any arena when there's established entities with volume, they can price differently, they just know the curve, and it's

harder to compete. And that's one of the major barriers anybody would run into, especially disadvantaged business."

Mr. Strong asked Mr. Jones if he had any recommendations about the kinds of things that entities such as the Airport Authority could do to assist firms at a competitive disadvantage because of their size. Mr. Jones said other individuals have suggested partnering, but if there is no real benefit for the majority firm to take on a smaller minority firm, the larger firm will just feel like the smaller one is "taking money out of their pocket." If there is a benefit to make them want to do it, the larger firms can help develop smaller companies and it helps the whole economy. Mr. Jones also said if there is no benefit, "just to win it [a contract], and then if it's not monitored properly, there's no benefits to the smaller company either." Mr. Strong asked if it would be correct to say that Mr. Jones is recommending that the Airport Authority or other governmental entities consider some type of incentives for larger prime contractors to work with smaller firms, to which Mr. Jones replied, "Yes".

Mr. Strong asked for additional comments. When none were forthcoming, he thanked the participants and turned the hearing over to Ms. Gooding. Ms. Gooding thanked participants, encouraged suggestions to strengthen the Airport's program, and then adjourned the hearing.

VII. COMPARATIVE ANALYSIS OF LOCAL MWBE PROGRAMS AT SIMILAR AIRPORTS

Background

For the purpose of this exercise, GSPC surveyed 10 airports of similar size (enplanement) to BNA to ascertain how many were administering local minority contracting programs. Of the ten airports reviewed, four are currently administering local Minority Business Enterprise (MBE) or similar programs. It should be noted that many medium and large hub airports administer programs designed to facilitate minority participation on non-federally assisted projects. However, for this effort and to maintain the comparison with similarly sized airports, only those of comparable size according to the FAA Ranking of Primary and Non-Primary Commercial Service Airports were reviewed.

The airports reviewed were: Pittsburgh International, Sacramento International, Kansas City, Santa Ana-John Wayne, Raleigh-Durham International, Indianapolis International, Houston Hobby International, Louis Armstrong New Orleans International, Southwest Florida International-Fort Meyers, and Austin-Bergstrom International.

Santa Ana-John Wayne and Sacramento are located in California, where the United States Court of Appeals for the 9th Circuit struck down the California Department of Transportation DBE program following a finding that the state's implementation of the program was unconstitutional. As a consequence of the 9th Circuit ruling, Santa-Ana and Sacramento do not currently administer federal DBE or other programs that could be classified as providing race or gender-specific assistance to groups of individuals claiming minority status.

Three of the airports reviewed are city-owned and managed as a department within city government: Kansas City, Austin-Bergstrom, and Houston Hobby. Of these airports, only Houston Hobby has an identifiable program for Minority and/or Women Business Owners.

In addition, Southwest Florida International, owned and operated by the Lee County Port Authority, and Pittsburgh International did not have identifiable MBE programs.

The remaining airports, Raleigh-Durham, Louis Armstrong, and Indianapolis, all have some type of MBE program in place.

As a further reference, three large hub airports located in the FAA Southern Region were evaluated: Hartsfield-Jackson Atlanta International Airport (HJAIA), Memphis International Airport, and Orlando International Airport. These airports all have long standing MBE and/or other similar programs. Like Nashville International, Orlando and Memphis are managed by an Authority. Conversely, HJAIA is owned and operated by the City of Atlanta, which administers an Equal Business Opportunity Program for non-federally funded projects. None of these programs have been challenged, although the Memphis program is currently under revision as the result of a challenge to the recommendations of a previous disparity study.

Analysis of Airport MBE, WBE, and SBE Programs

This section will assess the various programs in place, provide a brief description of the methodology used in developing the programs, and discuss how the programs are implemented.

Raleigh-Durham International Airport-(RDU)

RDU utilizes a Minority Business Program for locally funded projects. To locate businesses in the area, RDU uses the lists of certified MBE firms compiled by the North Carolina Department of Transportation and the cities of Raleigh and Durham. Airport staff does not certify businesses as minority- or woman-owned. Contract goals are set annually by airport staff or by a consultant working directly with staff. RDU does not have in place a program for small, non-minority-owned businesses.

Louis Armstrong New Orleans International Airport

This airport utilizes a State and Local Disadvantaged Business Enterprise (SLDBE) Program on all non-federally assisted projects. Annual goals are set based on the availability of firms and the dollar value of contracts anticipated for the year. Unlike a DBE program, airport staff does not certify firms as SLDBEs. Applications are submitted to an independent panel of sociologists and

economists who must verify the applicant's claims of social and/or economic disadvantage. No presumption of disadvantage is made; therefore, the burden of proof falls on the applicant to demonstrate that they are eligible to participate in the program. Although the program is called the Small and Local Disadvantaged program, eligible firms must be small and their owners members of one of the presumptive groups for social and economic disadvantage.

Houston Hobby International Airport

Houston Hobby is owned and operated by the City of Houston, Texas and is one of two primary service airports operated through the Houston Airport System (HAS). HAS maintains a large Small Business Development and Contract Compliance Division. This division is responsible for ensuring that small and minority-owned businesses have maximum access to HAS owned projects and contracting opportunities. The division manages four distinct programs. They are as follows:

- Small Business Enterprise Program, for small business owners who make no claim of social or economic disadvantage (non-minority males and those who do not meet financial guidelines for inclusion in the other programs);
- Minority Business Enterprise Program, a program similar to a DBE program designed to ensure minority participation on non-federally assisted projects;
- Persons with Disabilities Enterprise Program designed to assist business owners who have disabilities that hinder their ability to gain access to contracting opportunities; and
- Disadvantaged Business Enterprise Program.

Each program has a unique application process. For example, the process for acceptance into the SBE program is less stringent than for the others. In the SBE program, the applicant must apply and meet Small Business Administration guidelines. Because there is no claim of social or economic disadvantage, the burden of proof associated with the other programs is not required.

Goals for each program are set independently. Some non-federal contracts have goals set for each program as part of the contract requirements. Meeting goals is required for consideration as a responsive bidder. Most projects have multiple independent goals; therefore, compliance is

monitored for each goal. For example, a locally funded project may include three independent goals: a small, a minority, and a persons with disabilities goal. Then, each goal is monitored independently for compliance since the criteria for eligibility are different for each program.

Indianapolis International Airport

The Indianapolis International Airport is also owned and operated by an authority. The Supplier Diversity Department manages and maintains DBE, MBE, and WBE programs. Applicant firms are screened by the Indianapolis DOT. Airport staff does not certify firms in any of the programs; however, the staff is responsible for monitoring and enforcement of compliance on airport projects. As in the HAS system, MBE and WBE goals are set and monitored independently. Indianapolis does not operate a small business program. The city of Indianapolis also operates MBE and WBE programs. The airport authority uses these lists along with the state certifications to secure participation on locally funded projects.

Memphis International Airport

Memphis is owned and operated by the Memphis-Shelby County Airport Authority. Although the authority has active DBE and MWBE programs in place, staff is not responsible for certifications. All certifications are handled by the Mid-South Minority Business Council, an agency that provides D/M/WBE certification services to agencies in West Tennessee, particularly in the Memphis area. The airport employs a fully staffed contract compliance department which sets program goals, monitors contracts for compliance, and ensures that firms identified in bid and proposal documents as subcontractors are actually utilized and promptly paid for identified items. The department has the authority to reject bids and proposals for non-compliance with goals and/or good faith efforts and to delay or stop a project if it is found that subcontractors are not performing identified work items, that prime contractors have chosen to self perform items identified as subcontract items, or if a subcontractor has been dismissed from a project without staff approval.

