

# Durham North Carolina

Durham County/  
City of Durham, North Carolina

Multijurisdictional  
Disparity Study  
January 2015



GRIFFIN &  
STRONG PC

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Durham  
North Carolina  
Executive Summary



# INTRODUCTION

In 2013, the City of Durham, NC ("City") and Durham County, NC ("County") jointly contracted with Griffin & Strong, P.C. ("GSPC") to conduct a comprehensive disparity study ("Study") to examine and analyze the procurement policies and practices of both the City and the County and their prime contractors. GSPC sought to ascertain the participation and utilization of Minority and Women owned businesses ("MWBE") that are eligible to provide goods and services to either the City of Durham, Durham County, or both.

The goal of the Study was to determine whether there exists a statistically significant disparity between the number of available MWBEs in the Durham marketplace and the number of these firms that have been awarded contracts from the City, the County, or their prime contractors. The Study also will be used to determine if a legal predicate exists to maintain or create any remedial programs under City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

Durham City and County, and other governmental entities across the country, authorize disparity studies in response to Croson and subsequent cases in order to determine whether there is a compelling interest for the continuation and creation of remedial procurement programs, based upon race, gender, and ethnicity. In order for the legal requirements of Croson to be satisfied, GSPC must determine whether the City or the County have been a passive or active participants in discrimination with regard to the access of MWBEs in their procurement processes, or whether their existing programs, the City's Equal Business Opportunity ("EBO") Program and the County's Minority and Women Business Program, have eliminated the need for any such remedial programs.

To achieve these ends, GSPC analyzed the contracting and subcontracting activities of the County and its prime contractors during the five (5) year period beginning July 1, 2007, to June 30, 2012 ("Study Period"), and evaluated various options for future program development.

The principal objectives of this Study were:

- to determine whether the City or County, either in the past or currently, engages in discriminatory practices in the solicitation and award of contracts, in the business categories of Construction, Architecture & Engineering, Services, and Goods;
- to determine if a legally justified need continues to exist for any or all of Durham City and County's efforts in accordance with the guidelines set forth by the Supreme Court and relevant subsequent cases; and
- to provide recommendations as to suggested actions to be taken by the City or the County as a result of the findings of the Study, including serious consideration of race-neutral program options.

## TECHNICAL APPROACH

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

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

# PROJECT TEAM

- Rodney K. Strong, Esq., CEO, Griffin & Strong, P.C.
- Dr. Gregory Price, Senior Economist, Morehouse College
- Michele Clark Jenkins, J.D., Senior Director and Project Manager, Griffin & Strong, P.C.
- Imani Strong, Deputy Project Manager, Griffin & Strong, P.C.
- Ken Weeden & Associates, Anecdotal Interviews
- Oppenheim Research, Inc., Telephone Survey
- Gaither & Co., Data Entry Supervision
- Monarch Services, Data Entry

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

Griffin & Strong, P.C. is a professional corporation based in Atlanta, Georgia, that is actively engaged in the practice of law, as well as governmental and private consulting. Since the firm's inception in 1992, the public policy consulting division has been continuously directed and controlled by Rodney K. Strong. Attorney Strong has an extensive background in the area of public contracting with specific experience conducting disparity studies. Gregory Price, Ph.D., served as Senior Economist for this Study and reviewed all quantitative aspects of the Study. Michele Clark Jenkins, as the Project Manager, was responsible for the day-to-day aspects of the Study and for executing the methodology. Mrs. Jenkins has extensive experience in managing disparity studies, bench-markings, and goal settings. Imani Strong served as Deputy Project Manager and supported all activities of the Study. Ms. Strong's expertise in anthropological studies and prior experience on GSPC studies made her an asset to the execution of this Study, particularly in the analysis of the anecdotal evidence. Susan Johnson handled the administration of the Study particularly with regard to subcontractor tracking and payments.

## Other Members of the Project Team

- Founded in 1989, Ken Weeden and Associates (“KWA”) is a North Carolina-based full service DBE-HUB-MWBE-SBE programs consulting firm, with offices in Raleigh and Wilmington. KWA has nearly 25 years’ experience in all phases of data collection, compilation, and analysis, for the development and implementation of minority and women-business enterprise programs. The firm is a nationally recognized specialist in DBE programs (49 CFR Parts 26, and 23), having assisted more than 10 USDOT entities, including the NCDOT. It has been responsible for data collection, anecdotal data collection and compilation and conducting surveys for several leading companies on disparity studies.
- Monarch Services is a minority-owned business that is based in Durham and has been providing personnel solutions to its clients for over forty years. Its clients include Fortune 500, federal, state and local governments and small businesses. The firm provided data entry and data collection personnel. They previously worked with us on the Durham County Disparity Study in 2006. Monarch Services is a Black American woman-owned business, certified by the City of Durham and by the North Carolina Department of Administrative Services as an HUB.
- Oppenheim Research, Inc., is a Florida-based women-owned, full-service market research firm with over 35 years of experience serving public and private entities. Some of their services include telephone interviews, focus group, and mail survey data. For this project, they conducted the telephone survey.



# LEGAL ANALYSIS

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; 709 S.Ct. 706(1989), and Adarand Constructors, Inc. v. Peña, 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 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.<sup>1</sup> 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".

In Croson, 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.

In order for a local governmental entity to enact a constitutionally valid MWBE ordinance which awards contracts, it must show a compelling governmental interest. This compelling interest must be proven by particularized findings of past discrimination. North State Law Enforcement Officers Assn v. Charlotte-Mecklenburg Police Dep't, 862 F. Supp. 1445, 1451 (W.D.N.C. 1994). 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. Moreover, courts have ruled that general societal discrimination is insufficient proof to justify the use of race-based measures to satisfy a compelling governmental interest. Rather, there must be some showing of prior discrimination by the governmental actor involved, either as an "active" or "passive" participant. Croson, 488 U.S. at 498. Even if the governmental unit did not directly discriminate, it can take corrective action. Even if the governmental unit did not directly discriminate, it can take corrective action. As the Court noted in Tennessee Asphalt v. Farris, "[g]overnmental entities are not restricted to eradicating the effects only of their own discriminatory acts," 942 F.2d 969, 974 (6th Circuit 1991).

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. "Without question, remedying the effects of past discrimination is a compelling state interest. 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 provides no guidance for a legislative body to determine the precise scope of the injury it seeks to redress. Croson, 488 U.S. at 498-99. See Miller, 515 U.S. at 921.

The types of evidence routinely presented to show the existence of a compelling interest include statistical and anecdotal evidence.<sup>8</sup> 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. 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." Coral Construction Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991). 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 MWBE program is narrowly tailored to redress the effects of discrimination. In Croson, the Court considered four factors:

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

Twenty-five years of litigation following the Croson decision presents governments with continued evolution of the law in the area of remedial programs and processes used to ameliorate inequities concerning MWBE utilization in public contracting. In this study, the Griffin & Strong P.C. team evaluated both the quantitative and the qualitative evidence within the requirements of Croson and its progeny, to determine whether the City of Durham and/or the County of Durham have been active or passive participants in past or present discrimination, that warrant and permit such remediation. The overall findings and recommendations are presented in the following pages.



# FINDING 1

## City of Durham - Overall MWBE Prime Utilization

The City of Durham spent \$206.1 million in the various Relevant Markets during the Study Period. 2.66% or \$5.5 million was spent with minority and female owned firms across all procurement categories at prime level.

**Table 1: City of Durham MWBE Prime Utilization in the Relevant Market  
(Awards 7/1/2007-6/30/2012)  
Awards over \$30,000**

	Construction	%	A/E	%	Services	%	Goods	%	Totals	%
Black American	\$1,543,750	1.45%	\$1,060,994	3.85%	\$1,518,296	2.34%	\$0	0%	\$4,123,040	2.00%
Asian American	\$0	0%	\$57,785	0.21%	\$0	0%	\$0	0%	\$57,785	0.03%
Hispanic American	\$0	0%	\$57,931	0.21%	\$0	0%	\$0	0%	\$57,931	0.03%
American Indian	\$0	0%	\$0	0%	\$0	0%	\$0	0%	\$0	0.00%
White Female	\$67,988	0.06%	\$1,092,642	3.96%	\$90,853	0.14%	\$0	0%	\$1,251,483	0.61%
<b>Total MWBE</b>	<b>\$1,611,738</b>	<b>1.51%</b>	<b>\$2,269,352</b>	<b>8.23%</b>	<b>\$1,609,149</b>	<b>2.48%</b>	<b>\$0</b>	<b>0%</b>	<b>\$5,490,239</b>	<b>2.66%</b>
<b>Total Contract Awards</b>	<b>\$106,590,110</b>	<b>100%</b>	<b>\$27,585,266</b>	<b>100%</b>	<b>64,786,228</b>	<b>100%</b>	<b>\$7,155,057</b>	<b>100%</b>	<b>\$206,116,661</b>	<b>100.00%</b>

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# FINDING 2

## City of Durham - Statistically Significant Underutilization of MWBEs as Primes

Griffin & Strong, P.C. found that, in the City of Durham, minority and women owned firms were significantly underutilized as prime contractors in every category for every year of the study period.

**Table 2: City of Durham Summary of Statistically Significant MWBE Underutilization in Prime Contracting July 1, 2007-June 30, 2012**

CONSTRUCTION	A/E	SERVICES	GOODS
Black American	Black American	Black American	Black American
Asian American	Asian American	Asian American	Asian American
Hispanic American	Hispanic American	Hispanic American	Hispanic American
American Indian	American Indian	American Indian	American Indian
White Female	White Female	White Female	White Female

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# FINDING 3

## City of Durham - Statistically Significant Underutilization of MWBEs as Subcontractors

In subcontracting, Asian American, Hispanic American, and American Indian owned firms were significantly underutilized every year of the Study Period. Looking at the sum total of the subcontracting during the Study Period, Black American and White Female owned firms showed some overutilization during the Study Period.

Black American owned firms were underutilized during the Study Period in Construction subcontracting, but were overutilized in A/E, Services, and Goods. White Female owned firms were underutilized in Construction and Goods, but over utilized in both A/E and Services.

It is not coincidental that the two groups which are the focus of the City's MWBE program are overutilized as subcontractors in certain areas. This speaks to the effectiveness of the City's current program in these areas. However, with prime contracting with these same two groups being so substantially underutilized as primes, and there being almost no utilization of other minority groups either as primes or subs, there is a clear demonstration that, "but for" the establishment of remedial programs at the City, there is little utilization of minority and women owned businesses with the City of Durham.

The lack of participation of minority owned firms as prime contractors indicates that the City's program may need to be revamped to include components that encourage joint-venturing between smaller firms, the breakdown of larger contracts, and a mentor-protégé program in order to bridge the gap for these businesses into prime contracting.

# FINDING 3

**Table 3: City of Durham Summary of Statistically Significant MWBE Underutilization in Subcontracting  
July 1, 2007-June 30, 2012**

CONSTRUCTION	A/E	SERVICES	GOODS
Black American			
Asian American	Asian American	Asian American	Asian American
Hispanic American	Hispanic American	Hispanic American	Hispanic American
American Indian	American Indian	American Indian	American Indian
White Female			White Female
	Non-Minority Male	Non-Minority Male	Non-Minority Male

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# FINDING 4

## Durham County - Overall MWBE Utilization

Durham County spent \$313.6 million in the Relevant Market during the Study Period on contracts (FRs and POs) over \$30,000 and including awards totaling \$30,000 or more to any firm. Including in the utilization are additions to previous years' awards. 6.07% or \$19 million was spent with minority and female owned firms across all procurement categories at prime level during the Study Period.

**Table 4: Durham County- MWBE Prime Utilization in the Relevant Market  
(Awards 7/1/2007-6/30/2012)**

**Awards over \$30,000 to any firm in any year and including additions to previous years' awards**

	Construction	%	A/E	%	Services	%	Goods	%	Totals	%
Black American	\$115,000	0.05%	\$6,944,153	26.71%	\$1,831,247	4.47%	\$546,350	3.74%	\$9,436,750	3.01%
Asian American	\$0	0.00%	\$0	0.00%	\$0	0%	\$0	0%	\$0	0.00%
Hispanic American	\$0	0.00%	\$4,565,900	17.56%	\$0	0%	\$0	0%	\$4,565,900	1.46%
American Indian	\$0	0.00%	\$64,100	.25%	\$30,262	.07%	\$0	0%	\$94,362	0.03%
White Female	\$1,230,998	0.53%	\$139,772	.54%	\$3,307,403	8.08%	\$244,153	1.67%	\$4,922,326	1.57%
Total MWBE	\$1,345,998	0.58%	\$11,713,925	45.06%	\$5,168,912	12.62%	\$790,503	5.40%	\$19,019,338	6.07%
Total Contract Awards	\$231,996,478	100%	\$25,998,400	100%	\$40,946,761	100%	\$14,627,138	100%	\$313,568,777	100.00%

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# FINDING 5

## Durham County - Statistically Significant Underutilization of MWBEs as Primes

Griffin & Strong, P.C. found that, in Durham County, minority and women owned firms were significantly underutilized as prime contractors in Construction and Services for every year of the Study Period in which there was competitive bidding in contracts over \$30,000.

In A/E and Goods, Hispanic American and Female owned firms were significantly underutilized as prime contractors for every year of the Study Period. Black American owned firms were overutilized in A/E from 2009-2012, primarily because of additions to a previous year's contract to one architectural firm. Black American owned firms were overutilized in 2008 and 2010. Hispanic American owned firms were overutilized in A/E during 2008.



# FINDING 5

**Table 5: Durham County  
Summary of Statistically Significant MWBE  
Underutilization in Prime Contracting based on Ownership  
July 1, 2007-June 30, 2012**

<b>CONSTRUCTION</b>	<b>A/E</b>	<b>SERVICES</b>	<b>GOODS</b>
Black American		Black American	Black American
Asian American	Asian American	Asian American	Asian American
Hispanic American		Hispanic American	Hispanic American
American Indian	American Indian	American Indian	American Indian
White Female	White Female		White Female

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# FINDING 6

## Durham County - Statistically Significant Underutilization of MWBEs as Subcontractors

In subcontracting, MWBE's were significantly underutilized in total during the Study Period in Construction and A/E. Black American owned firms were overutilized in Services, as were White Females in Goods. Asian American, Hispanic American, and American Indian owned firms were all significantly underutilized. It is interesting to note that Non-minority Males were substantially underutilized in Services.

Again, the story is in the disaggregation of utilization by year. In A/E, there was substantial overutilization of Black American firms in 2008, but since then, there was underutilization of Black American owned firms for the remainder of the Study Period, again establishing a trend of underutilization. Similarly in Services, Black American firms were overutilized in 2008 and 2009, but were underutilized in 2010-2012.





# FINDING 6

**Table 6: Durham County  
Summary of Statistically Significant MWBE  
Underutilization in Subcontracting  
July 1, 2007-June 30, 2012**

CONSTRUCTION	A/E	SERVICES
Black American	Black American	
Asian American	Asian American	Asian American
	Hispanic American	Hispanic American
American Indian	American Indian	American Indian
White Female	White Female	White Female
		Non-Minority Male

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**Note:** As is not unusual, there was not enough subcontracting activity in the category of Goods to provide data from which inferences could be sufficiently made.

## FINDING 7

### Relevant Market

The relevant market for each procurement category is the area in which 75% or more of the dollars were spent during the Study Period. The relevant markets for this Study by procurement categories are:

- Construction – Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs
- A&E- Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs
- Services – State of North Carolina
- Goods – United States

## FINDING 8

### Regression Analysis

GSPC tested the disparities found in contracting by the City of Durham and the County of Durham to determine if the disparities were likely cause by race/ethnicity/gender status. This was performed by controlling for non-race/ethnicity/gender factors like age of the owner, education of the owner, years in business, etc. GSPC determined that race/ethnicity/gender ownership status has an adverse affect on a firm owner's ability to win prime and subcontracting opportunities. Further, it is likely that the disparities found in prime and subcontracting by both the City of Durham and the County of Durham were caused by the race/ethnicity/gender status of the owner.

# FINDING 9

## Access to Capital

GSPC found that MWBEs are less likely than non-MWBEs to have access to business capital to either start or expand their businesses. This is true even though MWBEs are more likely to need capital provided by the private sector to start or expand their businesses. This is consistent with anecdotal data gathered that indicates that startup capital and bonding are important aspects of business viability and success; and that minority and Women owned businesses in the Durham relevant market area desire assistance with such matters.



# FINDING 10

## Anecdotal Evidence

Anecdotal evidence assisted GSPC greatly in both getting a better picture of the empirical data and understanding the perceptions of the business community in the Durham, North Carolina marketplace. Through the anecdotal interviews, telephone surveys, public hearing, focus group, and public comment, GSPC determined the following perceptions:

- A. Both the County and the City have the makings and personnel for successful programs, but the compliance departments do not seem to have the resources or power to make the changes that need to be made or enforce what is already in place.
- B. There need to be more resources available to MWBE firms so that they can be successful in winning awards as primes. The programs only focus on subcontractors so there is no business development and no opportunities to network with primes.
- C. The County and the City bid out contracts that are too large for smaller firms when there are opportunities to break down those contracts into smaller ones.
- D. Only Black American and Female owned firms are able to do business in the Durham marketplace because there is no program for any other ethnic group.
- E. Without a program minority owned firms will not be awarded contracts.
- F. There are a substantial number of female owned firms that are in fact not controlled by females, but have been certified as female owned firms in order to participate in remedial programs, therefore taking valuable contracts meant for bona fide MWBEs.
- G. The City of Durham in particular has IT problems which hinder the ability of primes to identify qualified MWBE firms and to contact them.
- H. The County's program is only strong because of the person that is running the program but the contract compliance position itself is not a full time one. This reflects the lack of organizational focus on that role.

# FINDING 11

## Purchasing Practices Policies and Procedure Findings

In general, there seems to be a good understanding of the practices and procedures currently in place with the City and the County. The problems seem to lie in updating IT systems and data maintenance, which is a hindrance in the dissemination of information.

The purchasing practices and policies regarding MWBEs for both the City and the County are assisting in garnering contracts for some Black American and White Female owned businesses but are not robust enough to close the disparity gap for any MWBE group.



# RECOMMENDATION 1

## Narrow Tailoring of MWBE Programs

There is dramatic underutilization of all MWBE as prime contractors in most work categories in awards at the City of Durham and the County of Durham, but most apparent in Construction. Although there is some overutilization of Black American and White Female owned firms on City of Durham subcontracts, it is clear that without a program there would be little or no utilization of any minority or female owned firms as is demonstrated through the Private Sector analysis

GSPC recommends that both the County and the City institute aspirational goals for minority and female subcontractors in the areas of statistically significant underutilization. This can either be effectuated through individual goals for each race/ethnicity/gender group, or it can be an overall goal that could be met by any MWBE. In this type of program, it is important that there be hands on involvement of compliance personnel to inquire when certain groups do not seem to be represented in subcontracting despite the availability of such firms to perform the needed services. Goals should be set at for just below the availability figures (either individually or combined). The City already has dedicated personal to provide compliance, but the County should also have full time personnel solely dedicated to performing contract compliance responsibilities. GSPC believes that with the additional focus, the aspirational goal program along with the current race neutral program could return better attainment of MWBE firms.

# RECOMMENDATION 2

## Asian American, American Indian, and Hispanic American Goals and Outreach

Goals for these consistently underutilized groups should be established through benchmarking based on relative availability of firms in each demographic category. MWBE goals based on should be based on vendor availability in the relevant market area.

In addition, the City and County should make a concerted effort to target outreach to these underrepresented groups, including professional organizations and targeted business development nonprofits in order to advertise these new goals and encourage participation in City and County projects by Asian American, Hispanic American, and American Indian owned firms.

## RECOMMENDATION 3

### Joint Venture Contracts/MWBE Teams

In order to improve utilization of MWBE firms at the prime level, it is suggested that the City and County should look for instances in which MWBE capacity can be increased to match contract size through the encouragement of joint ventures. The City and County may also encourage joint ventures between MWBEs and nonminority firms on large-scale projects; however, these types of joint ventures pose the risk of potential illicit “fronts” and must be examined carefully.

## RECOMMENDATION 4

### Contract Sizing

The City and County should consider issuing contracts in small dollar amounts to expand the opportunities that small MWBEs have to do business with Durham.

## RECOMMENDATION 5

### Mentor-Protégé Programs

The City and County should consider the development of a mentor-protégé program (a suggestion that has considerable support from anecdotal evidence gathered for this study). In such a program, veteran and mid-size MWBEs serve as mentors for smaller and newer MWBE firms. The City and County may consider partnering with organizations such as Associated General Contractors, local builders associations, and other similar groups

## RECOMMENDATION 6

### Performance Reviews

City and County employees and user departments should be evaluated regularly based on the quality, transparency, and effectiveness of their attempts to reach procurement goals and achieve the overall goals of the MWBE programs in place.

## RECOMMENDATION 7

### Debriefings

Both the City and County should engage in regular debriefings with unsuccessful bidders to improve contractor awareness of the requirements of bidders and to enable them to provide more qualified or accurate responses to solicitations in the future.

## RECOMMENDATION 8

### Commercial Antidiscrimination Rules

An effective antidiscrimination policy may include submission and review of a Business Utilization report for evidence of discrimination. The City and County should be commended for providing officers and mechanisms for filing complaints against firms that have discriminated against MWBEs, and such mechanisms may be expanded to include a disseminated statement of due process of investigation by staff and, if necessary, the imposition of strict sanctions.

In addition, anecdotal evidence of contractor misrepresentation as White Female owned firms leads GSPC to recommend stricter policies regarding monitoring and review of such applications for certification.



## RECOMMENDATION 9

### Bonding Assistance Programs

Due to the results of the private sector and anecdotal analyses, Griffin & Strong, P.C. believes that it is important for the City and County of Durham to provide resources to SBE and MWBE firms by utilizing non-profit organizations for loans and bonding, and forming agreements with local banks to provide funding to small, minority, and women owned businesses recognized by the programs at the City and County. Further, the City and County should endeavor to make business owners in Durham aware of the avenues available through the Small Business Association and other bonding agencies.

## RECOMMENDATION 10

### Balanced Scorecard

The City and County should develop additional measures to gauge the effectiveness of their respective efforts, including

- Growth in MWBE prime contracting
- Growth in MWBE subcontracting to prime contractors
- Growth in the number of MWBEs winning first awards
- Growth in percentage of MWBE utilization
- Number of firms that receive bonding
- Number of joint ventures involving MWBEs

## RECOMMENDATION 11

### Increased Resources for County of Durham MWBE Program

An increase of staff and resources to the MWBE program in Durham County is recommended to ensure the necessary resources to operate the MWBE program, train the internal customers and end-users, and to track the data needed to report on accomplishments and metrics established for the program. The staff would be responsible for contract compliance monitoring, outreach, public inquiries, goal-setting, and the analysis of bid requirements.

## RECOMMENDATION 12

### Declining MWBE Goals

A city with a successful MWBE program implemented a hybrid program by establishing a declining schedule of race-conscious targets. In the first year of the program, the City proposed to meet 70% of its MWBE goal with race-conscious means, the second year 50%, and the third year 25%. At the end of the three year period, the program was to be evaluated.

The City and County of Durham may consider creating and funding some of these initiatives to include:

- Bond Enhancement Programs
- Access to Capital Program
- Educational Summits
- Semi-monthly MWBE payments
- Cap on the number and dollar value of set-aside contracts
- Appropriating funds necessary to implement these programs

## RECOMMENDATION 13

### Steering Committee

The MWBE or Contract Compliance Officers/Equal Opportunity Office alone cannot truly create the success of an SBE or MWBE program. There must first be a change in the business culture. There are key senior staff members in the City and County who should serve as a steering committee for each entity, including, in the City of Durham, the City Manager, Director of EO/EA, and User Department Heads. In the County, such a committee might include County Commissioners, representatives from the Finance Department, and the Director of the County's MWBE program. Communications strategies should be established to provide information to MWBEs and SBEs and encourage their total integration into the procurement process. The steering committee should be responsible for a quarterly review of outcomes and the monitoring of the department heads' responsibilities to implement, track, and report on the MWBE utilization efforts. Perhaps Durham City and County could consider a joint committee for the good of those Durham citizens and business owners who do business, or would like to, with both entities.

## RECOMMENDATION 14

### Additional Features for MWBE Websites

Each website, for both the City and County of Durham, should include the uniform certification application, program descriptions, information and resources on how to do business, bid tabulations, direct links to online purchasing manuals, capacity and experience data on certified firms, bid opportunities, vendor application, information on loan and bonding programs, and forecasts of business opportunities.

## RECOMMENDATION 15

### Durham County Guidelines and Internal Policies

Griffin & Strong, P.C. commends Durham County for their efforts in encouraging MWBE participation, but would like to note that there are certain current uncodified practices that are positive approaches to monitoring and administering MWBE participation that could potentially be erased unless they are instituted as written policy. Explicit guidelines and parameters are necessary for the Assistant Purchasing Manager/(MWBE) Coordinator position, as well as increased assistance from the IT department for both the Assistant Purchasing Manager/(MWBE) Coordinator position and the Purchasing Division as a whole. Furthermore, beyond the set-in-stone threshold based policies, it should be a requirement to obtain three quotes at every threshold, which could be useful in encouraging MWBE participation on small-dollar contracts.

## RECOMMENDATION 16

### Contractor Training and Education

It was suggested by interviewees in the anecdotal analysis that MWBE and SBE firms be given more of an opportunity to understand and ask questions about the bid specifications. This may entail the City and County (jointly or separately) providing outreach resources in the form of contractor education. A semi-regular “class” or seminar on reading bid specifications, obtaining bonding, and standard violations that may make a bid deemed unresponsive would be helpful in bridging that gap.

## RECOMMENDATION 17

### Online Processes

Another insight gleaned from the anecdotal analysis was that the bidding process could be easier for some business owners if the City and County provided the digital plans online instead of the contractors having to go to other physical addresses to look up the plans or paying expensive fees to have another entity pull them. In addition to this, it was noted by some interviewees within the City of Durham that the IT process should have a more explicit operating procedure by which the databases, especially for MWBE, can be updated concurrently and regularly.



## CONCLUSION

Although both the City of Durham and Durham County have tried to use race neutral measures to remediate the remnants of discrimination, the results of those programs have not been sufficient to level the procurement playing field. In both cases, more robust measures are warranted, particularly by the inclusion into the City's Program of Asian American, Hispanic American and American Indian owned firms.

GSPC has made numerous recommendations for narrowly tailored remedies, both additional race-neutral activities, as well as race- and gender-conscious initiatives. GSPC will continue to assist the City and the County in fashioning its recommendations into workable policy that will benefit all members of the business community in Durham.



# CITATIONS

1. See H.B. Rowe Company v. W. Lyndo Tippet, 615 F.3d 233, 251 (4th Circuit 2010); Belk, et al. v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305 (4th Circuit 2001); Eisenberg ex rel. v. Montgomery County Schools, 197 F.3d 123 (4th Circuit 1999); Daniel Podberesky v. University of Maryland at College Park, et al., 38 F.3d 147 (4th Circuit 1994); Dickerson Carolina, Inc. v. Harrelson, 114 N.C. App. 693 (1994).
2. Croson, 488 U.S. at 493. See also Freeman v. City of Fayetteville, 971 F. Supp. 971 (E.D.N.C. 1997); Cannon, et al. v. Durham County Board of Elections, 917 F. Supp. 387 (E.D.N.C. 1996).
3. Croson, 488 U.S. at 493. See also, Adarand, 515 U.S. at 235.
4. Croson, 488 U.S. at 496-97. See Miller v. Johnson, 515 U.S. 900, 922 (1995). See, e.g., Freeman, 971 F. Supp. at 975.
5. Belk v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305, 344 (4th Circuit 2001) (quoting Croson, 488 U.S. at 493).
6. Croson, 488 U.S. at 501. 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).
7. Croson, 488 U.S. at 501. See, United Black Firefighters Assn., 976 F.2d at 1009. See also, Engineering Contractors, 122 F.3d 895 (11th Cir. 1997).

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## I. INTRODUCTION

In 2013, the City of Durham, NC (“City”) and Durham County, NC (“County”) jointly contracted with Griffin & Strong, P.C. (“GSPC”) to conduct a comprehensive disparity study (“Study”) to examine and analyze the procurement policies and practices of both the City and the County and their prime contractors. GSPC sought to ascertain the participation and utilization of Minority and Women owned businesses (“MWBE”) that are eligible to provide goods and services to either the City of Durham, Durham County, or both.

The goal of the Study was to determine whether there exists a statistically significant disparity between the number of available MWBEs in the Durham marketplace and the number of these firms that have been awarded contracts from the City, the County, or their prime contractors. The Study also will be used to determine if a legal predicate exists to maintain or create any remedial programs under City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

Durham City and County, and other governmental entities across the country, authorize disparity studies in response to Croson and subsequent cases in order to determine whether there is a compelling interest for the continuation and creation of remedial procurement programs, based upon race, gender, and ethnicity. In order for the legal requirements of Croson to be satisfied, GSPC must determine whether the City or the County have been a passive or active participants in discrimination with regard to the access of MWBEs in their procurement processes, or whether their existing programs, the City’s Equal Business Opportunity (“EBO”) Program and the County’s Minority and Women Business Program, have eliminated the need for any such remedial programs.

To achieve these ends, GSPC analyzed the contracting and subcontracting activities of the County and its prime contractors during the five (5) year period beginning July 1, 2007, to June 30, 2012 (“Study Period”), and evaluated various options for future program development.

## **A. Objective**

The principal objectives of this Study were:

- to determine whether the City or County, either in the past or currently, engages in discriminatory practices in the solicitation and award of contracts, in the business categories of Construction, Architecture & Engineering, Services, and Goods;
- to determine if a legally justified need continues to exist for any or all of Durham City and County's efforts in accordance with the guidelines set forth by the Supreme Court and relevant subsequent cases; and
- to provide recommendations as to suggested actions to be taken by the City or the County as a result of the findings of the Study, including serious consideration of race-neutral program options.

## **B. Technical Approach**

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

- establishing data parameters and finalizing a work plan;
- legal analysis;
- policy and procurement process review and race-neutral program analysis;
- collecting, organizing, and cleaning data;
- conducting market area analyses;
- conducting utilization analyses;
- determining the availability of qualified firms;
- analyzing the utilization and availability data for disparity and statistical significance;
- conducting private sector analysis including credit and self-employment analysis;
- collecting and analyzing anecdotal information; and

- preparing a final report that presents race- and gender-neutral and narrowly tailored race- and gender-based remedies if indicated by the findings.

### **C. Report Organization**

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

Chapter II, which is an overview of the legal history and basis for the Study;

Chapter III-1, which provides a review of the City of Durham's purchasing policy and remedial policy;

Chapter III-2, which provides a review of Durham County's purchasing policy and remedial policy;

Chapter IV, which presents the methodology used in the collection of statistical data from both the City and the County and the analyses of the data as it relates to relative MWBE availability and separate utilization analyses for each respective entity. It also includes a discussion on levels of disparity for the City's prime contractors and subcontractors, as well as a separate disparity analysis for the County;

Chapter V, which analyzes whether there is discrimination in the private sector;

Chapter VI, which outlines the qualitative analyses: the analysis of anecdotal data collected from the telephone survey, personal interviews, focus groups and public meetings;

Chapter VII, which presents GSPC's detailed findings and recommendations;

Chapter VIII, which is GSPC's conclusion; and

Chapter IX, which is the Appendices.

## D. Project Team

- Rodney K. Strong, Esq., CEO, Griffin & Strong, P.C.
- Dr. Gregory Price, Senior Economist, Morehouse College
- Michele Clark Jenkins, J.D., Senior Director and Project Manager, Griffin & Strong, P.C.
- Imani Strong, Deputy Project Manager, Griffin & Strong, P.C.
- Ken Weeden & Associates, Anecdotal Interviews
- Oppenheim Research, Inc., Telephone Survey
- Gaither & Co., Data Entry Supervision
- Monarch Services, Data Entry

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

Griffin & Strong, P.C. is a professional corporation based in Atlanta, Georgia, that is actively engaged in the practice of law, as well as governmental and private consulting. Since the firm's inception in 1992, the public policy consulting division has been continuously directed and controlled by Rodney K. Strong. Attorney Strong has an extensive background in the area of public contracting with specific experience conducting disparity studies. Gregory Price, Ph.D., served as Senior Economist for this Study and reviewed all quantitative aspects of the Study. Michele Clark Jenkins, as the Project Manager, was responsible for the day-to-day aspects of the Study and for executing the methodology. Mrs. Jenkins has extensive experience in managing disparity studies, bench-markings, and goal settings. Imani Strong served as Deputy Project Manager and supported all activities of the Study. Ms. Strong's expertise in anthropological studies and prior experience on GSPC studies made her an asset to the execution of this Study, particularly in the analysis of the anecdotal evidence. Susan Johnson handled the administration of the Study particularly with regard to subcontractor tracking and payments.

#### Other Members of the Project Team

- Founded in 1989, **Ken Weeden and Associates (“KWA”)** is a North Carolina-based full service DBE-HUB-MWBE-SBE programs consulting firm, with offices in Raleigh and Wilmington. KWA has nearly 25 years’ experience in all phases of data collection, compilation, and analysis, for the development and implementation of minority and women-business enterprise programs. The firm is a nationally recognized specialist in DBE programs (49 CFR Parts 26, and 23), having assisted more than 10 USDOT entities, including the NCDOT. It has been responsible for data collection, anecdotal data collection and compilation and conducting surveys for several leading companies on disparity studies.
- **Monarch Services** is a minority-owned business that is based in Durham and has been providing personnel solutions to its clients for over forty years. Its clients include Fortune 500, federal, state and local governments and small businesses. The firm provided data entry and data collection personnel. They previously worked with us on the Durham County Disparity Study in 2006. Monarch Services is a Black American woman-owned business, certified by the City of Durham and by the North Carolina Department of Administrative Services as an HUB.
- **Oppenheim Research, Inc.**, is a Florida-based women-owned, full-service market research firm with over 35 years of experience serving public and private entities. Some of their services include telephone interviews, focus group, and mail survey data. For this project, they conducted the telephone survey.

## II. LEGAL ANALYSIS

### A. Background and Introduction

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; 709 S.Ct. 706(1989), and Adarand Constructors, Inc. v. Peña, 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 that such programs be narrowly tailored to achieve the governmental interest. See H.B. Rowe Company v. W. Lyndo Tippet, 615 F.3d 233, 251 4th Circuit (2010); Belk, et al. v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305 (4th Circuit 2001); Eisenberg ex rel. v. Montgomery County Schools, 197 F.3d 123 (4th Circuit 1999); Daniel Podberesky v. University of Maryland at College Park, et al., 38 F.3d 147 (4th Circuit 1994); Dickerson Carolina, Inc. v. Harrelson, 114 N.C. App. 693 (1994). 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”. Croson, 488 U.S. at 493. See also Freeman v. City of Fayetteville, 971 F. Supp. 971 (E.D.N.C. 1997); Cannon, et al. v. Durham County Board of Elections, 917 F. Supp. 387 (E.D.N.C. 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. See, Engineering Contractors, 122 F.3d at 907. See also, Rowe, 615 F.3d at 255.

Various governmental entities have confronted the issue of “affirmative action” in the Fourth 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 Durham County and the City of Durham. This legal analysis includes, inter alia, an extended discussion of public contracting and Equal Protection Clause cases from those courts which have had a direct impact on the methodology employed by Griffin & Strong in conducting its Study for both governmental entities. Below is a discussion of the legal principles outlined by the United States Supreme Court and lower Federal 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 both the City and County’s MWBE programs 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 ("MBE") program failed to satisfy both prongs of the "strict scrutiny" standard. Croson, 488 U.S. at 507. The City of Richmond 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 Black American) and awards of prime contracts to minority-owned firms (0.67 percent to Black American-owned 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 that "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, on what evidence might indicate a proper statistical comparison:

[W]here 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. Croson, 488 U.S. at 509.

In other words, the statistical comparison would be one between the percentage of MBEs in the market 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 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. Croson, 488 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 five 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 MWBE programs. First, we will discuss the standing requirements for a plaintiff to maintain a suit against an MWBE 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.

### **D. Standing**

As a result of the Croson decision, courts have entertained numerous legal challenges to MWBE set-aside programs. Standing is important because it usually is pivotal in determining a

party's relevance in a lawsuit. Thus, if an MWBE 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. Price v. City of Charlotte, 93 F.3d 1241, 1247 (4th Circuit 1996). See Cone Corp. v. Hillsborough County, 157 F.R.D. 533 (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).

For example, in Rob Farmer v. Ramsay, et al., 41 F. Supp.2d 587 (D.Md. 1999), the court addressed the standing of a nonminority male student who twice was denied admission to the University of Maryland School of Medicine ("UMSM"). Farmer, based upon his low income, participated in UMSM's Advanced Premedical Development Program ("Program") following his initial application to UMSM. UMSM designed the Program to increase the number of medical students from "minority and/or disadvantaged" backgrounds. All participants in the Program received special counseling and a free MCAT preparation course. Thereafter, Farmer retook the MCAT and improved his score. The plaintiff claimed that his second application for admission to UMSM would have qualified him for admission had he been a minority candidate. 41 F. Supp.2d at 589-590. Upon a motion to dismiss by the individual and institutional defendants, the court denied the motion – in part – because it ruled that Farmer had standing to sue. "For standing purposes...Farmer is not required to allege that he would have been admitted but for the illegal discrimination. The Supreme Court has held that being forced to compete in a discriminatory selection process constitutes an injury sufficient to establish standing." 41 F. Supp.2d at 593.

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), has 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 nonminority 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 MWBEs on an equal footing due to the ordinance's "discriminatory policy." 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 F. Supp. 2d 1354 (Plaintiff Greenthumb demonstrated that it was able to bid on contracts and a discriminatory policy prevented it). Specifically, the Court stated:

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. Northeastern Florida Chapter of Associated General Contractors of America at 666.

The Fourth Circuit Court, in ruling on a North Carolina case, opined that "the injury required to recover compensatory damages for a constitutional violation springs from the impermissible conduct of the Government in perpetrating invidious discrimination, not from the consequence of denial of plaintiff's ultimate goal." Price, 93 F.3d at 1246-47.

In Associated Utility Contractors of Maryland v. the Mayor and City of Baltimore, 83 F. Supp.2d 613 (D. Md. 2000), a federal court in a different part of the Fourth Circuit issued a decision which addressed the “injury in fact” element of the standing requirement. In Associated Utility Contractors, a contractors association brought an action challenging the constitutionality of the City of Baltimore’s minority business set-aside ordinance. The Federal District Court for the District of Maryland enjoined Baltimore from granting public contracts pursuant to its MWBE ordinance and the City moved to stay the injunction, inter alia, until it had completed a pending disparity study. The court held, in pertinent part, that the contractors association had demonstrated the “injury in fact” required to establish standing to challenge the constitutionality of the MWBE ordinance enacted by the City. “For the purposes of an equal protection challenge to affirmative action set-aside goals the Supreme Court has held that the ‘injury in fact’ is the inability to compete on an equal footing in the bidding process.” Associated Util. Contrs. Of Md., 83 F. Supp.2d at 616. This ruling also raised the issue of representational standing.

A case in a North Carolina Federal District Court reiterated the standing requirement. In N.C. Motorcoach Assn v. Guilford County Bd. of Educ., 315 F. Supp. 2d 784 (M.D.N.C. 2004), a bus company and its trade association sued a school board claiming that the board’s contracting requirements were constitutionally invalid. Although the Court ultimately ruled that the County school board’s contracting regulations did not violate the Commerce Clause of the Constitution, inter alia, the Court first determined that the bus company had standing to file such litigation.

In this case, Carolina American alleges that Defendant’s procedures have not only deterred it from entering into contracts to transport Guilford County public school students but have actually prevented it from doing so. In fact, Carolina American has alleged that not only had it bid on motor-carrier contracts prior to the implementation of the RFI [“Request for Information”], but Defendant, because of the RFI, actually cancelled several of Carolina American’s contracts. Based on these allegations, the Court finds that Carolina American’s Complaint contains sufficient allegations of an injury in fact. Furthermore, the Court finds that Carolina American has also sufficiently alleged that its injuries are fairly traceable to Defendant’s conduct and are redressable by this Court. NC Motorcoach Association, at 794.

The United States Supreme Court, in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), established a three-prong test to determine whether an association has associational standing to bring a lawsuit on behalf of its members. It wrote, a court must determine whether “(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members.” 432 U.S. at 343. The Federal Courts in North Carolina have adhered to this standard through numerous cases. See, Retail Indus. Leaders Assn v. Fielder, 475 F.3d 180, 186 (4th Cir. 2007); International Bottled Water Association v. Eco Canteen, Inc., 2010 U.S. Dist. LEXIS 102381.

The Court in Associated Utility Contractors submitted the AUC to the three-prong test and found that the group had demonstrated its standing. Similarly, the court ruled that a political association had standing to sue a state agency in Maryland State Conference of NAACP Branches v. Maryland Department of State Police, 72 F. Supp.2d 560 (D. Md. 1999). In this respect, see also Maryland Minority Contractors Association, et al. v. Maryland Stadium Authority, et al., 70 F. Supp.2d 580 (D. Md. 1998). By comparison, the court ruled that a contractors association lacked representational standing in its lawsuit regarding the constitutionality of the state’s MBE statute.

In Maryland Highway Contractors Association v. State of Maryland, et al., 933 F.2d 1246 (4th Circuit 1991), the Maryland Highway Contractors Association (“MHCA”) sought declaratory and injunctive relief against the State of Maryland in an effort to stop it from employing its MBE statute. The state responded that the MHCA lacked standing to sue and filed a motion for summary judgment. The trial court granted the motion and the MHCA appealed. In the interim, the state repealed the statute which was the subject of the suit and replaced it with a revised version. Although the 4th Circuit Court of Appeals ruled that the MHCA’s lawsuit had been mooted by the repealed legislation, it did address the issue of representational standing in its order to vacate and opined that MHCA failed to meet the final prong of the test. “[T]he members



of [the MHCA] have conflicting interests. Some of the members of the Association are certified MBEs; they benefit from the continued enforcement of the MBE statute. Other nonminority members of the Association would benefit if the MBE statute were declared unconstitutional. Thus, there are actual conflicts of interest which would require that the individual members come into the lawsuit to protect their interests.” 933 F.2d at 1253.

Lastly, 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." Adarand Constructors v. Peña, 515 U.S. 200, 211 (1995). 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.

#### E. 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 “[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

In H.B. Rowe Company v. Lyndo Tippet, the 4th Circuit Court of Appeals, citing to its own jurisprudence and Supreme Court cases involving abortion law, (Gonzales v. Carhart, 550 U.S. 124 (2007)), election law (Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008)), and a challenge to the bail reform act, (United States v. Salerno, 481 U.S. 739 (1987)), applies the Supreme Court’s disfavor of facial challenges on the basis of equal protection, to facial challenges to North Carolina statutory law concerning the inclusion of MWBEs in state public contracting. Judge Motz wrote:

“When a plaintiff alleges . . . that a statute violates the Equal Protection Clause, not only as applied, but also on its face, the plaintiff bears a heavy burden. The Supreme Court has, as a policy matter, expressed a strong preference for avoiding facial challenges. . . . The Court disfavors such challenges because they often rest on speculation, run contrary to the fundamental principle of judicial restraint, and threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. . . . In its facial challenge, therefore, a plaintiff has a very heavy burden to carry, and must show that a statutory scheme cannot operate constitutionally under any circumstance. Of course, even if a plaintiff cannot mount a successful facial challenge, it may nonetheless be able to demonstrate that the application or enforcement of a statute is unconstitutional. Where substantial record evidence exists as to the application of the challenged statutory scheme, a court has the concrete facts necessary to assess such an as-applied challenge.” Tippett, 615 F.3d at 243 (internal citations and internal quotation marks omitted).