Orlando International Airport

Orlando is also owned and operated by an authority. The Greater Orlando Aviation Authority (GOAA) maintains D/M/WBE programs as well as a Local Developing Business program (LDB). Each program operates independently, although some firms qualifying for the M/WBE program will also qualify for the DBE program. The LDB program is designed to assist those very small firms who have limited experience and/or access to capital or equipment gain access to and have the opportunity to successfully compete for and win airport projects. Guidelines for the LDB program are less stringent than for the D/MBE programs. Additionally, GOAA offers a Designated Mobilization Program to assist LSB firms in obtaining the necessary cash sometimes needed to begin work on projects. This may take the form of prepaying up to ten percent of the contract price for professional service firms. Construction and other firms may receive assistance from financial institutions that partner with GOAA in funding this program.

Hartsfield-Jackson Atlanta International Airport (HJAIA)

HJAIA is owned and operated as a division of city government. The City of Atlanta manages the DBE, M/FBE and Equal Business Opportunity Programs through the Office of Contract Compliance. The Division of Aviation (DOA), which manages the airport, does not set contract goals, manage contracts, or monitor compliance. These duties are the responsibility of the Office of Contract Compliance. The DOA has no interaction with the FAA pertaining to DBE goals, nor does the department interact with firms certified for the M/FBE program other than as contract work is completed. The city's Equal Business Opportunity Program provides the guidelines for implementation of the M/WBE programs.

Airports were reviewed based on either their size proximity to Nashville International or their location in the FAA's Southern Region, which has oversight of DBE programs in the Southeastern United States. The airports with successful MBE, WBE, or other such programs have departmental staff members who are dedicated to performing the duties necessary to maintain an effective and efficient program. Program directors are in significant positions of authority and have the discretion to make difficult program decisions to enforce policy and procedural guidelines throughout procurement and contracting processes.

All of these airports have long standing, vibrant and successful MBE and WBE programs. Most do not maintain a small business program; however, those that do ensure that the program is identified as a separate program with individual goals, without regard to the MBE or WBE goals. Small businesses in this context are those businesses whose owners are non-minority males. Because these individuals do not face the same economic and social barriers that minority and female businesses face, many agencies simply choose not to build programs to enhance small business participation. Including small business participation in the same calculations as those for minority- and women-owned firms exaggerates the numbers by giving the appearance of a higher level of participation until it can be disaggregated for minorities and women.

BEST PRACTICES FOR CREATING A SUCCESSFUL BUSINESS DIVERSITY PROGRAM

The Metropolitan Nashville Airport Authority (MNAA) has maintained programs aimed at promoting minority business opportunities since 2002. Data from contract files indicates limited success in these programs. The S/M/WBE Program adopted in 2002 was effectively rescinded in 2006 and replaced with the LSB program, a race and gender neutral program for which no guidelines appear to be in place. Interviews with minority business owners indicate a lack of understanding on how MNAA programs work, how to compete for business opportunities, and the overall belief that the Authority is not committed to the implementation of a program that will provide equitable opportunities for minorities to compete for airport-related work.

To determine a synopsis of best practices, GSPC reviewed how each entity operates its programs and reviewed the programs of other airports known for their successful program implementation.

The City of Atlanta has in place an Equal Business Opportunity Program which governs locally funded contracting at HJAIA. A copy of the EBO Program is attached as Exhibit A.

The Orlando airport has very aggressive and successful Minority/Women and Local Developing Business Programs. A brief explanation of the programs and eligibility requirements is attached as Exhibit B.

A common theme for all MWBE programs is either the absence of a small business program or the presence of a small business program that operates independently from any MBE and WBE programs. This ensures that small, non-minority-owned businesses are not included in the

reporting of participation for minority- and woman-owned businesses. Including SBEs in MWBE reports only skews the data, giving the appearance of attaining a higher level of participation, when, in fact, minority and women business participation may be low. If a small business program is in place, goals and participation should be set and monitored independently of minority- and woman-owned business goals.

The Authority should define which firms are eligible to participate in its business diversity programs and establish guidelines for ethnicity, size based on annual gross receipts, determination of personal net worth of the owner(s), examination of owner(s) for the necessary expertise to successfully direct the daily business of the firm, etc. The Authority also must determine who will be responsible for the certification process and develop guidelines for certification. The options are to either have internal staff members complete all certifications and renewals or to utilize consultants who specialize in certification and are well versed in contracting and small business development for these tasks.

Following are useful guidelines for the certification process:

(1) Application for certification: Firms who wish to be certified as such by the Business Diversity Office must submit a written certification application on a form approved and provided by the Business Diversity Office.

(2) Standards: The Business Diversity Office shall determine the eligibility of applicant firms to be certified according to the following standards:

(a) The owner of an M/WBE must be an African American, Hispanic, Asian, Native American or Female. Bona fide racial or ethnic group memberships shall be established on the basis of the individual's claim that he or she is African American, Hispanic, Asian or Native American and is so regarded by that particular racial or ethnic community.

(b) The business enterprise seeking certification must be a for-profit entity that is independent and continuing.

(c) The minority owner(s) listed on the certification application must "Own" and "Control" the business.

(d) The minority owner(s) must be able to demonstrate that his or her firm is or will be performing a commercially useful function; and

(e) The firm must be located in the region identified by the Authority as the program area.

(3) The Office of Business Diversity Development will certify the applicant as an MBE or WBE or provide the applicant with written justification of denial of certification, within 90 days after the date that the Office of Business Diversity Development receives a satisfactorily completed application from the applicant.

(4) The Office of Business Diversity Development will review and evaluate applications, and may reject an application based on one or more of the following:

(a) The applicant does not meet the requirements for certification as an MBE or WBE;

(b) The application is not satisfactorily completed within a reasonable period of time, as determined by the Business Diversity Office;

(c) The application contains false information; or

(d) The applicant does not promptly provide required information in connection with the certification review conducted by the Business Diversity Office.

(5) Certification Denial: If an applicant firm is denied certification on the basis of information submitted, the business cannot reapply for certification for a period of one year from the date of the notice of denial, provided that such business shall have the right to appeal such denial under section and to be certified if such appeal is decided in its favor.

(6) Investigation: Airport staff should investigate, including on-site investigation if necessary, African American, Hispanic, Asian, Native

American and female business ownership arrangements beyond formal documents submitted by such businesses if:

(a) The business is applying for certification with the city for the first time;
(b) The business is newly formed or the business has African American, Hispanic, Asian, Native American and/or female ownership of less than 100 percent;
(c) There is a previous or continuing employer-employee relationship between or among present owners;
(d) The ownership of the business has changed since documents have been submitted to the Office of Business Diversity Development;
(e) A review of the documents submitted with the application raises concerns regarding either ownership or control of the business; and/or
(f) The Director of Business Diversity Development deems it appropriate.

(7) Term: The Office of Business Diversity Development shall establish a term for MWBE certifications. These terms are customarily for two or three year periods, after which MWBE firms are required to submit new applications.

(8) Graduation: The Office of Business Diversity shall develop guidelines determining when or if a firm graduates from the program. Graduation customarily occurs when the gross revenues of a firm are equal to those of non-MWBE firms or when the owners' personal net worth exceeds established thresholds.

(9) Challenge: The Office of Business Diversity Development shall develop guidelines by which challenges to either the certification of an MWBE firm or to its continued eligibility for certification are received and reviewed. All

challenges to certification must be investigated to the extent that the eligibility of the challenged firm can be verified. A process for decertifying a firm and an appeal process must be in place to provide guidelines for removing firms that are no longer eligible to participate in the minority- and woman-owned business enterprise programs.