### **1. 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., Williams v. Hansen, 326 F.3d 569 (4th Circuit 2003); Hayes v. North State Law Enforcement Officers Association, 10 F.3d 207, 212 (4th Circuit 1993); Monroe v. City of Charlottesville, 471 F. Supp. 2d 657 (W.D.V.A. 2007). 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. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Rowe, 615 F.3d at 242. 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). See also, Adkins v. Rumsfeld, 464 F.3d 456, 468 (4th Cir. 2006). Therefore, race-conscious affirmative action is subject to a much higher standard of judicial review than gender-conscious affirmative action. Rowe, at 242.

a) **Strict Scrutiny**

In order for a local governmental entity to enact a constitutionally valid MWBE ordinance which awards contracts, it must show a compelling governmental interest. This compelling interest must be proven by particularized findings of past discrimination. North State Law Enforcement Officers Assn v. Charlotte-Mecklenburg Police Dep't, 862 F. Supp. 1445, 1451 (W.D.N.C. 1994). 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. Croson, 488 U.S. at 493. See also, Adarand, 515 U.S. at 235. The Court in North State Law Enforcement Officers Assn v. Charlotte-Mecklenburg Police Dep't, wrote that “[t]he purpose of this searching judicial inquiry . . . is to smoke out illegitimate uses of race by assuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool.” North State, 862 F. Supp. at 1445 (internal punctuation omitted) (quoting Croson, 488 U.S. at 493). Further, the court in Podberesky, noted that “absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” Podberesky, 38 F.3d at 153 (quoting Croson, 488 U.S. at 493). After legislative or administrative findings of constitutional or statutory violations, local governments have a compelling interest in remedying past discrimination.

The Fourth Circuit articulated the hyper-vigilance required to assess racial classifications when ruling on a North Carolina “reverse-discrimination” case.

In reviewing the constitutionality of state actions with regard to the standard embodied in the Fourteenth Amendment, the Supreme Court has “consistently repudiated ‘distinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality,’” and has held that “racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination...The level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.” Hayes, 10 F.3d at 211-12 (internal citations omitted) (quoting Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 273).

Moreover, courts have ruled that general societal discrimination is insufficient proof to justify the use of race-based measures to satisfy a compelling governmental interest. Croson, 488 U.S. at 496-97. See Miller v. Johnson, 515 U.S. 900, 922 (1995). See, e.g., Freeman, 971 F. Supp. at 975. Rather, there must be some showing of prior discrimination by the governmental actor involved, either as an “active” or “passive” participant. Croson, 488 U.S. at 498. Just such a finding by the State of Maryland, through its Minority Business Utilization Study, resulted in the creation of its MWBE statute. Maryland Highway Contractors Association, 933 F.2d at 1249. Likewise, in Rowe, the State of North Carolina learned through its 1993 legislature commissioned study that, “North Carolina minority and women subcontractors suffered from discrimination in the road construction industry and were underutilized in State contracts.” Rowe, 615 F.3d at 237. Conversely, a consent judgment entered in a lawsuit filed by nine Black- American applicants to the Fayetteville, North Carolina Police Department (“FPD”) – a decree in which the FPD never admitted any discriminatory conduct – was recently terminated, in part, because of the lack of evidence demonstrating a compelling state interest. Freeman, 971 F. Supp. at 975-977. Even if the governmental unit did not directly discriminate, it can take corrective action. As the Court noted in Tennessee Asphalt v. Farris, “[g]overnmental entities are not restricted to eradicating the effects only of their own discriminatory acts.” 942 F.2d 969, 974 (6th Circuit 1991).

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. “Without question, remedying the effects of past discrimination is a compelling state interest.” Belk v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305, 344 (4th Circuit 2001) (quoting Croson, 488 U.S. at 493). 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 provides no guidance for a legislative body to determine the precise scope of the injury it seeks to redress. Croson, 488 U.S. at 498-99. See Miller, 515 U.S. at 921.

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. Thus, the local government must identify the discrimination it seeks to redress. Croson, 488 U.S. at 500-01. Particularized findings of discrimination are required under Croson. See also Hayes, 10 F.3d at 213. 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. However, the Courts have said that such prerequisite particularized finding of discrimination "need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." Rothe Dev. Corp. v. Dep't of Def., 545 F.3d 1023, 1043 (Fed. Cir. 2008) (citing, Dean v. City of Shreveport, 438 F.3d 448, 455 (5th Cir. 2006)).

In Rowe, Rowe, a general contractor, owned and operated by a nonminority male, brought an action against the State because, though it was the lowest bidder on a construction contract, it was not awarded the contract. Although it had met and even exceeded by one percent the goals set forth in the State statute in effect at the time for the inclusion of women subcontractors, it failed to satisfy to the State that it had put forth a "good faith effort" "to satisfy participation goals for minority and women subcontractors on state-funded projects." Rowe, 615 F. 3d at 235. In fact, Rowe had zero utilization of minority subcontractors where the State had a goal of 10% utilization. Id. Prior to Rowe and subsequent to Croson, North Carolina suspended their MWBE program, commissioning a study of minority and women participation in State Highway and road construction contracts. The program was reinstated later in 1994. The Court found both at the District Court level as well as the appellate level, that the State had proved that there continued

to be underutilization of both African-American and Native-American owned firms in the State Construction Industry as subcontractors. The Court also observed that during the period while the statute sued upon was suspended, utilization of the aforementioned groups fell during the suspension of the program, to levels beneath even that which had been achieved prior to the program's suspension. The Court remarked that:

The State demonstrated that there was a "dramatic decline in the utilization of minority subcontractors during the Program's suspension." H.B. Rowe, Inc., 589 F. Supp. 2d at 596.

Additionally:

Both American Indian and Black American subcontractors experienced significant declines in sub-contracting dollars during that period. Rowe, 615 F. 3d at 250 (internal punctuation omitted).

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 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. This legal analysis will address more fully the Concrete Works litigation in subsection E, below.

The types of evidence routinely presented to show the existence of a compelling interest include statistical and anecdotal evidence. Croson, 488 U.S. at 501. 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). 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. Croson, 488 U.S. at 501. See, United Black Firefighters Assn., 976 F.2d at 1009. See also, Engineering Contractors, 122 F.3d 895 (11th Cir. 1997). 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." Coral Construction Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991).

Likewise, the absence of significant statistical disparity data and significant anecdotal evidence of racial discrimination can be fatal. In the Fourth Circuit, where there is an absence of conclusive proof of the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, a state may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. However, the use of such significant statistical disparity data must be "corroborated by significant anecdotal evidence of racial discrimination." Rowe, 615 F.3d at 241; Md. Troopers Assn, Inc. v. Evans, 993 F.2d 1072, 1077 (4th Cir. 1993).

In Hayes, a group of nonminority police officers - who claimed that they had been passed over for promotion by the Charlotte Police Department ["CPD"] – challenged the City's use of racial preference in the promotion of police officers to the rank of sergeant. The City's promotion policy grew out of a 1970s lawsuit filed by an organized group of Black American police officers who alleged racial discrimination in the CPD. Prior to the completion of the litigation, the City

and the officer's organization entered into a consent decree that provided specific goals for the promotion of Black American officers. Charlotte officials never admitted any discrimination in the consent decree. Accordingly, when the nonminority officers filed their lawsuit following a series of CPD promotions in 1991, the City had precious little evidence to use in defense of the consent decree.

The only evidence which the City offered to support its contention that effective law enforcement requires racial diversity was the opinion of the Chief of Police, Chief Stone, and three reports prepared in response to the urban riots in Detroit in the 1960's. . . . We have no doubt that Chief Stone's opinion is based on his significant experience in the field of law enforcement and his genuine desire for the police department of the City of Charlotte to perform up to its highest potential. Nevertheless, the dangers of relying on subjective evidence to support utilization of racial classifications in employment promotion decisions are apparent. In this case, Chief Stone essentially offers the "confidence and acceptance of the community" as a justification for denying promotions to nonminority police officers exclusively because of their race . . . . If this is found to be enough evidence to justify the need for race-conscious policies, we fear others could use the same rationale for a much less benign purpose. Such a result would promote racial polarization and the stereotypical view that only members of the same race can police themselves . . . . The only objective evidence the City has offered is three reports [from] the City of Detroit in the 1960s . . . . Although the City was not required to submit studies conducted in the City of Charlotte in 1991 which reach these same conclusions, it was obligated to offer strong objective evidence why the situation evaluated in these studies is analogous to the present circumstances in Charlotte. Hayes, 10 F.3d at 214-215.

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 MWBE program is narrowly tailored to redress the effects of discrimination. "Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieve a compelling state interest." Cannon v. North



Carolina State Board of Education, 917 F. Supp. 387, 390 (1996) (quoting Miller v. Johnson, 115 S. Ct. 2475, 2482 (1995)). Racial and ethnic specific programs must be a remedy of last resort. Eisenberg, 197 F.3d at 128; see also Freeman, 971 F. Supp. at 976. 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.

As the court in Hayes indicated, “the use of racial preferences must be limited so that they do not outlast their needs; they may not take on a life of their own.” Hayes, 10 F.3d at 216.

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. Concrete General, Inc. v. Washington Suburban Sanitary Commission, et al., 779 F. Supp. 370, 381-82 (1991). 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 third parties. Adarand, 515 U.S. at 238. In Rowe, the Court “identified the following factors as relevant in evaluating whether a state statute is narrowly tailored.”

- (1) the necessity of the policy and the efficacy of alternative race neutral policies;
- (2) the planned duration of the policy;
- (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population;
- (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and
- (5) the burden of the policy on innocent third parties. Rowe, 615 F. 3d at

252; Ensley Branch, 31 F.3d at 1569; Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 344 (4th Cir. 2001) (en banc).

b) **Intermediate Scrutiny**

The Croson decision failed to evaluate women-owned business, Women Business Enterprise (“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. Courts in Maryland have determined that “an affirmative action program survives “intermediate scrutiny” if the proponent can show it was ‘a product of analysis rather than a stereotypical reaction based on habit.’” Associated Utility Contractors, 83 F. Supp.2d at 620 (citing Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 582-583 (1990)).

The Eleventh Circuit Court of Appeals in Ensley Branch N.A.A.C.P. v. George Seibels, 31 F.3d 1548 (11th Cir. 1994), addressed the issue in a Title VII action. Ensley Branch, 31 F.3d at 1579. 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. Indeed, confusion regarding the standard for judging gender classifications has resulted from the unclear language of some decisions. For instance, in an earlier Supreme Court case, the judges ruled that “[c]lassifications based on race, national origin, alienage, sex, and illegitimacy must survive heightened scrutiny in order to pass constitutional muster.” See Goulart v. Meadows, 345 F.3d 239 (4th Circuit 2003), 260 (quoting City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-441 (1985) (emphasis added)).

Since Ensley, the Supreme Court decided United States v. Virginia, 518 U.S. 515 (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.” Id., 518 U.S. at 529. 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.” Id., 518 U.S. at 559. 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 Id., 518 U.S. at 571. 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.” Engineering Contractors Assn. of South Florida, 122 F.3d at 907-08. 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." Engineering Contractors Assn. of South Florida, 122 F.3d at 913. Closer to home, Fourth Circuit holdings have maintained that the intermediate standard of review, less stringent than "strict scrutiny," is appropriate for classifications based on gender.

In Knussman v. Maryland, 272 F.3d 625 (4th Cir. Md. 2001), the court stated that "a gender classification is subject to heightened scrutiny and will fail unless it 'serves important governmental objectives and [is] substantially related to achievement of those objectives.'" Knussman, 272 F.3d at 635 (quoting Craig v. Boren, 429 U.S. 190 (1976)). The fact that the court indicated that the government's interest had to be "important" rather than "compelling" denotes the lower threshold of inquiry. This threshold was reiterated in a recent criminal case in which a federal district court within the Fourth Circuit stated that "the right of males to be free of being strip-searched...while similarly situated women are not appears to be clearly established." Jones v. Murphy, 470 F. Supp. 2d 537 (D.Md. 2007), pp. 21-22.

In Maryland Minority Contractors Association, Inc., et al. v. Maryland Stadium Authority, 70 F. Supp.2d 580 (D. Md. 1998), an advocacy group for Black American and Latino contractors ("MMCA") filed a lawsuit regarding what it considered to be the inequitable distribution of contracts for the construction of the new football stadium for the Baltimore Ravens. The MMCA argued, inter alia, that the manner in which the State agency used the Maryland MWBE statute to award contracts to firms owned by White Women simply was a pretext to discriminating against its members. Consequently, the MMCA asserted that the State's use of a gender-specific remedy should be evaluated under the "strict scrutiny" standard. The trial court disagreed, holding that "[c]lassification according to gender is subject to the standard explained in United States v. Virginia...(expressly disclaiming 'equating gender classifications, for all purposes, to classifications based on race or national origin')." Maryland Minority Contractors Association, 70 F. Supp.2d at 596. See also Williams v. Board of Trustees, 2004 U.S. Dist. LEXIS 203 (D. Md. 2004).

The Fourth Circuit appears to settle the matter for the time being in H.B. Rowe Company v. W. Lyndo Tippett, 615 F.3d 233 (2010), when it states therein:

Precedent dictates that courts apply "intermediate scrutiny" to statutes that classify on the basis of gender. A defender of such a statute meets this burden "by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. Rowe, 615 F. 3d at 232; Adkins v. Rumsfeld, 464 F.3d at 468; Miss. Univ. for Women v. Hogan, 458 U.S. at 724 (Internal citation and punctuation omitted).

## 2 **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. Croson, 488 U.S. at 491-92; see also Derek M. Alphan, "Proving Discrimination after Croson and Adarand: 'If It Walks Like a Duck,'" 37 U.S.F.L. Rev. 887 (Summer 2003). In Engineering Contractors Assn of South Florida, 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." Engineering Contractors Assn of South Florida, 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, 488 U.S. 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 County or City government is infusing public funds into a discriminatory industry, Durham County or City, respectively, have a compelling interest in remedying the effects of such discrimination. There must be evidence, however, of exclusion or discriminatory practices by the contractors themselves.

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 translation 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 nonminority 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. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (Emphasis Added).

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 market place. 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. Adarand Constructors, Inc. v. Slater, 228 F.3d at 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 "[i]t 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." See Croson 488 U.S. at 492 (citing Norwood v. Harrison, 413 U.S. 455). See also, H.B. Rowe Company v. W. Lyndo Tippet, 615 F.3d 233 (4th Circuit N.C. 2010). See generally, Maryland Troopers Association, Inc. v. Evans, et al., 993 F.2d 1072, 1074-1075 (4th Circuit 1993); Maryland Highways Contractors Association, Inc. v. State of Maryland, et al., 933 F.2d 1246, 1248 (4th Circuit 1991).

### **3. 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 MWBE program in order to satisfy the particularized showing of discrimination required by Croson. This factual support can be developed from statistical and anecdotal evidence. Rowe, 615 F.3d at 241.

#### 4. 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." Croson, 488 U.S. at 509. 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. Ensley Branch N.A.A.C.P., 31 F3d at 1565. 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. Engineering Contractors Assn of South Florida, Inc., 122 F. 3rd at 925. 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." A lack of the requisite specificity doomed race-specific remedies in two Maryland cases.

The Court in Concrete General, Inc. v. Washington Suburban Sanitary Commission, et al., 779 F. Supp. 370 (D. Md. 1990) resolved a dispute regarding the viability of a state agency's Minority Procurement Program ("MPP"). The Washington Suburban Sanitary Commission ("WSSC") is an agency of the State of Maryland which operated and maintained the water, sewage, and drainage systems in Prince George's and Montgomery counties. When the WSSC created its race-conscious policy, it linked its numerical goals for minority participation to the size of the



minority population in the two counties. The trial court ruled that the program was unconstitutional because

[s]uch over breadth contributes to the Court's conclusion that the goal of the MPP, like the minority set-aside provision in [Croson], is designed to achieve the award of contracts to minority-owned firms in proportion to the percentage of minorities in the general population, rather than to remedy past discrimination within the specified workplace. Concrete General, Inc., 779 F. Supp. at 382.

Years later, in Associated Utility Contractors, the Federal District Court ruled that the City of Baltimore's MWBE ordinance was unconstitutional because the City had no statistical foundation to determine availability when it established its set-aside goals. Associated Utility Contractors, 83 F. Supp.2d at 620.

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 nonminority male and White woman plaintiff, owners of a landscaping and tree removal service, the Webster Greenthumb Company, brought suit against the Fulton County's 1994 Minority and Female Business Enterprise ("MFBE") Program. The Court analyzed the statistical factual predicate which was developed by Fulton County relying heavily on Croson, and the more recent Eleventh Circuit opinion, Engineering Contractors Association v. Metropolitan Dade County. 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. This ruling was upheld by the 11th Circuit the following year. See Webster v. Fulton County, 218 F.3d 1267 (11th Circuit 2000).



a) Availability

The method of calculating MWBE availability has varied from case to case. In Contractors Association of Eastern Pennsylvania v. City of Philadelphia, (3rd Cir.), supra, 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-Minority Male’s, census data. In Associated General Contractors of America v. City of Columbus, (S.D. Ohio), supra, the City’s consultants collected data on the number of MWBE firms in the Columbus MSA, in order to calculate the percentage of available MWBE firms. This is referred to as the rate of availability. Three sources were considered to determine the number of MWBEs “ready, willing and able” to perform construction work for the City. None of the measures of availability purported to measure the number of MWBEs who were qualified and willing to bid as a prime on city construction projects.

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, (11th Cir.). There, 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-owned 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 the Sixth Circuit case of Associated General Contractors v. Drabik, 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.*

In Northern Contracting, Inc. v. State of Illinois, et al., 473 F.3d 715 (7th Cir. 2007), the Seventh Circuit upheld a public entity’s race-specific program, in large part, because the program was narrowly-tailored to achieve the State’s compelling interest in remedying the effects of past and current discrimination. The Court found that the program was narrowly-tailored because of the sophistication of the availability analysis used by the public entity. In that case, the Illinois Department of Transportation (“IDOT”) had requested that its consultant perform a “custom census” in order to determine the availability of minority- and women-owned firms in the state. Consequently, IDOT used the availability figure to prepare its Disadvantaged Business Enterprise (“DBE”) plan for Fiscal Year 2005. The “custom census” included a survey of Dun & Bradstreet’s “Marketplace” database, along with the list of minority- and women-owned firms maintained by IDOT. The consultant then contacted a random sample of two groups: 1) businesses from the combined database list of minority- and women-owned firms; and, 2) businesses in the state that did not identify themselves as minority- or women-owned firms. The consultant determined that 22.8% of the firms in the first group were, in fact, owned by nonminority men and 14.5% of the businesses in the second group were owned by minorities and women who had chosen not to self-identify. Based upon these results, the consultant calculated a relative rate of availability at 22.77%. Northern Contracting, Inc., 473 F.3d at 718.

#### b) Utilization

Utilization is a natural corollary of availability, in terms of statistical calculation. In Associated General Contractors of America, the City’s consultants calculated the percentage of City contracting dollars that were paid to MWBE 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. Associated General Contractors of America, 936 F. Supp 1363 (1996).

### c) Disparity Index and Croson

To demonstrate the under-utilization of MWBEs in a particular area, parties can employ a statistical device known as the "disparity index." See H.B. Rowe Company, 615 F.3d at 243-44. The "disparity index" is calculated by dividing the percentage of MWBE participation in government contracts by the percentage of MWBEs in the relevant population of local firms. A "disparity index" of one (1) demonstrates full MWBE participation, whereas the closer the index is to zero, the greater the MWBE under-utilization. Some courts multiply the "disparity index" by 100, thereby creating a scale between 0 and 100, with 100 representing full MWBE utilization. When we last reviewed Durham County's MWBE program in 2007, the practice of employing a "disparity index" had not been as widely recognized in the Federal Circuit Courts as it is today. The Court in Rowe, cites to its ever expanding utilization in the Federal Circuits. Rowe, 615 F.3d at 244. See, e.g., Rothe Dev. Corp. v. Dep't of Def., 545 F.3d at 1037-38 (Fed. Cir.8); Concrete Works of Colo., Inc. v. City & County of Denver, 321 F.3d 950, 962-63 (10th Cir. 2003); W.H. Scott Constr. Co. v. City of Jackson, 199 F.3d 206, 218 (5th Cir. 1999); Engineering Contractors Assn of South Florida, Inc., 122 F.3d at 914; Contractors Assn. of Eastern Pennsylvania, 6 F.3d at 1005.

Courts have used these MWBE disparity indices to apply the "strong basis in evidence" standard in Croson. For instance, the Third Circuit held that a disparity of 0.04 was "probative of discrimination in City contracting in the Philadelphia construction industry." Contractors Assn. of Eastern Pennsylvania, 6 F.3d at 1005. The Fourth Circuit has recognized a disparity index of less than 80% "as warranting further investigation." Rowe, 615 F.3d at 244. But the Eleventh Circuit has said that, "disparity indices of 80% or greater, which are close to full participation, are not considered indications of discrimination." Engineering Contractors Assn. of South Florida, Inc., 122 F.3d at 914. The Tenth Circuit has said that "A 'disparity index' of 1 demonstrates full MBE and WBE participation, whereas the closer the index is to zero, the greater the MBE and WBE underutilization." Concrete Works of Colo., Inc., 321 F.3d at 962.

#### d) 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.” Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1556 (11th Cir. 1994). Quoting Hazelwood School District et al. v. United States, 433 US 308, 308 (1977), quoting Castaneda v. Partida, 430 U.S.482, 497 (1977). See also Rowe, supra, wherein the Court accepted the aforementioned two standard deviations threshold.

#### e) Statistical Regression Analysis

The statistical significance of certain quantitative analyses was another issue that arose in Webster v. Fulton County (51 F. Supp. 2d at 1377-78). The Court indicated that the appropriate test should resemble the one employed in Engineering Contractors Assn. of South Florida, Inc., et al v. Metropolitan Dade County, et al. 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 Black Business Enterprises (“BBE”), Hispanic Business Enterprises (“HBE”) and Women Business Enterprises (“WBE”) 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 standard industry classification ("SIC") code was not enough to show discrimination.

As mentioned in Podberesky, *infra*, the Court of Appeals determined that the University of Maryland's ("UMCP") merit-based scholarship program designed exclusively for Black American students was unconstitutional. In its opinion, the three-judge panel rejected UMCP's evidence about its reference pool of high school graduates as overly broad. Additionally, the Court voiced its concerns that the University's "collection of arbitrary figures" failed to account for economic or other explanations for the high attrition rates among Black American students at UMCP. "We can say with certainty...that the failure to account for these, and possibly other, nontrivial variables cannot withstand 'strict scrutiny'...In more practical terms, the reference pool must factor out, to the extent practicable, all nontrivial, non-race based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity." Podberesky, 38 F.3d at 160.

In H. B. Rowe Co., the Court focused on a 2004 study commissioned by the State of North Carolina. In that study, the national research and consulting firm commissioned by the State found what appeared to be significant statistical support for the proposition that there was underutilization of Black American, Hispanic American, Asian American, and American Indian-owned businesses, but an apparent overutilization of white women businesses in subcontracting. However, when it examined the data collected to determine the value of the average contract awarded, it uncovered the reality that even though white women subcontractors appeared to double their expected utilization, the value of the contract that they received was almost one-third that of the contract awarded to nonminority male owned businesses. And when the value of the contracts awarded to nonminority males was compared to those minority-owned subcontractors,

it was revealed that the nonminority male-owned businesses had a contract awarded that had a value of double that of the minority-owned businesses. Rowe, 615 F.3d at 245.

The national research and consulting firm in Rowe, went on to corroborate its findings through the use of regression analytical techniques. The Court relayed their undertaking as such:

[The analyst] . . . obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the Department. The survey pool consisted of a random sample of 647 such firms; of this group, 627 participated in the survey. [T]he firms' gross revenues [were used] as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. The analysis revealed that minority and women ownership universally had a negative effect on revenue. African-American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. H.B. Rowe Company, 615 F.3d At 245-46

In the previously mentioned case of Northern Contracting, *infra*, the Seventh Circuit upheld IDOT's race-specific program, in part, because IDOT sought to account for "nontrivial variables" through a regression analysis. After IDOT's consultant calculated a relative rate of availability of 22.77%, the consultant ran a statistical "regression analysis of Census Bureau data on earnings and business formation, and concluded that in the absence of discrimination, relative DBE availability would be 27.5%." Northern Contracting, Inc., 473 F.3d at 718.

## **5. Anecdotal Evidence**

The majority decision in Croson impliedly endorsed the inclusion of personal accounts of discrimination. Croson, 488 U.S. at 480, (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"). 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. See Concrete Works, 36 F. 3rd 1513 (10th Cir. 1994). 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 is particularly probative. In a recent Supreme Court case regarding religious freedom, the Court stated that "[this] Court has noted that 'context matters' in applying the compelling interest test...and has emphasized that 'strict scrutiny' does take relevant differences into account -- indeed, that is its fundamental purpose.," Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (quoting both Grutter v. Bollinger, 539 U.S. 306, 327 (2003) and Adarand 515 U.S. at 228 (1995)). See also McManus v. Bass, 2006 U.S. Dist. LEXIS 24272 (E.D. Va. 2006). Thus, Courts have required the inclusion of anecdotal evidence of past or present discrimination. 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 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.

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. Coral Construction Company, 941 F.2d at 919. The Third Circuit suggested that a combination of empirical and anecdotal evidence was necessary for establishing a prima facie case of discrimination. Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990, 1003 (3rd Cir. 1993). In addition, the Ninth Circuit approved the combination of statistical and anecdotal evidence used by the City of San Francisco in enacting its MWBE ordinances. 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 (1992).



On the other hand, neither empirical evidence nor selected anecdotal evidence standing 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. 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." O'Donnell, 963 F.2d at 427. Likewise, in a federal district case within this circuit, the jurist remarked that,

[t]he Supreme Court has held that 'statistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue... However, the Court went on to note that 'statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. Buchanan v. Consol. Stores Corp., 217 F.R.D. 178, 189 (D. Md. 2003) (quoting International Broth. Of Teamsters v. U.S., 431 U.S. 324, 329 (1977)).

The Fourth Circuit Court of Appeals also has addressed this matter in Podberesky. In this case, the plaintiff sued the University of Maryland at College Park regarding its scholarship program designed exclusively for Black American students. At the trial level, the District Court upheld the "Banneker scholarship program, which is a merit-based program for which only African-American students are eligible." However, at the appellate level, the Fourth Circuit bench rejected the trial court's conclusions and remanded the case for entry of judgment in favor of the plaintiff. 38 F.3d at 151-152.

At the district level, the University averred that it could demonstrate four present effects of past discrimination to justify its compelling interest in maintaining a race-conscious program:

(1) The University has a poor reputation within the Black American community; (2) Black Americans are underrepresented in the student population; (3) Black American students who enroll at the University have low retention and graduation rates; and (4) the atmosphere on campus is perceived as being hostile to Black American students. Podberesky, 38 F.3d at 152 (citing Podberesky v. Kirwan, 383 F. Supp. 1075, 1076-1077 (D. Md. 1993)).

Although the Appellate Court implied that these effects could provide a sufficient basis to support a race-specific remedy, they were concerned with the University's evidence:

To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program. Podberesky, 38 F.3d at 153.

In sum, the Fourth Circuit rejected as insufficient the University's "proof" which consisted of, among other things: 1) surveys of student attitudes and results of student focus groups; 2) a reference pool of high school graduates within the State of Maryland; 3) and statistical evidence of high attrition rates for Black American students. "There is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland." Podberesky, 38 F.3d at 155. Moreover, the Court determined that the University's reference pool was overly broad. The court felt that the low retention and graduation rates also could be explained by economic and other factors that did not pertain to race. Accordingly, the Banneker Scholarship Program was fatally flawed and could not survive

“strict scrutiny”. Podberesky, 38 F.3d at 157. See also Bishop v. Barnhart, 78 Fed. Appx. 265, 269 (4th Circuit 2003).

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 Cir. 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 MWBE 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. See also North State Law Enforcement Officers Assoc. v. Charlotte-Mecklenburg Police Department, 862 F. Supp 1445, 1456-60 (W.D.N.C. 1994).

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 discrimination. Associated General Contractors, 936 F. Supp 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.” Engineering Contractors Assn. of South Florida, Inc., 122 F. 3rd at 925 (11th Cir. 1997).

Accordingly, a combination of statistical disparities in the utilization of MWBEs and particularized anecdotal accounts of discrimination are required to satisfy the factual predicate. Therefore, we have included in this study anecdotal evidence of past and present discrimination in order to establish the factual predicate expressly desired by these guidelines, as well as to satisfy the jurisdictional requirements of H.B. Rowe Co. v. Tippett discussed Supra.

## 6. Geographic Scope of the Data – Relevant Market

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. Croson, 488 U.S. at 504. 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.

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. Tennessee Asphalt v. Farris, 942 F.2d 969 (6th Circuit 1991).

The Croson Court, as discussed in Dynalantic Corp. v. U.S. Dep't of Defense, 885 F.Supp.2d 237 (D.D.C., 2012) explained that "the government could meet its burden by demonstrating that there were eligible minorities in the relevant market—in that case, the Richmond construction industry—that were denied entry or access notwithstanding their abilities." Generally, this geographical scope has been described as the geographical area where the governmental entity draws the substantial portion its offerors.

## 7. 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." Croson, 488 U.S. at 504. 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 an MWBE program by a governmental entity. Such evidence is critical to any affirmative action program because, absent any pre-enactment evidence of discrimination, a state or local government would be unable to satisfy the standards

established in Croson. On the other hand, post-enactment evidence is that which has been developed since the affirmative action program was enacted and therefore was not specifically relied upon as a rationale for the government's race and gender conscious efforts. As such, post-enactment evidence has been another source of 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 and federal courts.

The District Court for the Eastern Division of Ohio in Associated General Contractors of Ohio v. Drabik, 50 F.Supp.2d. 741 (1999), 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 fact-finding." Drabik, 50 F. Supp. 2d., at 738. 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 the Durham County disparity study of 2007 and today.

Early post-Croson decisions permitted the use of post-enactment evidence to determine whether an MWBE program complies with Croson. See, e.g. Contractors Assn. of Eastern Pennsylvania, 6 F.3d at 1003-04; Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2nd Cir. 1992); Coral Construction Co., 941 F.2d at 921. In Ensley Branch N.A.A.C.P., 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. Ensley Branch, NAACP, 31 F.3d at 1565.

In Associated Utility Contractors, the Court explicitly stated its embrace of post-enactment evidence. As in Maryland Troopers Association, 993 F.2d at 1078, and Podberesky, 38 F.3d at 154, the Court in Associated Utility Contractors invalidated the MWBE program of the City of Baltimore, in large part, because the City created its race-specific remedy before it had any statistical evidence to support it. In the footnotes of his opinion, Judge Andre Davis remarks that the Fourth Circuit has not ruled on whether an affirmative action program must be justified solely on the basis of pre-enactment evidence. Then, he recited a litany of federal circuits that favor post-enactment evidence. Associated Util. Contrs. of Md., Inc., 83 F. Supp.2d at 620, n.6. Ultimately, Judge Davis ruled that the most beneficial role for post-enactment evidence is for the purpose of ensuring the narrow-tailoring of race-specific remedies. Associated Util. Contrs. of Md., Inc., 83 F. Supp.2d at 622.

It is important to note that the Court in Freeman rejected the plaintiffs' request for additional time to gather evidence of past discrimination to support a consent decree that included racial quotas. "The request that this evidence be allowed to be developed now, over two decades after the entry of original [consent] judgment was entered cannot be granted. Plaintiffs will not be allowed to attempt to gather evidence today in support of the constitutionality of the 1974 judgment." Freeman, 971 F. Supp. at 976. Of course, the situation in Freeman is distinguishable from those faced by the typical governmental entity as it creates a MWBE program because: 1) the Freeman consent decree of 1974 contained no evidence or admission of discrimination; 2) the Fayetteville Police Department conceded that it had complied with the 1974 consent decree; and 3) the plaintiffs' request to find and offer the court evidence of past discrimination occurred after the motion seeking the termination of the consent decree had been filed with the court. Freeman, 971 F. Supp. at 975.

Therefore, a race and gender-conscious program implemented by the governments of the City of Durham and Durham County 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. Contractors Association of Eastern Pennsylvania, Inc., et al. v. City of Philadelphia, 91 F.3d 586, 606 (1996).

### **8. Remedies-- Narrowly Tailored**

Under the Croson framework, any race-conscious plan must be narrowly tailored to ameliorate the effects of past discrimination. 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); see also Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Circuit 1999); North State, 862 F. Supp. at 1458-1459. The Fourth Circuit has set forth four considerations in determining whether a plan is narrowly tailored:

- consideration of race neutral alternatives,
- flexibility of plan,
- relationship of plan's numerical goals to relevant market, and
- effect of plan on third parties.

Concrete General, Inc., 779 F. Supp. at 379. See also Peightal v. Metropolitan Dade County, 940 F.2d 1394, 1406 (11th Cir. 1991); Engineering Contractors, 122 F.3d 895, 927 (citing Ensley Branch N.A.A.C.P. v. George Seibels, at 31 F.3d 1548, 1569).

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

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

As a result, Fourth Circuit Courts have invalidated race-specific approaches that they found were not narrowly tailored along these lines. See, i.e., Podberesky, 38 F.3d at 158; Hayes, 10 F.3d at 215-16; North State, 862 F. Supp. at 1456.

MWBE programs must be designed so that the benefits of the programs are targeted specifically toward those firms that faced discrimination in the local marketplace. To withstand a challenge, relief must extend only to those minority groups for which there is evidence of discrimination. See, H.B. Rowe Company, 615 F.3d at 254; Maryland Minority Contractors Association, 70 F. Supp.2d at 593-596. Consequently, MWBE firms from outside the local market must show that they have unsuccessfully attempted to do business within the local marketplace in order to benefit from the program.

The Fourth Circuit Court of Appeals in H. B. Rowe, affirmed in part and reversed in part the District Court's decision that all MWBE subcontractors continued to suffer the effects of discrimination in State subcontracting. Focusing exclusively on the reversed portion of the decision, the Court found that the inclusion of women, Asian American, and Hispanic American subcontractors in the acceptable application of a North Carolina statute's program designed to remedy the effects of past discrimination was unconstitutional given the fact that further subsection of surface results indicating discrimination to regression analysis and other confidence



testing, showed in fact that Black Americans and American Indians were the only two groups of those tested that in fact continued to experience the effects of discrimination in the public subcontracting marketplace. H.B. Rowe Company, 615 F.3d at 258.

Equally, the Fourth Circuit Court of Appeals in Tuttle rejected the District Court's finding that a Virginia County's desegregation plan was viable. The Court ruled that the plan was not narrowly tailored to remedy past discrimination. The Court found that the plan was unconstitutional because the school system seemed primarily interested in racial balancing rather than remedying present effects of past abuses. Tuttle, et al. v. Arlington County School Board, 195 F.3d 706, 706-07 (1999). Years earlier, the Fourth Circuit rejected the race-specific relief in a Consent Decree between the Coalition of Black Maryland State Troopers and the Maryland State Police because the statistical basis for the Consent Decree was flawed. Absent a strong nexus between the injury and the proposed relief, the Consent Decree could not withstand "strict scrutiny". "All too easily, invidious racial preferences can wear the mask of remedial measures – a risk that only magnifies as the governmental body gets smaller and more susceptible to interest-group capture." Maryland Troopers Association, 993 F.2d at 1074-76.

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. "We have learned through painful experience the danger of allowing agents of the State to make distinctions between individuals on the basis of race." Freeman, 971 F. Supp. at 977 (citing Hayes, 10 F.3d at 212). 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 American "prime contractors" who were capable of bidding on City prime contracts. Moreover, there was no firm evidentiary basis for believing that nonminority contractors would not hire Black American subcontractors. Contractor's Association of Eastern PA, Inc., 91 F.3d 586.

Court rulings have held that neutral measures must be considered, but not necessarily exhausted, in order for MWBE programs to be enacted. The Court in Marc Alexander upheld the affirmative action plan of the Prince George's County Fire Department, in part, because alternative, race-neutral approaches used by the Fire Department had not remedied the nagging disparities in the hiring of Black American firefighters. Mark Alexander v. Estep, 901 F. Supp. 986, 992-94 (1995) (reversed in part, affirmed in part by 95 F.3d 312 (1996)). 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 of Colo., Inc. v. City & County of Denver suggest the kinds of neutral measures considered by the courts.

Inherent in the above discussion is the notion that MWBE programs and remedies must maintain flexibility with regard to local conditions in the public and private sectors. Courts have suggested project-by-project goal setting and waiver provisions as means of insuring fairness to all vendors. As an example, the Fourth Circuit had little problem rejecting the Banneker Scholarship Program at the University of Maryland because it had no "sunset" provision. "The program thus could remain in force indefinitely based on arbitrary statistics unrelated to constitutionally permissible purposes." Podberesky, 38 F.3d at 160. 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. In upholding the Prince George's County Fire Department's affirmative action plan, the Court noted that the "Plan is limited in duration and is reviewed annually to see if its goals have been achieved." Marc Alexander, 901 F. Supp. at 995.

## **9. Burdens of Production and Proof**

The burden of proof in litigation involving a public entity's MWBE program differs from the standard in typical discrimination litigation. For example, in a case filed by a person who claimed to have been discriminated against by a private corporation, the plaintiff must first establish a prima facie case of discrimination. The defendant then can respond by proffering

evidence that it acted for a legitimate, non-discriminatory reason. Finally, the plaintiff is entitled to produce evidence to show that the defendant's proffered reason for action was a mere pretext for discrimination. Williams v. Staples, Inc., 372 F.3d 662, 667 (4th Circuit 2004).

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. Croson, 488 U.S. at 498-06. 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." Croson, 488 U.S. at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

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 MWBEs, the number of MWBE contractors actually contracted by the government, or by the entity's prime contractors. Furthermore, the quantum of evidence required for the governmental entity must be determined on a case-by-case basis and in the context and breadth of the MWBE program it advanced. See H.B. Rowe Company, 615 F.3d at 241; Concrete Works of Colo., Inc., 321 F.3d at 958-959. If the local government is able to do this, then the burden shifts to the challenging party to rebut the municipality's showing. See Concrete Works of Colo., Inc., 321 F.3d at 959; Contractors Assn. of Eastern Pennsylvania, 6 F.3d at 1007.

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. Concrete Works of Colo., Inc., 321 F.3d at 959; Mazeske v. City of Chicago, 218 F.3d 820 (7th Cir. 2000).

## RECENT CASES

### F. H.B. ROWE COMPANY, INCORPORATED v. W. LYNDO TIPPETT, et. al

H. B. Rowe Company, Incorporated (Rowe), a prime contractor, brought an action, asserting that the goals set forth in North Carolina statute (N.C. Gen. Stat. § 136-28.4 (1990)), violate the Equal Protection Clause, and sought injunctive relief as well as money damages. Rowe was denied a contract because of its failure to demonstrate good faith efforts to meet participation goals for minority and women owned subcontractors.

After extensive discovery and a bench trial, the District Court held the challenged statutory scheme constitutional both on its face and as applied. The Fourth Circuit Court of Appeals held that it agreed with the District Court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to Black American and American Indian subcontractors, and that the State demonstrated that the scheme was narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. But the Court did not agree with the District Court that the same was true as applied to other minority groups and women-owned businesses.

Although H. B. Rowe Company was lowest bidder on a North Carolina State contract that had goals set for 10% minority and 5% women participation by subcontractors, Rowe had 6.6% women and no minority subcontractor participation in its bid, so the State picked a slightly higher bid that had 9.3% women and 3.3% minority participation. Rowe was denied the contract because

it failed to demonstrate good faith efforts to attain the pre-designated levels of minority participation on the project. Rowe's bid however, was not unlike what was found by the national research and consulting firm commissioned by the State to perform its analysis on the necessity for a MWBE subcontractor participation goal requirement.

The research firm found that Black American and American Indian subcontractors were utilized in subcontracting projects less than nonminority male and White Women-owned firms, with Black American-owned firms being utilized the least. Rowe, 615 F.2d at 243-45. The researcher also found initial indications that Hispanic American and Asian American firms were underutilized, but the subsection of the results to standard deviation testing ("T-test") yielded less than desirable confidence levels in these findings. Examination of White Women-owned firms' participation indicated overutilization, with a 95% confidence level, for the same period as the underutilization of the minority-owned firms. Rowe's bid also provided for greater proposed utilization than was minimally sought.

The National Research Firm also sought to validate that which its disparity indices and standard deviation testing revealed, through regression analysis. Reviewing the response data obtained from a sample of 627 participants out of a pool size of 647, and using each firm's gross revenue as the dependent variable, while testing for the impact of certain other variables such as, "company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender . . . ." H. B. Rowe, 615 F.3d at 246. Controlling for firm revenue was necessary because the results of their disparity testing indicated during the period of supposed over utilization of White Women firms, the revenue received by nonminority male subcontractors was three times that received by the White Women subcontractors, and twice that of the minority-owned firms lumped together. The telephone survey provided data revealed that,

[M]inority and women ownership universally had a negative effect on revenue. Black American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. . . . [F]or African Americans, in particular, the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. H. B. Rowe, 615 F.3d at 246; (internal punctuation omitted).

The State, as respondent in the suit by Rowe, also bolstered the necessity for the continuation of the program by reflecting on what happened during the period from 1991 to 1993 while the statute and program were not being enforced.

[F]rom September 1991 to April 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. Between 1991 and 1992, for example, the total amount of these subcontracting dollars declined 37.7 percent. The decline was most significant for American Indian and women subcontractors. Meanwhile, the share of subcontracting dollars awarded to nonminority male subcontractors increased. *H. B. Rowe*, 615 F.3d 248.

Reviewing the results of the research firms testing, together with the data concerning the events in subcontractor inclusion during the program's suspension period, the Court was able to see that (1) the State's use of a goals program for inclusion of Black American, American Indian, and white women-owned businesses was supported by a statistically strong basis, and that (2) the newly revised North Carolina statute which called for frequent goal setting was constitutional. The Court of Appeals noticed prominently that the State's program had been going on since 1983, and had only achieved the inclusion numbers adduced in the 2004 study performed by the commissioned national researcher. *H. B. Rowe*, 615 F.3d 250.

Furthermore, the Court's rejection of Rowe's challenge of the North Carolina statute on the grounds of its lack of flexibility was thwarted by Rowe's failure to make a good faith effort to include minority subcontractors. The Court of Appeals wrote:

Prime contractors can bank any excess minority participation for use against future goals over the following two years. Given the lenient standard and flexibility of the "good faith" requirement, it comes as little surprise that as of July 2003, only 13 of 878 good faith submissions--including Rowe's--had failed to demonstrate good faith efforts. H. B. Rowe, 615 F.3d at 253-54.

### **1. Implications of the 4th Circuit's Decision**

Solidified in Rowe is the trend that began in the other appellate courts of this country. The Court, when presented with a viable challenge to a state's statute as it concerns MWBE programs, will need to see not only a program that has what Croson requires at the statute's initial enactment, but also that when the program's continuation is at issue, it too then will be well supported by more than mere conjecture as to its necessity to continue. There will need to be statistically sound collection of data from appropriate sources; testing of that data once collected to ensure high confidence; and anecdotal corroboration of findings to disprove other explanations for apparent disparities. Some other signals were presented by the Appellate Court in Rowe.

The Court also reported that the State did in fact, though it was not challenged on the basis of its having failed to do so, seek out race neutral measures in an attempt to overcome the effects of past and present racial exclusion. H. B. Rowe, 615 F.3d at 252. And the Court did not disapprove of the State requiring statutorily, that a new disparity study be conducted every five years. H. B. Rowe, 615 F.3d at 253.

## G. Conclusion

Twenty-five years of litigation following the Croson decision presents governments with continued evolution of the law in the area of remedial programs and processes used to ameliorate inequities concerning MWBE utilization in public contracting. In this study, the Griffin & Strong P.C. team evaluated both the quantitative and the qualitative evidence within the requirements of

Croson and its progeny, to determine whether the City of Durham and/or the County of Durham have been active or passive participants in past or present discrimination, that warrant and permit such remediation. If so, Griffin & Strong, P.C. will use its vast experience in recommending narrowly tailored remedies in accordance with the foregoing case law. The analyses, findings, and recommendations are presented in the pages, which follow.