The program(s) must have firm guidelines for enforcement. A policy for enforcement is equally important to the program as the initial policy that outlines the intent of and verifies the agency's commitment to the program. A policy statement that clearly identifies how the program is enforced, and provides consequences for non-compliance should be an integral part of the written procedures for any program designed to facilitate minority- and woman-owned business participation. Staff must be empowered not only to monitor compliance but to take corrective, occasionally punitive action when it becomes apparent that contractors are not in compliance.

EXHIBIT A (City of Atlanta)

Sec. 2-1448. Equal Business Opportunity Subcontracting Program

(1) Program Requirements.

(a) All Bidders are required to make efforts to ensure that businesses are not discriminated against on the basis of their race, ethnicity or gender, and to demonstrate compliance with these program requirements at or prior to the time of Bid opening, or upon request by OCC. Bidders are required to ensure that prospective subcontractors, vendors, suppliers and other potential participants are not denied opportunities to compete for work on a City contract on the basis of their race, ethnicity, or gender, and must afford all firms, including those owned by racial or ethnic minorities and women, opportunities to participate in the performance of the business of the City to the extent of their availability, capacity and willingness to compete.

(b) OCC will review information submitted by Bidders pertaining to efforts to promote opportunities for diverse businesses, including MFBEs, to compete for business as subcontractors and/or Suppliers. A Bidder is eligible for award of a City contract upon a finding by OCC that the Bidder has engaged in, and provided with its bid submission documentation of, efforts to ensure that its process of soliciting, evaluating and awarding subcontracts, placing orders, and partnering with other companies has been non-discriminatory. To assist prime contractors in this effort, the Office of Contract Compliance shall set forth in the solicitation documents for the Eligible Project the availability of businesses, including certified MFBEs within the relevant NAICS Codes for such Eligible Project.

(2) Determination of Non-discrimination during Bid Process.

No Bidder shall be awarded a contract on an Eligible Project unless the Office of Contract Compliance determines that the Bidder has satisfied the non-discrimination requirement of this section 2-1448 on such Eligible Project. Accordingly, each Bidder shall submit with each Bid the following:

(a) Covenant of Non Discrimination. Each Bidder shall submit with her/his Bid a Covenant of Non-Discrimination in such form as directed in the solicitation document by the Office of Contract Compliance.

(b) Outreach Efforts Documentation. Each Bidder shall submit with her/his Bid written documentation demonstrating the Bidder's outreach efforts to identify, contact, contract with, or utilize businesses, including certified MFBEs, as subcontractors or Suppliers on the Eligible Project. The Office of Contract Compliance shall set forth in the solicitation document the

documents that a bidder may submit to demonstrate its outreach efforts, and such documentation may include, without limitation, evidence of the following:

i. The Bidder contacted the Office of Contract Compliance, other private sector and government entities, or local MFBE organizations, to identify available businesses to work on the Eligible Project, including certified MFBEs, regardless of race, gender or ethnicity.

ii. The Bidder placed notices of opportunities for qualified businesses to perform subcontracting work on the Eligible Project in newspapers, trade journals, and other relevant publications, including publications specifically targeted to MFBEs, or communicated such notices of opportunities via the Internet or by other available media or means.

iii. The Bidder submitted invitations to bid for work on the Eligible Project to qualified businesses, including certified MFBEs, regardless of race, gender or ethnicity.

iv. The Bidder included in such notices and invitations a full disclosure of the criteria upon which bids, proposals or quotes would be evaluated, and also included contact information for inquiries, submissions, or requests to review any necessary bid documents.

v. The Bidder promptly responded to inquiries, provided necessary physical access and time for interested businesses to fully review all necessary bid documents, and otherwise provided information, access and time necessary to allow all interested businesses to prepare bids and quotes, regardless of race, gender or ethnicity.

vi. The Bidder considered, or hired, or otherwise utilized qualified and available businesses on the Eligible Project, including certified MFBEs, regardless of race, gender or ethnicity.

vii. For each business which contacted or was contacted by the Bidder regarding subcontracting or other services on the Eligible Project, but was not contracted with or otherwise utilized on the Eligible Project, the Bidder shall provide a written statement setting forth the dates of such contacts, the nature of such contacts, and the reasons why an agreement was not reached regarding work to be performed on the project. The Bidder shall maintain all written documents reflecting such contacts, including bids, quotes and proposals.

(c) Subcontractor Project Plan. Each Bidder shall submit with her/his Bid a completed and signed Subcontractor Project Plan, in a form approved and provided by the Office of Contract Compliance, which lists the name, address, telephone number and contact person of each subcontractor or other business to be used in the contract, the NAICS Code and the type of work or service each business will perform, the dollar value of the work and the scope of work, the ownership of each business by race and gender, if applicable the AABE, HBE, ABE, NABE, or FBE certification number of each business, and any other information requested by the Office of Contract Compliance. In order for the Office of Contract Compliance to officially consider a firm to be an MFBE, the MFBE firm must be certified by or have a certification application pending with the Office of Contract Compliance prior to the Bidder's submission of the Bid.

(3) OCC Review of Bidder Submissions.

The Office of Contract Compliance shall determine whether a Bidder has satisfied the non-discrimination requirement of this section 2-1448 based on its review of the Covenant of Non Discrimination, the Outreach Efforts Documentation, the Subcontractor Project Plan, and its review of other relevant facts and circumstances, including complaints received as part of the bid process. In reviewing the documents submitted by a Bidder to determine whether the Bidder has satisfied the good faith efforts requirement of this section, the Office of Contract Compliance will consider, among other things, the total project dollars subcontracted to or expended for services performed by other businesses, including certified MFBEs, whether such businesses perform Commercially Useful Functions in the work of the contract based upon standard industry trade practices, whether any amounts paid to Supplier businesses are for goods customarily and ordinarily used based upon standard industry trade practices, and the availability of certified MFBEs within the relevant NAICS Codes for such Eligible Project.

(a) Receipt of Complaint of Discrimination in the Bid Process

The Office of Contract Compliance shall accept complaints of alleged discrimination during the Bid process regarding any participant in the Bid process. Where the complaint of discrimination is specific to the procurement which is under consideration by the City, the Office of Contract Compliance may investigate said complaint, determine its validity, and determine whether the actions complained of impact the Bidder's responsiveness on the specific procurement. Allegations of discrimination based on events, incidents or occurrences which are unrelated to the specific procurement will be placed in the Bidder's file maintained in the Vendor Relations database and handled in accordance with the procedure established in the City's Vendor Relations Ordinance, section 2-1465, et seq.

(b) Determination of Violation of EBO Process

Where the Office of Contract Compliance investigates a complaint of discrimination that is related to the specific Bid process, as described in subsection 2-1448(3) (a) above, the details of that investigation, including findings, shall be recorded and maintained in the Vendor Relations Database, pursuant to Section 2-1469.

(c) Office of Contract Compliance Determination of Non-Responsiveness

When, based upon the totality of the circumstances, the Office of Contract Compliance determines that a bidder has been non-responsive to the EBO requirements of a City Bid solicitation, the Director of the Office of Contract Compliance shall present a written determination of non-responsiveness to the Chief Procurement Officer which states the determination and lists the reasons for the determination.

(4) Equal Business Opportunity Subcontracting Program Bid Process.

The Covenant of Non Discrimination, the Outreach Efforts Documentation, the Subcontractor Project Plan, and any other information required by OCC in the solicitation document must be completed in their entirety by each Bidder and submitted with the other required Bid documents in order for the Bid to be considered as a responsive Bid. Failure to timely submit these forms, fully completed, will result in the Bid being considered as a non-responsive Bid, and therefore, excluded from consideration.

(5) Contract Progress.

The Office of Contract Compliance shall require contractors on Eligible Projects to complete and submit to OCC documentation regarding their utilization of MFBEs, along with all other pertinent records required by OCC. Said documentation shall be in a format that is established by the Office of Contract Compliance. These records will be submitted to OCC monthly. The Subcontractor Project Plan shall not be changed or altered after approval of the plan and award of the contract without the written approval of the Director of the Office of Contract Compliance. A written letter to the Director of the Office of Contract Compliance requesting approval to change the Subcontractor Project Plan must be submitted prior to any change in the plan or termination of an MFBE's contract.

(6) Database.

The City will maintain a database identifying MFBEs that will include the types of services provided by the business enterprise and contact information for the business enterprise. A list from the database will be made available to Bidders to assist them in their efforts to meet the requirements of the Equal Business Opportunity Subcontracting program. The list prepared from the database will specify which firms the City of Atlanta has determined to be certified minority

and female business enterprises, in accordance with the City of Atlanta definitions for MFBEs. This list is not exhaustive.

(7) Minority and Female Business Enterprise Utilization.

To ensure that the Equal Business Opportunity Subcontracting Program achieves its purpose, the Office of Contract Compliance will verify the MFBE certification status of each firm claiming such designation. Only certified MFBEs may be designated in reports as MFBEs for purposes of City projects. The percentage of MFBEs utilized by a Bidder will be calculated by dividing the MFBE's price for providing direct labor or a bona fide service by the Bidder's total dollars as identified in the Bid.

(8) Equal Business Opportunity Program Compliance, Monitoring and Audit.

The City of Atlanta reserves the right to conduct an audit of a Bidder's work on an Eligible Project to confirm the Bidder's compliance with this Equal Business Opportunity Subcontracting Program, including without limitation compliance with the Covenant of Non Discrimination, the Outreach Efforts Documentation, and the Subcontractor Project Plan.

(9) Prohibition against Discrimination and Reporting Allegations.

Bidders shall prohibit discrimination against any person or business on the basis of race, color, creed, religion, sex, domestic relationship status, parental status, familial status, sexual orientation, disability, age, national origin, political affiliation, gender identity, or racial profiling. Bidders shall develop a written policy statement that shall be approved by the Office of Contract Compliance and distributed to all employees. Bidders shall conduct their contracting and purchasing programs so as to prohibit any discrimination and to resolve all allegations of discrimination. Bidders shall include a clause in its subcontracts that require the subcontractor to adopt and distribute a written non-discrimination policy that is the same as that of the contractor. The Office of Contract Compliance shall review and investigate all allegations of discrimination which claim that prohibited forms of discrimination have occurred. Allegations of discrimination that are determined to have merit may be subject to penalties decided upon by the Office of Contract Compliance in consultation with the initiating department.

(10) Penalties.

Breach of the Equal Business Opportunity Subcontracting program by a Bidder shall be subject to any or all of the penalties set forth in section 2-1473 below.

EXHIBIT B (Greater Orlando Aviation Authority)

LOCAL DEVELOPING BUSINESS is a business concern that is domiciled in the Local Area, meets the Revenue Limitations, and is owned and controlled by one or more individuals whose personal net worth does not exceed the Net Worth Limitation.

- **Local Area:** The Orlando Standard Metropolitan Statistical Area ("Orlando SMSA"). This area, according to the United States Department of Census, includes the counties of Orange, Seminole, Osceola and Lake.

- ***Revenue Limitations:***
    1. Construction contracting services and consulting services related to planning, design, and construction related improvements and architectural and engineering services - $2,500,000 in annual gross revenues averaged over the preceding three (3) years.
    2. Professional Services - $1,000,000 annual gross revenues averaged over the preceding three (3) years.
    3. Procurement of goods and services not including professional services included in 1 and 2 above - $1,000,000 annual gross profit averaged over the preceding three (3) years.

- **Ownership and Control*:*** Ownership and Control: Individuals, who do not exceed the Net Worth Limitation, must own at least fifty-one percent (51%) of the business, and control and manage the operations of the business on a daily basis.

- ***Net Worth:*** The sum of the fair market value of the interests owned by the individual in all assets (if an asset is owned jointly as husband and wife, then fifty percent (50%) of the fair market value for that asset will be counted if only one spouse participates in the firm being reviewed) minus the debt of the individual (if debt is attributable to an asset owned jointly as husband and wife then fifty percent (50%) of the debt will be counted if only one spouse participates in the firm being reviewed). For purposes of establishing Net Worth, the following items will be excluded:

    1. the equity in the individual's primary residence up to $500,000; and
    2. any businesses in which the individual is actively involved in the management and day to day operation. Net worth limitation is $500,000.

- **Designated Mobilization Program (DMP):** The Authority recognizes that a Local Developing Business (LDB) may experience limited access to working capital. To further promote the development of LDBs, the Authority makes available certain retainers and/or designated mobilization payments to LDB professional services, construction and procurement firms up to 5%. With the approval of the Executive Director, the percentage may be increased to 10%.

    1. Professional Services: After award of a prime or subcontract agreement at the Aviation Authority, an LDB may elect to participate in the Authority's DMP Program. Professional services firms may receive a 5% retainer of their contract

price. LDB professional services firms may reject the retainer and alternatively participate in the Working Capital Initiatives with the approved banking institutions up to a total of 10%.

2. Construction & Procurement Firms: Construction and Procurement firms may also participate under this program as either a Prime or a Subcontractor. The retainer is not available to construction or procurement firms. However, firms can receive through the approved banking institutions 5% of their contract price and a maximum of 10%

MINORITY/WOMAN BUSINESS ENTERPRISE

An M/WBE is a firm, which are at least 51% owned and controlled by one or more socially and economically disadvantaged individuals. Socially and economically disadvantaged individuals are persons who are citizens or lawful permanent residents of the United States and who are African Americans, Hispanic Americans, Asian Pacific Americans, Native Americans or Women. For this program, the Authority accepts the minority certifications of the City of Orlando, Orange County, the State of Florida and, in the case of suppliers, from the National Minority Suppliers Development Council (NMSDC).

VIII.PURCHASING POLICIES, PRACTICES, AND PROCEDURES

The purpose of this review is to determine whether there are purchasing policies, practices or procedures which may serve as barriers to businesses as they pursue opportunities, or engage in commerce, with MNAA. To the extent that areas of concern are revealed, they will be discussed and recommendations for changes will be made as part of the comprehensive Disparity Study recommendations. In conducting research for this analysis, which should not be construed as a formal audit, applicable written policies, procedures, memoranda, and reports were reviewed and interviews were conducted with key personnel regarding the manner in which they apply relevant procedures to their work, as well as their experiences and observations. All information was compiled and reviewed with a view toward making the following assessments:

- Whether MNAA has clear written procedures for purchasing activities, which have been communicated to all organizations and all personnel likely to influence the processes involved in selection of sources and administration of contracts:
- Whether the procurement process, as written and as practiced, is fair and open and does not contain provisions which are likely to have a disparate or negative impact on minority and women owned business enterprises;
- The existence and effectiveness of initiatives undertaken by MNAA in an effort to address any exclusionary practices or barriers to businesses, regardless of the race, ethnicity or gender of their owners;
- The effectiveness of outreach activities; and
- The extent to which MNAA monitors compliance with purchasing policies, practices, and procedures, particularly as they relate to bidding opportunities, manner of source selection, and contractor performance issues.

A. Policies, Practices and Procures--Overview

The Purchasing Department has responsibility for procurement of materials, supplies, and equipment and for securing construction, professional services, and other services necessary to support the airport's operations. The Purchasing Department is also responsible for the

administration and operation of warehouse facilities and commodities, receipt of equipment and materials and management of surplus property.