## TABLE OF AUTHORITIES

### **Cases**

Adarand Constructors v. Pena, 515 U.S. 200 (1995)

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147

Adkins v. Rumsfeld, 464 F.3d 456 (2006);

Associated General Contractors of America v. City of Columbus, 936 F. Supp 1363 (1996)

Associated Util. Contrs. Of Md., Inc. v. Mayor of Baltimore, 83 F. Supp. 2d 613 (2000)

Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (2001)

Bishop v. Barnhart, 78 Fed. Appx. 265 (2003)

Buchanan v. Consol. Stores Corp., 217 F.R.D. (2003)

Cannon v. North Carolina State Board of Education, 917 F. Supp. 387 (1996)

Castaneda v. Partida, 430 U.S.482 (1977)

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

Concrete General, Inc. v. Washington Suburban Sanitary Commission, et al., 779 F. Supp. 370 (1991)

Concrete Works of Colo., Inc. v. City & County of Denver, 321 F.3d 950 (2003)

Cone Corp. v. Hillsborough County, 157 F.R.D. 533 (1994)

Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990 (1993)

Contractors Association of Eastern Pennsylvania, Inc., et al v. City of Philadelphia, 91 F.3d 586 (1996)

Coral Construction Co. v. King County, 941 F.2d 910 (1991)



Daniel Podberesky v. University of Maryland at College Park, et al, 38 F.3d 147 (1994)

Dean v. City of Shreveport, 438 F.3d 448, (2006)

Dynalantic Corp. v. U.S. Dep't of Defense, 885 F.Supp.2d 237 (D.D.C., 2012)

Eisenberg ex rel. v. Montgomery County Schools, 197 F.3d.123 (1999)

Engineering Contractors Assn of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (1997)

Ensley Branch N.A.A.C.P. v. George Seibels, 31 F.3d 1548 (1994)

Freeman v. City of Fayetteville, 971 F. Supp. 971 (1997)

Gonzales v. Carhart, 550 U.S. 124 (2007)

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006)

Goulart v. Meadows, 345 F.3d 239 (2003)

Grutter v. Bollinger, 539 U.S. 306 (2003)

H.B. Rowe Company v. W. Lyndo Tippet, 615 F.3d 233 (2010)

Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50 (1992)

Hayes v. North State Law Enforcement Officers Assn, 10 F.3d 207 (1993)

Hazelwood School District et al. v. United States, 433 US 308 (1977)

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977)

International Bottled Water association v. Eco Canteen, Inc., 2010 U.S. Dist. Lexis 102381

Jones v. Murphy, 470 F. Supp. 2d 537 (2007)

Knussman v. Maryland, 272 F.3d 625 (2001)

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

Mark Alexander v. Estep, 95 F.3d 312 (1996)

Mark Alexander v. Estep, 901 F. Supp. 986 (1995)

Maryland Highways Contractors Assn v. Maryland, 933 F.2d 1246 (1991)

Maryland Minority Contractor's Assn v. Maryland Stadium Auth., 70 F.Supp.2d 580 (1998)

Maryland Troopers Assn. Inc. v. Evans, et al., 993 F.2d 1072 (1993)

Mazeske v. City of Chicago, 218 F.3d 820 (2000)

McManus v. Bass, 2006 U.S. Dist. Lexis 24272

Miller v. Johnson, 515 U.S. 900 (1995)

Milwaukee County Pavers Assn. v. Fielder, 922 F.2d 419 (1991)

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)

Monroe v. City of Charlottesville, 471 F. Supp. 2d 657 (2007)

N.C. Motorcoach Assn v. Guilford County Bd. of Educ., 315 F. Supp. 2d 784 (2004)

North State Law Enforcement Officers Assn v. Charlotte-Mecklenburg Police Dep't, 862 F. Supp. 1445 (1994)

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

Northern Contracting, Inc. v. State of Illinois, et al., 2004 U.S. Dist. LEXIS 3226

O'Donnell Construction v. District of Columbia, 963 F.2d 420 (1992)

Peightal v. Metropolitan Dade County, 26 F.3d 1545 (1994)

Peightal v. Metropolitan Dade County, 940 F.2d 1394 (1991)

Podberesky v. University of Maryland at College Park, et al., 38 F.3d 147 (1994)

Price v. City of Charlotte, 93 F.3d 1241 (1996)

Retail Indus. Leaders Assn v. Fielder, 475 F.3d 180 (2007)

Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165 (2009)

Rob Farmer v. Dr. David Ramsey, et al., 41 F. Supp. 2d 587 (1999)

Rothe Dev. Corp. v. Dep't of Def., 545 F.3d 1023 (2008)

Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964 (2004)

Stefanovic v. University of Tennessee, 1998 U. S. App. LEXIS 1905

Tennessee Asphalt v. Farris, 942 F.2d 969 (1991)

Tuttle, et al. v. Arlington County School Board, 195 F.3d 706 (1999)

United Black Firefighters Assn. v. City of Akron, 976 F.2d 999 (1992)

United States v. Salerno, 481 U.S. 739 (1987)

United States v. Virginia, 518 U.S. 515 (1996)

W.H. Scott Constr. Co. v. City of Jackson, 199 F.3d 206 (1999)

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008)

Webster v. Fulton County, 51 F. Supp. 2d 1354 (1999)

Webster v. Fulton County, 218 F.3d 1267 (2000)

Western States Paving Co, Inc. v. Washington State Dep't. Of Transp., 407 F.3d 983 (2005)

Williams v. Board of Trustees, 2004 U.S. Dist. Lexis 203

Williams v. Hansen, 326 F.3d 569 (2003)

Williams v. Staples, Inc., 372 F.3d 662 (2004)

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)

## Articles

Demand: Company Profiles and Information”, [www.manta.com](http://www.manta.com)

Illinois Valley Construction Industry Labor/Management Program's Contractor Directory at  
[www.ivlabgmt.org/Fence.html](http://www.ivlabgmt.org/Fence.html)

Illinois State Comptroller,  
[www.wh1.ioc.state.il.us/QuickTake/Contracts/Construction.cfm?StartRow=224](http://www.wh1.ioc.state.il.us/QuickTake/Contracts/Construction.cfm?StartRow=224)

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](http://www.roselle.il.us/news) and [www.oglecounty.org](http://www.oglecounty.org), respectively.

Derek M. Alphan, "Proving Discrimination After Croson and Adarand: 'If It Walks Like a Duck,'" 37 U.S.F.L. Rev. 887 (Summer 2003).

**Statutes and Constitutions**

U.S. Const. amend. XIV, § 1.

### **III. PURCHASING PRACTICES, POLICIES AND PROCEDURES**

#### **III-01. CITY OF DURHAM**

The objective of the “Purchasing Practices, Policies, and Procedures” chapter of this study is to review the stated policies of the City of Durham in relation to purchasing and to examine the familiarity of personnel within various departments with those policies. Secondly, this review is intended to ascertain whether or not, in policy or practice, there are barriers to small, minority, or women-owned businesses.

It is well understood that where there is policy, there is often room for interpretation and discretionary practice. These areas will be examined closely as well for any effect they may have on the overall ability of historically disadvantaged businesses to obtain work with the City of Durham.

#### **A. Review of Ordinances, Policies, and Internal Procedures**

Purchases made by the City are governed by Article 8 of Chapter 143 of the North Carolina General Statutes, City Charter Sec. 17 (Powers and duties of the City Manager), City Resolution No. 9673, internal policies based upon the dollar amount of the purchase. City policies also dictate certain obligations when engaging in purchasing activity. The Equal Business Opportunity Program was created under Chapter 18 in the City’s Code of Ordinances and is administered by the Department of Equal Opportunity/Equity Assurance.

#### **B. Personnel Interviews**

The following interviews were conducted with officials that engage regularly in purchasing within their respective departments in the City. The City, unlike the County of Durham, is under a decentralized model and much of the purchasing occurs within the departments themselves.

xcept for EOE, the departments interviewed were those departments that engage in the substantial majority of procurements.

- Equal Opportunity/Equity Assurance
- General Services
- Finance
- Transportation
- Public Works

### **C. State of North Carolina General Statute 143-129**

#### **1. Bidding Procedure**

Bidding is explicitly required for construction or repair work “requiring the estimated expenditure of public money in an amount equal to or more than five hundred thousand dollars (\$500,000)” or the “purchase of apparatus, supplies, materials, or equipment requiring an estimated expenditure of public money in an amount equal to or more than ninety thousand dollars (\$90,000)” (NCGS 143-129). Contracts awarded for construction or repair work estimated at less than five hundred thousand dollars (\$500,000) are not required to comply with this General Statute. These contracts may be awarded, rejected, or re-advertised by “the manager, school superintendent, chief purchasing official, or other employee” chosen by the governing body of any constituent jurisdiction, in compliance with this, Durham City Charter Section 17 prescribes contract authority to the City Manager.

G.S. 143-131 lays out the requirements for all bids that are considered “informal,” meaning that they “involve the expenditure of public money in the amount of \$30,000 or more, but less than the limits prescribed in G.S. 143-129.” These contracts are to be awarded to the lowest responsive bidder, with a consideration for quality and performance. This section of the General Statute also establishes a provision for minority participation. Public entities in North Carolina are required to “maintain a record of contractors solicited” and to “document efforts to recruit minority business participation in those contracts” but are not required to formally advertise for bids at this threshold. The data emergent from these efforts will be reported to North Carolina’s Historically Underutilized Business (“HUB”) Offices.



Per N.C. General Statute § 143-131 and as articulated by internal policy memorandum effective May 18, 2012, the informal bid threshold for construction or repair work paid for by the City of Durham encompasses all bids “equal to or greater than \$30,000” but less than \$500,000 (\$90,000 for purchases). According to another policy document issued on that same date, service contracts equal to or greater than \$50,000 require an Request for Proposal (“RFP”) with advertisement, but those greater than \$10,000 and less than \$50,000 are not required to advertise RFPs, but it is “recommended” that the bid notice be placed on the City’s website. Those contracts less than \$10,000 do not require RFPs. These City policies are in accordance with the wider General Statute and the City Charter authority.

## **2. Advertisement of Bids**

Proposals should be invited by “advertisement in a newspaper having general circulation in the political subdivision or by electronic means, or both” and the “governing board” of this political subdivision of the State may determine to advertise “solely by electronic means,” which the City of Durham elected to allow with Resolution No. 9640 (NCGS 143-129). Advertisements should appear “at a time where at least seven full days shall lapse” between the date of notice and the bid-opening date. Advertisements must state the time and place where bid specifications or a description of plans can be obtained and the time and place for the opening proposals. They must also “reserve to the board or governing body the right to reject any or all proposals,” which was upheld in the Durham City Charter, Section 17” (NCGS 143-129).

## **3. Formal Bid Proposal Process**

The Statute states that proposals can be rejected for “any reason determined by the board or governing body to be in the best interest of the unit,” but makes the provision that proposals cannot be rejected “for the purpose of evading the provisions” of the Article. All proposals are to be opened in public and awarded to the “lowest responsible bidder or bidders, taking into consideration quality, performance and the time specified in the proposals for the performance of



the contract” (NCGS 143-129). If the lowest bidder exceeds the budgeted or set-aside funds for a project, the “governing body” shall “enter into negotiations” with that bidder and make “reasonable” changes in plans to bring the contract price down. If this is not possible, the governing body is “authorized to re-advertise” after making every effort to bring the project or purchase cost within limits with the lowest bidder. All bids are sealed and opening them without the consent of the bidder is a Class 1 Misdemeanor.

#### **4. Contracts that Are Exempt from Article 8 of Chapter 143**

Contracts are not subject to the terms laid out in Article 8:

- In cases of emergency where the “health and safety of the people or their property” are at risk;
- If the purchase is made through “a competitive bidding group purchasing program” which “offers competitively obtained purchasing services at discount prices to two or more public agencies;”
- Construction or repair work undertaken during the progress of a construction or repair project initially begun pursuant to this section;
- The purchase of “gasoline, diesel fuel, alcohol fuel, motor oil, fuel oil, or natural gas;”
- Information Technology contracts established by the State Office of Information Technology Services (provisions in G.S. 147-33.82(b) and G.S. 147-33.92(b));
- Guaranteed energy savings contracts (provisions in Article 3B);
- Purchases from contracts established by the State, the Federal government, or any agency, State or Federal, if the contractor will provide the City with “the same or more favorable prices, terms, and conditions as established in the State contract” or the Federal contract;
- Purchase used or remanufactured equipment or goods;
- Contracts by a public entity with a construction manager at risk;
- The statute also allows for sole-sourcing “apparatus, supplies, materials or equipment” in situations when:

- The performance or price competition for a product is not available
- a product is only available from one firm
- standardization or compatibility is the overriding consideration
- particular medical equipment is required.

However, sole-sourced contracts must be approved by the City Manager prior to award. (NSGC 143-129-e).

### **5. Waiver Conditions**

Subject to board approval, the requirements for bid and proposal process may be waived “for the purchase of apparatus, supplies, materials, or equipment from any person or entity that has, within the previous 12 months, after having completed a public, formal bid process to the United States of America or “any Federal agency,” the State of North Carolina or any agency or “political subdivision” of the State (NCGS 143-129(g)).

### **D. Equal Business Opportunity Ordinance**

In addition to certification by the State of North Carolina, the City of Durham has its own certification program for Small Disadvantaged Business Enterprises (“SDBEs”) internally. An SDBE is defined as “at least fifty-one percent owned by one or more socially and economically disadvantaged individuals.” An SDBE must be a Small Business Enterprise, have a “physical location from which to engage in for profit activities in the scope(s) of expertise in the City’s Marketplace,” and be certified as SDBE by the City of Durham. “Socially Disadvantaged” is defined as “an individual who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his/her identification as a member of a group and without regard to individual qualities,” and includes persons of Black American descent, women business owners, or “any individual found by the City on a case-by-case basis to have been subjected to racial or ethnic prejudice or cultural bias.” In order to be considered “Economically Disadvantaged,” the majority owner of the business must have a Personal Net Worth less than \$750,000.

The Office of Equal Opportunity and Equity Assurance (“EO/EA”) operates as a department within the City and they have oversight of the purchasing practices insofar as ensuring that large contracts have received the appropriate number of quotes before being awarded and that certified SDBEs within the City are notified of upcoming contracts to encourage participation. It should be noted that, in the definition above, there is no explicit provision for other minority groups than Black American. City Charter 84.1 sets out that the City Council “may establish, agree to and/or comply with minimum minority and/or women’s business enterprise participation requirements in projects financed by public funds” by including requirements in contract specifications “pursuant to G.S. 143-129 and G.S. 143-131.” The authority to do so “may” be delegated to the City Manager or designee. However, the referenced Statutes refer to a broader minority inclusion than those recognized explicitly by the City’s SDBE program.

The City Manager, according to Sec. 18-53 of the Code of Ordinances, is responsible for “informing SDBEs of city contracting opportunities,” and providing them with information and assistance, as well as certifying new SDBEs and establishing “project specific goals.” The user departments, according to this section, are responsible for assisting the EO/EA department with setting goals on projects, gathering and maintaining subcontractor data, setting yearly internal SDBE contracting goals, and “managing contracts in a manner to facilitate contract compliance” (Code 1982, § 26-4; Ord. No. 12793, § 1, 5-8-2003). In addition, the ordinance makes provisions for certain race and gender-neutral initiatives, which fall on the City Manager. The manager is to provide “timely information on contracting procedures, bid preparation, and specific contracting opportunities,” adopt “prompt payment procedures” including requiring prime contractors to engage in the same.

Contractors are required, according to Section 18-59, to provide participation plans, which are binding. This includes a listing of all subcontractors intended for utilization on that particular contract. Requests to change or substitute subcontractors must go through the City Manager for approval and the facts supporting the request “must not have been known nor reasonably should have been known by either party prior to the submission of the participation plan.” The only conditions under which substitution is allowable are:

- “Unavailability after receipt of reasonable notice to proceed;
- Failure of performance;
- Financial incapacity;
- Refusal by the subcontractor to honor the bid or proposal price or qualifications description;
- Mistake of fact or law about the elements of the scope of work of a solicitation where agreement on commercially reasonable terms cannot be reached;
- Failure of the subcontractor to meet insurance, licensing or bonding requirements; or
- The subcontractor's withdrawal of its bid or proposal or qualifications description.”

(Code 1982, § 26-10; Ord. No. 12793, § 1, 5-8-2003; Ord. No. 14418, § 1, 4-1-2013)

Contractors may be penalized for providing “false or misleading” information to the City for certification or submission of bid. A contractor’s payments may be withheld if false or misleading information is discovered or if said contractor “failed in bad faith” to fulfill goals. (Code 1982, § 26-11; Ord. No. 12793, § 1, 5-8-2003). Providing false information can lead to a misdemeanor charge and other offenses are subject to breach of contract.

The Equal Business Opportunity program has attached an advisory committee consisting of SDBEs, non-SDBEs and “other interested persons” to serve two-year, staggered terms. The committee consists of two SDBE firm owners and one non-SDBE firm owner in the categories of construction and professional services, and one SDBE in non-professional services or commodities. (Code 1982, § 26-12; Ord. No. 12793, § 1, 5-8-2003).

### **E. EO/EA Practices and Procedures**

The City of Durham Equal Business Opportunity Ordinance was written to provide oversight for all contracts to come through the EO/EA office. Contracts over \$30,000 are consistently seen by the EO/EA office, but departments do not always present contracts between the 10K and 30K thresholds to EO/EA for review.

Generally, “as a matter of practice, “EO/EA does not set participation goals for projects estimated at less than \$100,000. If a contract is less than this amount, the EO/EA officers will review the database to see if there is a SDBE firm that could perform and will then leave it to the departments to notify those firms of the contracting opportunity. This practice does lend itself to people getting quotes on low threshold contracts. However, it is the general practice to seek three quotes, though there are many exceptions to this with regard to service contracts. By and large, if departments purchase in the “informal” bid range, they do seek three quotes.

Project managers follow a process through the EO/EA office where bids are reviewed for compliance with the ordinance as soon as they are returned. There are documents put in the RFP if there were no participation goals. It is the responsibility of EO/EA office to provide the City Council with information concerning SDBEs. The EO/EA office requires signed letters of intent to use SDBE firms and issues compliance letters on the basis of this documentation. Bids and RFPs that do not contain the requested information may be deemed nonresponsive, and therefore will not be considered. There is flexibility in the current ordinance. If a firm fails to meet participation goals or put in a “good faith effort” the City Manager can choose to make the award, but this does not happen often.

In order to become certified as an SDBE for the City, a firm must first be certified by the North Carolina HUB office. The EO/EA office uses an application to determine basic information about the number of employees, etc., but also requires three years of tax returns and copies of business licenses. They engage in site visits and, if this is not possible, will call the firm to go

through the site visit form. Two or more letters of reference are required and the firms are allowed to self-designate. The ordinance focuses on blacks and women but there is a provision to use other ethnicities to meet the participation goal if the firm cannot find a Black American or woman-owned business to fill the role.

There is a lag time between firms obtaining State certification and the City's certification. This, according to one informant, has slowed down the database. The EO/EA office does not want to lose focus on small businesses, but finds that people only seek certification when they are interested in doing business with the City and this is harder to do on short notice with the agreement to seek State certification first. The database in question is maintained within the department and is now "self-service vendor application process" which separates EO/EA from finance, meaning that a firm might be in the system as a vendor with a vendor number, but not identified as an SDBE in MUNIS. This creates issues when attempting to discern the "actual dollars" spent on certain firms. EO/EA has to work through Finance to obtain permissions to put firms in the system.

The certification process is intended to ensure that firms legitimately meet the requirements of certification outlined in the City's Equal Business Opportunity Program. The certification requirements aid in the identification of "fronts," which are generally firms that attempt to claim that they are owned and operated by a woman when in actuality, they are not. When the business requires a license to operate, the certification requirement that the business license be in the name of the woman owner helps to prevent this type of misrepresentation. There are occasionally reports of fronts and "we call them in and try to shake that out" and, if necessary, remove the offending firm from the databases (PPI-7). Substitution is permitted on a contract providing the prime contractor follows the process and attempts to replace the SDBE with another SDBE and provide appropriate documentation through the office of EO/EA. The office receives complaints concerning prime/sub relationships and follows up on those, especially issues with a prime contractor not providing a sub with the agreed upon amount of work after the award. SDBE payments are reported and subcontractor dollars are tracked in the MUNIS system. "Firms know that we will follow through and do our best to intercede behind the ordinance that we have in place," says PPI-7. Firms may be threatened with breach of contract if behavior continues.

Certain departments are very good at obtaining information and, because people know that they have to send in confirmation of payment, it diminishes issues. “(EO/EA) does what they can in terms of monitoring the actual follow-through,” one interviewee states, “We have a department that focuses on it, one person cannot do this all by themselves.” The EO/EA director reports annually to City Council concerning the participation numbers of their SDBE program.

## **F. Sampling of Department Structures**

### **1. General Services**

“The City has purchasing policies in place and authorization limits, or items that are based on commodity, to determine whether we get state discounting, but there is no centralized purchasing department” (PPI-8). The City does have a purchasing department (“Finance”) but “we don’t go to them to meet all of our purchasing needs,” PPI-8 states. Finance assists the general services department with processing and approving all requisitions. The bid process happens “in-house,” but Finance receives the requisitions for payments against purchase orders and contracts after approval in department.

The department head is the final approval in-house. The Business Services Division focuses on fiscal responsibilities (including bills, budgets, and data tracking performance, and making sure that all existing contracts are maintained and entered in MUNIS). The Work Control Division primarily functions to manage work control orders and prioritize them. The department runs a storeroom for small consistently used items stocked on-site. The analysts work with project managers to manage budgets based on activity, and initiate budget transfers through the business services division. Once a requisition has been converted to a Purchase Order (“PO”), the department may move forward and sends the invoice to accounting. General Services is a \$12.5 million dollar a year operation. An estimated \$7 million is spent on personnel, and \$4 or \$5 million on operations. “The bulk of our contracts are capital purchases” (PPI-8).

## **6. Public Works**

The Department of Public Works consists of three primary divisions: engineering, street maintenance, and storm water. The street maintenance office is offsite and their purchasing practices were outside of the realm of our interviewee's knowledge. There is one director overall and three division directors. The internal departmental threshold for obtaining multiple quotes has changed recently from all contracts \$5,000 and above to \$2,500 and above.

## **7. Finance**

The Finance department is comprised of two major divisions, including accounting and operations, which manages purchasing, billing, collecting, cashiering and all support that isn't accounting. There is a purchasing supervisor, two purchasing agents, and two purchasing technicians who act as clerical assistants. The City of Durham's purchasing is decentralized, so the Finance department supports all the other departments, whose managers rely on this central administrative group for material acquisitions. "Consumables" come through Finance. Departments do the preparation of bids and devise specifications, and often already have prices. Formal bids are generated by Finance. Individual departments, or end users, are involved in the procurement of services such as consulting and construction. Finance posts bid announcements so that they are "all in one place" and provides support "if necessary" with regulations (PPI-10). Finance processes all requisitions and reviews them for compliance issues, ensures that they are specified appropriately as formal or informal and that the funding is in place. Finally, this department prints the Purchase Orders and maintains the vendor database.

## **8. Transportation**

The transportation department is broken down into several work units including transit, traffic operations, and services, planning and administrative. Each unit has discretion over purchasing but transit must adhere primarily to Federal and State guidelines. The department



sets a goal MBE/SDBE utilization plan every three years. There is an SDBE component to the parking contract that was worked out during the process of drafting the Request for Qualifications (“RFQ”) and the EO/EA personnel were on the selection committee. Transit is largely monitored by the Federal Transit Administration (“FTA”) and adheres to those guidelines and goals. The bid process generally consists of department buyers obtaining a list of all qualified contractors through North Carolina Department of Transportation and notifying them of bids.

### **G. End-User Perspectives on Purchasing**

PPI-8 states that “there are two ways to do purchasing: (1) Solicit bids for services, depending on the level and (2) use P-cards.” As deliverables are met, “we begin requisitioning invoices.” All vendors are required to forward all invoices to the Finance department. PPI-8 considers the new system to be “slightly more efficient because we are not dealing with hard copies” (PPI-8). P-cards are issued to the department and they make requests through finance, then the cards are issued to appropriate people within the department. There are limits on the type of transactions using merchant codes and no cash advances are allowed. “The program has given us the flexibility to be more efficient with purchasing at the department level” (PPI-8).

It is understood that purchases over \$5,000 are required to obtain three quotes. There have been times when purchasing officials have been “required” to go for a second quote even though the policy “says that we don’t have to” (PPI-11). The departments generally pick the “cheapest option” or the best quote. If supplies obtained are very specialized, there might be only one supplier, in which case they sole source or “piggyback” off of State contracts. “We have the option to sole source sometimes and the justification has to be fairly detailed and extremely accurate,” meaning that there are only one or two firms in the entire country that provide that particular service, according to PPI-8. The department managers are the only people in-department who can approve sole sourcing.

The purchasing agents in Finance assist the department managers with getting at least three quotes. “We (in the departments, not Finance) set up budgets, the project manager begins, and the first major contract is with design services at 10 or 15% of the budget” (PPI-8). An RFQ is issued along with a scope of work and bidders are given a deadline. According to PPI-8, a department director can sign contracts up to \$30,000. Workflow is triggered after the contract is awarded and the compliance package goes through the approval process. The department can bring in people who have bid to have interviews, but it is not required, and they invite staff from EO/EA. These types of pre-bid meetings happen often, according to PPI-8.

For purchases exceeding \$10,000, Finance consults EO/EA and attempts to ensure that there are updated statistics for vendors and SDBE identifications. It is “common procedure” to seek out the EO/EA department’s assistance. “People really get it,” PPI-10 says, and understand the importance of the office. People here, unlike in a previous position this employee held in another jurisdiction, are aware of overall goals and policies. But the City of Durham has “put resources into it” with seemingly good results (PPI-10). Supporting this, PPI-8 states explicitly that “we always work with the EO/EA office to ensure that all requirements for the EO/EA ordinance are met” (PPI-8).

The understood policy is to “hire the lowest bidder that meets the requirements” according to PPI-8. “We tend to follow what the City has put forth when it comes to selecting different firms,” PPI-9 says. As far as departmental discretion, it is “out of our hands...we can’t just say ‘we want this firm’” (PPI-9). Purchasing personnel in the department are required to advertise the bid, send out electronic e-mails with the SDBE list from the EO/EA office, and then ensure that bidders are qualified before they can take the lowest bid. In previous history, PPI-9 recalls, there have been performance issues with firms that “come in low but perform horribly but are eligible to do more contracting for the City if they bid low again.” According to PPI-9, the determination needs to include not only the low bid and qualifications, but past performance for the City. Documenting this process, PPI-9 says, is important for transparency. This employee “has heard” of situations where department personnel want to use the same firms for construction or design because they are familiar with City guidelines. It is the practice of the public works department

to send out a bid list to the bidders with bid amounts for transparency's sake, but it is not a requirement and PPI-9 does not know if everyone in the City does this.

On CMAR-based ("Construction Manager at Risk") contracts, the prime gives a complete bid and "they manage all the subcontractors" (PPI-8). Project managers rarely go out and bid for all trades associated with the contract, but "we do track the contract for compliance through invoices" (PPI-8). The project manager is described as the "first line of defense" on compliance, but this seems to vary department to department. Subcontractors receive invoices from prime contractors and the invoice is required to be in a certain format to list the subcontractor recipients' work. "The prime won't pay subcontractors until they are paid" (PPI-8). A subcontractor can produce timely work, but a prime still hasn't done work for City necessary for payment. "We hear from subs occasionally, but our contract is with the prime," PPI-8 asserts. One department manager explicitly instructs employees not to directly engage with subs. The prime contractor can default on the contract when this happens frequently. This is described as a "system of checks and balances" to prevent discrimination or misuse (PPI-8).

#### H. Observations

Decentralization does not seem to have had a negative effect on the administration of the SDBE program because the program itself is centralized and the EO/EA acts as a hub for procurement. The fact that there is a full-time staff dedicated to the administration of the program contributes to its overall efficiency. The City has put measures in place to ensure equal opportunity, providing ample oversight for waivers and sole-sourcing to prevent misuse within the departments themselves.

The City of Durham has a firm policy foundation for its EBO program, between the provisions of the General Statute and those in the Code of Ordinances. It appears to be well understood amongst personnel in the various departments that the EO/EA office is an integral part of the contracting process and that oversight is necessary in order for projects to move

forward with bids. Having a central office for socially disadvantaged businesses is beneficial in that it allows energy and resources to be toward a viable program, it is a part of the process across the board, and project managers and firm owners throughout the City know which office to come to with their concerns. This oversight does create a gap because, though project managers are considered to be a “first line of defense” against discrimination and issues, particularly between prime and subcontractors, there are in existence internal department-specific policies that explicitly prohibit engagement in the prime/sub relationship and it is unclear whether or not that policy extends to notifying the EO/EA office in their stead. The fact that replacing a subcontractor after a contract has been awarded requires the City Manager’s approval prevents fraudulent activity and is, in the opinion of the study team, a positive step that the City of Durham has taken to ensure the integrity of their Equal Opportunity and Equity Assurance program.

One potential barrier to participation is the requirement in the North Carolina General Statute that construction firms responding to formal bids (above \$500,000) must provide the City with a certified check “in an amount equal to not less than five percent (5%) of the proposal” before it will be awarded. Alternatively, a firm may file a bid bond with a licensed corporate surety (NSGC 143-129). This amount may prevent small businesses especially from bidding as larger firms might be more capable of absorbing that initial cost or obtaining the funds necessary to bid.

The system of documentation provides ample opportunity for oversight and compliance monitoring by the EO/EA department; however, there are some areas of concern. The EO/EA office only explicitly serves Black American and women-owned businesses and unspecified “others” deemed socially disadvantaged by the council. The statistical section of this study will reveal if disparities are such that this should be expanded to include a more specific provision for other minority/disadvantaged groups. The Study team will reserve all conclusions until after it has analyzed the statistical section. Finally, the professed lack of coordination with the purchasing department’s database indicates a need for a more explicit IT operating procedure by which the databases can be concurrently updated on a regular basis. It should be noted that the City does track contract data for all minority groups, so The Study team should not have difficulty determining if there is a disparity and a need for expansion of the program’s scope.

## III-02. COUNTY OF DURHAM

The objective of the “Purchasing Practices, Policies, and Procedures” chapter of this Study is to review the written purchasing policies of Durham County with procurement personnel to assess the level of familiarity, understanding, and compliance with such written policies. Secondly, this review is intended to ascertain whether or not, in policy or practice, there are barriers to minority or woman-owned businesses. It is well understood that where there is policy, there is often room for interpretation and discretionary practice. These areas will be examined closely, as well as the effect they may have on the overall ability of historically disadvantaged businesses to obtain work with the County of Durham.

### A. Review of the Governing State and County Statutes

Durham County (“the County”) is governed by North Carolina General Statute 143-129, which applies to public contracts in the formal range, G.S. 143-141, which applies to informal contracts, and 143-128.2, which sets out regulations for minority owned businesses. County Ordinance 1-14-08 also maintains procedures to ensure that these laws are monitored and adhered to by the various departments within the County. The Purchasing Division is currently in the process of revising their internal policy manual, but in the meantime, the current Contract Manual, last updated in 2011, is in effect.

#### 1. Bidding Procedure

Formal bidding is explicitly required for construction or repair work “requiring the estimated expenditure of public money in an amount equal to or more than five hundred thousand dollars (\$500,000)” or the “purchase of apparatus, supplies, materials, or equipment requiring an estimated expenditure of public money in an amount equal to or more than ninety thousand dollars (\$90,000)” (NCGS 143-129). Informal bidding is required for construction or repair work and the purchase of apparatus, supplies, materials, or equipment requiring an estimated expenditure of public money in an amount equal to or more than thirty thousand dollars

(\$30,000) but less than the formal range amounts. (NCGS 143-131). The governing board is responsible for awarding formally bid contracts. The statute does not authorize the governing board to delegate the authority to award contracts for construction and repair work in the formal range; however, the governing board is authorized to delegate to the manager, chief purchasing official, or any other employee the authority to award formally bid contracts for the purchase of apparatus, supplies, materials, or equipment or for any informally bid contracts.

Contracts awarded for construction or repair work and for the purchase of apparatus, supplies, materials, or equipment estimated at less than thirty thousand dollars (\$30,000) are not required to comply with this state statute. These contracts may be awarded, rejected, or re-advertised by “the manager, chief purchasing official, or other employee” chosen by the governing body of any constituent jurisdiction. “Any political subdivision of the state” has the right to determine their own “restrictions as to dollar amount, or other conditions” in compliance with this Article of the Statute. In other words, the head of the County’s Purchasing Division may determine at their own discretion how to award and administer construction and repair contracts and contracts for the purchase of apparatus, supplies, materials, and equipment less than thirty thousand dollars \$30,000 without issuing a formal or informal bid.

## **2. Advertisement of Formal Bids**

Proposals should be invited by “advertisement in a newspaper having general circulation in the political subdivision or by electronic means, or both” and the governing board of this political subdivision of the State may determine to advertise “solely by electronic means” (NCGS 143-129). Advertisements should appear “at a time where at least seven full days shall lapse” between the date of notice and the bid-opening date. Advertisements must state the time and place where bid specifications or a description of plans can be obtained and the time and place for the opening proposals. They must also “reserve to the board or governing body the right to reject any or all proposals” (NCGS 143-129).

### **3. Bid Process**

Statute 143-129 states that bids can be rejected for “any reason determined by the board or governing body to be in the best interest of the unit,” but makes the provision that proposals cannot be rejected “for the purpose of evading the provisions” the Article. Therefore, all bids are awarded to the “lowest responsive and responsible bidder, taking into consideration quality, performance and the time specified in the proposals for the performance of the contract” (NCGS 143-129). If the lowest bidder exceeds the budgeted or set-aside funds for a project, the “governing body” shall “enter into negotiations” with that bidder and make “reasonable” changes in plans to bring the contract price down. If this is not possible, the governing body is “authorized to re-advertise” after making every effort to bring the project or purchase cost within limits with the lowest bidder. All formal bids are sealed and are to be opened in public.

Construction firms must provide the County with a certified check “in an amount equal to not less than five percent (5%) of the bid” before it will be awarded. Alternatively, a firm may file a bid bond with a licensed corporate surety (NSGC 143-129).

### **4. Contracts that Are Not Required to Bid**

#### **a) Emergency Contracts**

In cases of emergency where the “health and safety of the people or their property” are at risk, bidding is not required. This exception applies to both construction and repair contracts and the purchase of apparatus, supplies, materials, or equipment contracts. The exception is available only in rare circumstances. (NSGC 143-129).

#### **b) Sole Source Contracts**

When “performance or price competition for a product” are unavailable, only available through one source, or must be compatible or standardized, entities have the opportunity not to bid, with the approval of the governing board.



**c) Piggyback Contracts**

Subject to board approval, the requirements for bids may be waived “for the purchase of apparatus, supplies, materials, or equipment” from any person or entity that has, within the previous 12 months, after having completed a public, formal bid process to the United States of America or “any Federal agency,” the State of North Carolina or any agency or political subdivision of the State (NCGS 143-129).

**d) Group Purchasing Programs or State Contracts**

Purchases may be made through a “competitive bidding group purchasing program” which “offer competitively obtained purchasing services at discount prices to two or more public agencies” or through contracts that have been competitively bid by the North Carolina Division of Purchase and Contracts (NCGS 143-129).

**B. Review of the County Ordinance**

**1. Encouragement of M/WBE Contracting**

The County Manager is responsible for the implementation of Article V of the County Ordinance (Ord. of 1-14-08(1), § 1). The ordinance provides for certain race-neutral steps, including advertising for bids at least thirty days before receiving bids, the director’s presence at pre-bid conferences, assistance with bonding “where applicable and feasible” and coordination with the U.S. Small Business Association, and division of work requirements so that there are “good opportunities for small companies to perform as subcontractors.” The ordinance’s race-conscious provisions are that the County should maintain an MWBE availability database, provide outreach and assistance to subcontractors with a “comprehensive outreach program,” engage in “continuous recruitment” of MWBE firms and publish “at regular intervals” contact information where businesses can obtain information regarding ongoing contracting activity at the County.



Bidders are required to take “affirmative steps” to encourage participation prior to submitting bids. This can include “segmenting” work requirements, corresponding with MWBE firms, advertising in minority/women publications or media 20 days prior to the bid date, or assisting MWBE firms with finding bonding and insurance. In addition, bidders must report to the director on MWBE contract payments after award and “cooperate in good faith with the County to attempt to resolve any complaints of discrimination.” MWBE firms must be certified under the North Carolina HUB program and “make every effort” to establish contacts and relationships with bidders, “including attending pre-bid conferences and subscribing to industry and trade journals” (Ord. of 1-14-08(1), § 1).

The codified selection procedures for contractors and subcontractors include a consideration of MWBE requirements and discretion to reject bids in violation. MWBE participation is calculated using the total dollar value awarded. Bidders must document MWBE participation with full descriptions of subcontractor engagement, dollar amounts, and statements of intent from the subcontractors. A “good faith effort” is required of all bidders and constitutes: pre-bid attendance, notifying MWBEs from the NC HUB site, division of work, consideration of all MWBE bids and explanations for rejection, advertisement of bids, providing MWBEs with relevant information, and assisting MWBEs with bonding if necessary (Ord. of 1-14-08(1), § 1).

To enforce these policies, Ordinance 1-14-08 states that the County Manager and Director are responsible for monitoring all contracts for compliance and reviewing payment documents to determine whether payments are being made to MWBEs as indicated in the contract or bid. The Director is the first point of contact for the contractor in maintaining compliance documents. The contractor has 15 days or “a reasonable lesser amount of time” to “cure the deficiencies” in performance and compliance if found in breach, after which “lawful action” may be taken. Contractors are required to maintain the MWBE percentages, including any increase in dollar amount by change order.

### **C. Personnel Interviews**

The County's Purchasing Division engaged in the bulk of the interviews with Griffin & Strong, P.C.'s team because much of the purchasing within the County is funneled through this division of the Finance Department. Within this division are personnel specifically assigned to the positions of Purchasing Manager, Assistant Purchasing Manager/MWBE Coordinator, Contract Compliance Officer, and Senior Buyer, all of whom were interviewed. The Engineering Department and Wastewater Management were also chosen for interview because they engage regularly in specialized procurement and/or large projects.

### **D. Structure and Process**

All bidders are directed to send their questions regarding the RFPs, RFQs, or Invitation for Bids ("IFBs") to one email, which the Purchasing Division then forwards to the appropriate project manager. As soon as a bid is opened, the Assistant Purchasing Manager/ (MWBE) Coordinator reviews for MWBE participation (Affidavit B). If there is none, which PPI-1 states happens "often, especially on IFBs," the Assistant Purchasing Manager/ (MWBE) Coordinator attempts to work with the bidder to determine if there is a way to encourage more participation on a project. The law, as PPI-1 understands it, is that the bidder has three (3) days to provide Affidavit D along with the dollar amount if they are in fact able to obtain MWBE participation. Projects that are very specialized are not subject to this process, but the entire bid process will be suspended as the Assistant Purchasing Manager/ (MWBE) Coordinator assists the bidder with the MWBE participation goals. In so doing, they are often directed to the State of North Carolina's HUB site and encouraged to consider trades that could be subcontracted out to MWBE firms. The County ordinance requires a "good faith effort" to utilize MWBE firms on the part of all departments engaging in purchasing.

In the constituent departments of Durham County, the project manager acts as a liaison between the County and contractors. This job entails both administrative duties and sessions with end users and contractors. The Senior Buyer in Durham County's Purchasing Division is the first point of contact when the departments put out bids, ensuring that they are using the correct templates and are clear on whether the bid is formal or informal. Then the Senior Buyer assigns bids out to other Buyers and determines which to keep in her office. The goal is to ensure that the process is "fair and impartial" (PPI-3). Once plans and specifications for construction projects are sent out, the bidders who contact purchasing to obtain plans and specifications are directed to the County's hired Architecture and Engineering consultant.

All questions regarding a bid come directly to the Purchasing Division's email address. The assigned Buyer in the Purchasing Division handles administrative questions and forwards the technical questions to the appropriate project managers in the user department and the Architecture and Engineering consultant (if applicable). The Buyers from the Purchasing Division are not on the evaluation team because they have dealt with bidders throughout the process, so the Purchasing Manager is the representative to aid the user departments in evaluating proposals. (PPI-3)

The Buyers do the "legwork" by working directly with the project manager or with the Architecture and Engineering consultant (PPI-3). Buyers are also responsible for reviewing end users on-line purchase requisitions and converting the requisitions into POs. The Senior Buyer approves POs up to \$10,000. Any POs over this threshold go to the Purchasing Manager for approval and then to the Chief Finance Officer for pre-audit approval on all P.Os. Architecture and Engineering consultants work with the user departments to put together specifications and the Buyers in purchasing put together the solicitation documents and then work with departments to ensure that they comply with the statutory requirements. Though Buyers are not involved in the selection process, sometimes bidders do ask about the process. Seldom do bidders bring their complaints to a Buyer, as their first stop would be to the project manager within the department or the Purchasing Manager (PPI-3).



MWBE firms are referred to the Assistant Purchasing Manager/ (MWBE) Coordinator, who ensures goals and good faith efforts. The Assistant Purchasing Manager/ (MWBE) Coordinator will sometimes ask to have a performance bond waived or some other adjustment to the requirements to encourage participation. Once this has been done, the process “generally goes smoothly” and any questions, no matter how minor, are submitted and filtered through the Purchasing Division. The pre-bid conference is usually not mandatory (PPI-3). The goals produced by the user departments are in line with the ordinance, but it is the Buyer’s job to make sure they are aware that this does not trump the State statute. This is why the Purchasing Manager established thresholds so that bids can come through purchasing. Every department handles their own payments and if there is any issue between the prime contractor and an MWBE subcontractor, the Assistant Purchasing Manager/ (MWBE) Coordinator will assist. The Purchasing Manager also does MWBE verification as needed.

The Contract Compliance Officer (“CCO”) ensures that contract documents, including those regarding insurance and bond requirements, are arranged and that the process has been followed correctly and appropriately. The CCO does not work directly with Buyers. As a matter of course, the CCO checks to make sure that the department actually did the bid and that within that bid they have all the documents and that they went to the board if necessary. The CCO is also responsible for encumbering funds and creating boilerplate contract templates for departments. If a contract must be drafted, the CCO will work with the Legal Department to do so.

Once contract documents are fully executed, the focus is on administrative monitoring. In addition, the CCO can also approve POs within a certain threshold (up to \$10,000), and make sure that all of the technical information is there, as well as the quotes. She is the sole compliance professional in the County for reviewing contracts. At the end of the fiscal year, if there is an open encumbrance (funds reservations), the CCO works with departments and the Purchasing Manager to request a close out or roll forward of contract encumbrances. The CCO also does a performance measurement report to show how many contracts have come through the Purchasing Division and how long it took to process the contracts.

## **E. Perspectives on Efficiency and Discrimination**

### **1. The MWBE Coordinator Position**

Following up with the departments to ensure participation, which is the current practice of the Assistant Manager of the Purchasing Division, is not required. One County employee concedes that if there were someone less committed to participation in the position, it is very possible that these steps would not be taken due to the fact that this extent of oversight is not in the ordinance and says that “that’s how it was before” (PPI-1). This County employee also asserts that bidders tend to be resistant to searching for MWBEs to utilize as subcontractors and the Assistant Purchasing Manager/(MWBE) Coordinator goes further than the current policy demands in order to ensure that they do so.

The MWBE website is considered an essential tool for awareness and participation. The Assistant Purchasing Manager/(MWBE) Coordinator also steps in to mediate prime/sub relationships in the event that subcontractors are not being paid, are not paid on time or have been substituted after the award of the contract. Once again this is going “the extra mile” and it is not a part of the job description (PPI-1).

Though the Assistant Purchasing Manager/ (MWBE) Coordinator does have the discretion to halt the process of issuing a contract or going to the board until there is evidence of an “appropriate level of participation” or effort, there “needs to be something in place” in terms of explicit utilization percentages or thresholds at which the process is prevented from moving forward in order to ensure that there is adequate participation (PPI-1). “PPI-2 says that the Assistant Purchasing Manager is always out finding new firms and trying to give them opportunities. PPI-2 corroborates PPI-1’s statement that the discretion inherent in the position is beneficial. PPI-2 is thankful for the division’s discretion because they are aware that some issues are more politically sensitive than others.