Procurement personnel initially provided two written procedures: a Procurement Procedures Manual, effective May 21, 2006 and Procedure 3-301 for Purchasing Supplies, Materials and Equipment, effective September 21, 2001. Thresholds for delegated purchasing authority are: $10,000 for contracts for maintenance or the purchase of goods and services, $50,000 for contracts for Professional Services for departments other than Planning, Design and Construction (PDC), and $100,000 for PDC contracts. The Procedures Manual requires competitive selection of sources for purchases in excess of $10,000.00, except for professional services. Guidance is also provided regarding the manner of soliciting bids, which must be by one or a combination of methods that include personal contact, mailing invitations to bid or requests for proposal, posting notice in a public place, or advertising in a newspaper or electronic media of general circulation.

In accordance with Section 2.10 of the Procurement Procedures Manual, Waiver of Competitive Selection, competitive selections may be waived if the procurement is an emergency purchase; the goods or services are only available from a single source; inadequate competition is found to exist after the solicitation is completed; the purchase falls under the terms of a competitively awarded blanket agreement obtained by another State of Tennessee agency; the purchase is less than $50,000 and must be made to maintain a priority schedule, or the determination is made that a specific service provider should be selected due to its expertise or prior work performance for MNAA or another entity on similar matters. The Department Head responsible for the solicitation and contract and the Director of Purchasing must both recommend the waiver, which must then be approved by the President.

Unless circumstances require otherwise, public notice of solicitations in the form of ITBs, RFQs, or RFPs, as appropriate, are given at least thirty days (30) prior to the scheduled opening of submittals. In consultation with the Director of Purchasing, the responsible Department Head determines the criteria by which responses are evaluated. The ITBs, RFQs or RFPs must include a description of such criteria, which shall be based primarily on the qualifications and experience relevant to the services required and may include: recent specialized experience in completing similar assignments; availability of qualified staff members to complete the project; ability to

complete the project on time and within budget; and, willingness to provide DBE or SMWBE participation.

For individual procurements, the responsible Department Head designates a panel of at least three (3) impartial persons, to review Responses and interview and rate Respondents. The highest ranked Respondent is invited to negotiate Contract terms, subject to the provisions of controlling law and/or regulation.

Prospective providers of Architect/Engineer services may be required to pre-qualify to respond to a Solicitation for either a specific project or an identified group of projects. For such pre-qualification, the Authority must issue a pre-qualification questionnaire which each prospective service provider must return as instructed. Objective scoring criteria are established and the pre-qualification questionnaire is advertised in the same manner required for an RFQ. A successful pre-qualification is valid for not more than two years from the date of pre-qualification procedures.

MNAA's purchasing activities include administering programs with federal Disadvantaged Business Enterprise (DBE) requirements in concessions and construction. Federally funded contracts for construction services are procured in accordance with the provisions of 29 C.F.R. Part 18.36 governing sealed bid procurements. Construction contracts must include provisions setting forth minimum requirements for bonds, insurance, indemnification, modification, and termination for convenience, as set forth in the Procurement Procedures Manual. MNAA also administers a local program that involves the overall upkeep of airport buildings and grounds, such as janitorial, landscape, elevator maintenance, guard service, etc. For the majority of the period under review for this study, the local purchasing included a Small, Minority and Women Business Enterprise Program, which was established by MNAA in order to enhance business opportunities for small, minority, and women-owned business enterprises (SMWBEs). Approximately one year ago, the goals for the SMWBE Program were suspended and the SWBE solicitation clause was replaced with the Local Small Business (LSB) Program clause. The LSB Program, a race and gender neutral initiative, is described in solicitations issued by MNAA, as a program to:

...promote, encourage and stimulate participation of local small business enterprises between the Authority and the economic community served by it so as to provide maximum opportunities for participation in contracts, programs and all related business activities of the Authority. Contractors of the Authority are strongly encouraged to utilize the services of local small businesses and joint venture partners, subcontractors or to utilize the services of small businesses in the supply of goods and other services as may be appropriate in completing the project tasks.

The LSB Program requires that contractors use good faith efforts to obtain LSB participation, and that solicitations contain a list of nine suggested guidelines which describe the types of actions that a contractor would be expected to engage in before arriving at the conclusion that utilization of LSBs was not feasible under its contract. It should be noted that the list contains the same good faith effort measures that were included in solicitations under the old SMWBE Program, and is substantially similar to the list included in DBE Program solicitations as well. The full text of the document is reprinted below:

MNAA Local Small Business (LSB) Good Faith Efforts

The nine (9) steps listed below are suggested guidelines the Authority will use in determining if the Bidder has made a good faith effort to obtain LSB participation. The Bidder may also submit to the Authority other information on efforts s/he took to obtain LSB participation. The Bidder will provide a non-participation statement on the LSB Participation Report with the solicitation response if s/he cannot obtain the stated percentage goal using the suggested guidelines. Local Small Business's qualify for participation in Non-Federal funded projects.

[ ] Whether the Bidder attended any pre-solicitation or pre-bid meetings that were scheduled by the Authority to inform LSB(s) of contracting and subcontracting opportunities;

[ ] Whether the Bidder advertised in general circulation, trade associations, and minority focused media concerning the subcontracting opportunities;

[ ] Whether the Bidder provided written notice to a reasonable number of specific LSB(s) that their interest in the contract was being solicited, in sufficient time to allow the LSB(s) to participate effectively;

[ ] Whether the Bidder followed up initial solicitations of interest by contacting LSB(s) to determine with certainty whether the LSB(s) were interested;

[ ] Whether the Bidder selected portions of work to be performed by LSB(s) in order to increase the likelihood of the LSB participation (including, where appropriate, breaking down contracts into economically feasible units to facilitate LSB participation);

[ ] Whether the Bidder provided interested LSB(s) with adequate information about the plans, specifications and requirements of the contract;

[ ] Whether the Bidder negotiated in good faith with interested LSB(s), not rejecting LSB(s) as unqualified without sound reasons based on a thorough investigation of their capabilities;

[ ] Whether the Bidder made efforts to assist interested LSB(s) in obtaining lines of credit, or insurance required by the Authority; and

[ ] Whether the Bidder effectively used the services of available minority community organizations; minority contractors' groups; local and state and Federal Minority Business Assistance Offices; and other organizations that provide assistance in the recruitment and placement of LSB(s).

Under the SMWBE Program, contractors identified the SMWBEs that they intended to use on a contract in their bids or proposals. Since removal of the SMWBE goals, contractors have been using the List of Proposed Subcontractors to show who will be working on the job. This form asks for the address and contact information, but does not call for specific designation of participating firms as LSBs. DBE Participation Pay Request Reports are required with monthly invoices for work performed under the DBE Program and were a part of the SMWBE Program, but do not appear to have equivalents under the LSB Program.

As a component of this review, interviews were conducted with eight (8) MNAA personnel, each whom participate in some way in carrying out the mandates of the purchasing and compliance procedures. Most of the persons interviewed are managers or directors and are either directly responsible for some aspect of purchasing in their respective departments, or they influence the purchasing process and application of the LSB Program or its predecessor, the SMWBE Program. Matters discussed included, but were not limited to:

- Individual accountability for M/WBE participation; outreach to M/WBEs; and availability of resources such as databases;
- Steps taken by the interviewee or his or her department to ensure that a good faith effort is made in procurement and subcontracting;
- Whether, and to what extent, obstacles have been encountered in carrying out the mandates of the business diversity program;
- The extent of the interviewee's involvement in, or knowledge of, complaints, or protests with regard to business diversity program implementation;
- Observations or knowledge concerning changes in the participation of small, minority or woman owned business enterprises; and
- Other business diversity concerns or observations.

The interview responses, taken with the review of other documents, are incorporated into the observations and concerns of the study team.

B. Areas of Concern

1. Does MNAA have clear written procedures for purchasing activities, which have been communicated to all organizations and all personnel likely to influence the source selection process?

While MNAA has written procedures to govern most purchasing activities, these procedures are not always clear and contain some conflicting provisions which can have a negative or disparate impact on companies attempting to do business with MNAA.

Two specific purchasing procedures were initially provided to GSPC: the Procurement Procedures Manual, dated May 12, 2006, and Procedure 3-301, dated September 21, 2001. Upon reviewing these, there appeared to be a level of redundancy in some areas. A notable area of conflict pertained to the lists of conditions upon which a waiver of competition can be granted. Procedure 3-301 lists five conditions and the Procurement Procedures Manual lists six conditions, with the two lists sharing only four conditions in common.

A review of the Contract Administration Audit Report issued by MNAA's internal auditors, dated November 1, 2005, revealed that conflicts between the two procedures had been identified before this study. One of these conflicts involved organizational approval levels. The MNAA response to the audit finding reads in part:

> *Purchasing has addressed these inconsistencies with Finance. Finance is currently in the process of revising the approval levels to be consistent. Several areas have been noted during this revision process, the Authority has added several new positions to the approval process as well as Procedure 3-301 has been replaced with the Procurement Procedures Manual.*

The response to the audit finding raises questions as to whether Procedure 3-301 should be in circulation at all, and whether the provisions which are inconsistent with the Procurement Procedures Manual continue to be used by MNAA personnel.

As a matter of practice, there is confusion and conflict regarding the SMWBE Program. As explained by members of management, MNAA continues to have an active SMWBE Program, although the specific goals for minority and woman owned businesses have been eliminated.

Interviews with employees and anecdotal interviews with the business community reveal that most believe that the SMWBE program is no longer viable and that it has been replaced by the LSB Program. The SMWBE Program is, or was, governed by its own dedicated procedure and implementation instructions, while the LSB Program appears to exist mainly as a clause to be included in solicitations as boilerplate, apparently in lieu of SMWBE language.

In addition, while minority and women owned businesses or local small businesses could possibly be helped by the SMWBE Program and the LSB Program, the lack of clarity in the written procedures for these programs renders them virtually ineffective for their stated purposes. In the case of the SMWBE Program, elimination of the goals without further guidance as to implementation of the program without goals and monitoring progress has left MNAA employees in a state of confusion as what MNAA's diversity policy is and how to apply it. The LSB Program appears to exist as a fill-in for the SMWBE Program, but without a written procedure or implementation guidelines to which employees can refer.

2. Is the procurement process, as written and as practiced, fair and open, and does it contain provisions which are likely to have a disparate or negative impact on minority and women owned business enterprises?

As noted above, there are questions as to the circumstances under which competitive selections may be made. Inconsistencies in the application of procedures governing the competitive process can have a negative or disparate impact on companies pursuing MNAA business.

Another concern is the list of acceptable conditions for waiving competition. Specifically, the sixth exception listed in the Procurement Procedures Manual reads as follows:

> *F. A determination by the President that the Authority should retain a specific provider of professional services, other than Architect/Engineer Services, because of such provider's expertise or the provider's prior work performance for the Authority or other entity on similar matters.*

The selection of a contractor or vendor must always be made in the best interest of the entity on whose behalf the selection is made; however, such a broadly worded exception has the potential of posing a significant barrier to any number of businesses that are not incumbents or that are not otherwise connected with MNAA "or other entity" personnel in a manner that allows inside knowledge of their work.

Vendors selected from MNAA's database of certified minority and woman owned businesses have stated their belief that MNAA is not immune from what is frequently characterized as the "good old boy" system in its contracting and procurement processes, meaning a system in which business is awarded based on social relationships or other relationships that may not be directly relevant to the stated source selection criteria. These vendors expressed their belief that the competitive process, as they encountered it, was not open or fair because MNAA officials already knew who they wanted. (See the Anecdotal Evidence section of this study.) The waiver provision reprinted can be seen as exacerbating the situation, whether real or perceived, by taking away the appearance of fair and open opportunity while allowing an environment in which the "good old boy system" can thrive virtually unchecked.

The purchasing practices interviews yielded a range of responses to the question of how firms are selected when procurements fall within departmental discretion. One manager stated that the nature of the project determines whether his organization will compete the business at all. In some instances, a firm may be selected as a part of cycling through lists, starting with the SMWBE list. If there is only one firm on that list, it will likely get the work if it is in the firm's area of expertise. Another employee expressed skepticism that the lists of available firms are utilized and noted that often SMWBEs are called at odd hours and given short response times, thus increasing the likelihood that they will not respond in a timely manner. Related concerns were expressed regarding the placement of procurements using emergency purchase procedures.

3. What race and gender neutral initiatives have been undertaken by MNAA in an effort to address any exclusionary practices or barriers to all businesses, and in particular smaller businesses, and how effective have they been?

Race and gender neutral measures refer to those remedies that might be extended to all businesses, or small businesses in particular, that would address certain exclusionary aspects of a jurisdiction's purchasing and contracting process or barriers within the marketplace as a whole.
The LSB Program is a race and gender neutral program, which consists primarily of the solicitation clause put forward when the SMWBE Program's goals were removed. The effectiveness of the LSB Program is difficult to assess because the program lacks procedures, has not been fully implemented, and does not appear to be closely monitored for compliance. The LSB solicitation clause uses language for the good faith effort expectation that is essentially

boilerplate and appears to have been translated from the previous race and gender conscious program, where such language was developed as a direct response to the experiences of minorities and women in public contracting, and founded on the results of research and documentation of the barriers such businesses have historically encountered. In practice, the solicitation and contract documents do not consistently identify LSBs as such, which all but eliminates the possibility of monitoring and enforcement of the expectation.

Bonding and insurance requirements are often cited as barriers for smaller or newly formed businesses, especially on construction contracts. Some MNAA personnel raised concerns that adjustments to the bonding and insurance requirements on certain jobs could make it a bit easier for many small, minority, and woman-owned businesses to perform on airport jobs for which they are otherwise qualified. It was noted that there have been case-by-case circumstances in which the bid bonds have been waived on projects below $1,000,000.00. In some instances, bank Letters of Credit have also been accepted in lieu of bonds. These adjustments do not appear to have been part of an established program or organizational initiative, but were described more as exceptions made when the employees involved took an interest in working them out.

4. How effective are MNAA's outreach activities in reaching small businesses and minority and White Female-owned businesses?

Most user department personnel said that there are not enough certified firms in all areas. As one noted, where there are fewer firms, these tend to get overloaded, which can lead to performance issues. The Purchasing Department, in response to concerns raised about the publications in which it advertises, recently expanded the number of publications in which certain advertisements are placed. These now include not only the local paper of general circulation and the MNAA website, but also a newspaper that targets the African American community, and three airport industry publications.

Persons interviewed for both purchasing practices and anecdotal feedback voiced concerns about use of the airport's website for information on business opportunities. Some individuals questioned the site's usefulness as an outreach and informational tool. Issues with the site ranged from the size of the print, which some said was too small, to navigational issues. One employee

said that vendors have had such difficulty navigating the site that the employees frequently have to "walk people through" it to get beyond the travel-related business of the airport to the information on business opportunities. A business owner echoed the navigational issue and said he had to call for help to get to the business opportunities on the website. Other specific comments and suggestions from business owners regarding airport outreach are listed in the Anecdotal Evidence section of this study.