“Send this back, this is janitorial services. We have a lot of minority businesses involved in this industry and need to bid this out competitively or get more quotes.” (PPI-2).

It is not a one-person job” one employee states, speaking of the incorporation of MWBE outreach, Buyer supervision, procurement, data entry, and filing all MWBE payments attached to the Assistant Purchasing Manager’s position (PPI-1). “The last disparity study gave us an MWBE database,” PPI-1 asserts, “now there needs to be another body in the MWBE Coordinator position.” The Assistant Purchasing Manager also does MWBE administration and is a “one person shop” is a broad concern (PPI-2). Though the Purchasing Manager was able to get help for her in the form of a data entry consultant, the life of that contract is currently waning and the Assistant Purchasing Manager still needs someone permanent. The Assistant Purchasing Manager, another employee asserts, “Can’t do it all” and needs some form of assistance in the position (PPI-4).

## **2. Resources, IT, and Purchasing Division Structure**

PPI-2 believes that the Purchasing Division needs more access to resources. PPI-2 asserts, “What we have is adequate enough for what we are able to provide and we do extremely well.” The primary goal of the Purchasing Division is to ensure that it is being responsive to departments and firms. “We can’t stop a beat because when we stop a beat we hold up other departments” (PPI-2). The MWBE database and website are described widely as being great for the County; however, there are many maintenance concerns. At the time, the division received no IT help with getting the new MWBE website/database in place and the Purchasing Division had to hire an outside consultant. The division found that their requests were not taken seriously by IT, even after board approval (PPI-2).

It has become another role for the Manager of the Purchasing Division to ensure that the system used to issue POs and Funds Reservations (contracts) is in working order. The ERP SAP

system currently in use creates an automated process: it allows for on-line purchase requests and the issue of PO and contract encumbrances, and puts vendors in the database. The Purchasing Manager must work closely with IT and is therefore proficient” in the system. The Purchasing Manager must also train end users who then train county department personnel in using the system.

### **3. Effectiveness of Existing Policies**

Purchasing is not a centralized department, and they are too small to do everything in-house. They sometimes “push things out” to allow departments to be more accountable (PPI-2). Purchasing, one division employee asserts, is for oversight and compliance, not “pushing papers” (PPI-2). The decentralized process is considered effective. “It would be slow if everything flowed through [purchasing] to bid or find a vendor” (PPI-2). Departments are encouraged to seek competition and to obtain three quotes, including one from an MWBE firm even when not required to bid by statute or county policy.

PPI-2 believes that the ordinance for the MWBE process is “good” and cites the fact that, in 11 years, the Purchasing Manager has only had one bid protest that required a formal response from the legal department. “Most protests turn out to be nothing” (PPI-2). Either a firm didn’t qualify or sent the wrong forms, or some other error. This is generally solved by sending a copy of the bid tabulation or process.

General practice within purchasing is to engage in some oversight of low dollar bids anyway, prior to award. “Departments are aware that they can’t get anything by us,” PPI-2 says. “We document everything and have departments provide documents” (PPI-2). Before a PO or contract can be issued, it must come through purchasing, which is where the Assistant Purchasing Manager/ (MWBE) Coordinator comes in. The informal v. formal distinction dictates statutory guidelines. Above \$30,000 is considered competitive and the bidding process is normally handled by the Purchasing Division; however the Purchasing Manager is attempting to raise this threshold

up to \$90,000 before it needs to be sent to Purchasing for bidding and to place the accountability on departments in attempt to make the bid process a habit, so that perhaps they will even bid out the contracts below \$30,000.

PPI-4 notes that the Purchasing Division has to work with departments a little more, between the \$30,000 informal thresholds up to the formal limit, to make sure they have gotten quotes. Some departments can get “caught up in trying to do what they need to do and working with departments to get everything done can be like pulling teeth” (PPI-4). Departments are particularly dismissive about the process with smaller contracts. Otherwise, this County employee feels that the process, “from beginning to end,” from the point when the department determines what they need onward, “is a smooth flow” (PPI-4).

#### **4. End User Department Perspectives**

##### **a. Engineering**

“We always adhere to purchasing guidelines” (PPI-5). Some projects have been so large that the department will use Federal programs like GSA to obtain contracting; otherwise it’s the “usual suspects,” meaning five or six furniture or A&E firms (PPI-5). Once a relationship is established with vendors that are “timely and responsive”, the department tends to use them again and again (PPI-5).

In bids for construction, the department may request an allowance for specialized items, but otherwise they always send the package to purchasing for review and the production of MWBE guidelines, review of living wage and other compliance-related matters. The goals for the County are listed in the qualifications, and the Assistant Purchasing Manager/MWBE Coordinator reviews all bids higher than \$30,000 for MWBE participation. Purchasing helps the department obtain and complete the appropriate documentation. The MWBE goal is generally 27%.



For an RFQ (A&E Consultants), the process is governed by general statute. A&E firms cannot be selected on price, but must be chosen based on their qualifications. As a rule, the department adheres to purchasing guidelines. However, if a project is less than \$30,000, they do not tend to get more than one quote.

Projects are so large, generally, and under so much scrutiny that the Assistant Purchasing Manager/(MWBE) Coordinator is always tracking to ensure that primes have engaged in no substitution of subcontractors or otherwise questionable practices. Minority contractors, PPI-5 notes, have said that there are issues with obtaining bonding and, it is important to note that only one Black American general contractor has been used in Durham and he is engaged in a niche market. In his personal opinion, there is not a lot of opportunity in this field. “People sometimes beg for work, then don’t do the best job, so White contractors stick with people they know” (PPI-5). A&E and Construction are particularly hard to break into for minorities in the private sector, according to this interviewee.

#### b. Wastewater Management

The Department of Wastewater Management serves Research Triangle Park. The County decided to build a state-of-the-art plant designed to remove organics, (such as nitrogen and phosphorous) through biological and chemical methods. They also discharge a small creek and have expanded to accommodate both industrial and domestic customers. “There is a large governmental presence,” PPI-6 notes. The plant was operated by private contractors until 1999, and the County hired a full staff after contractors “asked for more money to do the job correctly” (PPI-6). The department sells some of the water and puts in sewers occasionally and has spent about \$15 million on construction in the last couple of years.

Wastewater management mostly procures chemicals, tools necessary to conduct their standard purification measures, and contractors to perform in emergencies. Chemicals always involve formal bids and the equipment used is mostly custom, foreign, and sole sourced. In drafting bid documents, they take previous bids, modify them, and send them to purchasing. The

bid documents go immediately to the Senior Buyer, who forwards them to the Buyer and sends them back for review. Dates are set and advertising is done with the assistance of purchasing. Then, bid packages are assigned to a Project Manager in the department. Once the review is complete, the Purchasing Manager is the “last word” (PPI-6). The scoring sheet is sent back to the Assistant Purchasing Manager/(MWBE) Coordinator with the County for review, and she may try to improve or increase the number of MWBE contracts before it is approved.

Percentage goals are generally respected, according to PPI-6. For instance, this employee recalls a construction project on which one of the vendors changed out their MWBE subcontractor and found another MWBE to replace them, so that the percentages would remain the same. During pre-bid conferences, there is significant MWBE presence. “We want as many proposals as possible” (PPI-6). According to PPI-6, MWBEs are active on projects under \$30,000 and a fair amount of engineering work (small contracts), expert, toxicologist or microbiologists, emergency services, or short term contracts for spills and hazardous waste.

## F. Conclusion

It is clear that the constituent departments of Durham County and their purchasing professionals understand the procurement policies and laws as they are set out for the State of North Carolina and the internal policies and thresholds set by the County. Still, the resources available to the Purchasing Division and Assistant Purchasing Manager/ (MWBE) Coordinator may prohibit the division from providing as much outreach and oversight as they would like. Combining the MWBE Coordinator position with that of the Assistant Purchasing Manager, whose position is already demanding, stretches personnel thin and prevents MWBE firms from receiving the full extent of the manager’s attention, due to lack of time and resources rather than a lack of desire. Although there is a lack of clear-cut threshold-based policies, there are current un-codified practices that are positive approaches to monitoring and administering MWBE participation. Unfortunately, these could potentially be erased unless they are instituted as written policy. Explicit guidelines and parameters are necessary for the Assistant Purchasing Manager/(MWBE) Coordinator position, as well as increased assistance from the IT department

for both the Assistant Purchasing Manager/ (MWBE) Coordinator position and the Purchasing Division as a whole.

The lack of opportunity in engineering, as a niche, expertise-based field, and the desire of prime contractors to return to those firms that are known to do a good job rather than expanding out to encompass new businesses, was expressed. The lack of opportunity noted by one county employee in the field of engineering indicates that there may be opportunity for the County to develop a mentorship or outreach program to allow small, new, and MWBE firms to interact with and learn from larger, more established primes. Large contracts currently being scrutinized by the Assistant Purchasing Manager/ (MWBE) Coordinator to ensure compliance could be split at the contract stage to allow more small and MWBE businesses to participate as primes. The bonding requirements might be restrictive to some, as was noted by one county employee, and therefore, bond assistance or lowered bond requirements on low-risk projects should be considered.

In addition, multiple purchasing personnel noted that it is very difficult sometimes to get departments to focus on goals, even with the provisions in place. Though there seems to be top-down awareness of the County's policies and thresholds, what constitutes "good faith effort" from department heads, project managers and contractors may require fleshing out through training. It should be noted that a requirement to obtain three quotes at every threshold could be useful in encouraging MWBE participation on small-dollar contracts. Upon the Study team's review of the anecdotal and statistical evidence, these recommendations will be discussed and further developed in the Findings and Recommendations chapter of this study.

## IV. STATISTICAL ANALYSIS

### A. Introduction

Griffin & Strong, P.C.'s ("GSPC") statistical analysis is comprised of various statistical components based upon extensive manual and electronic data collection from both the City and County of Durham, North Carolina. All relevant procurement information from departments that engage regularly in purchasing at the City and County was gathered for the study period of July 1, 2007-June 30, 2012.

The statistical analysis begins with a determination of the "relevant market area" or the geographic parameters in which 75% to 85% of the firms that contract with City and County are located. This analysis utilized combined City and County data with a single finding of the "Relevant Market" for each major work category (Construction, A/E, Services, and Goods). Within the Relevant Market, GSPC determined the percentage of firms in each race, gender, or ethnic category that were ready, willing, and able to perform services each of the Work Categories, termed, "Availability". GSPC then compared Availability to the percentage of dollars awarded by the City and County; or Utilization. The comparison reveals whether there is a disparity between the number of Available firms and the Utilization dollars for each race, ethnic, or gender group. This is presented as overutilization, underutilization, or parity.

Finally, the study team will determine whether any disparity found is statistically significant and whether its cause can be explained for any other reason, other than race, ethnicity, or gender. The availability/utilization analyses are intended, along with the private section and anecdotal evidence analyses, to establish whether or not discrimination exists in the marketplace and whether or not the City or County of Durham have been active or passive participants in such discrimination.

A thorough and extensive disparity analysis must consider the extent to which contracting and subcontracting awards or outcomes are condition on the race, ethnicity, or gender of firm owners and are not simply random. If the racial, ethnic, or gender identity of the owners is found to impact these outcomes in contracting and procurement in a statistically significant manner, this finding would imply that the observed disparities reflect discrimination in the market for contracting or subcontracting with public entities such as the City of Durham or Durham County.

Data is key to determining accurate outcomes in any carefully produced disparity study. Therefore, it is important that all data is properly tracked and documented, so that the chain of data can be double-checked and verified. The following processes regarding data assessment, collection, and maintenance were undertaken by GSPC in conducting this disparity study:

### **B. Data Assessment**

The data assessment meetings were held with Griffin & Strong, P.C., on October 28, 2013 at 9 AM, at Durham County's offices and on October 30, 2013 at 1pm, GSPC's team met with the team from the City of Durham at their offices. The purpose of each of these meetings was to determine what data the City and County of Durham had, in what format, and how GSPC could obtain the data. Further, the objective was for GSPC to get a better understanding of how procurement operated in order to execute the methodology that was approved by the City of Durham and Durham County. It was also important for GSPC's team to get to know procurement personnel and understand how to operate the study in a manner least intrusive to the City and County's personnel.

Both the City and County's teams were briefed on the nature of the project and they provided insight as to the most efficient methods of data collection within their constituent departments. It was determined that, due to the dual nature of the study, all data would be collected and analyzed jointly, but that, although the statistical chapter would be combined in the study, the utilization and disparity analyses would be separate for the City and the County.

GSPC's Data Assessment Report is attached hereto as Appendix A.

### **C. Data Set-Up**

Following approval of the Data Assessment Report, GSPC developed and executed a Data Collection Plan and submitted data requests to the City, the County, and other sources. The Data Collection Plan set out the process for collecting manual and electronic data for statistical analyses. In addition, it included a plan for collecting data needed for the anecdotal portions of the study which included surveys, public hearings, focus groups, and interviews.

GSPC's Data Collection Plan is attached hereto as Appendix B.

## **D. Data Collection and Creation of Databases**

### **1. Electronic Data**

Electronic data supplied by the City and County of Durham and other data collected by GSPC were catalogued and stored in GSPC's computer systems subsequent to the data collection effort. The data entered were used to develop databases containing contracting history for each business type, for both prime contracting and subcontracting. GSPC related all of the databases collected in order to cross-reference information among the files, including matching addresses, work categories, and MWBE identification.

### **2. Manual Data Collection**

Neither the City, nor the County maintained electronic bidder data (except a small portion provided by a few of the City's departments). GSPC needed this data to determine relevant market and to include bidders in the list of ready, willing, and able firms, called the "Master Vendor File" which is defined below. Bid tabulation data for the City resided with the individual departments and the County's were in PDF format, but addresses were not included on the bid tabs. Therefore, all the bid tabulations (with matching addresses) were manually collected and entered by temporary data personnel provided by Monarch Services, a certified Durham MWBE in the City's and County's offices. An on-site training session was conducted during which the temporary data entry personnel were trained by GSPC's Project Manager and supervised by GSPC's sub-consultant, Gaither & Company. A copy of the MS Access data entry forms for the Bid tabulations is attached in Appendix C.

### **3. Data Entry Verification**

GSPC examined each database to make sure that they were consistent in ethnicity identifications and work categories. Independent sources were used to resolve any inconsistencies and entire lists were verified by comparison to other databases, rather than verifying just a sample of each list. In many cases, GSPC manually examined files to make sure the data was consistent.

### **4. Data Source Description**

The following describes the databases created by GSPC and used for the analyses contained in this Study:

#### **a) Bidders' List**

The Bidders' List is a compilation of electronic bid tabulations (in Excel, PDF, and hard copy format). GSPC compiled the Bidder's List from all informal and formal bid solicitations solicited during the Study Period. The firms on the combined City and County Bidders' List were included in the Master Vendor File and the Bidders' List was used to calculate the geographic Relevant Market.

#### **b) Contract List**

The Contract List is a data file of all awards made during the Study Period. For the City, this included all contract awards. For the County, it included all awards from the funds reservation file (FRs) and the P.O. file. The combined City and County contract files (except Pos from the County because they are typically not subcontracted) were used to compile the mailing list for the Prime Vendor Questionnaire. Also, all the firms on the Contract List, that were located within the Relevant Market, were included in the Availability Estimates.

#### **c) Master Vendor File**

The Master Vendor file is a compilation of all lists of vendors used to determine availability estimates. It was also used to match and verify data in other data files, particularly to make sure that information assigned to firms for utilization calculations matched the information assigned to firms for availability calculations. This is important to make sure that GSPC is comparing like-

data to like-data. The Master Vendor File contains the lists of firms from the following data sources:

- City and County Bidders List
- City and County Awardees
- City and County MWBE List
- City and County Vendor List
- Subcontractors from Prime Vendor Survey
- North Carolina HUB List
- North Carolina DOT Vendor List

The purpose of the Master Vendor File is to collect, in one database, a listing of all firms that are ready, willing, and able to do business with the City or the County. It includes internal lists from both entities as well as outside lists from the State of North Carolina.

#### **d) Prime Vendor Questionnaire**

Neither the City nor the County maintains subcontractor data. It is important to include subcontractors in the Master Vendor File to determine availability, as well as to calculate separate City and County subcontractor utilization. In order to obtain this information, GSPC sent a questionnaire to all awardees on the Contact list (except POs for goods, because typically goods are not subject to subcontracting). In addition, the subcontractor race/ethnicity/gender identification was used to verify like information provided by the City and County in the various databases compiled and gathered by GSPC.

A copy of the questionnaire is attached as Appendix D. Between the City and the County, a total of 2852 questionnaires, reflecting 8128 individual contracts, were sent to contract awardees by Professional Mail Services, Inc. (a Durham County MWBE). This included a follow up letter reminding firms to respond and correcting and clarifying instructions. 398 questionnaires were returned with bad addresses. A total of 325 unique firms responded, which represented 931 contracts.

Although questionnaires are sent to a comprehensive list of awardees, it is anticipated that only a small percentage of those firms will respond. The responses then become a sample response which must determine whether the sample responses are representative of the whole.



In the case of both the City and the County, GSPC has determined that the sample response was representative and did not appear to be any response bias either in the firms that responded or those that did not respond.

The individual response rates and outcomes for subcontractor utilization for the City and the County appear Subcontractor Utilization below.

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

GSPC's process for post-data collection includes electronically and manually "cleaning" each database to eliminate duplicates, fill in unpopulated fields, and resolve any anomalies. In the cleanup process, GSPC made the assumption that any vendor that was not otherwise identified as an ethnic minority or Caucasian Female-owned business is considered a Non-Minority Male firm. In addition, when a firm owner appeared in multiple categories, GSPC counted race and ethnicity over gender, resulting in only Caucasian Female-owned firms in the Female-owned category.

After electronically matching firms, not all of the firms were identified by business categories; therefore, GSPC undertook to manually assign business categories to firms in accordance with the Contract Classifications set forth below.<sup>1</sup> In addition, some firms did not electronically match for race/ethnicity/gender, so GSPC undertook to manually matched firms to the North Carolina HUB (state MWBE list), as well as the City and County MWBE lists.

Additionally, some data files did not include addresses of firms. GSPC attempted to electronically match those addresses to addresses in other data files and to Google firm addresses.

Even after GSPC's best efforts, there were still some firms in the data files for which business classifications and/or addresses were not determined, either because the volume was too great to Google each one, or because the firm could not be located or identified. In that case, the firm was eliminated from the analysis. Firms were also eliminated because they were duplicates of firms

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<sup>1</sup> This included googling firms and categorizing firms by their names. E.g. ABC Construction Company would be categorized as a construction firm because the word "construction" appeared in its name. XYZ Supply Company would be categorized as a goods firm because the word, "supply" appeared in its name.

already accounted for. MWBEs and Non-Minority Males were equally as likely to be in this category of eliminated firms, so the elimination should not introduce any bias into the analysis.

#### **F. Contract Classifications**

The County's electronic files provided firms defined in four (4) business categories:

- Construction – all firms whose line of business falls into traditional commercial construction functions, including general contractors, electrical, painting, plumbing, concrete, hauling, grading, and other specialty trade contractors.
- Architecture & Engineering– architects & engineers, including surveyors and environmental & erosion firms.
- Services – other skilled and non-professional services, including lawyers, medical personnel, IT, repair, maintenance, and landscaping.
- Goods – supplies, goods, parts equipment, and other products.

GSPC utilized the MWBE lists provided by the County and City respectively, as well as lists provided by the North Carolina Office of Historically Underutilized Businesses to confirm the race/ethnicity/gender status of firms. According to North Carolina General Statute 143-131, the term "minority business" means a business *"in which at least fifty-one percent (51%) is owned by one or more minority persons or socially and economically disadvantaged individuals,"* with "minority" or "socially and economically disadvantaged" defined as:

- *Black, that is, a person having origins in any of the black racial groups in Africa;*
- *Hispanic, that is, a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race;*
- *Asian American, that is, a person having origins in any of the original peoples of the Far East, Southeast Asia and Asia, the Indian subcontinent, or the Pacific Islands;*
- *American Indian, that is, a person having origins in any of the original Indian peoples of North America; or*
- *Female.*

## **G. Relevant Market Analysis**

***The Relevant Market is the geographic area where at least 75% of firms that bid on contracts with the City or County of Durham are located***

Griffin & Strong, P.C. measured the geographical area radiating from the City and County of Durham, where at least 75% of bidders are located in each of the four work categories (construction, A&E, services, and goods). City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) supports this methodology that the relevant market area should encompass at least seventy-five to eighty-five percent of the "qualified" vendors that serve a particular sector. This concept also has its origins in antitrust lawsuits. United States Supreme Court Justice Sandra Day O'Connor, in Croson, wrote that the relevant statistical comparison in determining a disparity is one between the percentage of Minority Business Enterprises in the marketplace [or *Relevant Market*] who were qualified to perform contracting work (including prime and subcontractors) and the percentage of total City and County contracting dollars awarded to minority firms. GSPC used the 75% benchmark for the determination of the relevant market and only measured firms that were within the relevant market (by work category) in both its availability and utilization determinations.

For this joint study, GSPC combined the County and City bidder data that it gathered to determine where at least 75% of prime firms, qualified to do business with the County and City are located in the four (4) major work categories (i.e. construction, architecture and engineering ("A&E"), services, or goods). GSPC gives this method greater weight than other potential methods because, of all potential sources, 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 analyzing the relevant market data, GSPC tabulated the percentage of bidders by zip codes, beginning with the firms located in the City/County of Durham. If the 75% benchmark was not reached with bidders located in the City/County of Durham, then GSPC kept adding firms from greater and greater areas around the City/County of Durham until the 75% was reached in the following order:

1. City/County of Durham
2. Durham MSA (adding counties of Chatham, Orange, and Person)
3. Raleigh-Durham-Chapel Hill CSA (adding counties of Franklin, Granville, Harnett, Johnston, Lee, Vance, and Wake)
4. Greensboro-Winston Salem-High Point CSA (adding counties of Alamance, Davidson, Davie, Forsythe, Guilford, Randolph, Rockingham, Stokes, Surry, and Yadkin)
5. State of North Carolina (but not in the MSA or CSA)
6. United States (but not in the State of N.C.)
7. The remainder of the world.

The outcomes as demonstrated in the tables below were that the Relevant Markets are as follows:

1. Construction – Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs
2. A&E- Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs<sup>2</sup>
3. Services – State of North Carolina
4. Goods – United States

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<sup>2</sup> Although only 74% was achieved, since the next closest benchmark was 84%, with less than a point from the 75%, GSPC accepted the 74% mark as sufficient for the relevant market determination.

**Table 1: CONSTRUCTION (Using Bidder Data from 7/1/2007-6/30/2012)**

<b>Construction Total</b>	<b>145</b>			
	<b>#</b>	<b>%</b>	<b>Cum#</b>	<b>Cum%</b>
<b>City of Durham/County of Durham</b>	<b>39</b>	<b>27%</b>	<b>39</b>	<b>27%</b>
<b>Durham MSA</b>	<b>5</b>	<b>3%</b>	<b>44</b>	<b>30%</b>
<b>Raleigh-Durham-Chapel Hill CSA</b>	<b>53</b>	<b>37%</b>	<b>97</b>	<b>67%</b>
<b>Greensboro-Winston Salem-High Pt</b>	<b>14</b>	<b>10%</b>	<b>111</b>	<b>77%</b>
<b>State of North Carolina</b>	<b>18</b>	<b>12%</b>	<b>129</b>	<b>89%</b>
<b>US</b>	<b>16</b>	<b>11%</b>	<b>145</b>	<b>100%</b>
<b>Outside US</b>		<b>0%</b>		
<b>Total</b>	<b>145</b>	<b>100%</b>		

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**Table 2: A&E (Using Bidder Data from 7/1/2007-6/30/2012)**

<b>A&amp;E</b>	<b>204</b>			
	<b>#</b>	<b>%</b>	<b>Cum#</b>	<b>Cum%</b>
<b>City of Durham/County of Durham</b>	<b>54</b>	<b>26%</b>	<b>54</b>	<b>26%</b>
<b>Durham MSA</b>	<b>14</b>	<b>7%</b>	<b>68</b>	<b>33%</b>
<b>Raleigh-Durham-Chapel Hill CSA</b>	<b>72</b>	<b>35%</b>	<b>140</b>	<b>69%</b>
<b>Greensboro-Winston Salem-High Pt CS</b>	<b>10</b>	<b>5%</b>	<b>150</b>	<b>74%</b>
<b>State of North Carolina</b>	<b>22</b>	<b>11%</b>	<b>172</b>	<b>84%</b>
<b>US</b>	<b>31</b>	<b>15%</b>	<b>203</b>	<b>99%</b>
<b>Outside US</b>	<b>1</b>	<b>0%</b>	<b>204</b>	<b>100%</b>
<b>Total</b>	<b>204</b>	<b>100%</b>		

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**Table 3: SERVICES (Using Bidder Data)**

<b>Services</b>	<b>1134</b>				
	<b>#</b>	<b>%</b>	<b>Cum #</b>	<b>Cum%</b>	
<b>City of Durham/County of Durham</b>	<b>477</b>	<b>42%</b>	<b>477</b>	<b>42%</b>	
<b>Durham MSA</b>	<b>40</b>	<b>4%</b>	<b>517</b>	<b>46%</b>	
<b>Raleigh-Durham-Chapel Hill CSA</b>	<b>223</b>	<b>20%</b>	<b>740</b>	<b>65%</b>	
<b>Greensboro-Winston Salem-High Pt CS</b>	<b>65</b>	<b>6%</b>	<b>805</b>	<b>71%</b>	
<b>State of North Carolina</b>	<b>107</b>	<b>9%</b>	<b>912</b>	<b>80%</b>	
<b>US</b>	<b>223</b>	<b>20%</b>	<b>1134</b>	<b>100%</b>	
<b>Outside US</b>	<b>0</b>	<b>0%</b>			
<b>Total</b>	<b>1134</b>	<b>100%</b>			

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**Table 4: GOODS (Using Bidder Data)**

<b>Goods</b>	<b>393</b>				
	<b>#</b>	<b>%</b>	<b>Cum #</b>	<b>Cum%</b>	
<b>City of Durham/County of Durham</b>	<b>51</b>	<b>13%</b>	<b>51</b>	<b>13%</b>	
<b>Durham MSA</b>	<b>14</b>	<b>4%</b>	<b>65</b>	<b>17%</b>	
<b>Raleigh-Durham-Chapel Hill CSA</b>	<b>94</b>	<b>24%</b>	<b>159</b>	<b>40%</b>	
<b>Greensboro-Winston Salem-High Pt</b>	<b>47</b>	<b>12%</b>	<b>206</b>	<b>52%</b>	
<b>State of North Carolina</b>	<b>49</b>	<b>12%</b>	<b>255</b>	<b>65%</b>	
<b>US</b>	<b>138</b>	<b>35%</b>	<b>393</b>	<b>100%</b>	
<b>Outside US</b>		<b>0%</b>	<b>393</b>		
<b>Total</b>	<b>393</b>	<b>100%</b>			

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## H. Availability Analysis

***AVAILABILITY is the number of “ready, willing, and able” businesses in the Relevant Market categorized by business category and race/ethnicity/gender status***

The methodology utilized to determine the availability of businesses for public contracting is crucial to understanding whether a disparity exists within the relevant market. Although Croson defined availability as willing and able to perform the work, the courts have provided only general guidance on how to measure availability. GSPC’s measures of availability utilized in this disparity study incorporate the following criteria:

- The firm is identified as doing business within the work categories of construction, A/E, Services or Goods;
- The firm’s owner has taken steps to do business with some government entity through registering, being certified, bidding, or actually doing business with the City of Durham, Durham County, or the State of North Carolina;
- The firm is located within the relevant geographical area for each work category.

The following economic definitions are necessary for the estimation of availability:

Definitions:

Let:  $A$  = Availability Estimates

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

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

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

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

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

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

and total availability for all MWBE groups is given by

$$A (MWBE) = N (MWBE)/N (t).$$

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

There are numerous approaches to measuring available, qualified firms. GSPC has established a methodology of measuring availability based upon demonstrated interest in doing business with governmental entities. This means that GSPC only includes firms that have at least registered to do business with a governmental entity. In this case, only firms on lists provided by the City, County, or State of North Carolina were included.

Where the data lends itself to such a process, GSPC typically conducts a separate availability estimate for primes and subcontractors as there are some specific types of work that are typically only performed as subcontractors (e.g. painting, HVAC, plumbing, electric). However, since the County does not maintain commodity codes that would allow the determination of specific work performed, GSPC included all firms as available for both prime and subcontracting work. In addition, it appears, that both the County and the City have directly hired firms in the areas typically performed by subcontractors, therefore, separate availability estimates would likely not be necessary.

Tables 5 - 8 below provide the number and percentage of available firms from the Master Vendor File, that are located within the relevant market for each work category.



**Table 5: Availability Estimate – Construction  
In the Relevant Market of  
Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs**

<b>Race/Ethnicity</b>	<b>#</b>	<b>%</b>
BLACK AMERICAN	134	14.57%
ASIAN AMERICAN	12	1.30%
HISPANIC AMERICAN	39	4.24%
AMERICAN INDIAN	6	0.65%
WHITE FEMALE	127	13.80%
<b>TOTAL MWBE</b>	<b>318</b>	<b>34.57%</b>
NON-MWBE	602	65.43%
<b>TOTALS</b>	<b>920</b>	<b>100.00%</b>

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**Table 6: Availability Estimate - A & E  
In the Relevant Market of  
Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs**

<b>Race/Ethnicity</b>	<b>#</b>	<b>%</b>
BLACK AMERICAN	39	9.77%
ASIAN AMERICAN	12	3.01%
HISPANIC AMERICAN	7	1.75%
AMERICAN INDIAN	3	0.75%
WHITE FEMALE	44	11.03%
<b>TOTAL MWBE</b>	<b>105</b>	<b>26.32%</b>
NON-MWBE	294	73.68%
<b>TOTALS</b>	<b>399</b>	<b>100.00%</b>

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**Table 7: Availability Estimates – Services  
In the Relevant Market of the State of North Carolina**

Race/Ethnicity	#	%
BLACK AMERICAN	297	10.94%
ASIAN AMERICAN	30	1.10%
HISPANIC AMERICAN	31	1.14%
AMERICAN INDIAN	27	0.99%
WHITE FEMALE	259	9.54%
TOTAL MWBE	644	23.72%
NON-MWBE	2071	76.28%
TOTALS	2715	100.00%

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**Table 8: Availability Estimates – Goods  
In the Relevant Market of the United States**

Race/Ethnicity	#	%
BLACK AMERICAN	39	2.77%
ASIAN AMERICAN	6	0.43%
HISPANIC AMERICAN	6	0.43%
AMERICAN INDIAN	7	0.50%
WHITE FEMALE	101	7.17%
TOTAL MWBE	159	11.29%
NON-MWBE	1249	88.71%
TOTALS	1408	100.00%

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## I. City of Durham Utilization Analysis

### 1. Prime Contractor Utilization—City of Durham

***UTILIZATION is the percentage of awards made during the Study Period to MWBEs located in the Relevant Market in comparison to awards made to all firms***

GSPC used the contracts payment data file for awards made during the Study Period that was provided electronically by the City of Durham to determine utilization. All contracts that were grants, utilities, real estate leases, wages, or made to governments or non-profits were deleted from the analysis. A number of the firms did not have work categories, so GSPC undertook to make manual assignments, either by the clear import of the firm name, e.g. XYZ Construction Company, or ABE architects; by the type of contract; or by Googling the firm. GSPC also cross referenced the file to pick up addresses and race/ethnicity/gender assignments.

In an effort to undertake a more uniform methodology, similar to the County, GSPC only included contracts that had an award of \$30,000 or above during the Study Period.

In Tables 9 and 10 below, the utilization of prime contractors in the construction category by number of firms utilized and dollars awarded by the City of Durham, respectively, is shown. The number of MWBE firms utilized as primes in the City of Durham in Construction during the study period is a total of 5 businesses, with a total of \$1,611,738 in revenue. That is 1.5% of all dollars spent with primes in construction. Table 9 shows that although African-Americans received 2.38% of all contracts, they received only 1.45% of all prime dollars spent.

Likewise, White Female owned firms received .60% of contracts and only .06% of dollars spent by the city.



**Table 9: City of Durham  
Construction Prime Contractor Utilization by Firm Number**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL
	#	%	#	%	#	%	#	%	#	%	#	%	#
2008	1	3.85%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	25	96.15%	26
2009	0	0.00%	0	0.00%	0	0.00%	0	0.00%	1	3.57%	27	96.43%	28
2010	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	38	100.00%	38
2011	1	2.44%	0	0.00%	0	0.00%	0	0.00%	1	2.44%	39	95.12%	41
2012	4	11.43%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	31	88.57%	35
TOTAL*	4	2.38%	0	0.00%	0	0.00%	0	0.00%	1	0.60%	81	48.21%	168

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\*TOTAL represents the number of unique firms during the Study Period

**Table 10: City of Durham  
Construction Prime Contractor Utilization by Dollars**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$603,980	3.43%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$16,994,605	96.57%	\$17,598,585
2009	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$33,540	0.18%	\$18,669,793	99.82%	\$18,703,333
2010	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$17,288,976	100.00%	\$17,288,976
2011	\$110,541	0.42%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$34,448	0.13%	\$26,336,039	99.45%	\$26,481,028
2012	\$829,229	3.13%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$25,688,959	96.87%	\$26,518,188
TOTAL	\$1,543,750	1.45%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$67,988	0.06%	\$104,978,372	98.49%	\$106,590,110

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Tables 11 and 12 show prime contractor utilization in Architecture & Engineering by the City of Durham in Fiscal Years 2008 to 2012. There was no American Indian participation in A/E prime contracts with the City, and the total number of MWBE firms was only 5 of 40. Though Asian American and Hispanic American owned firms each brought in 2.5% of contracts, they only saw .21% of total dollars spent in this category.

**Table 11: City of Durham  
A/E Prime Contractor Utilization by Firm Number**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL #
	#	%	#	%	#	%	#	%	#	%	#	%	
2008	2	6.90%	0	0.00%	1	3.45%	0	0.00%	1	3.45%	25	86.21%	29.00
2009	2	7.69%	0	0.00%	1	3.85%	0	0.00%	1	3.85%	22	84.62%	26.00
2010	2	7.69%	1	3.85%	1	3.85%	0	0.00%	1	3.85%	21	80.77%	26.00
2011	1	5.00%	1	5.00%	0	0.00%	0	0.00%	1	5.00%	17	85.00%	20.00
2012	1	4.55%	0	0.00%	0	0.00%	0	0.00%	1	4.55%	20	90.91%	22.00
<b>TOTAL</b>	<b>2</b>	<b>5.00%</b>	<b>1</b>	<b>2.50%</b>	<b>1</b>	<b>2.50%</b>	<b>0</b>	<b>0.00%</b>	<b>1</b>	<b>2.50%</b>	<b>35</b>	<b>87.50%</b>	<b>40.00</b>

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**Table 12: City of Durham  
A/E Prime Contractor Utilization by Dollars**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL \$
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	
2008	\$471,045	9.31%	\$0	0.00%	\$32,175	0.64%	\$0.00	0.00%	\$335,675	6.63%	\$4,221,927	83.42%	\$5,060,822
2009	\$389,353	8.51%	\$0	0.00%	\$2,468	0.05%	\$0.00	0.00%	\$193,043	4.22%	\$3,988,844	87.21%	\$4,573,708
2010	\$165,064	2.87%	\$30,225	0.52%	\$23,288	0.40%	\$0.00	0.00%	\$202,493	3.52%	\$5,338,671	92.69%	\$5,759,741
2011	\$4,235	0.06%	\$27,560	0.40%	\$0	0.00%	\$0.00	0.00%	\$271,821	3.92%	\$6,631,254	95.62%	\$6,934,870
2012	\$31,297	0.60%	\$0	0.00%	\$0	0.00%	\$0.00	0.00%	\$89,610	1.70%	\$5,135,218	97.70%	\$5,256,125
<b>TOTAL</b>	<b>\$1,060,994</b>	<b>3.85%</b>	<b>\$57,785</b>	<b>0.21%</b>	<b>\$57,931</b>	<b>0.21%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$1,092,642</b>	<b>3.96%</b>	<b>\$25,315,914</b>	<b>91.77%</b>	<b>\$27,585,266</b>

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Tables 13 and 14 show the utilization numbers for the City of Durham of all prime contractor firms in the services industry, as well as dollars awarded. There were no Asian American, Hispanic American or American Indian services firms utilized in any year in the study period. Black Americans saw their highest average percentage of contracts in the services category at 5.62% with 2.34% of the dollars. Whereas White Female owned firms received 2.25% of contracts, again they received far less in terms of dollars, only bringing in 0.14% of all dollars spent in services.



**Table 13: City of Durham  
Services Prime Contractor Utilization by Firm Number**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL
	#	%	#	%	#	%	#	%	#	%	#	%	#
2008	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	34	100.00%	34
2009	1	1.96%	0	0.00%	0	0.00%	0	0.00%	1	1.96%	49	96.08%	51
2010	4	6.45%	0	0.00%	0	0.00%	0	0.00%	1	1.61%	57	91.94%	62
2011	4	7.02%	0	0.00%	0	0.00%	0	0.00%	1	1.754%	52	91.23%	57
2012	4	8.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	46	92.00%	50
<b>TOTAL</b>	<b>5</b>	<b>5.62%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>2</b>	<b>2.25%</b>	<b>82</b>	<b>92.13%</b>	<b>89</b>

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**Table 14: City of Durham  
Services Prime Contractor Utilization by Dollars**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$0	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0	0.00%	\$10,073,413	100.00%	\$10,073,413
2009	\$463,111	3.35%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$56,853	0.41%	\$13,318,299	96.24%	\$13,838,263
2010	\$589,624	2.94%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$31,750	0.16%	\$19,440,181	96.90%	\$20,061,555
2011	\$286,785	2.12%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$2,250	0.02%	\$13,223,253	97.86%	\$13,512,288
2012	\$178,776	2.45%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0	0.00%	\$7,121,933	97.55%	\$7,300,709
<b>TOTAL</b>	<b>\$1,518,296</b>	<b>2.34%</b>	<b>\$0.00</b>	<b>0.00%</b>	<b>\$0.00</b>	<b>0.00%</b>	<b>\$0.00</b>	<b>0.00%</b>	<b>\$90,853</b>	<b>0.14%</b>	<b>\$63,177,079</b>	<b>97.52%</b>	<b>\$64,786,228</b>

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Tables 15 and 16 reveal prime contracting numbers and dollars spent by the City of Durham in the Goods category. There was no prime utilization of any minority or female owned firms in any year of the Study in Goods. 100% of the contracts went to Non-Minority Male firms.

**Table 15: City of Durham  
Goods Prime Contractor Utilization by Dollars**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL
	#	%	#	%	#	%	#	%	#	%	#	%	
2008	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	12	100.00%	12
2009	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	15	100.00%	15
2010	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	11	100.00%	11
2011	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	8	100.00%	8
2012	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	7	100.00%	7
<b>TOTAL</b>	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	25	100.00%	25

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**Table 16: City of Durham  
Goods Prime Contractor Utilization by Dollars**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	
2008	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$819,814	100.00%	\$819,814
2009	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$1,301,892	100.00%	\$1,301,892
2010	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$458,273	100.00%	\$458,273
2011	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$1,186,286	100.00%	\$1,186,286
2012	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$3,388,792	100.00%	\$3,388,792
<b>TOTAL</b>	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$7,155,057	100.00%	\$7,155,057

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## **2. City of Durham Subcontractor Utilization**

GSPC utilized the Prime Vendor Questionnaire to determine subcontractor utilization because, although the City maintains subcontractor data, the data lacked information regarding the location and work categories of the subcontractors. GSPC attempted to match this information with other data files, but the only data that substantially matched was MWBEs because of the certified list. GSPC also tried to supplement the Prime Vendor Questionnaire responses with some of the information from the subcontractor data but found that many times it overlapped and was inconsistent with the results of the Prime Vendor Questionnaire. This may be because the subcontractor data seemed to reflect the amounts paid so far on awards made during the Study Period to subcontractors and not the full amount of the awards.

1,639 unique prime vendors were sent questionnaires (one questionnaire per firm to fill out for each contract), representing 6,794 contracts. 221 questionnaires were returned (with incorrect addresses) which left a total of 1,418 unique firms that should have received questionnaires representing 6,122 contracts. GSPC received 170 responses representing 754 contracts which is a response rate of 12% for both the number of firms and the number of contracts.

Table 17 shows that, Hispanic American owned firms received less than .3% of all contracts awarded to subcontractors over the entire study period in all categories and Asian American and American Indian owned firms received none. Black American owned firms were utilized, on average at 8.85% and White Female owned firms at 4.16%. Non-Minority Males were utilized across all categories at an average of 86.82% of contracts awarded.



**Table 17: City of Durham Subcontractor Utilization by Dollars- Construction**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$111,111	36.38%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$194,332	63.62%	\$305,443
2009	\$111,766	69.01%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$29,697	18.34%	\$20,496	12.66%	\$161,959
2010	\$30,368	2.38%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$93,163	7.31%	\$1,151,369	90.31%	\$1,274,900
2011	\$119,551	9.04%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$67,832	5.13%	\$1,135,592	85.84%	\$1,322,975
2012	\$32,809	2.16%	\$0	0.00%	\$7,542	0.50%	\$0	0.00%	\$0	0.00%	\$1,476,476	97.34%	\$1,516,827
<b>TOTAL</b>	<b>\$405,605</b>	<b>8.85%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$7,542</b>	<b>0.165%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$190,692</b>	<b>4.16%</b>	<b>\$3,978,265</b>	<b>86.82%</b>	<b>\$4,582,104</b>

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In Table 18, White Female owned firms were utilized at 24.80% of total contracts awarded to A/E subcontractors and Black Americans followed at 16.47%. Hispanic American and Asian American utilization were each less than 1% of all contracts awarded and American Indian owned firms were completely unutilized.

**Table 18: City of Durham Subcontractor Utilization by Dollars- A/E**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$193,730	40.17%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$130,190	27.00%	\$158,353	32.83%	\$482,273
2009	\$66,585	19.74%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$155,186	46.00%	\$115,619	34.27%	\$337,390
2010	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$37,719	100.00%	\$37,719
2011	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$21,855	12.84%	\$148,323	87.16%	\$170,178
2012	\$0	0.00%	\$12,266	2.22%	\$10,000	1.81%	\$0	0.00%	\$84,661	15.31%	\$445,964	80.66%	\$552,891
<b>TOTAL</b>	<b>\$260,315</b>	<b>16.47%</b>	<b>\$12,266</b>	<b>0.78%</b>	<b>\$10,000</b>	<b>0.633%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$391,892</b>	<b>24.80%</b>	<b>\$905,978</b>	<b>57.32%</b>	<b>\$1,580,451</b>

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In Table 19, subcontracting for services in the City of Durham, Asian American, Hispanic American, and American Indian owned firms were completely unutilized, whereas Black American owned firms were at nearly 46% overall and White Female owned firms were awarded over a quarter of all contracts over the study period.



**Table 19: City of Durham Subcontractor Utilization by Dollars- Services**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$11,673	98.15%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$220	1.85%	\$11,893
2009	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$4,825	100.00%	\$0	0.00%	\$4,825
2010	\$8	0.64%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$1,250	99.36%	\$1,258
2011	\$179,861	65.82%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$42,704	15.63%	\$50,698	18.55%	\$273,263
2012	\$5,474	3.98%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$64,662	47.04%	\$67,312	48.97%	\$137,448
<b>TOTAL</b>	<b>\$197,016</b>	<b>45.96%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.000%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$112,191</b>	<b>26.17%</b>	<b>\$119,480</b>	<b>27.87%</b>	<b>\$428,687</b>

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Table 20 shows subcontractor utilization in the goods category with Black American owned firms receiving over half of all contracts awarded in the study period all in one year, 2011. White Female owned firms were only utilized as subcontractors in this category in 2011 and they received 3.52% of those contracts awarded. Again, Asian American, Hispanic American, and American Indian owned businesses went completely unutilized as subcontractors in this category.

**Table 20: City of Durham Subcontractor Utilization by Dollars-Goods**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
2009	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$3,203	100.00%	\$3,203
2010	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
2011	\$1,103,071	57.23%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$69,067	3.58%	\$755,439	39.19%	\$1,927,577
2012	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$34,123	100.00%	\$34,123
<b>TOTAL</b>	<b>\$1,103,071</b>	<b>56.14%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.000%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$69,067</b>	<b>3.52%</b>	<b>\$792,765</b>	<b>40.35%</b>	<b>\$1,964,903</b>

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In Table 21 below, Black American, Hispanic American, and White Female owned firms are the only MWBEs utilized over the entirety of the study period as subcontractors in construction. Black American owned firms were utilized every year for a total of 8.85% of the contract awards and White Female owned firms received 4.16%. Hispanic American owned firms were utilized only in 2012 for a total of .165% of contracts awarded. Non-Minority Males were utilized in every year of the study period for a total of 86.82%.

**Table 21: Total City Subcontracting in All Categories and All Geographic Areas**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$316,514	31.80%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$136,612	13.73%	\$542,223	54.48%	\$995,349
2009	\$178,351	30.13%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$274,191	46.33%	\$139,319	23.54%	\$591,861
2010	\$42,337	3.14%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$98,873	7.32%	\$1,209,238	89.54%	\$1,350,448
2011	\$1,402,483	19.27%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$201,458	2.77%	\$5,674,046	77.96%	\$7,277,987
2012	\$38,283	1.50%	\$12,266	0.48%	\$17,542	0.69%	\$0	0.00%	\$149,323	5.84%	\$2,341,275	91.50%	\$2,558,689
<b>TOTAL</b>	<b>\$1,977,968</b>	<b>15.48%</b>	<b>\$12,266</b>	<b>0.10%</b>	<b>\$17,542</b>	<b>0.137%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$860,457</b>	<b>6.74%</b>	<b>\$9,906,101</b>	<b>77.55%</b>	<b>\$12,774,334</b>

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## J. City of Durham Disparity Indices and Analysis

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

To assess the existence and extent of disparity, GSPC compared the utilization percentages of minority and women owned firms to the percentage of the total pool of those firms in the relevant geographic area.

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

Let:  $U$  = Utilization percentage for the MWBE group

$A$  = Availability percentage for the MWBE group

$DI$  = Disparity Index for the MWBE group

$DI = U/A$  or Utilization divided by Availability

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. In cases where there is utilization, but no availability, the resulting disparity index is designated by the infinity ( $\infty$ ) 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, gender, and disabled status group. They are also broken out by year, for each year of the Study Period.

The results obtained by a disparity analysis will result in one of three conclusions: overutilization, underutilization or parity. Underutilization is when the Disparity Index is below one. Overutilization is when the Disparity Index is over one. Parity is when the Disparity Index is one. Statistically significant overutilization (1.10 or above) and statistically significant underutilization (.80 or below) will be bolded and in red in the Disparity Indices.

### **1. Prime Vendor Disparity Indices and Analysis**

Minority and Female owned firms were underutilized as prime contractors by the City of Durham in every category. Nonminority Male owned firms were substantially overutilized by the City in every category in every year of the study period. Tables 22 through 25 show the disparity indices produced through a comparison of availability of firms to their utilization throughout the study period.

The City of Durham's prime contractor disparity indices, produced through the formulas described above, reveal that, in the category of construction,

In A/E, shown below in Table 23, Non-Minority Male firms were again overutilized in every year of the study period.

In the category of Services, Asian American, American Indian, and Hispanic American owned firms were unutilized from 2008 through 2011 and, even after this period, all MWBEs (including Black Americans and White Females) were significantly underutilized. Non-Minority Males were overutilized in every year of the study period.

In the Goods work category, Black American owned firms were the only MWBEs utilized as prime contractors and Non-Minority Male owned firms were significantly overutilized.

**Table 22 : City of Durham  
Prime Disparity Index- Construction**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	3.43	14.57	0.24	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	3.43	34.57	0.10	UNDERUTILIZED
NON-MINORITY MALE	96.57	65.43	1.48	OVERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	0.00	14.57	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.18	13.80	0.01	UNDERUTILIZED
ALL MINORITIES	0.18	34.57	0.01	UNDERUTILIZED
NON-MWBE	99.82	65.43	1.53	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	0.00	14.57	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	34.57	0.00	UNDERUTILIZED
NON-MWBE	100.00	65.43	1.53	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	0.42	14.57	0.03	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.13	13.80	0.01	UNDERUTILIZED
ALL MINORITIES	0.55	34.57	0.02	UNDERUTILIZED
NON-MWBE	99.45	65.43	1.52	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	3.13	14.57	0.21	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	3.13	34.57	0.09	UNDERUTILIZED
NON-MWBE	96.87	65.43	1.48	OVERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	1.45	14.57	0.10	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.06	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	1.51	34.57	0.04	UNDERUTILIZED
NON-MWBE	98.49	65.43	1.51	OVERUTILIZED

**Table 23: City of Durham  
Prime Disparity Index-A/E**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	9.31	9.77	0.95	UNDERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.64	1.75	0.37	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	6.63	11.03	0.60	UNDERUTILIZED
ALL MINORITIES	16.58	26.32	0.63	UNDERUTILIZED
NON-MINORITY MALE	83.42	73.68	1.13	OVERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	8.51	9.77	0.87	UNDERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.05	1.75	0.03	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	4.22	11.03	0.38	UNDERUTILIZED
ALL MINORITIES	12.78	26.32	0.49	UNDERUTILIZED
NON-MWBE	87.22	73.68	1.18	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	2.87	9.77	0.29	UNDERUTILIZED
ASIAN AMERICAN	0.52	3.01	0.17	UNDERUTILIZED
HISPANIC AMERICAN	0.40	1.75	0.23	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	3.52	11.03	0.32	UNDERUTILIZED
ALL MINORITIES	7.31	26.32	0.28	UNDERUTILIZED
NON-MWBE	92.69	73.68	1.26	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	0.06	9.77	0.01	UNDERUTILIZED
ASIAN AMERICAN	0.40	3.01	0.13	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	3.92	11.03	0.36	UNDERUTILIZED
ALL MINORITIES	4.38	26.32	0.17	UNDERUTILIZED
NON-MWBE	95.62	73.68	1.30	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	0.60	9.77	0.06	UNDERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	1.70	11.03	0.15	UNDERUTILIZED
ALL MINORITIES	2.30	26.32	0.09	UNDERUTILIZED
NON-MWBE	97.70	73.68	1.33	OVERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	3.85	9.77	0.39	UNDERUTILIZED
ASIAN AMERICAN	0.21	3.01	0.07	UNDERUTILIZED
HISPANIC AMERICAN	0.21	1.75	0.12	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	3.96	11.03	0.36	UNDERUTILIZED
ALL MINORITIES	8.23	26.32	0.31	UNDERUTILIZED
NON-MWBE	91.77	73.68	1.25	OVERUTILIZED

**Table 24: City of Durham Disparity Index- Services**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	0.00	10.94	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	23.72	0.00	UNDERUTILIZED
NON-MINORITY MALE	100.00	76.28	1.31	OVERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	3.35	10.94	0.31	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.41	9.54	0.04	UNDERUTILIZED
ALL MINORITIES	3.76	23.72	0.16	UNDERUTILIZED
NON-MWBE	96.24	76.28	1.26	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	2.94	10.94	0.27	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.16	9.54	0.02	UNDERUTILIZED
ALL MINORITIES	3.10	23.72	0.13	UNDERUTILIZED
NON-MWBE	96.90	76.28	1.27	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	2.12	10.94	0.19	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.02	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	2.14	23.72	0.09	UNDERUTILIZED
NON-MWBE	97.86	76.28	1.28	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	2.45	10.94	0.22	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	2.45	23.72	0.10	UNDERUTILIZED
NON-MWBE	97.55	76.28	1.28	OVERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	2.34	10.94	0.21	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.14	9.54	0.01	UNDERUTILIZED
ALL MINORITIES	2.48	23.72	0.10	UNDERUTILIZED
NON-MWBE	97.52	76.28	1.28	OVERUTILIZED



Table 25: City of Durham Prime Disparity Indices- Goods

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	8.43	2.77	3.04	OVERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	1.72	7.17	0.24	UNDERUTILIZED
ALL MINORITIES	10.15	11.29	0.90	UNDERUTILIZED
NON-MINORITY MALE	89.85	88.71	1.01	OVERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	1.57	2.77	0.57	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	7.17	0.00	UNDERUTILIZED
ALL MINORITIES	1.57	11.29	0.14	UNDERUTILIZED
NON-MINORITY MALES	98.43	88.71	1.11	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	5.82	2.77	2.10	OVERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	3.59	7.17	0.50	UNDERUTILIZED
ALL MINORITIES	9.41	11.29	0.83	UNDERUTILIZED
NON-MINORITY MALES	90.59	88.71	1.02	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	0.00	2.77	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	2.00	7.17	0.28	UNDERUTILIZED
ALL MINORITIES	2.00	11.29	0.18	UNDERUTILIZED
NON-MINORITY MALES	98.00	88.71	1.10	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	0.00	2.77	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	7.17	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	11.29	0.00	UNDERUTILIZED
NON-MINORITY MALES	100.00	88.71	1.13	OVERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	3.74	2.77	1.35	OVERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	1.67	7.17	0.23	UNDERUTILIZED
ALL MINORITIES	5.41	11.29	0.48	UNDERUTILIZED
NON-MINORITY MALES	94.60	88.71	1.07	OVERUTILIZED

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## **2. City of Durham Subcontractor Disparity Indices and Analysis**

As can be seen in Tables 26 through 29 below, Non-Minority Males are, on average, overutilized in Construction as subcontractors, whereas every other demographic group is underutilized over the Study Period. However, on a yearly disaggregated basis, Black American owned firms were overutilized in 2008 and 2009, and White Female owned firms were overutilized in 2009.

Black American and White Female owned businesses are overutilized on average in A/E and every other group, including Nonminority Male owned firms is significantly underutilized on average. In disaggregating the data by year, Black American owned firms were overutilized in 2008 and 2009, but underutilized in the remaining Study Period. White Females were overutilized every year except 2010.

In the category of services, though White Female owned firms were overutilized to the index of 10.48 in 2009, they were underutilized the next year. Black American owned firms were significantly overutilized in 2008 and 2011, and, again, all other groups were unutilized in the study period.

Similarly, in Goods subcontracting, there was no participation for any MWBE group until 2011 when Black American owned firms were overutilized with a disparity index of 23.17 and White Females were underutilized. This was the only year of MWBE utilization as subcontractors in Goods.



**Table 26: City of Durham Subcontractor Disparity Index- Construction**

**CITY OF DURHAM  
MWBE SUBCONTRACTOR DISPARITY INDEX IN CONSTRUCTION  
BASED ON ACTUAL UTILIZATION  
AND AVAILABILITY ESTIMATES  
(JULY 1, 2007 TO JUNE 30, 2012)**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	36.38	14.57	2.50	OVERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	36.38	34.57	1.05	OVERUTILIZED
NON-MINORITY MALE	63.62	65.43	0.97	UNDERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	69.01	14.57	4.74	OVERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	18.34	13.80	1.33	OVERUTILIZED
ALL MINORITIES	87.35	34.57	2.53	OVERUTILIZED
NON-MINORITY MALE	12.66	65.43	0.19	UNDERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	2.38	14.57	0.16	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	7.31	13.80	0.53	UNDERUTILIZED
ALL MINORITIES	9.69	34.57	0.28	UNDERUTILIZED
NON-MINORITY MALE	90.31	65.43	1.38	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	9.04	14.57	0.62	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	5.13	13.80	0.37	UNDERUTILIZED
ALL MINORITIES	14.17	34.57	0.41	UNDERUTILIZED
NON-MINORITY MALE	85.84	65.43	1.31	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	2.16	14.57	0.15	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.50	4.24	0.12	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	2.66	34.57	0.08	UNDERUTILIZED
NON-MINORITY MALE	97.34	65.43	1.49	OVERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	8.85	14.57	0.61	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.17	4.24	0.04	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	4.16	13.80	0.30	UNDERUTILIZED
ALL MINORITIES	13.18	34.57	0.38	UNDERUTILIZED
NON-MINORITY MALE	86.82	65.43	1.33	OVERUTILIZED

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**Table 27: City of Durham Subcontractor Disparity Index- A/E**

CITY OF DURHAM MWBE SUBCONTRACTOR DISPARITY INDEX A/E BASED ON ACTUAL UTILIZATION AND AVAILABILITY ESTIMATES (JULY 1, 2007 TO JUNE 30, 2012)				
ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARITY IMPACT FOR UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	40.17	9.77	4.11	OVERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	27.00	11.03	2.45	OVERUTILIZED
ALL MINORITIES	67.17	26.32	2.55	OVERUTILIZED
NON-MINORITY MALE	32.83	73.68	0.45	UNDERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	19.74	9.77	2.02	OVERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	46.00	11.03	4.17	OVERUTILIZED
ALL MINORITIES	65.74	26.32	2.50	OVERUTILIZED
NON-MINORITY MALE	34.27	73.68	0.47	UNDERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	0.00	9.77	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	11.03	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	26.32	0.00	UNDERUTILIZED
NON-MINORITY MALE	100.00	73.68	1.36	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	0.00	9.77	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	12.84	11.03	1.16	OVERUTILIZED
ALL MINORITIES	12.84	26.32	0.49	OVERUTILIZED
NON-MINORITY MALE	87.16	73.68	1.18	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	0.00	9.77	0.00	UNDERUTILIZED
ASIAN AMERICAN	2.22	3.01	0.74	UNDERUTILIZED
HISPANIC AMERICAN	1.81	1.75	1.03	OVERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	15.31	11.03	1.39	OVERUTILIZED
ALL MINORITIES	19.34	26.32	0.73	UNDERUTILIZED
NON-MINORITY MALE	80.66	73.68	1.09	OVERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	16.47	9.77	1.69	OVERUTILIZED
ASIAN AMERICAN	0.78	3.01	0.26	UNDERUTILIZED
HISPANIC AMERICAN	0.63	1.75	0.36	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	24.80	11.03	2.25	OVERUTILIZED
ALL MINORITIES	42.68	26.32	1.62	OVERUTILIZED
NON-MINORITY MALE	57.32	73.68	0.78	UNDERUTILIZED

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**Table 28: City of Durham Subcontractor Disparity Index- Services**

**CITY OF DURHAM  
 MWBE SUBCONTRACTOR DISPARITY INDEX IN SERVICES  
 BASED ON ACTUAL UTILIZATION  
 AND AVAILABILITY ESTIMATES  
 (JULY 1, 2007 TO JUNE 30, 2012)**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U) (%)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION (U/AMV)
<b>FY 2008</b>				
BLACK AMERICAN	98.15	10.94	8.97	OVERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	98.15	23.72	4.14	OVERUTILIZED
NON-MINORITY MALE	1.85	76.28	0.02	UNDERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	0.00	10.94	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	100.00	9.54	10.48	OVERUTILIZED
ALL MINORITIES	100.00	23.72	4.22	OVERUTILIZED
NON-MINORITY MALE	0.00	76.28	0.00	UNDERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	0.64	10.94	0.06	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	0.64	23.72	0.03	UNDERUTILIZED
NON-MINORITY MALE	99.36	76.28	1.30	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	65.82	10.94	6.02	OVERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	15.63	9.54	1.64	OVERUTILIZED
ALL MINORITIES	81.45	23.72	3.43	OVERUTILIZED
NON-MINORITY MALE	18.55	76.28	0.24	UNDERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	3.98	10.94	0.36	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	47.04	9.54	4.93	OVERUTILIZED
ALL MINORITIES	51.02	23.72	2.15	OVERUTILIZED
NON-MINORITY MALE	48.97	76.28	0.64	UNDERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	45.96	10.94	4.20	OVERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	26.17	9.54	2.74	OVERUTILIZED
ALL MINORITIES	72.13	23.72	3.04	OVERUTILIZED
NON-MINORITY MALE	27.87	76.28	0.37	UNDERUTILIZED

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**Table 29: City of Durham Subcontractor Disparity Index- Goods**

CITY OF DURHAM MWBE SUBCONTRACTOR DISPARITY INDEX IN GOODS BASED ON ACTUAL UTILIZATION AND AVAILABILITY ESTIMATES (JULY 2007 TO JUNE 2012)				
ETHNICITY/RACE AND GENDER GROUP	UTILIZATION (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	0.00	2.47	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	0.38	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	0.38	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.44	0.00	NO UTILIZATION
WHITE FEMALE	0.00	6.39	0.00	NO UTILIZATION
ALL MINORITIES	0.00	10.06	0.00	NO UTILIZATION
NON-MINORITY MALE	0.00	89.94	0.00	NO UTILIZATION
<b>FY 2009</b>				
BLACK AMERICAN	0.00	2.47	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.38	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.38	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.44	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	6.39	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	10.06	0.00	UNDERUTILIZED
NON-MINORITY MALE	100.00	89.94	1.11	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	0.00	2.47	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	0.38	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	0.38	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.44	0.00	NO UTILIZATION
WHITE FEMALE	0.00	6.39	0.00	NO UTILIZATION
ALL MINORITIES	0.00	10.06	0.00	NO UTILIZATION
NON-MINORITY MALE	0.00	89.94	0.00	NO UTILIZATION
<b>FY 2011</b>				
BLACK AMERICAN	57.23	2.47	23.17	OVERUTILIZED
ASIAN AMERICAN	0.00	0.38	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.38	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.44	0.00	UNDERUTILIZED
WHITE FEMALE	3.58	6.39	0.56	UNDERUTILIZED
ALL MINORITIES	0.55	10.06	0.05	UNDERUTILIZED
NON-MINORITY MALE	39.19	89.94	0.44	UNDERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	0.00	2.47	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.38	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.38	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.44	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	6.39	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	10.06	0.00	UNDERUTILIZED
NON-MINORITY MALE	100.00	89.94	1.11	OVERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	56.14	2.47	22.73	OVERUTILIZED
ASIAN AMERICAN	0.00	0.38	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.38	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.44	0.00	UNDERUTILIZED
WHITE FEMALE	3.52	6.39	0.55	UNDERUTILIZED
ALL MINORITIES	59.66	10.06	5.93	OVERUTILIZED
NON-MINORITY MALE	40.35	89.94	0.45	UNDERUTILIZED

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Note: there is no subcontractor utilization in 2008 and 2010. This is not unusual since there is very little subcontracting in Goods.



**K. Durham County Utilization Analysis**

*UTILIZATION is the percentage of awards made during the Study Period to MWBEs located in the Relevant Market in comparison to awards made to all firms*

**1. Prime Contractor Utilization- Durham County**

GSPC used the Funds Reservation (“FR”) and Purchase Order (“PO”) data for awards made during the Study Period that was provided electronically by Durham County to determine prime utilization. Only competitive bids that were \$30,000 or above were included in the utilization analysis for primes and procurement card records were also not included. All contracts that were grants, real estate purchase or rental, emergencies, legal pay outs or settlements, book purchases, or made to governments, non-profits or employees were deleted from the analysis. Work categories were determined by contract descriptions. GSPC also cross referenced the files to pick up addresses and race/ethnicity/gender assignments.

Tables 30 and 31 show 4.17% prime contractor utilization by any MWBE group in Construction between 2008 and 2012. In 2011 and 2012, no group, including Non-Minority Male firms, was utilized, indicating that the County did not spend money in construction during this two-year period.

**Table 30: Durham County Prime Contractor Utilization by Firm Number- Construction in the Relevant Market**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	#	%	#	%	#	%	#	%	#	%	#	%	#
2008	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	6	100.00%	6
2009	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	15	100.00%	15
2010	1	6.67%	0	0.00%	0	0.00%	0	0.00%	2	13.33%	12	80.00%	15
2011	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0
2012	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0
TOTAL*	1	4.17%	0	0.00%	0	0.00%	0	0.00%	2	8.33%	21	87.50%	24

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**Table 31: Durham County Prime Contractor Utilization by Dollars- Construction in the Relevant Market**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	
2008	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$13,081,382	100.00%	\$13,081,382
2009	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$92,912,600	100.00%	\$92,912,600
2010	\$115,000	0.09%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$1,230,998	0.97%	\$124,656,498	98.94%	\$126,002,496
2011	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
2012	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
<b>TOTAL</b>	<b>\$115,000</b>	<b>0.05%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$1,230,998</b>	<b>0.53%</b>	<b>\$230,650,480</b>	<b>99.42%</b>	<b>\$231,996,478</b>

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Tables 32 and 33 show no utilization of Asian American owned firms for the entire study period in Architecture and Engineering. One Black American firm earned \$6.9 million over the entire study period. Two Hispanic American and one White Female owned firm were utilized over the entire study period.

**Table 32: Durham County Prime Contractor Utilization by Firm Number- A/E in the Relevant Market**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL
	#	%	#	%	#	%	#	%	#	%	#	%	
2008	1	0.08	0	0	2	0.15	0	0	1	0.08	9	0.69	13
2009	1	0.13	0	0	0	0.00	0	0	0	0.00	7	0.88	8
2010	1	0.13	0	0	0	0.00	1	0.13	0	0.00	6	0.75	8
2011	1	0.17	0	0	0	0.00	0	0	0	0.00	5	0.83	6
2012	1	0.33	0	0	0	0.00	0	0	0	0.00	2	0.67	3
<b>TOTAL</b>	<b>1</b>	<b>0.05</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>0.11</b>	<b>1</b>	<b>0.05</b>	<b>1</b>	<b>0.05</b>	<b>14</b>	<b>0.74</b>	<b>19</b>

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**Table 33: Durham County Prime Contractor Utilization by Dollars- A/E  
in the Relevant Market**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$925,313	13.63%	\$0	0.00%	\$4,565,900	67.25%	\$0	0.00%	\$139,772	2.06%	\$1,158,386	17.06%	\$6,789,371
2009	\$856,608	11.83%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$5,232,975	72.30%	\$7,238,009
2010	\$1,854,541	25.87%	\$0	0.00%	\$0	0.00%	\$64,100	0.89%	\$0	0.00%	\$5,251,188	73.24%	\$7,169,829
2011	\$1,302,657	46.93%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$1,473,123	53.07%	\$2,775,780
2012	\$2,005,034	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$1,168,803	36.83%	\$3,173,837
<b>TOTAL</b>	<b>\$6,944,153</b>	<b>26.71%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$4,565,900</b>	<b>17.560%</b>	<b>\$64,100</b>	<b>0.25%</b>	<b>\$139,772</b>	<b>0.54%</b>	<b>\$14,284,475</b>	<b>54.94%</b>	<b>\$25,998,400</b>

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Table 34 and 35 – show a total of fourteen Black American owned firms and 17 White female owned firms were utilized in the study period as prime contractors in Services. No Asian American or Hispanic American owned firms were utilized and one American Indian owned firm earned .07% of the money spent in Services from FY 2008 to 2012.

**Table 34: Durham County Prime Contractor Utilization by Firm Number- Services  
in the Relevant Market**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL
	#	%	#	%	#	%	#	%	#	%	#	%	#
2008	4	5.97%	0	0.00%	0	0.00%	1	1.49%	9	13.43%	53	79.10%	67
2009	7	11.11%	0	0.00%	0	0.00%	0	0.00%	9	14.29%	47	74.60%	63
2010	7	10.94%	0	0.00%	0	0.00%	0	0.00%	8	12.50%	49	76.56%	64
2011	5	13.16%	0	0.00%	0	0.00%	0	0.00%	3	7.895%	30	78.95%	38
2012	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0
<b>TOTAL</b>	<b>14</b>	<b>9.86%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>1</b>	<b>0.70%</b>	<b>17</b>	<b>11.97%</b>	<b>110</b>	<b>77.46%</b>	<b>142</b>

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**Table 35: Durham County Prime Contractor Utilization by Dollars- Services  
in the Relevant Market**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	
2008	\$432,856	5.35%	\$0	0.00%	\$0	0.00%	\$30,262	0.37%	\$1,332,480	16.48%	\$6,290,242	77.79%	\$8,085,840
2009	\$626,907	6.42%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$696,274	7.13%	\$8,442,452	86.45%	\$9,765,633
2010	\$580,388	2.73%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$1,161,704	5.46%	\$19,520,081	91.81%	\$21,262,173
2011	\$191,096	10.42%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$116,945	6.38%	\$1,525,074	83.20%	\$1,833,115
2012	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
<b>TOTAL</b>	<b>\$1,831,247</b>	<b>4.47%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$30,262</b>	<b>0.07%</b>	<b>\$3,307,403</b>	<b>8.08%</b>	<b>\$35,777,849</b>	<b>87.38%</b>	<b>\$40,946,761</b>

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As can be seen in Tables 36 and 37 below, Asian American, Hispanic American, and American Indian owned firms were not utilized at all as prime contractors in Goods throughout the study period. Two black American owned firms and one white female owned firm was utilized from FY 2008 to 2012.

**Table 36: Durham County Prime Contractor Utilization by Firm Number- Goods  
in the Relevant Market**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-Minority Male		TOTAL
	#	%	#	%	#	%	#	%	#	%	#	%	
2008	1	4.17%	0	0.00%	0	0.00%	0	0.00%	1	4.17%	22	91.67%	24
2009	1	3.45%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	28	96.55%	29
2010	1	3.85%	0	0.00%	0	0.00%	0	0.00%	1	3.85%	24	92.31%	26
2011	0	0.00%	0	0.00%	0	0.00%	0	0.00%	2	6.67%	28	93.33%	30
2012	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	25	100.00%	25
<b>TOTAL</b>	<b>2</b>	<b>1.30%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>0</b>	<b>0.00%</b>	<b>4</b>	<b>2.60%</b>	<b>83</b>	<b>53.90%</b>	<b>154</b>

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**Table 37: Durham County Prime Contractor Utilization by Dollars- Goods in the Relevant Market**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	
2008	\$284,950	8.43%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$57,986	1.72%	\$3,035,991	89.85%	\$3,378,927
2009	\$42,500	1.57%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$2,669,641	98.43%	\$2,712,141
2010	\$218,900	5.82%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$134,995	3.59%	\$3,407,362	90.59%	\$3,761,257
2011	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$51,172	2.00%	\$2,510,472	98.00%	\$2,561,644
2012	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$2,213,169	100.00%	\$2,213,169
<b>TOTAL</b>	<b>\$546,350</b>	<b>3.74%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$244,153</b>	<b>1.67%</b>	<b>\$13,836,635</b>	<b>94.60%</b>	<b>\$14,627,138</b>

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## 2. Subcontractor Utilization- Durham County

GSPC conducted a Prime Vendor Questionnaire, which asked all contractors who obtained awards during the Study Period to respond, providing information about their subcontracting. (See D(4)(d) on page 94 for more information about the Prime Vendor Questionnaire). The results of the Prime Vendor Questionnaire are based upon the sample of responses returned to GSPC. Although they are sample results, GSPC can make inferences about all subcontracting.

Table 38 shows very little utilization of MWBE firms during the Study Period as construction subcontractors. In fact, Hispanic American owned firms were the only MWBE utilized and then only in 2010, for 7% of the \$22,799 spent on construction subcontractors as a whole.

**Table 38: Durham County Subcontractor Utilization- Construction**

FY	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
2009	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
2010	\$0	0.00%	\$0	0.00%	\$1,600	100.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$1,600
2011	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$21,199	100.00%	\$21,199
2012	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
<b>TOTAL</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$1,600</b>	<b>7.02%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$21,199</b>	<b>92.98%</b>	<b>\$22,799</b>

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Table 39 below shows that Asian American, Hispanic American, and American Indian firms were not utilized at all as primes in the County and Black American and White Female owned firms were utilized only in 2008 for less than 5% of the total Architecture and Engineering subcontracting dollars over the Study Period.

**Table 39: Durham County Subcontractor Utilization- A/E**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$1,200	28.43%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$2,531	59.96%	\$490	11.61%	\$4,221
2009	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$65,089	100.00%	\$65,089
2010	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
2011	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$29,364	100.00%	\$29,364
2012	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
TOTAL	\$1,200	1.22%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$2,531	2.57%	\$94,943	96.22%	\$98,674

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Table 40 reveals, again, zero utilization of Asian American, Hispanic American, and American Indian firms, as well as White Females. Non-Minority Male firms received 58% of all dollars spent in services subcontracting and the remainder, nearly 42% of dollars went to Black American owned firms during the Study Period.

**Table 40: Durham County Subcontractor Utilization-Services**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$66,012	50.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$66,012	50.00%	\$132,024
2009	\$48,600	70.03%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$20,800	29.97%	\$69,400
2010	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$24,100	100.00%	\$24,100
2011	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$9,750	100.00%	\$9,750
2012	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$40,257	100.00%	\$40,257
TOTAL	\$114,612	41.60%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$160,919	58.40%	\$275,531

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Table 41 reveals that the only utilization of any demographic in any category in any year of the study for County goods subcontracting was of White Females in 2008, for a sum of \$10,227. It is typical that there is little or no subcontracting in goods, therefore, GSPC determined that there is not enough data in the category of Goods from which inferences could be sufficiently made.



**Table 41: Durham County Subcontractor Utilization- Goods**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$10,227	100.00%	\$0	0.00%	\$10,227
2009	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
2010	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
2011	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
2012	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0
TOTAL	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$10,227	100.00%	\$0	0.00%	\$10,227

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Table 42 below shows the total County subcontractor utilization in all categories, revealing that Asian American owned firms received 0.10% of all dollars spent, followed by Hispanic American owned firms at nearly 0.14%. American Indian firms were never utilized as subcontractors on any County project in any work category during the study period and White Female owned firms had a total of 6.74% utilization. Black American owned firms were utilized most of any MWBE group with 15.48% of a total of \$12,774,334 spent on subcontracting within Durham County.

**Table 42: Total Durham County Subcontractor Utilization in All Categories and All Geographic Areas**

FY	Black American		Asian American		Hispanic American		American Indian		White Female		Non-MWBE		TOTAL
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$
2008	\$316,514	31.80%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$136,612	13.73%	\$542,223	54.48%	\$995,349
2009	\$178,351	30.13%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$274,191	46.33%	\$139,319	23.54%	\$591,861
2010	\$42,337	3.14%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$98,873	7.32%	\$1,209,238	89.54%	\$1,350,448
2011	\$1,402,483	19.27%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$201,458	2.77%	\$5,674,046	77.96%	\$7,277,987
2012	\$38,283	1.50%	\$12,266	0.48%	\$17,542	0.69%	\$0	0.00%	\$149,323	5.84%	\$2,341,275	91.50%	\$2,558,689
TOTAL	\$1,977,968	15.48%	\$12,266	0.10%	\$17,542	0.137%	\$0	0.00%	\$860,457	6.74%	\$9,906,101	77.55%	\$12,774,334

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GSPC conducted the Prime Vendor Questionnaire in order to obtain information about subcontractors. The County does maintain complete data on MWBE subcontractors, but not Non-Minority Male subcontractors. Without information about the Non-Minority Male's GSPC cannot calculate a percentage of all subcontracting.

However, the tables below provide the **dollar** amounts that were awarded to MWBE subcontractors during the Study Period as well as the number of firms in each ethnicity/race/gender category that those dollars are attributed to. Note that subcontractors are reflected in the work category of the type project. There were **no goods** that had subcontractors. It is important to reiterate that Tables 38-42 above represent a sample of all subcontractors but the percentages are representative of all subcontractors. Tables 43-48 below represent all dollars spent with MWBE firms but do not provide any percentages to measure against all subcontractors because there is no reporting of non-minority subcontractors.

**Table 43: Durham County MWBE Subcontractor Utilization  
(number of firms)  
FY2008-2012  
CONSTRUCTION**

	Black American	Asian American	Hispanic American	American Indian	White Female	TOTAL MWBE
FY	#	#	#	#	#	#
2008	4	1	0	0	13	18
2009	15	0	3	0	37	55
2010	14	0	3	0	26	43
2011	4	0	1	0	43	48
2012	7	0	1	0	4	12
<b>TOTAL</b>	<b>41</b>	<b>1</b>	<b>8</b>	<b>2</b>	<b>72</b>	<b>124</b>

Griffin & Strong, P.C. 2014 \* Total represents the number of unique firms



**Table 44: Durham County MWBE Subcontractor Utilization  
(dollars)  
FY2008-2012  
CONSTRUCTION**

	Black American	Asian American	Hispanic American	American Indian	White Female	TOTAL MWBE
FY	\$	\$	\$	\$	\$	\$
2008	\$682,033	\$0	\$0	\$0	\$1,145,284	\$1,827,317
2009	\$2,847,968	\$0	\$448,009	\$0	\$14,135,255	\$17,431,232
2010	\$10,720,993	\$422,060	\$859,674	\$0	\$16,127,228	\$28,129,955
2011	\$76,785	\$0	\$3,200	\$0	\$219,135	\$299,120
2012	\$305,118	\$0	\$9,792	\$0	\$524,521	\$839,431
<b>TOTAL</b>	<b>\$14,632,897</b>	<b>\$422,060</b>	<b>\$1,320,675</b>	<b>\$0</b>	<b>\$32,151,423</b>	<b>\$48,527,055</b>

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**Table 45: Durham County MWBE Subcontractor Utilization  
(number of firms)  
FY2008-2012  
A/E**

	Black American	Asian American	Hispanic American	American Indian	White Female	TOTAL MWBE
FY	#	#	#	#	#	#
2008	0	0	0	0	4	4
2009	0	0	0	0	0	0
2010	3	0	1	0	9	13
2011	3	0	0	1	6	10
2012	3	0	0	0	1	4
<b>TOTAL</b>	<b>8</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>17</b>	<b>28</b>

Griffin & Strong, P.C. 2014 \* Total represents the number of unique firms

**Table 46: Durham County MWBE Subcontractor Utilization  
(dollars)  
FY2008-2012  
A/E**

	Black American	Asian American	Hispanic American	American Indian	White Female	TOTAL MWBE
FY	\$	\$	\$	\$	\$	\$
2008	\$0	\$0	\$0	\$0	\$88,002	\$88,002
2009	\$0	\$0	\$0	\$0	\$0	\$0
2010	\$50,603	\$0	\$103,914	\$0	\$721,840	\$876,357
2011	\$83,468	\$0	\$0	\$10,362	\$284,722	\$378,552
2012	\$120,862	\$0	\$0	\$0	\$39,710	\$160,572
<b>TOTAL</b>	<b>\$254,933</b>	<b>\$0</b>	<b>\$103,914</b>	<b>\$10,362</b>	<b>\$1,134,274</b>	<b>\$1,503,483</b>

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**Table 47: Durham County MWBE Subcontractor Utilization  
(number of firms)  
FY2008-2012  
SERVICES**

	Black American	Asian American	Hispanic American	American Indian	White Female	TOTAL MWBE
FY	#	#	#	#	#	#
2008	0	0	0	0	0	0
2009	0	0	0	0	0	0
2010	0	0	0	0	0	0
2011	4	0	0	0	1	5
2012	0	0	0	0	1	1
<b>TOTAL</b>	<b>4</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>6</b>

Griffin & Strong, P.C. 2014 \* Total represents the number of unique firms

**Table 48: Durham County MWBE Subcontractor Utilization  
(dollars)  
FY2008-2012  
SERVICES**

	Black American	Asian American	Hispanic American	American Indian	White Female	TOTAL MWBE
FY	\$	\$	\$	\$	\$	\$
2008	\$0	\$0	\$0	\$0	0	\$0
2009	\$0	\$0	\$0	\$0	\$0	\$0
2010	\$0	\$0	\$0	\$0	\$0	\$0
2011	\$273,345	\$0	\$0	\$0	\$27,647	\$300,992
2012	\$0	\$0	\$0	\$0	\$60,000	\$60,000
<b>TOTAL</b>	<b>\$273,345</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>	<b>\$87,647</b>	<b>\$360,992</b>

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### L. Durham County Prime Contractor Disparity Indices and Analysis

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

To assess the existence and extent of disparity, GSPC compared the utilization percentages of minority and women owned firms to the percentage of the total pool of those firms in the relevant geographic area.

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

Let: *U* = Utilization percentage for the MWBE group

*A* = Availability percentage for the MWBE group

*DI* = Disparity Index for the MWBE group

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



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. In cases where there is utilization, but no availability, the resulting disparity index is designated by the infinity ( $\infty$ ) 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, gender, and disabled status group. They are also broken out by year, for each year of the Study Period.

The results obtained by a disparity analysis will result in one of three conclusions: overutilization, underutilization or parity. Underutilization is when the Disparity Index is below one. Overutilization is when the Disparity Index is over one. Parity is when the Disparity Index is one. Statistically significant overutilization (1.10 or above) and statistically significant underutilization (.80 or below) will be bolded and in **red** in the Disparity Indices.

### **1. Durham County Prime Vendor Disparity Indices and Analysis**

Tables 49 through 52 show the disparity indices in each category for prime contracting in Durham County. There was no utilization of MWBEs in Construction prime contracting with the County in 2008 and 2009 with minimal utilization of Black and Women owned firms in 2010. There was no utilization of any group, including Non-Minority Male firms, in 2011 and 2012.

In A/E prime contracting, African American owned firms were overutilized every year of the term. This is substantially due to the County adding additional work to a Black American owned firm on a contract that was awarded before the term. Hispanic American owned firms were overutilized in 2008 and 2010 and unutilized in every other year of the study. Non-Minority Male owned firms were significantly overutilized

In Services, there was no significant utilization of MWBEs as primes except women were overutilized in 2008, and no utilization of any group as primes in 2011.

In the Goods category, African American owned firms were overutilized as prime contractors in 2008 and 2010 and unutilized in every other year. Non-Minority Male owned firms were significantly overutilized.

**Table 49: Durham County Prime Contractor Disparity Index- Construction**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	0.00	14.57	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	34.57	0.00	UNDERUTILIZED
NON-MINORITY MALE	100.00	65.43	1.53	OVERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	0.00	14.57	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	34.57	0.00	UNDERUTILIZED
NON-MINORITY MALE	100.00	65.43	1.53	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	0.09	14.57	0.01	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.97	13.80	0.07	UNDERUTILIZED
ALL MINORITIES	1.06	34.57	0.03	UNDERUTILIZED
NON-MINORITY MALE	98.94	65.43	1.51	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	0.00	14.57	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	1.30	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	4.24	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.65	0.00	NO UTILIZATION
WHITE FEMALE	0.00	13.80	0.00	NO UTILIZATION
ALL MINORITIES	0.00	34.57	0.00	NO UTILIZATION
NON-MINORITY MALE	0.00	65.43	0.00	NO UTILIZATION
<b>FY 2012</b>				
BLACK AMERICAN	0.00	14.57	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	1.30	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	4.24	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.65	0.00	NO UTILIZATION
WHITE FEMALE	0.00	13.80	0.00	NO UTILIZATION
ALL MINORITIES	0.00	34.57	0.00	NO UTILIZATION
NON-MINORITY MALE	0.00	65.43	0.00	NO UTILIZATION
<b>TOTALS</b>				
BLACK AMERICAN	0.05	14.57	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.53	13.80	0.04	UNDERUTILIZED
ALL MINORITIES	0.58	34.57	0.02	UNDERUTILIZED
NON-MINORITY MALE	99.42	65.43	1.52	OVERUTILIZED

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**Table 50: Durham County Prime Contractor Disparity Index- A/E**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	13.63	9.77	1.40	OVERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	67.25	1.75	38.43	OVERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	2.06	11.03	0.19	UNDERUTILIZED
ALL MINORITIES	82.94	26.32	3.15	OVERUTILIZED
NON-MINORITY MALE	17.06	73.68	0.23	UNDERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	11.83	9.77	1.21	OVERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	11.03	0.00	UNDERUTILIZED
ALL MINORITIES	11.83	26.32	0.45	UNDERUTILIZED
NON-MWBE	88.17	73.68	1.20	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	25.87	9.77	2.65	OVERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.89	0.75	1.19	OVERUTILIZED
WHITE FEMALE	0.00	11.03	0.00	UNDERUTILIZED
ALL MINORITIES	26.76	26.32	1.02	OVERUTILIZED
NON-MWBE	73.24	73.68	0.99	UNDERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	46.93	9.77	4.80	OVERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	11.03	0.00	UNDERUTILIZED
ALL MINORITIES	46.93	26.32	1.78	OVERUTILIZED
NON-MWBE	53.07	73.68	0.72	UNDERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	63.17	9.77	6.47	OVERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	11.03	0.00	UNDERUTILIZED
ALL MINORITIES	63.17	26.32	2.40	OVERUTILIZED
NON-MWBE	36.83	73.68	0.50	UNDERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	26.71	9.77	2.73	OVERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.00	UNDERUTILIZED
HISPANIC AMERICAN	17.56	1.75	10.03	OVERUTILIZED
AMERICAN INDIAN	0.25	0.75	0.33	UNDERUTILIZED
WHITE FEMALE	0.54	11.03	0.05	UNDERUTILIZED
ALL MINORITIES	45.06	26.32	1.71	OVERUTILIZED
NON-MWBE	54.94	73.68	0.75	UNDERUTILIZED

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**Table 51: Durham County Prime Disparity Index-Services**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	5.35	10.94	0.49	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.37	0.99	0.37	UNDERUTILIZED
WHITE FEMALE	16.48	9.54	1.73	OVERUTILIZED
ALL MINORITIES	22.20	23.72	0.94	UNDERUTILIZED
NON-MINORITY MALE	77.80	76.28	1.02	OVERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	6.42	10.94	0.59	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	7.13	9.54	0.75	UNDERUTILIZED
ALL MINORITIES	13.55	23.72	0.57	UNDERUTILIZED
NON-MWBE	86.45	76.28	1.13	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	2.73	10.94	0.25	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	5.46	9.54	0.57	UNDERUTILIZED
ALL MINORITIES	8.19	23.72	0.35	UNDERUTILIZED
NON-MWBE	91.81	76.28	1.20	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	10.42	10.94	0.95	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	6.38	9.54	0.67	UNDERUTILIZED
ALL MINORITIES	16.80	23.72	0.71	UNDERUTILIZED
NON-MWBE	83.20	76.28	1.09	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	0.00	10.94	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	1.10	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	1.14	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.99	0.00	NO UTILIZATION
WHITE FEMALE	0.00	9.54	0.00	NO UTILIZATION
ALL MINORITIES	0.00	23.72	0.00	NO UTILIZATION
NON-MWBE	0.00	76.28	0.00	NO UTILIZATION
<b>TOTALS</b>				
BLACK AMERICAN	4.47	10.94	0.41	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.07	0.99	0.07	UNDERUTILIZED
WHITE FEMALE	8.08	9.54	0.85	UNDERUTILIZED
ALL MINORITIES	12.62	23.72	0.53	UNDERUTILIZED
NON-MWBE	87.38	76.28	1.15	OVERUTILIZED

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**Table 52: Durham County Prime Disparity Index- Goods**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	8.43	2.77	3.04	OVERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	1.72	7.17	0.24	UNDERUTILIZED
ALL MINORITIES	10.15	11.29	0.90	UNDERUTILIZED
NON-MINORITY MALE	89.85	88.71	1.01	OVERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	1.57	2.77	0.57	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	7.17	0.00	UNDERUTILIZED
ALL MINORITIES	1.57	11.29	0.14	UNDERUTILIZED
NON-MINORITY MALES	98.43	88.71	1.11	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	5.82	2.77	2.10	OVERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	3.59	7.17	0.50	UNDERUTILIZED
ALL MINORITIES	9.41	11.29	0.83	UNDERUTILIZED
NON-MINORITY MALES	90.59	88.71	1.02	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	0.00	2.77	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	2.00	7.17	0.28	UNDERUTILIZED
ALL MINORITIES	2.00	11.29	0.18	UNDERUTILIZED
NON-MINORITY MALES	98.00	88.71	1.10	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	0.00	2.77	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	7.17	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	11.29	0.00	UNDERUTILIZED
NON-MINORITY MALES	100.00	88.71	1.13	OVERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	3.74	2.77	1.35	OVERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	1.67	7.17	0.23	UNDERUTILIZED
ALL MINORITIES	5.41	11.29	0.48	UNDERUTILIZED
NON-MINORITY MALES	94.60	88.71	1.07	OVERUTILIZED
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## **2. Durham County Subcontractor Disparity Indices and Analysis**

Tables 53 through 56 show the disparity indices for Durham County's subcontractors during the study period. Subcontracting in Durham County showed significant underutilization in Construction in all groups, including Non-Minority Males.