Nearly all of the employees interviewed said they had participated in some type of outreach or networking initiative. Most referred to "Bridges to Opportunity" meetings, which occurred some time in the past, but few indicated any recent activities.

On the whole, MNAA's outreach efforts appear to have mixed results. The fact that business information is available on the website is clearly a positive achievement, as is the fact that advertisements for some opportunities are being placed in more diverse publications. Both of these achievements can be built on with feedback from the community and additional demographic research into the targeted audiences. Such activities, if they are to yield optimum results, require the dedication and focus of a diversity officer or equivalent personnel, so that efforts and resources can be targeted effectively. MNAA's outreach efforts have suffered, not only because this position has changed hands several times in the past five years, but also because management policies and directives have lacked clarity and single-mindedness of purpose with regard to the responsibilities of the position and overall diversity expectations. Most people involved in the anecdotal interviews expressed skepticism regarding the airport's commitment to diversity, not only because of the recent removal of goals, but also because of the turnover of diversity officers over the years. Most interviewees were unaware that the position had been filled at the time interviews were conducted. Minority and woman-owned businesses often do not have the marketing resources that will allow them to cast a wide net; their survival in business often depends on knowing how to determine when an entity is serious about providing opportunities and when it is simply going through the motions to give the appearance of openness. MNAA is perceived by many SMWBEs as being in the latter category and will need to take more active and aggressive steps to define and express its commitment to diversity internally, and then to express its level of commitment through outreach.

5. To what extent does MNAA monitor compliance with purchasing policies, practices, and procedures, particularly as they relate to bidding opportunities, manner of source selection, and contractor performance issues?

The MNAA November 2005 Contract Administration Audit Report made two recommendations concerning monitoring DBE and SMWBE participation. GSPC's efforts in this study are directed primarily at the SMWBE Program, since the DBE Program is not included in this study. The pertinent part of Finding #4 of the Contract Administration Audit Report reads as follows:

> *Recommendation*
>
> *All department heads, managers, and project managers are responsible for measuring and obtaining SMWBE contract goals to achieve full compliance with Procedure No. 3-801. The department head and/or manager approving invoices for payment as well Minority Affairs should monitor invoicing for SMWBE participation levels to ensure SMWBE contract goals are attained.*
>
> *Additionally, Minority Affairs should perform compliance testing to ensure that contractors and subcontractors comply with SMWBE provisions. However, Procedure No. 3-801 does not address compliance-testing measures and should be revised to include compliance testing requirements. An SMWBE compliance form should be developed and utilized to document the compliance work performed by Minority Affairs.*
>
> *As previously recommended for DBE participation, it is also recommended that SMWBE participation should be added, as an agenda item for progress meetings with contractors and consultants. This will ensure that SMWBE participation levels are on the agenda of items to be discussed for each scheduled meeting. In addition, Minority Affairs should attend progress meetings on a monthly basis or as schedules permit to assist contractors and consultants that are having difficulties meeting SMWBE contract goals.*
>
> *Management Response*
>
> *All managers and department heads have been trained as to the proper procedures for obtaining and tracking SMWBE participation. The SMWBE/DBE participation is reviewed during progress meetings for all construction projects managed by PDC. Managers in other areas will receive additional information regarding tracking participation on contracts, and will be asked to review participation during all project progress meetings. Managers and supervisors will also be advised to contact the Minority Affairs Office in cases of payment disputes or work disputes between prime and subcontractors. This ensures that the area responsible for compliance is aware of any problems throughout the contract that may affect the ability to meet the project goal.*

> *Contracts are awarded to the most responsive bidder. Although SMWBE participation is normally part of the criteria for responsiveness, it is not the deciding factor in all awards. Participation is only one of several criteria used to determine the most responsive or lowest and best bid. Bids that are well over budget will not be awarded simply to obtain SMWBE participation.*
>
> *The Authority may commission a disparity study, if necessary, to assess the history of disparity in contracting opportunities for small, minority, and woman owned businesses in the local area. This study would either affirm the need for the SMWBE program or will indicate no history of disparity, which could lead to a recommendation to discontinue the SMWBE program. If the study indicates a history of disparity, the program would continue, but will request recommendations for implementing a concise methodology to be used for goal setting, a complete compliance program, and enhanced reporting mechanisms. The anticipated completion date is December 29, 2006.*

As stated in the Management Response, the Authority commissioned a disparity study, although it began in 2007, months after its anticipated completion date of December 2006. The Management Response did not mention plans for the interim step of removing or suspending SMWBE goals pending the results of the disparity study. Research conducted for the disparity study revealed that removal of SMWBE goals and the prolonged vacancy in the Minority Affairs position, indicated that little, if any, progress has been made on monitoring and compliance at the level referred to in the audit report.

The job of Business Diversity Director, a relatively new position that replaced the position of Manager of Minority Affairs and Contract Compliance, is a higher-level, more visible position than its predecessor. It also appears to carry with it the prospect of additional staff for performing the full range of duties assigned to the office. Because the position was created after this study began and the SMWBE Program has been in a state of flux, the matter of assessing the duties, responsibilities, and overall effectiveness of the job is much more of a challenge. It is nevertheless apparent that the office is still understaffed for compliance and monitoring, which must take place if the recommendations of the internal audit team are carried out and if MNAA intends to remain in compliance with the federal DBE Program.

It is also of great concern that the full range of responsibilities for the Diversity Director have not been clarified and communicated throughout MNAA's internal organizations. Interviews highlighted the fact that many MNAA personnel have their own opinions of what the Diversity Director's job should entail and of how performance of the job should be approached. Terms

such as "collaborative", "enforcement and policing" versus "teambuilding" and other such references appeared to confuse the personalities of the people in the job with the job they were expected to perform. "Compliance and monitoring" had negative connotations in clear reference to the individuals who may have performed the job in the past. The history of the position, including its high turnover rate and relatively low placement on the organization chart, suggest that MNAA's management has not entirely defined its objectives for the position and this lack of definition has been communicated throughout the organization. As a result, each person has decided for himself what the diversity officer should be doing and any action inconsistent with the individual's belief engenders resentment. Despite the audit report's findings regarding compliance and monitoring and the unambiguous interpretation of responsibility, it was noted in interviews that some MNAA personnel still believe that job should be carried out passively with less emphasis on compliance than the applicable regulations require.

With regard to reporting, the disparity study team questioned the suitability of MNAA's data collection and record-keeping for compliance and monitoring purposes. It appears that most data are maintained in the Finance Department, but not necessarily in a manner designed to capture the full range of data that may be required for monitoring and reporting SMWBE compliance.

Goal setting is also an area that will require attention and additional training and tools. One manager stressed that the fact that goals are no longer being set on MNAA's local operations is extremely problematic. On the other hand, the interviewee said that, in his opinion, the goals have not always been realistic and have led to an overstatement of availability in some areas; however, realistic goals have the effect of allowing organizations to meet them and provide the tools to ensure that contractors stay compliant. The same individual stressed that the current method of simply encouraging contractors with a "generic expectation" statement (such as with the LSB Program) has been ineffective on local operations in stark contrast with DBE utilization on federal programs.

Some MNAA employees emphasized other concerns, as well, such as quick and proper certification of businesses, and maintenance of an accurate database. Again, in order to address these concerns, staffing levels for the Business Diversity Office would have to be addressed.

Federal government DBE activities notwithstanding, with respect to local operations, MNAA's employees are struggling to meet diversity expectations that have not always been communicated by management with one voice through clearly defined policies, practices and procedures. Improvements can and should be made in internal procedures, outreach, compliance and monitoring, as set forth in the comprehensive recommendations for this study.