Architecture and Engineering subcontractors with the County showed no MWBE utilization from 2009 to 2012 however, Black Americans and White Females were overutilized in 2008. In the Services category, Black American subcontractors were underutilized every year after 2009, and there was no utilization of any group in 2010. Non-Minority Males were significantly overutilized as Services subcontractors in 2011 and 2012. Finally, in the Goods category, White Female owned firms were the only group utilized in any of the years of the study period, 2008, and were unutilized in any other year. In both Construction and Goods, there was no utilization whatsoever for several years. In the Construction category, years 2008, 2009, and 2012 showed no procurement activity and in Goods, there were no subcontractor purchases in any year other than 2008.

**Table 53: Durham County Subcontractor Disparity Index- Construction**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	0.00	14.57	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	1.30	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	4.24	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.65	0.00	NO UTILIZATION
WHITE FEMALE	0.00	13.80	0.00	NO UTILIZATION
ALL MINORITIES	0.00	34.57	0.00	NO UTILIZATION
NON-MINORITY MALE	0.00	65.43	0.00	NO UTILIZATION
<b>FY 2009</b>				
BLACK AMERICAN	0.00	14.57	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	1.30	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	4.24	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.65	0.00	NO UTILIZATION
WHITE FEMALE	0.00	13.80	0.00	NO UTILIZATION
ALL MINORITIES	0.00	34.57	0.00	NO UTILIZATION
NON-MINORITY MALE	0.00	65.43	0.00	NO UTILIZATION
<b>FY 2010</b>				
BLACK AMERICAN	0.00	14.57	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	100.00	4.24	23.58	OVERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	100.00	34.57	2.89	UNDERUTILIZED
NON-MINORITY MALE	0.00	65.43	0.00	UNDERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	0.00	14.57	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	4.24	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	34.57	0.00	UNDERUTILIZED
NON-MINORITY MALE	100.00	65.43	1.53	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	0.00	14.57	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	1.30	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	4.24	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.65	0.00	NO UTILIZATION
WHITE FEMALE	0.00	13.80	0.00	NO UTILIZATION
ALL MINORITIES	0.00	34.57	0.00	NO UTILIZATION
NON-MINORITY MALE	0.00	65.43	0.00	NO UTILIZATION
<b>TOTALS</b>				
BLACK AMERICAN	0.00	14.57	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.30	0.00	UNDERUTILIZED
HISPANIC AMERICAN	7.02	4.24	1.66	OVERUTILIZED
AMERICAN INDIAN	0.00	0.65	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	13.80	0.00	UNDERUTILIZED
ALL MINORITIES	7.02	34.57	0.20	UNDERUTILIZED
NON-MINORITY MALE	92.98	65.43	1.42	OVERUTILIZED

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Table 54: Durham County Subcontractor Disparity Index- A/E

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	28.43	9.77	2.9	OVERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.0	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.0	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.0	UNDERUTILIZED
WHITE FEMALE	59.96	11.03	5.4	OVERUTILIZED
ALL MINORITIES	88.39	26.32	3.4	OVERUTILIZED
NON-MINORITY MALE	11.61	73.68	0.2	UNDERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	0.00	9.77	0.0	UNDERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.0	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.0	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.0	UNDERUTILIZED
WHITE FEMALE	0.00	11.03	0.0	UNDERUTILIZED
ALL MINORITIES	0.00	26.32	0.0	UNDERUTILIZED
NON-MWBE	100.00	73.68	1.4	OVERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	0.00	9.77	0.0	NO UTILIZATION
ASIAN AMERICAN	0.00	3.01	0.0	NO UTILIZATION
HISPANIC AMERICAN	0.00	1.75	0.0	NO UTILIZATION
AMERICAN INDIAN	0.00	0.75	0.0	NO UTILIZATION
WHITE FEMALE	0.00	11.03	0.0	NO UTILIZATION
ALL MINORITIES	0.00	26.32	0.0	NO UTILIZATION
NON-MWBE	0.00	73.68	0.0	NO UTILIZATION
<b>FY 2011</b>				
BLACK AMERICAN	0.00	9.77	0.0	UNDERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.0	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.0	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.0	UNDERUTILIZED
WHITE FEMALE	0.00	11.03	0.0	UNDERUTILIZED
ALL MINORITIES	0.00	26.32	0.0	UNDERUTILIZED
NON-MWBE	100.00	73.68	1.4	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	0.00	9.77	0.0	NO UTILIZATION
ASIAN AMERICAN	0.00	3.01	0.0	NO UTILIZATION
HISPANIC AMERICAN	0.00	1.75	0.0	NO UTILIZATION
AMERICAN INDIAN	0.00	0.75	0.0	NO UTILIZATION
WHITE FEMALE	0.00	11.03	0.0	NO UTILIZATION
ALL MINORITIES	0.00	26.32	0.0	NO UTILIZATION
NON-MWBE	0.00	73.68	0.0	NO UTILIZATION
<b>TOTALS</b>				
BLACK AMERICAN	1.22	9.77	0.1	UNDERUTILIZED
ASIAN AMERICAN	0.00	3.01	0.0	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.75	0.0	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.75	0.0	UNDERUTILIZED
WHITE FEMALE	2.57	11.03	0.2	UNDERUTILIZED
ALL MINORITIES	3.79	26.32	0.1	UNDERUTILIZED
NON-MWBE	96.22	73.68	1.3	OVERUTILIZED

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**Table 55: Durham County Subcontractor Disparity Index- Services**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	AVAILABILITY % BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	50.00	10.94	4.57	OVERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	50.00	23.72	2.11	OVERUTILIZED
NON-MINORITY MALE	50.00	76.28	0.66	UNDERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	70.03	10.94	6.40	OVERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	70.03	23.72	2.95	OVERUTILIZED
NON-MWBE	29.97	76.28	0.39	UNDERUTILIZED
<b>FY 2010</b>				
BLACK AMERICAN	0.00	10.94	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	23.72	0.00	UNDERUTILIZED
NON-MWBE	100.00	76.28	1.31	OVERUTILIZED
<b>FY 2011</b>				
BLACK AMERICAN	0.00	10.94	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	23.72	0.00	UNDERUTILIZED
NON-MWBE	100.00	76.28	1.31	OVERUTILIZED
<b>FY 2012</b>				
BLACK AMERICAN	0.00	10.94	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	0.00	23.72	0.00	UNDERUTILIZED
NON-MWBE	100.00	76.28	1.31	OVERUTILIZED
<b>TOTALS</b>				
BLACK AMERICAN	41.60	10.94	3.80	OVERUTILIZED
ASIAN AMERICAN	0.00	1.10	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	1.14	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.99	0.00	UNDERUTILIZED
WHITE FEMALE	0.00	9.54	0.00	UNDERUTILIZED
ALL MINORITIES	41.60	23.72	1.75	OVERUTILIZED
NON-MWBE	58.40	76.28	0.77	UNDERUTILIZED



**Table 56: Durham County Subcontractor Disparity Index- Goods**

ETHNICITY/RACE AND GENDER GROUP	UTILIZATION % (U)	BASED ON MASTER VENDOR FILE (AMV)	DISPARITY INDEX (U/AMV)	DISPARATE IMPACT OF UTILIZATION FOR U/AMV
<b>FY 2008</b>				
BLACK AMERICAN	0.00	2.77	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	100.00	7.17	13.95	OVERUTILIZED
ALL MINORITIES	100.00	11.29	8.86	UNDERUTILIZED
NON-MINORITY MALE	0.00	88.71	0.00	UNDERUTILIZED
<b>FY 2009</b>				
BLACK AMERICAN	0.00	2.77	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	0.43	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	0.43	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.50	0.00	NO UTILIZATION
WHITE FEMALE	0.00	7.17	0.00	NO UTILIZATION
ALL MINORITIES	0.00	11.29	0.00	NO UTILIZATION
NON-MINORITY MALES	0.00	88.71	0.00	NO UTILIZATION
<b>FY 2010</b>				
BLACK AMERICAN	0.00	2.77	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	0.43	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	0.43	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.50	0.00	NO UTILIZATION
WHITE FEMALE	0.00	7.17	0.00	NO UTILIZATION
ALL MINORITIES	0.00	11.29	0.00	NO UTILIZATION
NON-MINORITY MALES	0.00	88.71	0.00	NO UTILIZATION
<b>FY 2011</b>				
BLACK AMERICAN	0.00	2.77	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	0.43	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	0.43	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.50	0.00	NO UTILIZATION
WHITE FEMALE	0.00	7.17	0.00	NO UTILIZATION
ALL MINORITIES	0.00	11.29	0.00	NO UTILIZATION
NON-MINORITY MALES	0.00	88.71	0.00	NO UTILIZATION
<b>FY 2012</b>				
BLACK AMERICAN	0.00	2.77	0.00	NO UTILIZATION
ASIAN AMERICAN	0.00	0.43	0.00	NO UTILIZATION
HISPANIC AMERICAN	0.00	0.43	0.00	NO UTILIZATION
AMERICAN INDIAN	0.00	0.50	0.00	NO UTILIZATION
WHITE FEMALE	0.00	7.17	0.00	NO UTILIZATION
ALL MINORITIES	0.00	11.29	0.00	NO UTILIZATION
NON-MINORITY MALES	0.00	88.71	0.00	NO UTILIZATION
<b>TOTALS</b>				
BLACK AMERICAN	0.00	2.77	0.00	UNDERUTILIZED
ASIAN AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
HISPANIC AMERICAN	0.00	0.43	0.00	UNDERUTILIZED
AMERICAN INDIAN	0.00	0.50	0.00	UNDERUTILIZED
WHITE FEMALE	100.00	7.17	13.95	OVERUTILIZED
ALL MINORITIES	100.00	11.29	8.86	UNDERUTILIZED
NON-MINORITY MALES	0.00	88.71	0.00	UNDERUTILIZED
Griffin & Strong, P.C. 2014				

### M. Determining the Significance of Disparity Indices

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

Typically the determination of whether a disparity is “statistically significant” can be based on the depth of the disparity in that any disparity index that is less than .80 is considered to be a statistically significant underutilization and any disparity index over 1.10 is considered to be a statistically significant overutilization<sup>3</sup>. The disparity indexes impact as designated in the following tables as “overutilization”, “underutilization”, or “parity” have been bolded to indicate such statistically significant impact.

However, further, Our approach to determining whether a measured disparity is significant in the general population versus being merely an artifact of our sample is nonparametric, meaning that we do not assume the data or population have any characteristic structure or parameters. In particular, we use a Wilcoxon test that considers whether or not the typical disparity index across all vendor categories is equal to unity. <sup>4</sup>This constitutes a null hypothesis of “parity” and the Wilcoxon test estimates the probability that the typical disparity index departs from unity, and the magnitude of the calculated z-score indicates whether there is typically underutilization ( $z < 0$ ) or overrepresentation ( $z > 0$ ).

For all instances of the estimated disparity indices reported in the tables below, the Wilcoxon test rejected the null hypothesis of parity, and the z-score for the typical disparity index was negative, suggesting underrepresentation in all the relevant contracting categories on average. As the Wilcoxon test is based upon the median or typical value in the distribution of disparity

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<sup>3</sup> In the disparity indices, statistically significant overutilization and underutilization was marked in bold red in the far right column.

<sup>4</sup> For an overview of the Wilcoxon test see: Bradley R. A. (2001) “Frank Wilcoxon” in *Statisticians of the Centuries*, (eds.) C.C Heyde and E. Seneta, pp. 420 – 424, Wiley, New York, NY. The Wilcoxon signed-rank test is a non-parametric statistical hypothesis test used when comparing two related samples, matched samples, or repeated measurements on a single sample to assess whether their population mean ranks differ.

indices, the finding of underrepresentation overall applies to all groups except Non-Minority Males as they are at the top of the disparity index distribution, with a disparity index that is on average greater than unity.

The existence of a statistically significant disparity between the availability and utilization of minority or female owned businesses that is determined to likely be the result of the owners' race, gender, or ethnicity will impact the recommendations provided as a result of this study. GSPC will, in such a case, make recommendations for appropriate and narrowly-tailored race/ethnicity/gender-neutral remedies for this discrimination to give all firms equal access to public contracting with the City and County. GSPC will also, if appropriate, recommend narrowly-tailored race/ethnicity/gender-conscious remedies. If no statistically significant disparity is found to exist or if such a disparity is not determined to be a likely result of firm owners' race, ethnicity, or gender on their success in the marketplace, GSPC may still make recommendations to support the continuation of engagement, outreach, small business development, and non-discrimination policies in the procurement processes of both the City and County of Durham.

## V. PRIVATE SECTOR ANALYSIS

### A. Introduction

A disparity analysis aids in determining if the government has assisted—at least indirectly—or will continue to assist in perpetuating the discriminatory conduct of private actors by being a passive participant in market processes that are discriminatory in their effects on minority and women-owned business enterprise. Indeed, Justice O’Connor, speaking for the Supreme Court in Croson, indicated that a State “has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction,” and can even “use its spending powers to remedy private discrimination if it identifies that discrimination with the particularity required by the Fourteenth Amendment.”<sup>5</sup> GSPC sought to discover whether there is a pervasive pattern of private sector discrimination in the State of North Carolina from which it can be inferred that the City of Durham and Durham County have passively assisted in perpetuating the discriminatory conduct of private actors. The data utilized in this analysis comes from the US Census Bureau’s 2007 Survey of Business Owners Public Use Microdata Sample (“SPUMS”).

SPUMS provides the only comprehensive, regularly collected source of information on selected economic and demographic characteristics for businesses and business owners by gender, ethnicity, race, and veteran status in the 50 states and District of Columbia.<sup>6</sup> The SPUMS universe consists of the population of all non-farm businesses filing Internal Revenue Service tax forms as individual proprietorships, partnerships, or any type of corporation, and with receipts of \$1,000 or more. The SPUMS covers both firms with paid employees and firms with no paid employees.<sup>7</sup> A company or firm in the SPUMS is a business consisting of one or more domestic

<sup>5</sup> See: Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

<sup>6</sup> SPUMS data are publicly available at <http://www.census.gov/econ/sbo/pums.html>

<sup>7</sup> The SPUMS data are stratified by state, industry, frame, and whether the company had paid employees in 2007. SPUMS does not report if business owners are disabled, and veteran’s status—which is in all likelihood correlated with disability status—enables some understanding of the effects of disabled business owner status on business outcomes.



establishments that the reporting firm specified under its ownership or control. For each business sampled in the SPUMS, business ownership is also demographically defined.

Business ownership is defined for particular demographic groups having 51 percent or more of the stock or equity in the business and is categorized by: (1) Gender: male; female; or equally male/female, (2) Ethnicity: Hispanic American; equally Hispanic American/non-Hispanic American; non-Hispanic American, (3) Race: White; Black American; American Indian or Alaska Native; Asian American; Native Hawaiian or Other Pacific Islander; some other race; minority; equally minority/nonminority male; nonminority male, (4) Veteran status: Veteran; equally veteran/nonveteran; nonveteran, and (5) Publicly held and other firms not classifiable by gender, ethnicity, race, and veteran status.

The private sector analysis in our analysis considers the SPUMS data for the State of North Carolina. While the State of North Carolina need not constitute the relevant market area for public contracting by The City of Durham and Durham County, SPUMS does not capture data at the City or County level—the State is the smallest level of geography measured in SPUMS. The value of using SPUMS to evaluate private sector discrimination is that it captures business owner outcomes that can be adversely impacted by discriminatory practice, and the sampling is representative of the universe of firms in the State of North Carolina, which enables unbiased statistical estimates of the effects of minority and gender status on business owner outcomes in the State of North Carolina—a political jurisdiction that includes the City of Durham and Durham County. In this context, basing the private sector analysis on the State of North Carolina SPUMS data is consistent with the reasoning in Croson that the relevant market for statistical analysis of discrimination is not necessarily confined to specific governmental jurisdictional boundaries, such as cities or counties.<sup>8</sup>

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<sup>8</sup> See: Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

## **1. Minority and Women Status as a Barrier To Business Start-up and Expansion Capital in the North Carolina Private Sector**

In neoclassical economic theory, the output of firms is conditioned on the complementary relationship between capital and other relevant inputs. In the absence of capital, and/or the means to finance capital and the other inputs required to produce goods/services for the market, profit-maximizing firms are constrained from entering a market to produce output. A firm's ability to acquire and finance capital and other necessary inputs therefore is arguably one of the most important determinants of whether it enters a market, and once in the market, whether it can finance additional capital and other inputs to expand the business.<sup>9</sup> A major source of financing for the capital and other inputs for businesses are the private actors in capital markets that provide equity, loans, and venture capital.<sup>10</sup> If business access to private equity, loans and venture capital is adversely affected as a result of minority and women ownership status, this would be suggestive of, and consistent with, discrimination against minority and women-owned businesses in the private sector.

Given the significance of access to financing for capital and other inputs for the emergence and survival of small businesses, our private sector analysis considers the extent to which minority and women-owned businesses in the State of North Carolina face discriminatory barriers in securing such financing. The SPUMS is particularly well-suited to such an inquiry because it captures data that shows whether firms secured various types of financing during their initial start-up, and later during expansion. GSPC's emphasis on exploring barriers to financing is motivated by the research literature on minority and women-owned businesses, which is dominated by considerations of access to financing, underscoring the importance of discriminatory barriers faced by minority and women-owned businesses that compromise their formation, operation, and survival.<sup>11</sup> As such, our private sector analysis will inform whether

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<sup>9</sup> See: Beck, Thorsten, Asli Demirgüç-Kunt, and Vojislav Maksimovic. "Financial and legal constraints to growth: does firm size matter?" *Journal of Finance* 60, no. 1 (2005): 137 - 177.

<sup>10</sup> See: Bates, Timothy, and William Bradford. "Analysis of venture-capital funds that finance minority-owned businesses." *Review of Black Political Economy* 32, no. 1 (2004): 37 - 46., and Ratcliffe, Janneke. "Who's counting? Measuring social outcomes from targeted private equity." *Community Development Investment Review, Federal Reserve Bank of San Francisco* 3, no. 1 (2007): 23 - 37.

<sup>11</sup> See: Asiedu, Elizabeth, James A. Freeman, and Akwasi Nti-Addae. "Access to credit by small businesses: How relevant are race, ethnicity, and gender?." *American Economic Review* 102, no. 3 (2012): 532 - 537., Blanchard,

private actors providing business financing in the State of North Carolina are engaging in discriminatory practices in a way that is biased against minority and women-owned businesses. Evidence of such a bias would be suggestive of a key private sector barrier faced by minority and women-owned business in the State of North Carolina—a barrier to equal opportunity access to financing that can constrain the ability of minority and women-owned businesses to compete on equal terms with other businesses in the market for goods and services.<sup>12</sup>

Lastly, evidence of bias in the market for financing against minority and women-owned businesses in the State of North Carolina would lend support to the "but-for justification" for targeted set-asides. Ian Ayres and Frederick Vars, in their consideration of the constitutionality of public affirmative programs, posit a scenario in which private suppliers of financing systematically exclude or charge higher prices to minority and women businesses.<sup>13</sup> If a political jurisdiction awards contracts to the low-cost bidder, this effectively renders the political jurisdiction a passive participant in the private discrimination as minority and women-owned firms may only have recourse to higher cost financing due to facing discrimination in private sector capital markets, which compromises the competitiveness of their bids. Such a perspective on discrimination suggests that barriers faced by minority and women-owned firms in private markets for financing can rationalize targeted contracting programs by political jurisdictions, as the counterfactual is that in the absence of such discrimination, they would be able to compete with other firms in bidding for public contracts. Such a rationale for minority and women set-asides also coheres the finding that both the entry and performance of black-owned firms is

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Lloyd, Bo Zhao, and John Yinger. "Do lenders discriminate against minority and woman entrepreneurs?." *Journal of Urban Economics* 63, no. 2 (2008): 467 - 497., Blanchflower, David G., Phillip B. Levine, and David J. Zimmerman. "Discrimination in the small-business credit market." *Review of Economics and Statistics* 85, no. 4 (2003): 930 - 943., Mijid, Naranchimeg, and Alexandra Bernasek. "Decomposing racial and ethnic differences in small business lending: Evidence of discrimination." *Review of Social Economy* (2013): 1 - 31., and Robb, Alicia M., and Robert W. Fairlie. "Access to financial capital among US businesses: The case of African American firms." *Annals of the American Academy of Political and Social Science* 613, no. 1 (2007): 47 - 72.

<sup>12</sup> (See: Bates, Timothy. "Minority business access to mainstream markets." *Journal of Urban Affairs* 23, no. 1 (2001): 41-56.

<sup>13</sup> See: Ayres, Ian, and Fredrick E. Vars. "When does private discrimination justify public affirmative action?." *Columbia Law Review* 98, no. 7 (1998): 1577-1641.



compromised by their low trust in the capacity and willingness of Federal Government (e.g. courts, regulatory agencies) to mitigate the discrimination they face in the private sector.<sup>14</sup>

## B. Statistical and Econometric Framework

Methodologically, our private sector analysis utilizes a binary regression model (“BRM”) framework—which will permit an assessment of the relationship between a binary/categorical dependent variable, such as a business having received a particular form of business financing, and independent categorical variables, such as race, ethnicity, gender and disability status. The central aim of our private sector analysis with a BRM is to examine how the race/gender/ethnicity/disability status of a business owner in the State of North Carolina effects the likelihood and probability of securing particular types of financing in the private sector—relative to nonminority male business owners.<sup>15</sup>

The SPUMS does not provide sampling weights, so our analysis reports estimates from a heteroscedastic probit specification of the BRM, as failing to account for omitted variables driving selection into the SPUMS data could result in biased parameter estimates if based on a homoscedastic specification for the variance of the error term as in standard simple logit and

<sup>14</sup> See: Price, Gregory N. "Race, trust in government, and self-employment." *American Economist* 57, no. 2 (2012): 171 - 187.

<sup>15</sup> Formally, for an outcome deemed success and indexed by unity, a BRM specification for the process determining success is  $Prob(Y_i = 1) = \phi(\sum \beta_i X_i)$ , where the  $X_i$  are independent covariates that explain outcome  $Y_i$ , the  $\beta_i$  are the effects of the  $X_i$ , and  $\phi$  is a cumulative probability function. The outcomes  $Y_i = 1$  or 0 can be viewed as being generated by a linear latent variable regression function of the form  $y_i^* = \sum \beta_i x_i + \varepsilon_i$ , where the mean value of  $\varepsilon_i$  is zero and its variance is unity,  $Y_i = 1$  if  $y_i^* > 0$ , and  $Y_i = 0$  if  $y_i^* \leq 0$ . While the  $X_i$  account for the effects of observed covariates on  $Y_i$  for a given population, the effect of unobserved covariates can be assumed to be accounted for in an error term  $\varepsilon_i$ .

probit specifications of the BRM.<sup>16</sup> A heteroscedastic error specification of the BRM fit to the SPUMS data allows for unbiased estimation of the effects of the covariates on the dependent variable.<sup>17</sup> In other words, although the sample used for the analysis was not weighted but just pulled randomly from the business population across all categories, GSPC does not expect any sample bias that will keep the outcome from being representative of the whole business population.

### C. The Effects of Minority and Women-Owned Business Status on Financing Business Start-up and Expansion in North Carolina

GSPC identified 22,641 sample firm observations in the State of North Carolina from the SPUMS. The data permitted identification of minority and women-owned firms that were owned by 1.) Asian Americans, 2.) Women, 3.) Disabled Veterans, 4.) Hispanic Americans, 5.) Black Americans, and 6.) Native Americans (American Indian or Alaskan Native). Approximately 29 percent of the sample firms in North Carolina were owned by one of these six minority and women groups, and to estimate the parameters of our BRM specifications, we use binary variables for each separate minority and women group category, in addition to one for firm group membership

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<sup>16</sup> A primary justification for sampling weights is to account for heteroscedasticity that can exist in a population, See: Solon, Gary, Steven J. Haider, and Jeffrey Wooldridge. 2013. "What are we weighting for?" National Bureau of Economic Research Working Paper No. 18859, Cambridge, MA.

<sup>17</sup> A heteroscedastic probit specification of the BRM is  $Prob(Y_i = 1) = \Phi \left[ \frac{\sum \beta_i X_i}{\exp(\sum \gamma_i Z_i)} \right]$ , where  $\Phi$  is now the cumulative density function for the standard normal distribution, and  $\sum \gamma_i Z_i$  is a specification for the error variance, which can differ across realizations of  $Y_i$ , as a function of covariates  $Z_i$ , which can differ from the covariates  $X_i$ . For the underlying heteroscedastic probit latent variable regression specification, the variance of  $\varepsilon_i$  is  $[\exp(\sum \gamma_i Z_i)]^2$ . The difference between the standard probit and heteroscedastic specification of the BRM is simply the denominator of  $\exp(\sum \gamma_i Z_i)$ , as the standard probit assumes the error variance is unity, and every observation has an equal weight. As the SBOPUMS does not provide sampling weights, and there could be some self-selection into the sample for which no controls may be available for—they are unobserved—the heteroscedastic probit specification of the BRM is more compelling.

in any of them.<sup>18</sup> To control for unobserved heterogeneity and the bias caused by omitted variables, we allowed the heteroscedasticity in outcomes to be a function of the firm's reported sales revenue.<sup>19</sup>

Heteroscedastic probit BRM parameter estimates are reported in Tables 57 - 74.<sup>20</sup> We report, for each private sector outcome under consideration, a specification that considers all minority and women-owned firm outcomes relative to nonminority male-owned firm outcomes, and a specification that disaggregates minority and women-owned firm outcomes by race, ethnicity, gender and disabled-veteran status. The disaggregation permits assessment as to whether or not particular groups within the minority and women-owned firm classification have different outcomes, suggestive of facing differential discrimination in the market for financing business enterprise in the North Carolina private sector. For the sake of brevity, and economy of results presentation, we do not report the estimated coefficients for the specification of heteroscedasticity; however, in each instance, the specification was significant, implying that the presumed form of unobserved heterogeneity in the error term was consistent with the data.

For each specification we report the estimated coefficient—which measures how minority and women-owned firm status affects the probability of the outcome under consideration. The standard error of the estimated coefficient along with the absolute value of its t-value, and its statistical significance is also reported. A significant t-value suggests that the estimated coefficient is not due to pure chance, and instead suggests that it is caused by the covariate in question—in this instance minority and women-owned firm status. As diagnostic measures to assess the adequacy of the estimated specification, we report a chi-square test that the covariates jointly have no effect on the dependent variable.<sup>21</sup> A significant chi-square statistic is consistent

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<sup>18</sup> Among the 6,459 minority-owned firms the approximate shares owned by each group were 11 percent for Asian Americans, 77 percent for women, 3 percent for Disabled Veterans, 17 percent for Hispanic Americans, 2 percent for Blacks/African Americans, and 1 percent for Native Americans.

<sup>19</sup> The mean value of sales for firms in the sample was approximately \$4,333.

<sup>20</sup> *STATA 11.0* was used to estimate the parameters of the heteroscedastic probit BRM specifications. For a description of *STATA*—software for statistical/econometric analysis—see <http://www.stata.com/>

<sup>21</sup> A chi-square test is a statistical test used to compare the parameters estimated from observed data with parameters we would expect to obtain according to a specific hypothesis that the parameters are not jointly and statistically different from zero.

with rejecting a null hypothesis that the covariates jointly have no effect on the dependent variable under consideration in each specification.

### **1. Minority and Women-Owned Firm Status and The Demand For Start-up Capital in the North Carolina Private Sector**

Tables 57 - 58 report parameter estimates of the effects of minority and women-owned firm status on the demand, and measured by the need for start-up capital in the North Carolina private sector. The parameter estimates reported in Tables 57 - 58 enable insight into the extent to which, relative to nonminority male-owned firms, minority and women-owned firms are different with respect to having a need for start-up financing. For the specifications in Tables 57 - 58, the dependent binary variable is whether or not the firm had "no need" for start-up capital. The statistically significant and negative sign on the aggregate minority and women-owned firm status indicator in Table 57 suggests that in general, minority and women-owned firms are less likely, relative to nonminority male and women-owned firms, to have no need for start-up capital. With the exception of firms owned by Disabled Veterans and American Indians, the results in Table 58 are similar, with the largest effect for Hispanic American-owned firms. Overall, the parameter estimates in Tables 57 - 58 suggest that relative to nonminority male-owned firms, minority and women-owned firms are more likely to need start-up financing provided by the private sector in North Carolina.

Table 57

**Heteroscedastic Probit Parameter Estimates:  
 Minority and Women-Owned Business Status and The Demand  
 For Start-up Capital In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand: No Start-up Capital Needed (Binary) Regressors:</i>			
Constant	.267	.007	38.14 <sup>a</sup>
Minority and Women-Owned Business	-.296	.016	18.50 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	350.03 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

**Table 58**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and The Demand**  
**For Start-up Capital In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand: No Start-up Capital Needed (Binary)</i>			
<i>Regressors:</i>			
Constant	.262	.007	.559
Asian American-Owned Business	-.019	.034	2.37 <sup>b</sup>
Women-Owned Business	-.316	.015	21.06 <sup>a</sup>
Disabled Veteran-Owned Business	.038	.048	.792
Hispanic American-Owned Business	-.334	.042	7.95 <sup>a</sup>
Black American-Owned Business	-.199	.098	2.03 <sup>b</sup>
American Indian-Owned Business	-.737	.641	1.15
Number of Observations	42738		
$\chi^2_k$	515.56 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

<sup>b</sup> Significant at the .05 level

## **2. Minority and Women-Owned Firm Status and Bank Loan Start-up Financing.**

Tables 59 - 60 report parameter estimates of the effects of minority and women-owned firm status and financing firm start-up with a bank loan in the North Carolina private sector. For the specifications in Tables 59 - 60, the dependent binary variable is whether or not the firm started-up with a bank loan. The statistically significant and positive sign on the aggregate minority and women-owned firm status indicator in Table 59 suggests that in general, minority and women-owned firms are more likely, relative to nonminority male-owned firms, to have bank loans as a source of start-up financing. With the exception of firms owned by Hispanic Americans, Black Americans, and American Indians, the parameter estimates reported in Table 60 are similar, with American Indian-owned firms being relatively less likely to have used bank loans as start-up financing. Overall, the parameter estimates in Tables 59 - 60 suggest that relative to nonminority male-owned firms, minority and women-owned firms are more likely to have bank loans as a source of start-up financing in the North Carolina private sector.

**Table 59**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Bank Loan Start-up**  
**Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Start-up Financed by Bank Loan (Binary)			
<i>Regressors:</i>			
Constant	-1.95	.016	121.87 <sup>a</sup>
Minority and Women-Owned Business	.237	.025	9.48 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	91.20 <sup>a</sup>		

**Notes:**

- <sup>a</sup> Significant at the .01 level
- <sup>b</sup> Significant at the .05 level
- <sup>c</sup> Significant at the .10 level



**Table 60**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Bank Loan Start-up**  
**Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Start-up Financed by Bank Loan (Binary)			
<i>Regressors:</i>			
Constant	-1.94	.015	129.33 <sup>a</sup>
Asian American-Owned Business	.168	.059	2.85 <sup>b</sup>
Women-Owned Business	.176	.027	6.52 <sup>a</sup>
Disabled Veteran-Owned Business	.710	.064	11.09 <sup>a</sup>
Hispanic American-Owned Business	.061	.079	.772
Black American-Owned Business	.232	.160	1.45
American Indian-Owned Business	-3.55	.176	20.17 <sup>a</sup>
Number of Observations	42738		
$\chi^2$	550.85 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

<sup>b</sup> Significant at the .05 level

<sup>c</sup> Significant at the .10 level

### **3. Minority and Women-Owned Firm Status and Government Guaranteed Bank Loan Start-up Financing**

Tables 61 - 62 report parameter estimates of the effects of minority and women-owned firm status and financing firm start-up with a government guaranteed bank loan in the North Carolina private sector. For the specifications in Tables 61 - 62, the dependent binary variable is whether or not the firm started-up with a government guaranteed bank loan. The statistically insignificant sign on the aggregate minority and women-owned firm status indicator for the parameter estimates reported in Table 61 suggest that in general, minority and women-owned firms are neither more or less likely, relative to nonminority male-owned firms, to have government guaranteed bank loans as a source of start-up financing. The parameter estimates reported in Table 62 suggest that relative to nonminority male-owned firms, Asian American-owned are more likely, and firms owned by Hispanic Americans and American Indian are less likely to have government guaranteed bank loans as a source of start-up financing.

**Table 61**

**Heteroscedastic Probit Parameter Estimates:**

**Minority and Women-Owned Business Status and Government Guaranteed Bank Loan  
Start-up Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Start-up Financed by Government Guaranteed Bank Loan (Binary) <i>Regressors:</i>			
Minority and Women-Owned Business	.022	.048	.458
Number of Observations	42738		
$\chi^2_k$	.220		

*Notes:*

<sup>a</sup> Significant at the .01 level

**Table 62**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Government Guaranteed Bank Loan**  
**Start-up Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand: Start-up Financed by Government Guaranteed Bank Loan (Binary) Regressors:</i>			
Constant	-2.54	.027	94.07 <sup>a</sup>
Asian American-Owned Business	.266	.095	2.80 <sup>b</sup>
Women-Owned Business	.009	.052	.173
Disabled Veteran-Owned Business	-.237	.231	1.03
Hispanic American-Owned Business	-.556	.299	1.86 <sup>c</sup>
Black American-Owned Business	.044	.354	.124
American Indian-Owned Business	-1.79	.208	8.61 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	97.74 <sup>a</sup>		

*Notes:*

- <sup>a</sup> Significant at the .01 level
- <sup>b</sup> Significant at the .10 level
- <sup>c</sup> Significant at the .10 level

#### **4. Minority and Women-Owned Firm Status and Home Equity Start-up Financing**

Tables 63 - 64 report parameter estimates of the effects of minority and women-owned firm status and financing firm start-up with a home equity loan in the North Carolina private sector. For the specifications in Tables 63 - 64, the dependent binary variable is whether or not the firm started-up with a home equity loan. The statistically significant and negative sign on the aggregate minority and women-owned firm status indicator for the parameter estimates in Table 63 suggests that in general, minority and women-owned firms are less likely relative to nonminority male-owned firms to have home equity loans as a source of start-up financing. The parameter estimates reported in Table 64 suggest that this is true for all types of minority and women-owned firms except for Asian American-owned firms. Overall, the parameter estimates reported in Tables 63 - 64 suggest that relative to nonminority male-owned firms only Disabled veteran-owned and women-owned firms are less likely to have home equity loans as a source of start-up financing in the North Carolina private sector.

**Table 63**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Home Equity**  
**Start-up Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand: Start-up Financed by Home Equity Loan (Binary) Regressors:</i>			
Constant	-1.71	.013	131.54 <sup>a</sup>
Minority and Women-Owned Business	-.155	.025	6.30 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	37.71 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

**Table 64**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Home Equity**  
**Start-up Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand: Start-up Financed by Home Equity Loan (Binary) Regressors:</i>			
Constant	-1.71	.013	131.54 <sup>a</sup>
Asian American-Owned Business	-.042	.062	.677
Women-Owned Business	-.149	.027	5.52 <sup>a</sup>
Disabled Veteran-Owned Business	-.253	.103	2.46 <sup>b</sup>
Hispanic American-Owned Business	-.113	.082	1.38
Black American-Owned Business	-.323	.233	1.39
American Indian-Owned Business	-2.93	.137	21.39 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	568.38 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

<sup>b</sup> Significant at the .10 level

## **5. Minority and Women-Owned Firm Status and Venture Capital Start-up Financing**

Tables 65 - 66 report parameter estimates of the effects of minority and women-owned firm status and financing firm start-up with venture capital in the North Carolina private sector. For the specifications in Tables 65 - 66, the dependent binary variable is whether or not the firm started-up with venture capital. The statistically significant and positive sign on the aggregate minority and women-owned firm status indicator for the parameter estimates in Table 65 suggest that in general, minority and women-owned firms are more likely relative to nonminority male-owned firms to have venture as a source of start-up financing. The parameter estimates reported in Table 66 suggest that the increased likelihood of minority and women-owned firms having venture capital as a source of start-up financing is true for all except for firms owned by Hispanic Americans, Black Americans, and American Indians. Relative to nonminority male-owned businesses, American Indian-owned firms are less likely to have venture capital as a source of start-up financing.



**Table 65**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Venture Capital**  
**Start-up Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Start-up Financed by Ventured Capital (Binary)			
<i>Regressors:</i>			
Constant	-1.95	.016	121.87 <sup>a</sup>
Minority and Women-Owned Business	.227	.025	9.08 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	91.20 <sup>a</sup>		

*Notes:*

<sup>a</sup> Significant at the .01 level

**Table 66**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Venture Capital**  
**Start-up Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Start-up Financed by Venture Capital (Binary)			
<i>Regressors:</i>			
Constant	-1.94	.015	129.33 <sup>a</sup>
Asian American-Owned Business	.168	.059	2.85 <sup>b</sup>
Women-Owned Business	.176	.027	6.52 <sup>a</sup>
Disabled Veteran-Owned Business	.710	.064	11.09 <sup>a</sup>
Hispanic American-Owned Business	-.061	.079	.772
Black American-Owned Business	.232	.160	1.45
American Indian-Owned Business	-3.55	.176	20.17 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	550.85 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

<sup>b</sup> Significant at the .10 level

## **6. Minority and Women-Owned Firm Status and Bank Loan Business Expansion Financing**

Tables 67 - 68 report parameter estimates of the effects of minority and women-owned firm status and bank loan business expansion financing in the North Carolina private sector. For the specifications in Tables 67 - 68, the dependent binary variable is whether or not the business financed its expansion with a bank loan. The statistically significant and negative sign on the aggregate minority and women-owned firm status indicator for the parameter estimates in Table 67 suggest that in general, relative to nonminority male-owned firms minority and women-owned firms are less likely to finance the expansion of their business with a bank loan. The parameter estimates reported in Table 68 suggest that the reduced relative likelihood of minority and women-owned firms having bank loans as a source of financing the expansion of their businesses is similar for all minority and women-owned businesses under consideration, except for firms owned by Asian Americans, and Black Americans.

**Table 67**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Bank Loan**  
**Expansion Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Expansion Financed by Bank Loan (Binary)			
<i>Regressors:</i>			
Constant	-1.43	.016	89.37 <sup>a</sup>
Minority and Women-Owned Business	-.406	.024	16.92 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	277.06 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

**Table 68**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Bank Loan**  
**Expansion Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Expansion Financed by Bank Loan (Binary)			
<i>Regressors:</i>			
Constant	-1.43	.016	89.37 <sup>a</sup>
Asian American-Owned Business	-.023	.058	.396
Women-Owned Business	-.442	.027	16.36 <sup>a</sup>
Disabled Veteran-Owned Business	-.291	.088	-3.31 <sup>a</sup>
Hispanic American-Owned Business	-.474	.089	5.32 <sup>a</sup>
Black American-Owned Business	-.037	.156	.237
American Indian-Owned Business	-5.40	.154	35.06 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	1500.67 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

## **7. Minority-Owned Firm Status and Government Guaranteed Bank Loan Business Expansion Financing**

Tables 69 - 70 report parameter estimates of the effects of minority and women-owned firm status and government guaranteed bank loan business expansion financing in the North Carolina private sector. For the specifications in Tables 69 - 70, the dependent binary variable was whether or not the business financed its expansion with a government guaranteed bank loan. The statistically insignificant and sign on the aggregate minority and women-owned firm status indicator for the parameter estimates in Table 69 suggest that in general, relative to nonminority male-owned firms, minority and women-owned firms are neither more or less likely to finance the expansion of their businesses with a government guaranteed bank loan. However, the overall specification has poor explanatory power as the chi-square test for the joint significance of the regressors being different from zero cannot be rejected. For the disaggregated specification in Table 70, the chi-square test is rejected. These parameter estimates suggest that relative to nonminority male-owned firms, those owned by Hispanic Americans and American Indians have a reduced likelihood of financing the expansion of their business with a government guaranteed bank loan.

**Table 69**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Government Guaranteed Bank Loan**  
**Expansion Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Expansion Financed by Government			
Guaranteed Bank Loan (Binary)			
<i>Regressors:</i>			
Constant	-2.81	.038	73.94 <sup>a</sup>
Minority and Women-Owned Business	-.028	.070	.400
Number of Observations	42738		
$\chi^2_k$	.160		

**Notes:**

<sup>a</sup> Significant at the .01 level

**Table 70**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Government Guaranteed Bank Loan**  
**Expansion Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Expansion Financed by Government			
Guaranteed Bank Loan (Binary)			
<i>Regressors:</i>			
Constant	-2.81	.037	79.95 <sup>a</sup>
Asian American-Owned Business	.240	.134	1.79 <sup>c</sup>
Women-Owned Business	-.120	.082	1.46
Disabled Veteran-Owned Business	.291	.173	1.68 <sup>c</sup>
Hispanic American-Owned Business	-3.09	.046	67.17 <sup>a</sup>
Black American-Owned Business	.359	.358	1.00
American Indian-Owned Business	-2.61	.188	13.88 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	7113.67 <sup>a</sup>		

*Notes:*

<sup>a</sup> Significant at the .01 level

<sup>b</sup> Significant at the .05 level

<sup>c</sup> Significant at the .05 level



### **8. Minority and Women-Owned Firm Status and Home Equity Loan Business Expansion Financing**

Tables 71 - 72 report parameter estimates of the effects of minority and women-owned firm status and home equity loan business expansion financing in the North Carolina private sector. For the specifications in Tables 71 - 72, the dependent binary variable is whether or not the business financed its expansion with a home equity loan. The statistically significant and negative sign on the aggregate minority and women-owned firm status indicator for the parameter estimates in Table 71 suggest that in general, relative to nonminority male-owned firms minority and women-owned firms are less likely to finance the expansion of their business with a home equity loan. The parameter estimates reported in Table 72 suggests that the reduced likelihood of minority and women-owned firms utilizing home equity loans as a source of financing the expansion of their businesses is driven by the relative lower likelihood of all minority and women-owned firms except those owned by Asian Americans and Black Americans.

**Table 71**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Home Equity Loan**  
**Expansion Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Expansion Financed by Home Equity Loan (Binary)			
<i>Regressors:</i>			
Constant	-1.82	.015	121.33 <sup>a</sup>
Minority and Women-Owned Business	-.142	.028	5.07 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	26.38 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

**Table 72**

**Heteroscedastic Probit Parameter Estimates:**

**Minority and Women-Owned Business Status and Home Equity Loan Expansion Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Expansion Financed by Home Equity			
Loan (Binary)			
<i>Regressors:</i>			
Constant	-1.83	.014	130.71 <sup>a</sup>
Asian American-Owned Business	.082	.062	1.32
Women-Owned Business	-.154	.030	5.13 <sup>a</sup>
Disabled Veteran-Owned Business	-.177	.107	1.65 <sup>c</sup>
Hispanic American-Owned Business	-.159	.093	1.71 <sup>c</sup>
Black American-Owned Business	.169	.173	.977
American Indian-Owned Business	-2.79	.138	20.22 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	525.25 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

<sup>b</sup> Significant at the .05 level

<sup>c</sup> Significant at the .10 level

### **9. Minority and Women-Owned Firm Status and Venture Capital Business Expansion Financing**

Last but not least, Tables 73 - 74 report parameter estimates of the effects of minority and women-owned firm status and venture capital business expansion financing in the North Carolina private sector. For the specifications in Tables 73 - 74, the dependent binary variable is whether or not the business financed its expansion with venture capital. The statistically significant and negative sign on the aggregate minority and women-owned firm status indicator for the parameter estimates in Table 73 suggest that in general, relative to nonminority male-owned firms, minority and women-owned firms are less likely to finance the expansion of their businesses with venture capital. The parameter estimates reported in Table 74 suggest that the reduced relative likelihood of minority and women-owned firms utilizing venture capital is driven by the outcomes of firms owned by Women and American Indians.

**Table 73**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Venture Capital**  
**Expansion Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Expansion Financed by Venture Capital (Binary)			
<i>Regressors:</i>			
Constant	-2.89	.041	70.49 <sup>a</sup>
Minority and Women Owned Business	-.281	.101	2.78 <sup>b</sup>
Number of Observations	42738		
$\chi^2_k$	7.73 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

<sup>b</sup> Significant at the .05 level

**Table 74**  
**Heteroscedastic Probit Parameter Estimates:**  
**Minority and Women-Owned Business Status and Venture Capital**  
**Expansion Financing In The North Carolina Private Sector**

	<b>Coefficient</b>	<b>Standard Error</b>	<b>t-Value</b>
<i>Regressand:</i> Expansion Financed by Venture Capital			
(Binary)			
<i>Regressors:</i>			
Constant	-2.89	.041	70.24 <sup>a</sup>
Asian American-Owned Business	.077	.188	.409
Women-Owned Business	-.487	.144	3.38 <sup>a</sup>
Disabled Veteran-Owned Business	-.093	.311	.299
Hispanic American-Owned Business	-.128	.305	.419
Black American-Owned Business	.490	.359	1.36
American Indian-Owned Business	-2.92	.202	14.45 <sup>a</sup>
Number of Observations	42738		
$\chi^2_k$	807.04 <sup>a</sup>		

**Notes:**

<sup>a</sup> Significant at the .01 level

#### **D. Implications For The Existence of Discrimination Against Minority and Women-owned Firms In the North Carolina Private Sector**

GSPC's private sector analysis of minority and women-owned businesses in the State of North Carolina is motivated by the idea that if business firm access to private equity, loans and venture capital is conditioned on minority and women ownership status, this would be suggestive of and consistent with discrimination against minority and women-owned businesses in the private sector. Discrimination against minority and women-owned businesses in private sector markets for business financing would result in those businesses having a reduced likelihood, relative to nonminority male-owned businesses, of receiving start-up and expansion financing from private sector sources. GSPC's analysis finds that relative to nonminority male-owned businesses, minority and women-owned businesses in the State of North Carolina are less likely to have utilized bank loans, home equity and venture capital to finance business start-up and expansion.

The parameter estimates reported in Tables 57 - 74 reveal that the probability and likelihood of minority and women-owned businesses utilizing start-up and expansion finance capital from the private sector in North Carolina is smaller relative to that of nonminority male-owned firms, as being a minority and woman-owned firm in general reduced the likelihood relative to nonminority male-owned firms of receiving financing in 7 of the 9 types of start-up or expansion financing considered. Such relative probabilities and likelihoods are consistent with discriminatory behavior by private lenders against minority and women-owned businesses in the North Carolina private sector, which constrains their ability to enter the market, and once in the market, to expand their capabilities. Even when minority and women status is disaggregated into relevant race/gender/ethnicity/disability status (e.g Asian American, Women, Disabled Veteran, Hispanic American, Black American, American Indian) for each type of financing considered, the results reported in Tables 57 - 74 still show that in general, at least one form of minority and women-owned status reduces the relative likelihood of a capital market outcome important for starting-up and expanding a business.

These findings, while consistent with private sector discrimination against minority and women-owned firms in North Carolina, are not necessarily proof of actual private sector

discrimination. While our analysis considers minority and women-group based disparities in accessing and using certain types of business financing, a shortcoming of using disparity in group outcomes to infer discrimination is that statistical/econometric specifications based on disparate group outcomes could omit variables that are unobserved, but important to the group outcomes under consideration.<sup>22</sup> For example, our analysis does not control for a business firm's and/or its principle owner's credit history, which is not included in the SPUMS. As such, our parameter estimate could be biased if relative to nonminority male-owned firms, minority and women-owned firms have inferior credit histories, resulting in them being less likely to secure financing from the private sector because they are riskier, and not because they are minority and women-owned. However, we are confident that our parameter estimates identify the conditional effect of minority and women status on receiving financing as they are based on an estimator that controls for the heteroscedasticity associated with omitted variables that may also condition the outcome under consideration. Indeed, our heteroscedastic probit estimator controls for unobserved heterogeneity in the form of omitted variables and selection into the SPUMS sample associated with business firm size as measured by sales revenue. The sign and significance on the minority and women-owned firm indicators in our parameter estimates correspond to what they would if business financing suppliers discriminated against minority and women-owned businesses, suggest that our parameter estimates identify the effects of private sector discrimination against minority and women-owned firms in the private sector of North Carolina.

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<sup>22</sup> See: Pager, Devah, and Hana Shepard. "The sociology of discrimination: Racial discrimination in employment, housing, credit, and consumer markets." *Annual review of sociology* 34 (2008): 181 - 209.



## **E. Analysis of Public Contracting Disparities In The City of Durham Relevant Market Area**

### **1. Introduction**

In this section, GSPC considers the relative self-employment, public contracting and subcontracting outcomes of business firms owned by nonwhites in the relevant market area for the City of Durham. Our analysis utilizes data from business firms that are either willing, able, or have actually contracted/subcontracted with the City of Durham, with the aim of determining if the statistical likelihood of successful self-employment, and contracting/subcontracting with the City of Durham, is conditioned in a statistically significant manner on the race, ethnicity, gender and disability status of business owners. Such an analysis is a useful and important complement to estimating disparity indexes, which assume all things important for success and failure are equal among business firms/owners competing for public contracts, and are based on unconditional moments—statistics that do not necessarily inform causality or the source of differences across such statistics. As disparity indexes do not condition on possible confounders of self-employment, and success and failure in public sector contracting/subcontracting by business firms, they are only suggestive of disparate treatment, and their implied likelihood of success/failure could be biased.

Our analysis posits that there are indeed confounders of success and failure in self-employment and public sector contracting/subcontracting that are sources of heterogeneity among business firms that lead to heterogeneity in success and failure. Failure to condition on sources of heterogeneity in success/failure in self-employment and public sector contracting/subcontracting can leave simple disparity indexes devoid of substantive policy implications as they could possibly reflect, in part or in whole, disparate outcomes driven by disparate business firm characteristics that matter fundamentally for success/failure in business start-ups and public sector contracting/subcontracting by nonwhite firms. Controlling for confounders that are presumably independent of the race, ethnicity, gender, and disability status of business firm owners, and important for differences in the success/failure rate of business firms competing for public sector contracts/subcontracts, if race, ethnicity, gender, or disability status

conditions a lower likelihood of success/failure, this would be suggestive of such status causing observed disparities.

## 2. Data

Our analysis is based on survey data compiled by GSPC, and constitutes a two-stage cluster sample of firms from the bidder and vendor lists provided by the City of Durham. Clusters were constructed on the basis of assigned categories for a business enterprise's primary line of business. The GSPC survey categorized three primary lines of business: Construction, Architecture & Engineering, and Other Services. Given a cost-based constraint of a total sample of approximately 500, a random sample from each cluster was selected, and the cluster share of total observations was used to approximate probability weights for the individual observations of businesses in the cluster.

The GSPC survey was a 101 item questionnaire, that captured data on firm and individual owner characteristics that approximates the content of the SBOPUMS on which we based our private sector analysis in an earlier part of this report. The interest in this section is in the extent to which a business firm owner's race, ethnicity, gender and disability status conditions success/failure in City of Durham public contracting opportunities. As such, our use of the data in the GSPC survey is limited to the measured covariates that in our view are best suited for evaluating the extent to which a business firm owner's race, ethnicity and disability status are a possible cause of public contracting disparities.

Table 75 reports a summary on the description, mean and standard deviation of the covariates from the GSPC survey that are relevant to the analysis of this section. The first three listed covariates measure the public contracting activities and outcomes of the business firms in the relevant market area for the City of Durham since July 2007. Their unconditional variation—given by the standard deviation—in the sample presumably reflects unconditional variation in each business firm's propensity to seek public contracting opportunities and success securing such opportunities. However, the other covariates also have unconditional variation and they measure business firm and owner characteristics that could be important for the variation in seeking and being successful in obtaining public contracting opportunities in the City of Durham.

Table 75: Covariate Summary

Number of Sub Prime Contractor Bids since July 2007	<i>Categorical Variable:</i>	2.08	1.52	503
	1 = Zero bids			
	2 = 1 - 10 bids			
	3 = 11 - 25 bids			
	4 = 26 - 50 bids			
	5 = 51 - 100 bids			
	6 = More than 100 bids			
Performed Work as a prince Contractor since July 2007	<i>Binary Variable:</i>	.339	.474	503
	1 = Yes			
Performed Work as a Subcontractor since July 2007	<i>Binary Variable:</i>	.139	.346	503
	1 = Yes			
Number of Employees	<i>Numeric:</i>	54.66	425.61	502
	No of fulltime and part time employees			
Number of Years in Business	<i>Numeric:</i>	24.98	23.44	503
	No of yrs Business Operating			
Business owner has a Baccalaureate Degree		.475	.499	503
Minority-Owned Business Enterprise (MBE)	<i>Binary:</i>	.207	.405	503
	1 = Business has MBE certification after 2007			
Women-Owned Business Enterprise (WBE)	<i>Binary:</i>	.193	.395	503
	1 = Business has WBE Certification			
Disabled-Owned Business Enterprise (DBE)	<i>Binary:</i>	.085	.279	503
	1 = Business has DBE certification			
Firm Owner Is Female	<i>Binary:</i>	.211	.408	503
	1 = More than 50 percent			
Firm Owner Is Black	<i>Binary:</i>	.193	.395	503
	1 = More than 50 percent of firm is owned by a Black individual or individuals			
Firm Owner Is Hispanic	<i>Binary:</i>	.048	.213	503
	1 = More than 50 percent of firm is owned by a Hispanic individual or individuals			
Firm Owner Is Asian	<i>Binary:</i>	.018	.133	503
	1 = More than 50 percent Of Firm is Owned by Asian individual or individuals			
Firm Owner Is Other race (non-white)	<i>Binary:</i>	.028	.165	503
	1 = More than 50 percent of firm is owned by an Other race individual or individuals			
Newly self-employed Since 2007	<i>Binary:</i>	.135	.342	503
	1 = Firm entered market			

### 3. Statistical and Econometric Framework

Methodologically, the GSPC statistical and econometric analysis of public contracting disparities in the City of Durham conditioned on race, ethnicity, gender and disability status generalizes the binary regression (BRM) model framework utilized in the public sector analysis. The generalization in this section is that of the categorical regression model (CRM) framework.<sup>23</sup> As the covariates measuring public contracting activity and success in Table 1 are indeed categorical (e.g. public contracting bid ranges, yes, no), a CRM views the categories as latent variables with likelihood thresholds that are conditioned on other covariates. In the case where there are more than two categories and the succession of categories have a natural ranking, a CRM permits a determination as to how particular covariates condition the likelihood/probability of being in the highest valued category relative to the lower-valued categories. In the case of just two categorical but not naturally ordered categories, the CRM reduces to the BRM.<sup>24</sup>

For all the CRM parameter estimates below, we determine the statistical significance on the basis of the estimated coefficient's probability value—or P-value. The P-value is the probability of obtaining an estimate of the coefficient by chance alone, assuming that the null hypothesis of the variable having a zero effect is true. As a convention, GSPC rejects the null hypothesis of no effect, and concludes the estimated coefficient is statistically significant as long as P-value ≤ .10. We highlight the P-value in bold when it meets this criterion of statistical significance.

<sup>23</sup> See: Richard D. McKelvey and William Zavoina. 1975. "A Statistical Model for the Analysis of Ordinal Level Dependent Variables," *Journal of Mathematical Sociology*, 4: pp. 103 - 120.

<sup>24</sup> More formally, if the latent realization of an outcome is  $Y_i^*$ , ranging from  $-\infty$  to  $\infty$ , a structural and conditional specification for  $Y_i^*$  is  $Y_i^* = X_i \beta + \varepsilon_i$ , where  $X$  is a vector of exogenous covariates,  $\beta$  is a vector of coefficients measuring the effects of particular covariates on the realization of  $Y_i^*$ , and  $\varepsilon_i$  is a random error. For categorical and ordinal outcomes  $m = 1 \dots J$ ,  $Y_i = m$  if  $\tau_{m-1} \leq Y_i^* < \tau_m$ , where the  $\tau_i$  are thresholds for the particular realizations of  $Y_i^* = m$ . Conditional on  $X$  the likelihood/probability that  $Y_i$  takes on a particular realization is  $Pr(Y_i = m | X) = \Phi(\tau_m - X\beta) - \Phi(\tau_{m-1} - X\beta)$ , where  $\Phi$  is the cumulative density function of  $\varepsilon$ .

#### 4. The Relative Self-Employment Propensities of NonWhite Business Owners in the City of Durham

We first examine the effects of non-White status on an individual's participation in the private sector as a self-employed business operators in the City of Durham. To the extent that nonwhite business owners have self-employment disparities relative to White business owners, it would suggest that discrimination against minorities is sufficiently present to warrant consideration of public sector legal remedies such as affirmative action and minority set-aside contracting. Such a perspective on discrimination suggests that entry barriers faced by non-White firms in private markets can rationalize targeted contracting programs by political jurisdictions, as the counterfactual is that in the absence of such discrimination, they would be able to enter the market at business owners, and compete with other firms in bidding for public contracts.

To determine if nonwhite status is a barrier market entry in the City of Durham, we estimate the parameters of a Probit CRM with the a binary variable for a firm establishing itself since July 2007 as the dependent variable. As standard control covariates we include the number of employees the business employs, and whether or not the owner has a baccalaureate degree—to approximate entry barriers associated with firm size and an individual's business acumen/ability. To determine if nonwhite business owners propensity to be self-employed differs from white business owners, we exclude the binary covariate measuring being a white business in the Probit parameter estimates. We report Pseudo-  $R^2$  as a goodness-of-fit measure for our estimated Probit specifications.<sup>25</sup>

Table 76 reports Logit parameter estimates where the conditioning on the number of new business owners in the City of Durham since 2007 is on whether the non-White businesses have official certification as being a Minority Business Enterprise (MBE), Women Business Enterprise (WBE), or Disabled Business Enterprise (DBE). None of the estimated coefficients on the control covariates are no different from White-business owners—the excluded comparison group—with respect to entering the relevant market area as new self-employed business owners.

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<sup>25</sup> Pseudo-  $R^2$  is not to be interpreted as the  $R^2$  in standard Ordinary Least Squares (OLS) estimation, as OLS proceeds by minimizing variance to get parameter estimates. Probit specifications are likelihood-based, and higher values of Pseudo- $R^2$  indicate that the specified model is an increasingly better alternative to a null model with only an intercept.

**Table 76**

***Odds Ratio): Business Enterprise Ownership Status and Self-Employment Propensities***

**In City of Durham Relevant Market Area**

	Coefficient	Standard Error	P-value
<i>Regressand:</i> Newly Self-Employed Since July 1, 2007 (Binary)			
<i>Regressors:</i>			
Number of Employees	1.02	.0004	.3240
Owner has a Baccalaureate Degree	1.07	.051	.1219
Minority-Owned Business Enterprise	1.02	.063	.2422
Women-Owned Business Enterprise	.921	.092	.1579
Disabled-Owned Business Enterprise	.905	.034	.5381
Number of Observations	502		
<i>Pseudo-R<sup>2</sup></i>	.021		

*Notes:* Parameter estimates are weighted with the probability of an individual firm being in the sample and cluster.

**5. Are Non-White Business Owners Less Likely To Compete for Prime Contracts in the City of Durham?**

One reason disparities in public contracting awards between White-owned and non-White-owned businesses could exist is that relative to White-owned businesses, non-White-owned businesses are less likely to submit bids for public contracts. To determine if this is the case in the City of Durham, we estimate the parameters of a CRM with the number of prime subcontracting bids submitted since July 2007 as the dependent variable. As standard control covariates we include the number of employees the business employs, and the number of years

the business has been in operation. These standard controls measure sources of heterogeneity that could explain differential success in public contracting among business owners. As covariates of interest we use several measures of the business owner’s race, ethnicity, gender, disability, and certification status. To determine if non-White business owners are less likely to compete for prime contracting opportunities with the City of Durham relative to White business owners, we exclude a binary covariate measuring being a White business owner in all our GRM parameter estimates.

We parameterize our specification of the cumulative density function as normal—hence our CRM is commonly known as a Ordinal Probit specification. To enable a clear interpretation of our Ordinal Probit parameter estimates, we report them as odds ratios. The odds ratio represents the odds that an outcome—measured by the dependent variable—will occur given a particular covariate, compared to the odds of the outcome occurring in the absence of that covariate. The estimated odds ratio enables a determination of how a particular covariate affects the likelihood/probability of an outcome of interest measured by the dependent variable. In particular, the covariate decreases the likelihood/probability of the outcome of interest if the odds ratio is less than one, does not affect the likelihood/probability if the odds ratio is one, and increases the likelihood/probability if the odds ratio is greater than one. We also report Pseudo- $R^2$  as a goodness-of-fit measure for our estimated Ordinal Logit specifications.<sup>26</sup>

Table 77 reports Ordinal Logit parameter estimates where the conditioning on the number of project bid submissions to the City of Durham is on whether the non-White businesses have official certification as being a Minority Business Enterprise (MBE), Women Business Enterprise (WBE), or Disabled Business Enterprise (DBE). The estimated odds ratio is statistically significant only in the case of MBE. This suggests that in the relevant market area for the City of Durham, relative to White business owners, business owners

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<sup>26</sup> Pseudo- $R^2$  is not to be interpreted as the  $R^2$  in standard Ordinary Least Squares (OLS) estimation, as OLS proceeds by minimizing variance to get parameter estimates. GRM specification is likelihood-based, and higher values of Pseudo- $R^2$  indicate that the specified model is an increasingly better alternative to a null model with only an intercept.

with MBE and DBE certification are less likely than White business owners to compete for public contracting opportunities.

Table 77

**Ordinal Logit Parameter Estimates (Odds ratio):  
Business Enterprise Ownership Status and Prime Bid Submissions  
In City of Durham Relevant Market Area**

	Odds Ratio	Standard Error	P-Value
<i>Regressand:</i> Number of Submitted Prime Contractor Bids Since July 1, 2007 (Categorical/Ordinal) <i>Regressors:</i>			
Number of Employees	1.13	.0145	.3318
Number of Years in Business	1.05	.0267	.2503
Minority-Owned Business Enterprise	.9023	.0139	.0312
Women-Owned Business Enterprise	1.07	.0722	.1629
Disabled-Owned Business Enterprise	.9403	.0417	.2218
Number of Observations	502		
<i>Pseudo-R<sup>2</sup></i>	.012		

To the extent that all minority, women and disabled business owners are not certified as such, the estimated parameters in Table 77 could be biased estimates of the effects of having such status on competing for public contracting opportunities in the City of Durnam. To consider this, in Table 78 we condition the number of project bid submissions on disaggregated measures of non-White business owner status. The parameter estimates suggests that Minority-owned businesses are no different from White business owners in competing for public contracting opportunities as the estimated odds ratio is statistically significant in these instances.



Table 78

**Ordinal Logit Parameter Estimates (Odds ratio):**  
**Business Enterprise Status and Prime Bid Submissions**  
**In City of Durham Relevant Market Area**

	Coefficient	Standard Error	P-value
<i>Regressand:</i> Number of Submitted Prime Contractor Bids since July 1, 2007 <i>(Categorical/Ordinal) Regressors:</i>			
Number of Employees	1.15	.0213	.0329
Number of Years in Business	1.03	.1240	.0263
Business Owner has a Baccalaureate Degree	1.09	.2127	.0478
Business is Certified	1.11	.1955	.1612
Firm Owner is Female	1.02	.4239	.2056
Firm Owner is Disabled	.652	.3914	.5519
Firm Owner is Black	1.14	.1692	.0912
Firm Owner is Hispanic	.8021	.3295	.1795
Firm Owner is Asian	.9217	.1269	.1346
Firm Owner is Other Race (non-White)	.9677	.0516	.1847
Number of Observations	502		
<i>Pseudo- R<sup>2</sup></i>	.016		

*Notes:* Parameter estimates are weighted with the probability of an individual firm being in the sample and cluster.

The statistical insignificance of Minority-owned status on Prime bid submission suggests that any disparities in prime contract awards to Minority-owned firms cannot be attributed to their lower bid submission rates relative to white-owned businesses.

In Table 79, we report parameter estimates when conditioning on the status of non-White business owners with certification. As the excluded group now also includes, in addition to White business owners, non-White business owners without certification, the interpretation of the estimated coefficients is not the same as those estimated in Tables 77 - 78. The odds ratio is now the likelihood/probability of certified non-White business owners competing for public contracts relative to White business owners and non-certified non-White business owners. The estimated odds ratio suggests that certification does not necessarily matter for relative success in competing for public contracting opportunities, except for certified Black-owned businesses in which the odds ratio is significantly high relative to White-owned businesses.

Table 79

**Ordinal Logit Parameter Estimates (Odds ratio):  
Business Enterprise Ownership Status and Prime Bid Submissions  
In City of Durham Relevant Market Area**

	Coefficient	Standard Error	P-value
<i>Regressand:</i> Number of Submitted Prime Contractor Bids since July 1, 2007 <i>(Ordinal/Categorical) Regressors:</i>			
Number of Employees	1.12	.0013	.0893
Number of Years in Business	1.17	.0900	.0422
Business Owner has a Baccalaureate Degree	1.1	.0576	.0722
Firm Owner is Female and Certified	.8217	.0227	.1484
Firm Owner is Disabled and Certified	.9263	.0679	.1369
Firm Owner is Black and Certified	1.06	.0173	.0891
Firm Owner is Hispanic and Certified	1.33	1.56	.850
Firm Owner is Asian and Certified	.9721	.0944	.1629
Firm Owner is Other Race (non-White) and Certified	.8967	.0475	.1273
Number of Observations	502		
<i>Pseudo- R<sup>2</sup></i>	.031		

*Notes:* Parameter estimates are weighted with the probability of an individual firm being in the sample and cluster.

To the extent that disparities between White-owned and non-White-owned businesses in successfully securing public contracting opportunities can be explained by the possibility that nonwhite-owned businesses are less likely to submit bids for public contracts, our analysis provides no evidence for this as a general rule. Indeed, we find that for certified Black-owned businesses in the Durham relevant market area, relative to White-owned businesses, they are more likely to submit prime bids.

#### **6. Are Non-White Business Owners Less Likely To Secure Public Contracts From The City of Durham?**

Given that the GSPC data provides covariates measuring success in securing public contracting opportunities with the City of Durham since July 2007, we now seek to determine if there are success disparities conditioned on a business owner's nonwhite status. As the covariate measuring success in securing public contracting opportunities are binary with two categories—Yes and No—we specify the CRM as a simple Probit specification. We consider success in two types of public contracting opportunities, as a prime contractor and as a subcontractor. As the effect of changing covariate on the probability of success depends upon the value of the covariate in Probit parameter estimates, we report the Probit parameter estimates as marginal effects—which captures how changes in the covariate change the probability of success at the mean values of the covariates. We estimate the marginal effects parameters across the same exogenous variable specifications utilized in Tables 77 - 79. As was the case in the Ordinal Probit parameter estimates, the excluded comparison group is White business owners.

Table 80

**Probit Parameter Estimates (Marginal Effects):**

**Business Enterprise Ownership Status and Successful Prime Contracting**

**In City of Durham Relevant Market Area**

	Coefficient	Standard Error	P-value
<i>Regressand:</i> Performed work as a prime contractor for City of Durham since July 1, 2007 (Binary) <i>Regressors:</i>			
Constant	-1.71	.0113	.0000
Number of Employees	.012	.0001	.0000
Number of Years In Business	.012	.0001	.0000
Business Owner has a Baccalaureate degree	.067	.0150	.0000
Minority-Owned Business Enterprise	-.043	.0123	.0001
Women-Owned Business Enterprise	.042	.059	.1639
Disabled-Owned Business Enterprise	-.217	.193	.1482
Number of Observations	502		
<i>Pseudo-R</i> <sup>2</sup>	.026		

*Notes:* Parameter estimates are weighted with the probability of an individual firm being in the sample and cluster.

For success in securing prime contract awards relative to white business owners in the City of Durham, Tables 80 - 81 report Probit marginal effects parameter estimates across different aggregations of nonwhite business owner status and certification. A comparison of the estimates across tables 80 - 81 permit some generalization about the relative success of nonwhite business owners in securing prime contracting opportunities. Based upon the frequency of statistical significance and sign on the marginal effects, there appear to be success disparities for Black-owned businesses, as a negative and statistically significant estimated parameter holds across the specifications.



Table 81

*Probit Parameter Estimates (Marginal Effects):*

**Business Enterprise Ownership Status and Successful Prime Contracting**

**In City of Durham Relevant Market Area**

	Coefficient	Standard Error	P-value
<i>Regressand:</i> Performed work as a prime contractor for City of Durham since July 1, 2007 (Binary)			
<i>Regressors:</i>			
Constant	-1.82	.0235	.0000
Number of Employees	.010	.0001	.0000
Number of Years in Business	.003	.0009	.0000
Business Owner has a Baccalaureate Degree	.063	.031	.0731
Business is Certified	.023	.010	.0692
Firm Owner is Female	.092	.712	.4479
Firm Owner is Disabled	.066	.032	.0843
Firm Owner is Black	-.045	.024	.0896
Firm Owner is Hispanic	.112	.212	.5619
Firm Owner is Asian	.234	.283	.6748
Firm Owner is Other Race (non-White)	-.327	.156	.6139
Number of Observations	502		
<i>Pseudo-R<sup>2</sup></i>	.037		

Notes: Parameter estimates are weighted with the probability of an individual firm being in the sample and cluster.

Tables 82 - 85 report Probit marginal effects parameter estimates across different aggregations of non-White business owner status and certification for the relative success of non-White business owners securing subcontracting opportunities. A comparison of the estimates across tables 82 - 85 permit some generalizations about the relative success of non-White business owners in securing subcontracting opportunities. Based upon the frequency of statistical significance and sign on the marginal effects, there appear to be success disparities for businesses owned by Blacks, Females and the Disabled as a negative and statistically significant estimated parameter dominates across the specifications.

Table 82

**Probit Parameter Estimates (Marginal Effects):  
Business Enterprise Ownership Status and Successful Prime Contracting  
In City of Durham Relevant Market Area**

	Coefficient	Standard Error	P-value
<i>Regressand:</i> Performed work as a prime contractor for City of Durham since July 1, 2007 (Binary) <i>Regressors:</i>			
Constant	-2.03	.0622	.0000
Number of Employees	.027	.0105	.0000
Number of Years in Business	.058	.0058	.0000
Business Owner has a Baccalaureate Degree	.045	.033	.4615
Firm Owner is Female and Certified	.066	.059	.5138
Firm Owner is Disabled and Certified	.173	.158	.5381
Firm Owner is Black and Certified	-.083	.037	.0477
Firm Owner is Hispanic & Certified	-.047	.028	.0521
Firm Owner is Asian and Certified	-.078	.072	.3892
Firm Owner is Other Race (non-White) and Certified	.092	.079	.5219
Number of Observations	502		
<i>Pseudo-R<sup>2</sup></i>	.046		

*Notes:* Parameter estimates are weighted with the probability of an individual firm being in the sample and cluster.

In general, our Probit parameter estimates on the the effects of being a nonwhite business owner on the probability of successfully securing prime contracts or subcontracts from the City of Durham suggest that any observed disparities are in many instances conditioned on the race, ethnicity, gender and disability status of business owners in market area relevant for contracting and subcontracting opportunities in the City of Durham.

Table 83

**Probit Parameter Estimates (Marginal Effects):**

**Business Enterprise Ownership Status and Successful Subcontracting**

**In City of Durham Relevant Market Area**

	Coefficient	Standard Error	P-value
<i>Regressand:</i> Performed work as a subcontractor for City of Durham since July 1, 2007 (Binary) <i>Regressors:</i>			
Constant	-1.74	.213	.0000
Number of Employees	.0055	.0010	.0000
Number of Years in Business	.0521	.0016	.0000
Business Owner has a Baccalaureate Degree	.0285	.0230	.5381
Minority-Owned Business Enterprise	-.0264	.0112	.0683
Women-Owned Business Enterprise	-.0280	.0105	.0726
Disabled-Owned Business Enterprise	-.0375	.035	.4872
Number of Observations	502		
<i>Pseudo-R</i> <sup>2</sup>	.032		

Notes: Parameter estimates are weighted with the probability of an individual firm being in the sample and cluster.



Table 84

**Probit Parameter Estimates (Marginal Effects):  
Business Enterprise Ownership Status and Successful Subcontracting  
In City of Durham Relevant Market Area**

	Coefficient	Standard Error	P-value
<i>Regressand:</i> Performed work as a subcontractor for City of Durham since July 1, 2007 (Binary) <i>Regressors:</i>			
Constant	-1.35	.1011	.0000
Number of Employees	.0078	.0008	.0000
Number of Years in Business	.0030	.0066	.6089
Business Owner has a Baccalaureate Degree	.055	.052	.8391
Business is Certified	.085	.110	.8755
Firm Owner is Female	-.083	.013	.0000
Firm Owner is Disabled	.028	.036	.5732
Firm Owner is Black	-.090	.012	.0000
Firm Owner is Hispanic	-.011	.069	.5730
Firm Owner is Asian	-.033	.012	.0453
Firm Owner is Other Race (non-White)	-.216	.189	.4728
Number of Observations	502		
<i>Pseudo-R</i> <sup>2</sup>	.026		

*Notes:* Parameter estimates are weighted with the probability of an individual firm being in the sample and cluster.

Table 85

**Probit Parameter Estimates (Marginal Effects):**

**Business Enterprise Ownership Status and Successful Subcontracting**

**In City of Durham Relevant Market Area**

	Coefficient	Standard Error	P-value
<i>Regressand:</i> Performed work as a subcontractor for City of Durham since July 1, 2007 (Binary) <i>Regressors:</i>			
Constant	-1.36	.1251	.0000
Number of Employees	.0030	.0005	.0000
Number of Years in Business	.0070	.0011	.0000
Business Owner has a Baccalaureate Degree	.0076	.0922	.6821
Firm Owner is Female and Certified	-.0600	.0435	.3801
Firm Owner is Disabled and Certified	-.0155	.0194	.5277
Firm Owner is Black and Certified	-.2005	.1000	.0571
Firm Owner is Hispanic and Certified	.0500	.0624	.4622
Firm Owner is Asian and Certified	-.0070	.0096	.4217
Number of Observations	502		
<i>Pseudo-R<sup>2</sup></i>	.028		

*Notes:* Parameter estimates are weighted with the probability of an individual firm being in the sample and cluster.

## **F. Conclusion**

GSPC's analysis of disparities in public contracting and subcontracting in the City of Durham relevant market area aimed to provide some policy-relevant insight to observed unconditional disparity indexes. Our analysis explicitly links a business owner's race, ethnicity, gender and disability status to outcomes that can inform the magnitude of observed disparity indexes. Our focus on non-White business owners success relative to White business owners in entering the market as new business owners, competing for public contracting opportunities and actually securing them, provides a framework to rationalize observed disparity indexes. Indeed we find that in general, a business owner's race, ethnicity, gender and disability status has a statistically significant and adverse effect on becoming newly self-employed as a business owner, securing public contracting and subcontracting opportunities relative to White business owners.

We also find that being a non-White business owner does not necessarily reduce the likelihood/probability of pursuing public contracting or subcontracting opportunities relative to White business owners in the City of Durham relevant market area. As our results show that the race, ethnicity, gender and disability status of business owners do not cohere in a way to completely rationalize any observed unconditional public contracting/subcontracting disparities in the City of Durham relevant market area, it suggests that such disparities are conditioned on the race, ethnicity, gender and disability status of firm owners, consistent with such characteristics being a basis for discrimination, and warranting the continuation of public contracting/subcontracting programs that target Minority-owned businesses.

## VI. ANECDOTAL EVIDENCE

### A. Introduction

The collection and analysis of anecdotal evidence is an aspect of the comprehensive approach Griffin & Strong, P.C. utilizes in conducting disparity studies in compliance with the U.S. Supreme Court's decision in City of Richmond v. J.A. Croson Company<sup>27</sup>. In Croson, the Court held that, while they cannot stand alone, anecdotal accounts of discrimination may help to establish a compelling interest for a local government to pursue race- and gender-conscious remedies. Moreover, such evidence can provide a local governmental or quasi-governmental entity with a firm basis for fashioning a program that is narrowly tailored to remedy identified forms of marketplace discrimination and other barriers to disadvantaged, minority and women-owned business participation in contract opportunities.

GSPC's methodology for collecting and analyzing qualitative data incorporates multiple methods of information-gathering through a combination of telephone surveys, focus groups, public hearings, and phone interviews, as well as e-mail comments. The evidence gathered through these methods of observation and interaction is used in conjunction with the statistical and econometric research to provide clarity as to the particular causes of any discrimination or disparities found. GSPC's engagement with business owners in the Durham area was both public and individual, and included:

1. Telephone Survey of Business Owners
2. Anecdotal Interviews
3. Public Hearings
4. Focus Groups
5. Comment

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<sup>27</sup> City of Richmond v. J.A. Croson Company, 488 U.S. 469, 709 S.Ct. 706 (1989).

GSPC's anecdotal analysis is intended to “reach behind” the numbers, to enable the firm to draw inferences from the statistical data as to the prevalence and type of obstacles faced by minority, women-owned, and small businesses in the City of Durham and Durham County's procurements. The focus of the engagement with businesses in the relevant market area was to identify respondents' experiences in conducting business with either the City or the County. GSPC solicited participation and responses from community members and businesses that have done, or attempted to do, business with the City and County. The personal interview guide used in interviewing businesses included questions designed to establish a business profile for each business. Interviewers gathered information concerning the primary line of business, gender and ethnicity of owner, organizational status, number of employees, year business established, gross revenues, and level of education. The telephone survey (tables in text below and in Appendix A) provides a broad examination of central issues for business owners in contracting and draws from a larger sample of firms to relate their experiences.

The public hearings drew business owners to speak on the record about their experiences, each taking the floor for a certain amount of time, to address GSPC and the wider public, as well as the officials and administrators from the City and County of Durham. Focus groups are intended to allow firm owners to discuss their experiences, and to interact with one another in a less exposed environment. However, as we discuss below, the focus group in Durham turned out to yield something else entirely, but it is still significant evidence. The combination of these five (5) methods of collecting the stories of business owners in the Durham area as well as the survey data available for review, create a well-rounded picture of the perception and experiences of business owners in the City and County of Durham.

## **B. Telephone Survey of Business Owners**

On behalf of GSPC, Oppenheim Research<sup>28</sup> conducted a telephone survey of business owners from the Durham business community. GSPC provided the questions for the survey,

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<sup>28</sup> Oppenheim Research is a woman-owned firm that specializes in telephone surveys and has extensive experience in conducting them as part of a disparity study.



and a random list of firms. The list was taken from Durham City and County's manual and electronic bidder files and stratified by the major work categories.

Each category list was randomly numbered so that Oppenheim could start with the first number and continue until it achieved the sample size for that category. Oppenheim Research surveyed a total of 504 firms.

The telephone survey consisted of 86 substantive questions which asked for various financial and demographic data. A sample of the telephone survey is attached as Appendix A.

### **C. Town Hall Meeting**

A Town Hall Meeting for the City and County of Durham North Carolina Disparity Study was conducted on May 20, 2014, at 6 o'clock PM at the City Council Chambers. An e-mail blast was sent to 2,654 firms in the area inviting their participation and the meeting was advertised on Griffin & Strong, P.C.'s various social media platforms. In attendance were Griffin & Strong, P.C. team members as well as several representatives from the City and County, including City of Durham EO/EA officer, the County's purchasing manager and assistant purchasing manager/MWBE officer. Fifteen (15) of the firms present spoke on the record.

Of the twenty (20) to thirty (30) business owners and community members present, fourteen came forward to speak at the microphone and address the attendees. Several issues that reoccurred in the speeches of business owners and community group leaders will be examined below.

## **City and County Program Expansion and Oversight**

The City of Durham's efforts to reach out to small, minority, women-owned, and disadvantaged businesses were lauded several times, though several suggestions were made concerning how the impact of such efforts might be increased. One business owner and representative of the Council of American Minority Professionals stated that the City of Durham's program should be allowed to continue for the good of small and minority businesses. This participant also noted that he has experienced having his firm's name used multiple times and they were "given nothing" in terms of work, or only a small piece of what they were promised. The remedy to this, he argued, is to give the staff at the City and County "more power....sometimes their hands are tied too" (THP 1).

According to the owner of an environmental consulting firm, though the EO/EA office at the City "does a good job," they still need to "come in and slow the process down" at the point that general contractors fill out the form stating that they have searched for minority firms but could not find anyone. According to this business owner, the questions asked at that point should be "Who did you contact? How come this other person found somebody and you didn't?" and that further compliance monitoring would be necessary.

### **1. Exclusion of Certain Minority Groups**

THP 2 referenced the City of Raleigh's exclusion of Asian Americans from its race-conscious program, stating that they "pulled (the decision) out of a hat" and were forced to reverse it (THP 2). He does not want to see the same happen in Durham. Another participant, a representative from the North Carolina Indian Economic Development Initiative, praised the City's efforts, but did corroborate this concern. American Indian-owned firms were also excluded from the diversity program in Raleigh and they "fought that effort...we were concerned that several municipalities were going to adopt that study" (THP 3). He stated that, to ensure inclusiveness, the study currently being conducted should incorporate data from American Indian-owned firms and organizations to "make sure that your numbers ring true" (THP 3).

## 2. Goal-Setting

Amongst the recommendations the first speaker made, he highlighted that the City and County should continue the minority-owned business program, but require “at least 10% MBE participation in all professional services,” citing cities such as Baltimore and Washington, D.C. as examples of cities with 30-35% goals. One staffing and construction firm owner stated that the City and County’s programs are “extremely strong” and that he has personally benefitted from their MWBE programs. However, he noted that while public money is open and transparent, private dollars with city funds for infrastructure are often bid “behind closed doors” and minorities are inadequately represented. It is on these “public-private” ventures that he has experienced exclusion. He went on to note that small business programs, while useful in conjunction with a strong race and gender conscious program, threaten to usurp MWBE opportunities when they stand alone. He asserted that the goals for MWBEs should remain the same even when there are set-asides for SBEs.

A participant from a large firm that does regular work in Durham, who describes himself as being “passionate” about small, local, and minority businesses, asserted that the City should have a requirement that any project receiving “even a dollar” of City money should follow the City’s guidelines. “We try to be transparent” he said, but the requirement should be there nonetheless. He added that there should be a local goal on all contracts. He suggested that the City and County measure firms’ minority participation based on their annual revenue, not percentage goals. “Then companies would have to give a true answer” (THP 5).



### 3. Business Development Program Recommendations

A representative from the Black Chamber of Commerce made a point to note that the City and County's EO/EA and MWBE officers respectively "do a good job" but that "they are two or three people pulling in the right direction against others that might not be" (THP 12). He identified the biggest issue as "capacity building" in minority communities through business development. He suggested expanding programs into retail, food, etc. and not focusing so heavily on construction and energy. The City and the County, he argued, should work heavily in disadvantaged communities to grow disadvantaged and small businesses. Similarly, a representative of North Carolina Institute of Minority Economic Development came forward to address the issue of prime contractors' tendency to only subcontract out certain divisions of work. In his estimation, "scope of work" is a key factor in capacity growth for small firms.

A minority owner of a multi-million dollar contracting firm stressed the need for continuity and sustainability in business development for small firms. He suggested that the City and County become involved in partnering (and monitoring the partnerships between) large and small firms, allowing them to learn the ins and outs of business by being mentored. "If you work for me, you get first right of refusal" he says of the small businesses he mentors, "you need to have someone that will do that for you" (THP 8). Similarly, a business owner and chair for the Small and Historically Underutilized Businesses of the State of North Carolina added that, while the City and County have an "accurate" process for allowing minorities to participate, "people still do business with people they know," suggesting greater collaboration on City and County contracts. A representative from the North Carolina MWBE Coordinators Network stated that if this study determines that there are disparities in prime contracting, maybe there will be opportunities to create a program to help firms partner on "hard bids" and to "break packages down to small non-bonding packages" to ensure participation by small and minority businesses (TPH 10).

Suggesting a different type of partnership, a college student with an affiliation to the Greater Durham Black Chamber of Commerce made the suggestion of a student/business mentor-protégé program. By partnering students to small businesses, he argued, it gives them the

opportunity to learn and share information and provides the businesses with greater capacity. “People in the community can say the City is looking out for me because they are looking to the next generation” (THP 13).

#### 4. Administrative and Technical Barriers

One woman business owner who runs a “one person micro-business” feels excluded by the registration and paperwork process. “My primary focus must be the production of a technically sound proposal,” she stated, and she finds the process to be both “time and cost prohibitive” (PH 2). Citing an experience where one form was incorrectly completed and her entire proposal was eliminated without being looked at, she asserts that there must be greater advertisement of the fact that City personnel are available to assist businesses in navigating the system. This concern echoes those expressed in GSPC’s “focus group” case-study held the previous day.

An employee from a minority owned firm brought up the fact that the process for sending quotes for small jobs under \$10,000 with the City is not advertised and that doing so would encourage small and minority- or women-owned businesses to compete on low dollar contracts.

Finally, a member of the City and County’s inspection department, speaking as a concerned community member, suggested that business owners take code courses, available online, as though they are studying to be inspectors. This would aid them in understanding code enforcement and prevent them from receiving citations or other disciplinary action.

#### D. Focus Group/Case Study

GSPC also held a focus group in the City of Durham's offices at 6pm on May 19, 2014, at the City's offices on East Pettigrew Street, Durham, NC. Though Griffin & Strong's team sent an e-mail to 100 randomly selected firms, called and left voicemail messages for 80 of those firms, received 5 verbal RSVP's from firms planning on attending, and sent a reminder email to those firms, the actual attendance consisted of one firm, represented by two owners, a married couple. It was determined in an analysis of this meeting that the material presented here constitutes a useful case study of a firm in the Durham area whose experiences might, in light of the assertions at the town hall meeting and the anecdotal interviews examined below, be considered not uncommon.

The participants sat down with GSPC's CEO, Rodney K. Strong, and the Deputy Project Manager, Imani Strong, to discuss their experiences doing business with and in the City and County of Durham. Theirs has proved to be an interesting case study for the manner in which race- and gender-conscious programs are perceived and utilized.

The participants were a married nonminority couple in business together, having previously done eighteen (18) years of private work on pipelines. They are now bidding for government work under the name of a new firm that is only two years old. During the economic downturn, the firm's previous primary owner switched the firm to his wife's name, making her a 51% shareholder, and became certified as a WBE with the State of North Carolina's HUB office.

The firm handles aspects of pipeline excavation, cleaning, monitoring, and maintenance. They started with no external capital and used their own equipment and savings, but no bank loans and no financing through the Federal Small Business Administration. They did recount difficulties obtaining bonding, but were unaware of the SBA's bonding program. Though the City of Raleigh "and other municipalities" accept their HUB certification as a Woman-Owned firm, the City of Durham has special forms and, though "they (the City EO/EA office) were very helpful, we didn't know that we needed it." (FG 1). Paperwork is one of the couple's major concerns with both the City and the County. The County reportedly "requires a lot of documentation...six copies of everything, notarized and with a CD," which they note can be an expensive undertaking. Though

both participants have experience putting together bid packages from their previous business, they acknowledge that a “newcomer” to business would find it difficult to navigate the process.

In terms of the actual bid process, their experience with the County has not been favorable, overall. One project was won by another firm but there was no information about which firm received it, and another that they bid on has had the award date pushed back then put on hold. Their assumption is that the County “didn’t like the numbers they got” (FG 2). They state that their firm was within \$2,000 of the low bid, but it still has not been awarded.

“They told us in the meeting that pricing was not the number one component. They said it played a part and supposedly being DBE played huge part, but I know that these contracts in the last 5 years have never been given to DBE or MWBE” (FG 2).