IX. RECOMMENDATIONS

- MNAA should develop a commercial non-discrimination program which will include narrowly tailored race and gender participation levels for each opportunity. The evidence supports narrowly tailored race and gender conscious efforts to ensure that the airport's processes are free from discrimination and from passive participation in private sector discrimination. The Small, Minority and Women Business Enterprise (SMWBE) Program should be revised to take these considerations into account.

- MNAA's Office of Business Diversity should coordinate an ongoing outreach, technical, bonding and financial assistance program.

- MNAA should develop comprehensive policies and procedures for the SMWBE program in order to increase opportunities for small and MWBE firms. The following areas should be addressed:

  1. Incorporation of SMWBEs in all procurements. Procurement planning should include consideration of the impact on SMWBEs of the procurement strategies chosen. Demonstration of efforts to include SMWBEs by issuing or responsible departments should be reviewed by the Office of Business Diversity for procurements over $10,000.

  2. Thorough consideration should be given to unbundling large projects and bidding them based on their components.

  3. Written guidelines should be developed for instances in which the CEO or the Department of Planning, Design and Construction will grant a contract up to $100,000 without competition.

  4. Automatic extensions and renewals of contracts should be reviewed. A determination should be made by the Office of Business Diversity as to the impact of each contract extension and renewal on SMWBE participation.

  5. MNAA should review insurance and bonding requirements on all contracts and consider reducing those when it is determined that MNAA's interests will be protected with lower bonding and insurance limits.

6. MNAA should strengthen the role of compliance by the Office of Business Diversity Development to include monitoring, contract compliance, and facilitation of issues and disputes resolution involving DBE concessionaires and contractors.

7. Additional resources should be added to the Office of Business Diversity Development to ensure the successful implementation of the Disparity Study recommendations.

X. APPENDIX: FULL RESULTS OF THE MULTIVARIATE LINEAR REGRESSION ANALYSES

(The Dependent Variable was the 1999 Self-Employment Income in Nashville, TN MSA)

APPENDIX 1
ALL INDUSTRIES

	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
(Constant)	**6.787**	0.583		11.647	0.000
Disability	**0.064**	0.029	**0.021**	2.168	0.030
Level of Education[104]	0.003	0.008	0.004	0.366	0.714
Ability to Speak English Well	0.017	0.058	0.003	0.285	0.775
Availability of Capital	**0.031**	0.006	**0.049**	4.947	0.000
Marital Status	**0.038**	0.008	**0.049**	4.968	0.000
Asian American	**-0.086**	0.171	**-0.005**	-2.506	0.013
African American	**-0.290**	0.056	**-0.052**	-5.207	0.000
Native American	**-0.104**	0.192	**-0.005**	-2.541	0.030
Hispanic American	**-0.296**	0.098	**-0.030**	-3.032	0.002
White Females	**-0.182**	0.023	**-0.078**	-7.801	0.000

Source: Griffin & Strong, P.C. and Census of Population and Housing (Census 2000 PUMS Five Percent Sample), Calculations using SPSS. Bold coefficients are statistically significant (prob- value <= .05)

APPENDIX 2
CONSTRUCTION

	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
(Constant)	**7.259**	0.610		11.892	0.000
Disability	**0.070**	0.030	**0.023**	2.298	0.022
Level of Education	0.014	0.008	0.017	1.638	0.101
Ability to Speak English Well	0.018	0.059	0.003	0.304	0.761
Availability of Capital	**0.031**	0.006	**0.049**	4.804	0.000
Marital Status	**0.038**	0.008	**0.049**	4.785	0.000
Asian American	**-0.112**	0.175	**-0.006**	-2.636	0.025
African American	**-0.298**	0.057	**-0.054**	-5.271	0.000
Native American	**-0.300**	0.205	**-0.015**	-2.460	0.044
Hispanic American	**-0.369**	0.100	**-0.038**	-3.678	0.000
White Females	**-0.199**	0.024	**-0.085**	-8.185	0.000

Source: Griffin & Strong, P.C. and Census of Population and Housing (Census 2000 PUMS Five Percent Sample), Calculations using SPSS. Bold coefficients are statistically significant (prob- value <= .05)

[104] The level of education of the owner is coded as follows: 1 = no Schooling completed, 2 = nursing school to 4th grade, 3 = 5th grade to 12th grade, 4 = high school graduate, 5 = some college, 6 = Associate degree, 7 = bachelor degree, 8 = master's degree, 9 = professional degree and 10 = doctorate degree.

APPENDIX 3
PROFESSIONAL SERVICES

	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
(Constant)	**6.832**	0.596		11.466	0.000
Disability	**0.057***	0.030	**0.019***	1.891	0.059
Level of Education	0.005	0.008	0.007	0.673	0.501
Ability to Speak English Well	0.013	0.059	0.002	0.220	0.826
Availability of Capital	**0.031**	0.006	**0.050**	4.971	0.000
Marital Status	**0.038**	0.008	**0.048**	4.830	0.000
Asian American	0.091	0.174	0.005	0.525	0.599
African American	**-0.302**	0.057	**-0.053**	-5.299	0.000
Native American	-0.109	0.196	-0.005	-0.553	0.580
Hispanic American	**-0.309**	0.100	**-0.031**	-3.096	0.002
White Females	**-0.193**	0.024	**-0.082**	-8.079	0.000

Source: Griffin & Strong, P.C. and Census of Population and Housing (Census 2000 PUMS Five Percent Sample), Calculations using SPSS. Bold coefficients are statistically significant (prob- value <= .05)

Note: (*) The statistical significance of being disabled in professional services is ***marginal*** (the significance of coefficients with a "Sig (prob- value)" between 0.05 and 0.10 is ***marginal.*** The "Sig" for this coefficient is 0.059 getting closer to 0.06 (a little more than 0.05) (please see the value of t "1.891 or less than 2", t should be more than or equal to +/- 2 to indicate statistical significance.

APPENDIX 4
GOODS AND NON-PROFESSIONAL SERVICES

	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
(Constant)	**6.668**	0.594		11.234	0.000
Disability	**0.093**	0.030	**0.033**	3.076	0.002
Level of Education	0.002	0.008	0.003	0.250	0.803
Ability to Speak English Well	0.046	0.059	0.009	0.790	0.430
Availability of Capital	**0.033**	0.006	**0.057**	5.247	0.000
Marital Status	**0.030**	0.008	**0.042**	3.898	0.000
Asian American	0.151	0.165	0.010	0.918	0.359
African American	**-0.221**	0.055	**-0.044**	-4.008	0.000
Native American	-0.183	0.202	-0.010	-0.906	0.365
Hispanic American	**-0.304**	0.099	**-0.034**	-3.067	0.002
White Females	**-0.111**	0.024	**-0.051**	-4.610	0.000

Source: Griffin & Strong, P.C. and Census of Population and Housing (Census 2000 PUMS Five Percent Sample), Calculations using SPSS. Bold coefficients are statistically significant (prob- value <= .05)

APPENDIX 5
2006 INCOME REGRESSION BASED ON SURVEY DATA
(ALL INDUSTRIES)

	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
(Constant)	5.301	1.419		3.736	.000
Number of Employees	**.754**	.209	**.352**	3.606	.000
Capacity measure (Highest Amount of Loan Received)	**.269**	.087	**.304**	3.103	.002
Owner's age	.152	.209	.061	.730	.467
White Female	-.100	1.081	-.318	-1.434	.155
African American	-.424	1.129	**-.332**	-1.925*	.057
Hispanic American	**-.372**	1.515	**-.290**	-2.490	.014
Level of Education	.072	.147	.042	.492	.624

Source: Griffin & Strong, P.C. and Survey of Business Owners July 2007
Calculations using SPSS. Bold coefficients are statistically significant (prob- value <= .05)
*Note marginal significance