Part of their dissatisfaction with the process is that they were never contacted for interview or presentation, even though their bid was very close to the winning bid. Both participants argued that it is “hard to get perspective” on new companies that an entity has “never dealt with” by simply looking at a document and they would have liked the opportunity to sit down and talk to the officials making the final determination. Their suggestion was to do a shortlist and have the low bidders come to the County and present especially since “the other low bid had it the last five years and is not a minority firm” (FG 1).

This firm has primarily bid as a subcontractor and has won a couple of contracts over the last two years in other municipalities. The City of Durham has only put one contract out for bid for which their firm was eligible and it was at that pre-bid conference that they discovered that the City had a different certification process, separate from NC HUB. The couple also claimed that the City put a “last minute” performance bond on the project (meaning that they did not see that noted in any of the advertised bid documents and were presented with it at the conference). A national company won that bid.

“National companies take this stuff as a filler and then don’t complete on time. Then City puts in all kinds of regulations and the little guy gets stepped on because we can’t meet the new regulations. They will take the low bid no matter what” (FG 2).

Because the participants asserted that the City (and other municipalities in North Carolina) do not have the safeguards in place to prevent underbidding, GSPC’s team asked them to elaborate further. They referred to a job in Raleigh that was underbid and went into \$1,300

dollars/day in liquidated damages, but the City of Raleigh refused to “cut them off”. According to FG2, the best way to prevent underbidding is to “interview these contractors” and have “strong LD clauses” that will be enforced. “If everybody else is 4 million dollars higher, why take the low bid?” (FG 2).

Another point of concern for these business owners is the seeming lack of local preference. “We don’t look at North Carolina companies before we look at somebody else” (FG 1). In their view, there should be a strong local preference that trumps pricing where the bids are within a certain threshold of one another. In addition, the participants suggested a post-bid debriefing process whereby bidders can have their questions answered about the decision. In reference to their unsuccessful bidding attempts with the County, FG1 says that she thought:

“This is a way to get our foot in the door, I thought I would get it. We had a low bid, we’re WBE....and we’re a small firm.... a lot of individual attention. I didn’t hear anything, then found out they didn’t make a decision and thinking about putting it back out to bid” (FG 1).

Though they rearranged their firm to give themselves an edge in the market with WBE set-asides, they have learned that many prime contractors will call “asking us to do all kinds of work that we don’t do” (FG 1). “All they have to do is check off, ‘Yes I asked a minority to bid’” (FG 2). Though they have determined that the requirements are not strict enough to force primes to tailor their contact attempts, the bigger issue seems to be that there are jobs “in water and sewer that have federal money” that do not have DBE set-asides. The participants believe this to be a lack of enforcement of Federal regulations in local, federally-funded projects.

Though there are no accounts or accusations herein of overt discrimination, the experiences of this firm with large firms that do not respect the WBE or DBE goals, their perception of good-old-boy networking on one of their prior bids, and their accounts of difficulty navigating the process with everything from forms to bonding brings to light some issues that appear to be universal:

- A primary concern of firms seems to be transparency in the bid process.
- Hard-and-fast restrictions on what constitutes “good faith efforts” is necessary for prime contractors.

- Regardless of MWBE or SDBE status, new firms must be assisted in the process and guided to resources that will help them become competitive in the market. They often look to the governments with which they are seeking work to provide this assistance.

### **E. Anecdotal Interviews**

The personal interviews were conducted during the months of June, July, and August 2014. The one-on-one interviews were conducted with a random sample derived from databases provided to GSPC by Durham City and County officials. Kenneth Weeden & Associates mailed, emailed, telephoned or faxed confirmation letters to all firms that agreed to be interviewed. The interviews were conducted either at the firm owner's office, at a location designated by the firm owner, or over the phone if requested by the firm owner. Interviews ranged in length from 15 to 90 minutes.

#### **1. Personal Interview Demographics**

Of the 60 firm representatives interviewed for this study, the ethnic and gender breakdown is as follows:

- 47 Black American-owned firms
  - 11 women-owned
  - 36 male-owned
- 2 American Indian-owned firms
  - 1 women-owned
  - 1 male-owned
- 3 Hispanic American-owned firms
  - 1 women-owned
  - 2 male-owned

- 2 Asian American-owned firms, both of which were male-owned
- 6 Nonminority-owned firms, all of which were women-owned

The lack of participation by nonminority male-owned firms is due to, in equal parts, incorrect information in City and County databases and a refusal, related verbally to the interview coordinator, to participate. 429 firms owned by nonminority males were on the sample list of firms and attempts were made to solicit participation from the entire list.

## **2. Misrepresented Certification**

Six (6) firms out of the sixty (60) interviewed alleged that some nonminority male business owners designate their wife as the majority owner “without [the wife] actually being involved in the business” (AAI-19). By making this false statement, many of those interviewed believe that these firms are benefitting from goals meant for bona fide minority and women-owned businesses. In the case of some prime contractors that claim to be women-owned businesses, they are able to bypass the need to subcontract any work to MWBEs because they can fulfill the goals with their own certification. AAI-2 claims that the “dilution of diversity goals” or the combination of MBE and WBE goals allows for this practice, and considers it to be a major issue undermining the City and County’s programs.

“Yes, suddenly there are so many white women showing up as business owners—particularly in my other business. They’re all fake” (EOEA-13).

“A lot of them [nonminority owners] are putting their businesses in their wives’ names so they can get that ‘minority credit’. They will often ignore the percentage of minorities that they are supposed to use on a job, and just use their own people. (MWI-2)

### **3. Discrimination**

It is believed by some of the firms interviewed that prime contractors will not work with minority or women-owned firms unless they are forced to do so. Even when the goal is met, several MWBE firms recounted meeting with resistance. Five (5) of the firms interviewed stated explicitly that they fear retaliation for raising complaints against either prime contractors in their dealings on City or County projects, or City and County officials themselves. Interviewees cite stereotype, outright racism and sexism, and “human nature”— the desire to create relationships with people one knows—as reasons for this exclusion. There is a desire for stronger MWBE goals, but also a desire for closer monitoring of projects with goals attached in order to protect MWBEs post-award.

EOEA-18, a Black American business owner, says that general contractors would not use minority contractors if there were no MWBE goals. “I’ve actually heard prime contractors say, ‘Do we have to do that? Are you making us do that?’ A lot of times there aren’t the right questions asked. When they’re forced to use a minority contractor against their will, for whatever reason – upbringing, personal belief – a lot of time because of that past experience they will set you up to fail. They will give me 85 percent of the information and hold me accountable for 100 percent of it” (EOEA-18).

EOEA-15, an American Indian business owner, states that “Some general contractors would rather use their favorite people and won’t reach out and ask me to bid. Some will ask, but they won’t give me enough time to bid! They will say that I was unable to do the job, instead of stating the fact that I wasn’t given enough time to quote the job properly.” MWI-8, a minority supplier, states that he has often found that sales reps quote different prices to businesses, which could adversely affect his bidding price.



When asked about the biggest obstacles faced by minority- or Women- owned businesses. EOEA-15 responded that one obstacle is “reputation, one bad experience and everyone is lumped into the same category” and another is “the misconception about our quality of work in construction.” MWI-20 agrees that stereotypes are a prevailing problem. As a Woman-owned business, MWI-20 has faced the obstacles of “lack of trust” that she can get the job done, stating that MWBE’s are often regarded as “incapable” of working independently.

MWI-10, a Hispanic American firm owner, states that, “I’ve been doing this a long time and we’ve run into some pretty bad obstacles”. He goes on to say that because nonminority companies don’t really want to work with him, they just want to check off the box saying they contacted a minority business owner, a statement which MWI-14 corroborates in his interview:

“At the point of engagement they’re just trying to satisfy their minority numbers, and at the end of the day they can drive you out. These prime contractors, they’re making a ton of money off state and local government and all they have to do is potentially get 10 percent into the hands of folk that don’t look like them, but they do it fighting and screaming and doing all they can to really destroy us as a business entity” (MWI-14).

Another issue for minority-owned businesses is being pigeon-holed into the position of subcontractor. EOEA-1 states that his overhead is probably 20 percent less than the larger firms. “We come in and deliver the same thing they do and can be competitive, even at a lower cost.” His experience – as well as others who get called in to do work for municipalities – is only to do a job underneath the larger companies. “I think the way to remedy that and to really help firms grow ... is to give them an opportunity to compete with the big guys” (EOEA-1).

#### **4. Good Old Boy Network**

Apparently, according to those interviewed for this study, the “good old boy” network, exclusionary practices between government and private firms that rely on relationships rather

than the bid process in awards, is a major impediment to MWBE utilization and the success of minority- and women-owned firms.

AAI-2, a minority supplier, states that the City and County “buy from the same people with no accountability. The procedures are not such that the people who buy goods and services have to buy them from minority companies.” AAI-2 adds that the inability for presidents of small companies to get a face-to-face hearing or meeting with the actual decision maker on a project versus an intermediary hinders their ability to compete effectively in the public sector. Of the sixty (60) business owners interviewed, ten (10) of them stated outright that it is difficult to build the relationships necessary to get by in Durham and twenty (20) referenced a “good ol’ boy” or “informal” network excluding them from doing work with the City and County. AAI-16 states that “If they [majority firms] can get around and not use you, they’ll definitely get around (you).”

While EOEA-2, an Asian-Indian owner of a professional services firm, does not feel that his company has ever been treated unfairly, he does say that it appears some companies are given an edge through their relationships. “I have seen some project managers within a government entity - they are buddy-buddy with somebody, so they want to give that buddy a project whereas the other (company) could be better qualified or more serious and more needy than another one” (EOEA-2).

Another related barrier is that of thresholds on projects and informal bids. One Black American printing and supply business owner states that Durham County is “better” about this than the City of Durham “because the quotes are under the \$5,000 threshold. Under \$5,000, the projects are pretty much given to us. Over that amount I get very few” (EOEA-4). It is his understanding that Durham County is not required to bid out anything under \$30,000 and that control of those bids falls to individual County departments. EOEA-4 states that “most of the time, those departments only go to majority-owned firms to fulfill contracts.”

EOEA-13 thinks that all is fair in Durham City and County, with the exception of informal bids. “The contractors only need three (3) bids, and you can select who you want to do the job,” though she notes that the City’s new small business program may get rid of the informal bid contracts.

However, some firms have attempted to get their foot in the door. AAI-19 is very interested in getting into the informal bidding process. In that process, he says, the projects are small enough that small companies don’t have to overextend themselves on carrying bonding and the compensation usually occurs within two weeks. The problem, according to this firm owner, is that these informal bid projects are part of a “good ’ol boy network. That’s the hidden gem. Trust me. It’s the sweetest deal around for any bid going” (AAI-19). AAI-19 says that he has been asked make informal bids numerous times, but he has never actually been asked to submit a bid.

EOEA-4 says he spends a lot of time trying to get to know individual department heads so he can get more contracts, but runs up against a “club mentality”. He says department heads have made him feel as if he is taking business away from their associates and friends because of the color of his skin. He has also encountered problems after he has won a bid and meets with the department head regarding contract specifications. Sometimes there will be additional requests inserted, as if they are looking for a reason to cancel the contract. “It’s like they’re saying, ‘I don’t see how you won this’” (EOEA-4). Another minority firm owner concedes that “people do work with people that they know and are comfortable with” but the effect of this is that “if there’s not a black person in the office, we don’t get a phone call” (EOEA-7).

In contrast, AAI-4 prefers to subcontract rather than bid on quotes and has done multiple projects with the City of Durham. This Black American business owner has a very comfortable relationship with one general contractor in particular that he works with consistently. He hears about all the jobs through the general contractor and submits his quotes, which are always accepted. Because of this relationship, AAI-4 doesn’t really compete for work and has had little direct experience with the machinations of Durham’s bidding and contracting environment. When asked if there are obstacles to minority and women-owned businesses, he states, “I don’t

really have an opinion. I just work with general contractors. I just go out on a job and do it” (AAI-4). This firm owner can be seen as having achieved what many other firms are attempting—to build relationships that can bring consistent business.

## **5. Bonding and Cash flow**

Obtaining bonding, maintaining adequate cash flow, and not having resources to compete with large firms were cited as major issues by those interviewed. Twelve (12) firms out of the sixty (60) interviewed brought up finances as an impediment to doing business with the City and County of Durham.

AAI-19 says that bonding and cash flow present major problems for small firms like his that are looking to get work. He notes that the minimum bonding amounts for small businesses are high and are hard to meet when you’ve got to meet payroll, equipment and other demands coupled with at least a month on turnaround for getting paid in the formal bidding process. MWI-8 agrees, stating that delays in payments from primes to subcontractors can keep subs from bidding projects and potentially bankrupt small businesses. He would like to see someone with the City and County appointed to handle payment concerns and scheduling.

EOEA-6 cites being able to compete against large firms as the biggest issue for a small business. These companies can buy materials at cost and bid at much lower prices, and make up the difference later by charging more on the service side for upkeep and maintenance, according to EOEA-6. Small companies have to know their costs and be able to pay their employees, so they can’t bid low and count on making money later. “We have to make sure that we’re not losing money to make money down the road” (EOEA-6).

## **6. Administrative Support and Communication**

AAI-2 claims that if he doesn't go to the website to look up opportunities, he'll have very little way of knowing about upcoming projects he may want to bid on. He is one of ten (10) interviewees who cited an issue with a lack of communication about bid opportunities.

Of the City and County's program structure, one firm owner says that

"The City has been great in how they communicate with email blasts. The City has the resources of [the EO/EA] team, while the County doesn't have the same dedicated resources. Great group of people on both sides. I think that that the County could do better if they could staff up by 2-3 more people" (EOEA-13).

## **7. Certifications**

AAI-18 finds the City's certification process "intimidating" and "redundant," echoing statements made by nine (9) other interviewees, who indicated that the process is either difficult or ineffective in garnering increased utilization. AAI-19 notes that the paperwork is "tedious" and could use some streamlining and states that, because minority-owned businesses still have to meet the same bonding and other requirements that all primes and businesses do, certification is ineffective in creating opportunity. Adding to some of the frustration is the "good faith effort" requirement which has lead MWI-12 to state that certification "hurts" because firms send invitations "just to get a price, never intending to use me, just to meet their good-faith effort. They already know who they want to use, but they'll take my quote."

On the other hand, AAI-11 says that certification gives her "an invitation to the table," joining the eleven (11) other firms interviewed who stated openly that they find certification with the City and County to be helpful to their firms. EOEA-15 does not think that primes would use

minority or, women-owned businesses if there were no MWBE programs or certifications, mainly due to relationships formed. “As a minority it helps us to get in the door” (EOEA-15). Some, however, don’t believe such provisions are necessary. When asked if certification has an effect on his company’s ability to compete, AAI-2 stated that it does not, because “we do good business. It doesn’t matter if you’re certified or not. Our clients like us because of our work.”

There is some debate as to the classifications in the City and County’s certification processes. Certain firms feel that the lines should be drawn differently. For instance, EOEA-8, a Black American Woman business owner, noted that Black American-owned businesses are classified as DBE, preventing her from WBE certification. In her opinion, Black American women should be able to qualify for both, or the percentage of DBE participation should be made higher by their participation on a project.

MWI-4 states that Asian Americans do not qualify as minorities under Durham County and City rules. “Race is a big issue over there,” MWI-4 says. He says that those designations go to Black American, Hispanic and women-owned businesses. MWI-4 finds this odd because the state, Wake County and Federal guidelines accept Asian Americans as minority-owned businesses. MWI-4 says it makes him feel like it’s not worth bothering to bid. It also becomes an obstacle for his company when attempting to partner as a subcontractor with primes because they have certain minority goals to meet - and MWI-4’s company does not help them meet that goal. This makes it easy for primes to overlook his firm in the bidding process. “It’s not worth it.” Additionally, because his firm isn’t considered a minority-owned firm, they are not included in advance communications encouraging minority-owned businesses to bid on new projects.

## **8. Praise for City and County of Durham**

AAI-3, a Black American woman-owned construction company, has bid on several projects, but has not yet won any bids. However, she has high praise for the help the City has

given her, and cites the City's EO/EA office as a great source of help and assistance in getting her firm off the ground. "This has really changed my perspective of the City of Durham" (AAI-3).

AAI-7 says that the City and County "are very fair" and that "they make sure goals are enforced... they make sure that minorities are a part of the process." AAI-8 has worked with Durham County in the past and has high praise for their operations. "The County was very integral in making sure I got paid. They were strong advocates" (AAI-8). Of the City and County of Durham, one business owner states:

"They both have been courteous to me, and fair. In the early stages of me trying to do business with them, I needed help. I had only done business with the private sector. Once you meet their standards, it's all up to you" (MWI-2).

These firm owners are among fourteen total interviewees who stated outright that the City and County of Durham treated them fairly and with courtesy.

EOEA-6 recounted a time when her company was working as a subcontractor to a mechanical subcontractor on a project with a prime. The mechanical company did not complete their work, but EOEA-6's company had finished their part of the project, which included providing materials. Since the mechanical company did not complete their portion of the contract, the prime did not pay the mechanical contractor, and EOEA-6's company was not going to get paid. She contacted the Director of the Office of Equal Opportunity/Equity Assurance with the City of Durham and she was able to help her company recoup the cost of materials by putting pressure on the contractor. "Without [the EO/EA director], we would not have gotten anything" – aside from taking the guy to small claims court, and most small businesses can't afford the time or money involved in that process, she says. MWI-14 states that "The City has one of the best programs in the state."

## **9. Interviewee Suggestions for City and County Procurement**

### **a) “Half and Half” Goals**

EOEA-6 suggested, for example, that if a goal is to have 20 percent minority participation on projects, 10 percent should go to skilled laborers and 10 percent should go to unskilled laborers instead of all of the work going to unskilled laborers.

### **b) Internal Review**

Of post-award discrimination by prime contractors, EOEA-18 states that “there is no recourse for these people when they do something to us, and they know it. They only have to get you on the job. They can do whatever they want to do to cause you to leave”. He compares his idea to Internal Affairs in the police department. He states that the City and County should adopt similar practices because “there is no one for us to call, and a lot of times it’s our word against theirs.” He notes that often these firms are making one (1) to five (5) million dollars a year and “a slap on the wrist” will not worry them. Instead, he suggests an internal review process whereby procurement professionals at the City and County keep track of violations and penalize firms for mistreating their subcontractors. “They give them points for using minority contractors, there should also be demerits for doing derogatory things to minority contractors while they’re on their project” (EOEA-18).

### **c) Training and Mentoring**

EOEA-3 asserts that minorities need to be given more of an opportunity to understand and ask questions about the bid specifications. “There needs to be a class on reading and understanding the specs of a job that you’ve bid on” (EOEA-3). He also suggests that the City in particular set up a mentor-protégé program with the general contractors. “They should match up the City-qualified firm with (them) so that more businesses can connect and work together” (EOEA-3)



#### d) Breaking Down Contracts

MWI-1 says that departments only reach out to vendors and contractors they've worked with in the past. What would help is if there were smaller projects that specifically related to the competencies of firms like his own, projects where he wouldn't have to compete against the larger, more established firms. MW-1 suggests the addition of small, set-aside projects that would be appropriate in scope for businesses like his to make submittals for the selection process. Not having smaller projects hurts minority businesses because there is no opportunity to build experience and reputation. "The crux of the problem is for minority firms being able to get experience, build up a good reputation and getting enough work to be sustainable so they can stay in business for a long time," says MWI-1.

MWI-12, similarly, suggests that the City and County put small projects out for bid and set them aside for "actual" small business enterprises. "Up to \$1.5 million in revenue. That's considered small business by the DOT, and they have contracts out there that are SBE. Those are the ones I target because I know I'll be competing with people at my level" (MWI-12). MWI-13 would like for the City and County to provide contracts specifically for the roofing parts of a project, so that roofing companies can bid on their own. She says that she will never have a fair shot in the way the procurements are currently set up. Breaking down the parts of a project could, she believes, encourage participation.

"All we have is a different color of skin, and we get 3 cents on the dollar. There needs to be set-asides. You do the math, it doesn't make sense. There needs to be money put in projects that are of a size that will allow minority businesses to participate" (MWI-14)

e) **Go Digital and Open the Process**

MWI-16, a Black American woman owner of a land surveying company, says that she is informed of upcoming projects by receiving regular emails from City and County staff. She said the bidding process would be much easier if the City/County made digital plans available online instead of the contractors having to go to other physical addresses to look up the plans or paying expensive fees to have another entity pull the plans for her. MWI-16 said she would also like for the City and County to open the bidding process earlier to subcontractors like herself. As is, she says she is often brought in in the middle of a project, after engineers and architects have done their own surveying and drawn up plans. That cuts significantly into what she might be able to contribute on a project.

MWI-7 says that he would also like to see a more open bidding process, especially at the end. He says that small businesses are at a disadvantage because they never learn the specifics of the winning bid. “Once you bid on a job, there’s no disclosure. So you don’t know if you’re the low bid or not. Everything needs to be on the table to see how competitive you are” (MWI-7).

**F. Conclusion**

There are several issues that seem to be foremost on the minds of business owners in and around Durham City and County. The need for transparency in the process and communication with bidders pre- and post-award was a major theme of the anecdotal interviews. The difficulty of building relationships in Durham City and County was also a salient issue. Firms in the area may benefit from a mentor-protégé program or even prime and subcontractor networking facilitated by the City and the County to give firms an opportunity to “get their foot in the door.” Additionally, the financial concerns of many small and disadvantaged businesses indicate that bonding programs might be beneficial and something as simple as a wider dissemination of information regarding the resources available, such as SBA bonding through the federal government, would provide these firms with greater opportunities for success.

With regards to existing certifications and goals, there seems to be some contention regarding the monitoring of women-owned businesses to ensure that the certification is not being exploited. This concern was brought up by minority business owners in several of the interviews and the owners of the firm in our case study (from a randomly selected sample of the database provided) did corroborate the assertion that this occurs, at least in one instance, by stating that their decision to switch ownership from husband to wife was based on the belief that they could benefit from the City's goals for women-owned firms. Still, these owners expressed their concerns about prime firms calling for quotes for unrelated work categories and a lack of enforcement of stated goals on federally-funded projects, revealing that certification is not a surefire method for gaining a foothold in the market. The ambivalence of interviewees surrounding the efficacy of certification reflects this. Firms were split, with 10 of the 60 interviewed believing that certification is at best ineffective and at worst a hindrance due to stereotype, and 12 interviewees asserting that certification had gained them some opportunity in Durham, as intended.

Finally, a recurrent theme in all of the anecdotal evidence collected for this study is that of the potential misrepresentation of firms that are certified as women-owned businesses. As in our case study above, there are assertions and rumors that previously nonminority male-owned firms will switch their certification to become certified as WBE in order to have access to the benefits of the programs in place at the City and County. However, the case study reveals that simply becoming certified does not guarantee that a firm will be awarded contracts and can bring its own headaches in the process—firms simply contacting them for quotes without intending to utilize their services, for instance. Though we cannot know the specifics of the firms' day-to-day operations, the fact that our case study firm decided to transfer ownership from having a nonminority male at the helm to becoming a women-owned firm purely for the certification and related those facts to us in no uncertain terms, indicates that some members of Durham's business population are not aware or do not believe that there is anything wrong with this practice. Several minority business owners, however, view it as an egregious misuse of Durham's programs and are demanding that the City and County take steps to monitor and control this practice.

## VII. FINDINGS AND RECOMMENDATIONS

### A. Findings

#### FINDING 1: City of Durham - Overall MWBE Prime Utilization

The City of Durham spent \$206.1 million in the various Relevant Markets during the Study Period. 2.66% or \$5.5 million was spent with minority and female owned firms across all procurement categories at prime level.

*Table 86: City of Durham MWBE Prime Utilization in the Relevant Market  
(Awards 7/1/2007-6/30/2012)  
Awards over \$30,000*

	Construction	%	A/E	%	Services	%	Goods	%	Totals	%
<i>City of Durham - MWBE Utilization (in the Relevant Markets)</i>										
Black American	\$1,543,750	1.45%	\$1,060,994	3.85%	\$1,518,296	2.34%	\$0	0.00%	\$4,123,040	2.00%
Asian American	\$0	0.00%	\$57,785	0.21%	\$0	0.00%	\$0	0.00%	\$57,785	0.03%
Hispanic American	\$0	0.00%	\$57,931	0.21%	\$0	0.00%	\$0	0.00%	\$57,931	0.03%
American Indian	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%
White Female	\$67,988	0.06%	\$1,092,642	3.96%	\$90,853	0.14%	\$0	0.00%	\$1,251,483	0.61%
<b>Total MWBE</b>	<b>\$1,611,738</b>	<b>1.51%</b>	<b>\$2,269,352</b>	<b>8.23%</b>	<b>\$1,609,149</b>	<b>2.48%</b>	<b>\$0</b>	<b>0.00%</b>	<b>\$5,490,239</b>	<b>2.66%</b>
<b>Total Contract Awards</b>	<b>\$106,590,110</b>	<b>100.00%</b>	<b>\$27,585,266</b>	<b>100.00%</b>	<b>\$64,786,228</b>	<b>100.00%</b>	<b>\$7,155,057</b>	<b>100.00%</b>	<b>\$206,116,661</b>	<b>100.00%</b>

Griffin & Strong, P.C. 2014

#### FINDING 2: City of Durham - Statistically Significant Underutilization of MWBEs as Primes

Griffin & Strong, P.C. found that, in the City of Durham, minority and women owned firms were significantly underutilized as prime contractors in every category for every year of the study period.

*Table 87: City of Durham  
Summary of Statistically Significant MWBE  
Underutilization in Prime Contracting  
July 1, 2007-June 30, 2012*

<b>CONSTRUCTION</b>	<b>A/E</b>	<b>SERVICES</b>	<b>GOODS</b>
<b>Black American</b>	<b>Black American</b>	<b>Black American</b>	<b>Black American</b>
<b>Asian American</b>	<b>Asian American</b>	<b>Asian American</b>	<b>Asian American</b>
<b>Hispanic American</b>	<b>Hispanic American</b>	<b>Hispanic American</b>	<b>Hispanic American</b>
<b>American Indian</b>	<b>American Indian</b>	<b>American Indian</b>	<b>American Indian</b>
<b>White Female</b>	<b>White Female</b>	<b>White Female</b>	<b>White Female</b>

Griffin & Strong, P.C. 2014

**FINDING 3: City of Durham - Statistically Significant Underutilization of MWBEs as Subcontractors**

In subcontracting, Asian American, Hispanic American, and American Indian owned firms were significantly underutilized every year of the Study Period. Looking at the sum total of the subcontracting during the Study Period, Black American and White Female owned firms showed some overutilization during the Study Period.

Black American owned firms were underutilized during the Study Period in Construction subcontracting, but were overutilized in A/E, Services, and Goods. White Female owned firms were underutilized in Construction and Goods, but over utilized in both A/E and Services.

It is not coincidental that the two groups which are the focus of the City's MWBE program are overutilized as subcontractors in certain areas. This speaks to the effectiveness of the City's current program in these areas. However, with prime contracting with these same two groups being so substantially underutilized as primes, and there being almost no utilization of other

minority groups either as primes or subs, there is a clear demonstration that, “but for” the establishment of remedial programs at the City, there is little utilization of minority and women owned businesses with the City of Durham.

The lack of participation of minority owned firms as prime contractors indicates that the City’s program may need to be revamped to include components that encourage joint-venturing between smaller firms, the breakdown of larger contracts, and a mentor-protégé program in order to bridge the gap for these businesses into prime contracting.

*Table 88: City of Durham*

*Summary of Statistically Significant MWBE Underutilization in Subcontracting July 1, 2007-June 30, 2012*

<b>CONSTRUCTION</b>	<b>A/E</b>	<b>SERVICES</b>	<b>GOODS</b>
<b>Black American</b>			
<b>Asian American</b>	<b>Asian American</b>	<b>Asian American</b>	<b>Asian American</b>
<b>Hispanic American</b>	<b>Hispanic American</b>	<b>Hispanic American</b>	<b>Hispanic American</b>
<b>American Indian</b>	<b>American Indian</b>	<b>American Indian</b>	<b>American Indian</b>
<b>White Female</b>			<b>White Female</b>
	<b>Non-Minority Male</b>	<b>Non-Minority Male</b>	<b>Non-Minority Male</b>

Griffin & Strong, P.C. 2014

**FINDING 4: Durham County - Overall MWBE Utilization**

Durham County spent \$313.6 million in the Relevant Market during the Study Period on contracts (FRs and POs) over \$30,000 and including awards totaling \$30,000 or more to any firm. Including in the utilization are additions to previous years’ awards. 6.07% or \$19 million

was spent with minority and female owned firms across all procurement categories at prime level during the Study Period.

*Table 89 Durham County- MWBE Prime Utilization in the Relevant Market  
(Awards 7/1/2007-6/30/2012)  
Awards over \$30,000 to any firm in any year  
and including additions to previous years' awards*

	Construction	%	A/E	%	Services	%	Goods	%	Totals	%
County of Durham - MWBE Utilization (in the Relevant Markets)										
Black American	\$115,000	0.05%	\$6,944,153	26.71%	\$1,831,247	4.47%	\$546,350	3.74%	\$9,436,750	3.01%
Asian American	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%	\$0	0.00%
Hispanic American	\$0	0.00%	\$4,565,900	17.56%	\$0	0.00%	\$0	0.00%	\$4,565,900	1.46%
American Indian	\$0	0.00%	\$64,100	0.25%	\$30,262	0.07%	\$0	0.00%	\$94,362	0.03%
White Female	\$1,230,998	0.53%	\$139,772	0.54%	\$3,307,403	8.08%	\$244,153	1.67%	\$4,922,326	1.57%
Total MWBE	\$1,345,998	0.58%	\$11,713,925	45.06%	\$5,168,912	12.62%	\$790,503	5.40%	\$19,019,338	6.07%
Total Contract Awards	\$231,996,478	100.00%	\$25,998,400	100.00%	\$40,946,761	100.00%	\$14,627,138	100.00%	\$313,568,777	100.00%

Griffin & Strong, P.C. 2014

**FINDING 5: Durham County - Statistically Significant Underutilization of MWBEs as Primes**

Griffin & Strong, P.C. found that, in Durham County, minority and women owned firms were significantly underutilized as prime contractors in Construction and Services for every year of the Study Period in which there was competitive bidding in contracts over \$30,000.

In A/E and Goods, Hispanic American and Female owned firms were significantly underutilized as prime contractors for every year of the Study Period. Black American owned firms were overutilized in A/E from 2009-2012, primarily because of additions to a previous year's contract to one architectural firm. Black American owned firms were overutilized in 2008 and 2010. Hispanic American owned firms were overutilized in A/E during 2008.

*Table 90: Durham County*

*Summary of Statistically Significant MWBE  
Underutilization in Prime Contracting based on ownership  
July 1, 2007-June 30, 2012*

<b>CONSTRUCTION</b>	<b>A/E</b>	<b>SERVICES</b>	<b>GOODS</b>
<b>Black American</b>		<b>Black American</b>	<b>Black American</b>
<b>Asian American</b>	<b>Asian American</b>	<b>Asian American</b>	<b>Asian American</b>
<b>Hispanic American</b>		<b>Hispanic American</b>	<b>Hispanic American</b>
<b>American Indian</b>	<b>American Indian</b>	<b>American Indian</b>	<b>American Indian</b>
<b>White Female</b>	<b>White Female</b>		<b>White Female</b>

Griffin & Strong, P.C. 2014

**FINDING 6: Durham County - Statistically Significant Underutilization of MWBEs as Subcontractors**

In subcontracting, MWBE’s were significantly underutilized in total during the Study Period in Construction and A/E. Black American owned firms were overutilized in Services, as were White Females in Goods and Hispanic American owned firms in Construction. Asian American and American Indian owned firms were all significantly underutilized. It is interesting to note that Non-minority Males were substantially underutilized in Services.

Again, the story is in the disaggregation of utilization by year. In A/E, there was substantial overutilization of Black American firms in 2008, but since then, there was underutilization of Black American owned firms for the remainder of the Study Period, again establishing a trend of underutilization. Similarly in Services, Black American firms were overutilized in 2008 and 2009, but were underutilized in 2010-2012.



*Table 91: Durham County  
Summary of Statistically Significant MWBE  
Underutilization in Subcontracting  
July 1, 2007-June 30, 2012*

<b>CONSTRUCTION</b>	<b>A/E</b>	<b>SERVICES</b>
<b>Black American</b>	<b>Black American</b>	
<b>Asian American</b>	<b>Asian American</b>	<b>Asian American</b>
	<b>Hispanic American</b>	<b>Hispanic American</b>
<b>American Indian</b>	<b>American Indian</b>	<b>American Indian</b>
<b>White Female</b>	<b>White Female</b>	<b>White Female</b>
		<b>Non-Minority Male</b>

Griffin & Strong, P.C. 2014

Note: As is not unusual, there was not enough subcontracting activity in Goods to provide data from which inferences could be sufficiently made.

**FINDING 7: Relevant Market**

The relevant market for each procurement category is the area in which 75% or more of the dollars were spent during the Study Period. The relevant markets for this Study by procurement categories are:

- Construction – Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs
- A&E- Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs
- Services – State of North Carolina
- Goods – United States

### **FINDING 8: Regression Analysis**

GSPC tested the disparities found in contracting by the City of Durham and the County of Durham to determine if the disparities were likely caused by race/ethnicity/gender status. This was performed by controlling for non-race/ethnicity/gender factors like age of the owner, education of the owner, years in business, etc. GSPC determined that race/ethnicity/gender ownership status has an adverse effect on a firm owner's ability to win prime and subcontracting opportunities. Further, it is likely that the disparities found in prime and subcontracting by both the City of Durham and the County of Durham were caused by the race/ethnicity/gender status of the owner.

### **FINDING 9: Access to Capital**

GSPC found that MWBEs are less likely than Non-Minority Males to have access to business capital to either start or expand their businesses. This is true even though MWBEs are more likely to need capital provided by the private sector to start or expand their businesses. This is consistent with anecdotal data gathered that indicates that startup capital and bonding are important aspects of business viability and success; and that minority and Women owned businesses in the Durham relevant market area desire assistance with such matters.

### **FINDING 10: Anecdotal Evidence**

Anecdotal evidence assisted GSPC greatly in both getting a better picture of the empirical data and understanding the perceptions of the business community in the Durham, North Carolina marketplace. Through the anecdotal interviews, telephone surveys, public hearing, focus group, and public comment, GSPC determined the following perceptions:

- a) Both the County and the City have the makings and personnel for successful programs, but the compliance departments do not seem to have the resources or power to make the changes that need to be made or enforce what is already in place.

- b) There need to be more resources available to MWBE firms so that they can be successful in winning awards as primes. The programs only focus on subcontractors so there is no business development and no opportunities to network with primes.
- c) The County and the City bid out contracts that are too large for smaller firms when there are opportunities to break down those contracts into smaller ones.
- d) Only Black American and Female owned firms are able to do business in the Durham marketplace because there is no program for any other ethnic group.
- e) Without a program minority owned firms will not be awarded contracts.
- f) There are a substantial number of female owned firms that are in fact not controlled by females, but have been certified as female owned firms in order to participate in remedial programs, therefore taking valuable contracts meant for bona fide MWBEs.
- g) The City of Durham in particular has IT problems which hinder the ability of primes to identify qualified MWBE firms and to contact them.
- h) The County's program is only strong because of the person that is running the program but the contract compliance position itself is not a full time one. This reflects the lack of organizational focus on that role.

#### **FINDING 11: Purchasing Practices Policies and Procedure Findings**

In general, there seems to be a good understanding of the practices and procedures currently in place with the City and the County. The problems seem to lie in updating IT systems and data maintenance, which is a hindrance in the dissemination of information.

The purchasing practices and policies regarding MWBEs for both the City and the County are assisting in garnering contracts for some Black American and White Female owned businesses but are not robust enough to close the disparity gap for any MWBE group.

## **B. Recommendations**

### **Recommendation 1: Narrow Tailoring of MWBE Programs**

There is dramatic underutilization of all MWBE as prime contractors in most work categories in awards at the City of Durham and the County of Durham, but most apparent in Construction. Although there is some overutilization of Black American and White Female owned firms on City of Durham subcontracts, it is clear that without a program there would be little or no utilization of any minority or female owned firms as is demonstrated through the Private Sector analysis

GSPC recommends that both the County and the City institute aspirational goals for minority and female subcontractors in the areas of statistically significant underutilization. This can either be effectuated through individual goals for each race/ethnicity/gender group, or it can be an overall goal that could be met by any MWBE. In this type of program, it is important that there be hands on involvement of compliance personnel to inquire when certain groups do not seem to be represented in subcontracting despite the availability of such firms to perform the needed services. Goals should be set at for just below the availability figures (either individually or combined).

The City already has dedicated personal to provide compliance, but the County should also have full time personnel solely dedicated to performing contract compliance responsibilities. GSPC believes that with the additional focus, the aspirational goal program along with the current race neutral program could return better attainment of MWBE firms.

### **Recommendation 2: Asian American, American Indian, and Hispanic American Goals and Outreach**

Goals for these consistently underutilized groups should be established through benchmarking based on relative availability of firms in each demographic category. MWBE goals based on should be based on vendor availability in the relevant market area.

In addition, the City and County should make a concerted effort to target outreach to these underrepresented groups, including professional organizations and targeted business development nonprofits in order to advertise these new goals and encourage participation in City and County projects by Asian American, Hispanic American, and American Indian owned firms.

### **Recommendation 3: Joint Venture Contracts/MWBE Teams**

In order to improve utilization of MWBE firms at the prime level, it is suggested that the City and County should look for instances in which MWBE capacity can be increased to match contract size through the encouragement of joint ventures. The City and County may also encourage joint ventures between MWBEs and nonminority firms on large-scale projects; however, these types of joint ventures pose the risk of potential illicit “fronts” and must be examined carefully.

### **Recommendation 4: Contract Sizing**

The City and County should consider issuing contracts in small dollar amounts to expand the opportunities that small MWBEs have to do business with Durham.

### **Recommendation 5: Mentor-Protégé Programs**

The City and County should consider the development of a mentor-protégé program (a suggestion that has considerable support from anecdotal evidence gathered for this study). In such a program, veteran and mid-size MWBEs serve as mentors for smaller and newer MWBE firms. The City and County may consider partnering with organizations such as Associated General Contractors, local builders associations, and other similar groups.

### **Recommendation 6: Performance Reviews**

City and County employees and user departments should be evaluated regularly based on the quality, transparency, and effectiveness of their attempts to reach procurement goals and achieve the overall goals of the MWBE programs in place.

### **Recommendation 7: Debriefings**

Both the City and County should engage in regular debriefings with unsuccessful bidders to improve contractor awareness of the requirements of bidders and to enable them to provide more qualified or accurate responses to solicitations in the future.

### **Recommendation 8: Commercial Antidiscrimination Rules**

An effective antidiscrimination policy may include submission and review of a Business Utilization report for evidence of discrimination. The City and County should be commended for providing officers and mechanisms for filing complaints against firms that have discriminated against MWBEs, and such mechanisms may be expanded to include a disseminated statement of due process of investigation by staff and, if necessary, the imposition of strict sanctions.

- a) In addition, anecdotal evidence of contractor misrepresentation as White Female owned firms leads GSPC to recommend stricter policies regarding monitoring and review of such applications for certification.

### **Recommendation 9: Bonding Assistance Programs**

Due to the results of the private sector and anecdotal analyses, Griffin & Strong, P.C. believes that it is important for the City and County of Durham to provide resources to SBE and MWBE firms by utilizing non-profit organizations for loans and bonding, and forming agreements with local banks to provide funding to small, minority, and women owned businesses recognized by the programs at the City and County. Further, the City and County should endeavor to make business owners in Durham aware of the avenues available through the Small Business Association and other bonding agencies.

### **Recommendation 10: Balanced Scorecard**

The City and County should develop additional measures to gauge the effectiveness of their respective efforts, including

- Growth in MWBE prime contracting
- Growth in MWBE subcontracting to prime contractors
- Growth in the number of MWBEs winning first awards
- Growth in percentage of MWBE utilization
- Number of firms that receive bonding
- Number of joint ventures involving MWBEs

### **Recommendation 11: Increased Resources for County of Durham MWBE Program**

An increase of staff and resources to the MWBE program in Durham County is recommended to ensure the necessary resources to operate the MWBE program, train the internal customers and end-users, and to track the data needed to report on accomplishments and metrics established for the program. The staff would be responsible for contract compliance monitoring, outreach, public inquiries, goal-setting, and the analysis of bid requirements.

### **Recommendation 12: Declining MWBE Goals**

A city with a successful MWBE program implemented a hybrid program by establishing a declining schedule of race-conscious targets. In the first year of the program, the City proposed to meet 70% of its MWBE goal with race-conscious means, the second year 50%, and the third year 25%. At the end of the three year period, the program was to be evaluated.

The City and County of Durham may consider creating and funding some of these initiatives to include:

- Bond Enhancement Programs
- Access to Capital Program

- Educational Summits
- Semi-monthly MWBE payments
- Cap on the number and dollar value of set-aside contracts
- Appropriating funds necessary to implement these programs

### **Recommendation 13: Steering Committee**

The MWBE or Contract Compliance Officers/Equal Opportunity Office alone cannot truly create the success of an SBE or MWBE program. There must first be a change in the business culture. There are key senior staff members in the City and County who should serve as a steering committee for each entity, including, in the City of Durham, the City Manager, Director of EO/EA, and User Department Heads. In the County, such a committee might include County Commissioners, representatives from the Finance Department, and the Director of the County's MWBE program. Communications strategies should be established to provide information to MWBEs and SBEs and encourage their total integration into the procurement process. The steering committee should be responsible for a quarterly review of outcomes and the monitoring of the department heads' responsibilities to implement, track, and report on the MWBE utilization efforts. Perhaps Durham City and County could consider a joint committee for the good of those Durham citizens and business owners who do business, or would like to, with both entities.

### **Recommendation 14: Additional Features for MWBE Websites**

Each website, for both the City and County of Durham, should include the uniform certification application, program descriptions, information and resources on how to do business, bid tabulations, direct links to online purchasing manuals, capacity and experience data on certified firms, bid opportunities, vendor application, information on loan and bonding programs, and forecasts of business opportunities.



### **Recommendation 15: Durham County Guidelines and Internal Policies**

Griffin & Strong, P.C. commends Durham County for their efforts in encouraging MWBE participation, but would like to note that there are certain current uncodified practices that are positive approaches to monitoring and administering MWBE participation that could potentially be erased unless they are instituted as written policy. Explicit guidelines and parameters are necessary for the Assistant Purchasing Manager/(MWBE) Coordinator position, as well as increased assistance from the IT department for both the Assistant Purchasing Manager/(MWBE) Coordinator position and the Purchasing Division as a whole. Furthermore, beyond the set-in-stone threshold based policies, it should be a requirement to obtain three quotes at every threshold, which could be useful in encouraging MWBE participation on small-dollar contracts.

### **Recommendation 16: Contractor Training and Education**

It was suggested by interviewees in the anecdotal analysis that MWBE and SBE firms be given more of an opportunity to understand and ask questions about the bid specifications. This may entail the City and County (jointly or separately) providing outreach resources in the form of contractor education. A semi-regular “class” or seminar on reading bid specifications, obtaining bonding, and standard violations that may make a bid deemed unresponsive would be helpful in bridging that gap.

### **Recommendation 17: Online Processes**

Another insight gleaned from the anecdotal analysis was that the bidding process could be easier for some business owners if the City and County provided the digital plans online instead of the contractors having to go to other physical addresses to look up the plans or paying expensive fees to have another entity pull them. In addition to this, it was noted by some interviewees within the City of Durham that the IT process should have a more explicit operating procedure by which the databases, especially for MWBE, can be updated concurrently and regularly.

## VIII. CONCLUSION

Although both the City of Durham and Durham County have tried to use race neutral measures to remediate the remnants of discrimination, the results of those programs have not been sufficient to level the procurement playing field. In both cases, more robust measures are warranted, particularly by the inclusion into the City's Program of Asian American, Hispanic American and American Indian owned firms.

GSPC has made numerous recommendations for narrowly tailored remedies, both additional race-neutral activities, as well as race- and gender-conscious initiatives. GSPC will continue to assist the City and the County in fashioning its recommendations into workable policy that will benefit all members of the business community in Durham.

Griffin & Strong, P.C.

October, 2014

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